UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 04-70868

JORGE SOTO VEGA,

Petitioner,

v.

JOHN ASHCROFT,
Attorney General,

Respondent.

ON APPEAL FROM THE UNITED STATES
BOARD OF IMMIGRATION APPEALS
(Agency No. A 95 880 786)

OPENING BRIEF OF PETITIONER

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STATEMENT OF JURISDICTION

Through this proceeding, Petitioner Jorge Soto Vega ("Mr. Soto Vega") seeks reversal of the final administrative order of the Board of Immigration Appeals ("BIA") dated January 27, 2004. Certified Administrative Record ("CAR") 2.

The BIA had jurisdiction over this matter, pursuant to 8 C.F.R. § 1003.1(b)(3) and (9), 8 C.F.R. § 1240.15, and 8 U.S.C. §1158(d)(5)(A)(iv), because Mr. Soto Vega timely petitioned the BIA for judicial review of an Immigration Judge's final administrative order of removal that denied Mr. Soto Vega's application for asylum. See CAR 77, 87. The BIA's order affirmed without opinion the results of the decision of the Immigration Judge, thereby adopting his decision as the final agency determination. CAR 2. The Immigration Judge's decision, and therefore the BIA's order, disposed of all claims with respect to all parties. CAR 2, 87, 94-96.

Mr. Soto Vega timely petitioned this Court for review of the BIA's order on February 26, 2004. See 8 U.S.C. §1252(b)(1). This Court has jurisdiction to review the BIA's final administrative order pursuant to 8 U.S.C. §1252(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether, once Mr. Soto Vega proved past persecution, the Immigration Judge ("IJ") erred as a matter of law by failing to require the Immigration and Naturalization Service (the "INS," currently the Department of Homeland Security (the "DHS")) to rebut the presumption that Mr. Soto Vega has a well-founded fear of persecution, and by placing on Mr. Soto Vega the burden of proof affirmatively to establish his well-founded fear.

2. Whether the IJ erred as a matter of law by further requiring Mr. Soto Vega to prove conclusively that he "would be" persecuted in Mexico.

3. Whether the IJ erred as a matter of law by denying asylum based on his conclusion that country conditions are "changing" in Mexico rather than requiring the INS to establish an individualized showing of such a fundamental change in circumstances as to negate Mr. Soto Vega's well-founded fear of future persecution.

4. Whether the IJ's determination that Mr. Soto Vega could avoid persecution by trying to hide the fact that he is gay was wrong as a matter of law.

5. Whether the IJ's determination that Mr. Soto Vega could avoid persecution by relocating somewhere in Mexico other than his home town, without the INS showing that such relocation would be reasonable, was wrong as a matter

of law.

6. Whether the IJ's denial of withholding, after Mr. Soto Vega showed that his life and freedom had been threatened and the INS failed to rebut the presumption created by such showing, was wrong as a matter of law.

STATEMENT OF THE CASE

The Nature of this Case

This case is before the Court on a Petition for Review of the order of the BIA (CAR 2), which affirmed without opinion the decision of the IJ (CAR 87), in which Mr. Soto Vega's Application for Asylum and for Withholding of Removal were denied.

Course of the Proceedings

Jorge Soto Vega last entered the United States on August 26, 2001 without inspection, and timely filed an affirmative application for asylum on July 24, 2002. CAR 89, 185, 207. His application was referred to the IJ through the INS's filing with the Immigration Court in Los Angeles, California, and service on Mr. Soto Vega, of a Notice to Appear. CAR 521. A merits hearing on Mr. Soto Vega's application was held before the IJ in Los Angeles on January 21, 2003. CAR 104-

84. At the conclusion of the hearing, the IJ denied Mr. Soto Vega's application for asylum, denied withholding of removal, and ordered voluntary removal to Mexico. CAR 87, 94-95. The IJ concluded that:

1. Mr. Soto Vega proved past persecution on account of his being gay (CAR 90), and thus, even according to the IJ, established a reasonable possibility of future persecution (CAR 91);
2. Mr. Soto Vega did not prove conclusively that he "would" be persecuted upon return to Mexico (CAR 91, 94);
3. Country conditions in Mexico are "changing" for homosexuals (CAR 94);
4. Mr. Soto Vega did not exhibit stereotypically gay characteristics of speech, dress or mannerisms such that the IJ could determine that Mr. Soto Vega is gay (CAR 91-92);
5. In the IJ's view, Mr. Soto Vega could go to a location in Mexico where he was not known and avoid persecution by not making his homosexuality "obvious" (CAR 93-94); and
6. Mr. Soto Vega had not shown a clear probability of persecution (CAR 90, 94).

On February 13, 2003 Mr. Soto Vega timely filed a Notice of Appeal to the

BIA. CAR 77. 8 C.F.R. §§ 1003.3(a)(1), 1003.38(b)-(c), 1240.15. Mr. Soto Vega filed a Brief on Appeal with the BIA on August 25, 2003. CAR 48. An amicus curiae brief thereafter was filed in support of Mr. Soto Vega by Lambda Legal Defense and Education Fund, Inc. and the Lesbian and Gay Immigration Rights Task Force, Inc. (which is now known as "Immigration Equality"). CAR 3, 9. According to the Certified Administrative Record in this matter, no brief on appeal or response to the amicus brief ever was filed with the BIA by the government.

The Disposition Below

Even though no brief opposing Mr. Soto Vega's appeal was submitted to the BIA, the BIA affirmed the IJ's decision without opinion on January 27, 2004, thereby adopting that decision as the final agency determination. CAR 2.

As noted above, on February 26, 2004 Mr. Soto Vega timely filed a Petition for Review in the Ninth Circuit Court of Appeals and moved for a stay of removal pending Resolution of the Petition for Review. On May 27, 2004, after Respondent filed a statement of non-opposition to the motion to stay removal pending review, this Court issued an order continuing the automatic temporary stay, pursuant to Ninth Circuit General Order 6.4(c), until issuance of the mandate in this case or further order of the Court.

STATEMENT OF FACTS

Jorge Soto Vega was born in 1969 and lived with his parents, five brothers and five sisters in the small town of Tuxpan, Mexico. At an early age he knew that he was different, and soon realized that he was gay. CAR 196. In his childhood, his father and brothers violently beat him, telling him it was for his own benefit so that he would change and become "a man, not a joto" (a derogatory Spanish term for a gay man, usually translated as "fag"). CAR 423. Mr. Soto Vega's father and brothers repeatedly pushed him into doing "manly" things, like riding horses, so valued in Mexican culture as a result of the influence of *"Machismo."* Even though Mr. Soto Vega was terrified of riding, he did it anyway, to try to please his father. CAR 196-97. When he was thrown and rendered unconscious by the largest and most ferocious horse around, his father and brothers berated and ridiculed him, telling him he should go be with the women. CAR 197, 423. Although his sisters initially tried to protect him from such ridicule, they later told him they were wrong to do so, and that they should have let their father "turn him into a real man." CAR 198.

When Mr. Soto Vega started school, he suffered taunts and verbal abuse that continued throughout his adolescence. His classmates called him "*joto*" and "*cullioni*" (a Spanish term meaning "effeminate fag"). CAR 198. Though trying

not to attract attention, he soon learned that his appearance and mannerisms were perceived to be effeminate, CAR 130, and this led not only to more verbal abuse but to physical abuse as well. The boys from his school would follow him on the way to school and attack him, throwing rocks at him and hitting, punching, tripping, and, on one specific occasion, kicking him in the rib cage to the point where he was left bloody and was bruised for a month. CAR 128-29, 198-99. When Mr. Soto Vega asked his teachers for help, they told him he had brought the assaults on himself by his "girly behavior." CAR 199. Later, when he complained to the principal of his school, the principal likewise refused to do anything to protect him from physical attack, telling him it was his own fault because of his effeminate behavior. CAR 129-31. In high school, things got even worse, as Mr. Soto Vega became known as an easy target for physical attacks and abuse by street gangs. He was beaten constantly, and ultimately feared even leaving his house. CAR 200.

After high school, Mr. Soto Vega and his cousin, Carlos, who also was gay, moved to Guadalajara in the hopes of finding an environment in which Mr. Soto Vega could escape from the attacks and abuse that had become routine for him.

CAR 200.[1] In Guadalajara, Mr. Soto Vega met a community of other gay men, and began to think that it might be possible to live openly as a gay man in his native country, but sadly that was not to be. Instead, Mr. Soto Vega experienced even worse persecution in Guadalajara, and this time at the hands of the government's own agents, the police, the very arm of government that should have protected him from such violence.

One night in Guadalajara, Mr. Soto Vega and his cousin Carlos attended a party in an area known locally to be frequented by gay people. On the way home, he and Carlos suddenly were accosted by police officers, for no apparent reason. The police demanded identification, and immediately began to question the two harshly and repeatedly about where they lived, where they had been, and what they were doing. At first, Mr. Soto Vega tried to resist telling the police specifically where he had been, saying only that they had been at a friend's house. When Mr. Soto Vega finally told the police the address, the officers immediately began to beat him and Carlos, first with the officers' fists, repeatedly punching Mr. Soto Vega and his cousin until they were bleeding. The police then beat Mr. Soto Vega and his cousin with either a metal baton or flashlight. The officers robbed the two

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[1] Guadalajara is the second largest city in Mexico, boasting a population of approximately 3 million people. See All About Guadalajara, <http://www.allaboutguadalajara.com> (visited Oct. 22, 2004) .

men of their money, berated them with anti-gay slurs, and threatened to kill Mr. Soto Vega and his cousin, saying that, in doing so, the police would be "ridding the streets of two more fags." When Mr. Soto Vega and Carlos finally were able to get up and begin running away, Mr. Soto Vega heard the police shout that, if they ever saw him again, it would be "over" for him. Mr. Soto Vega was terrified and was certain the police were going to track him down and kill him. CAR 133, 201-02. Ever since this experience, he has had a constant and unrelenting fear that the police were just one step behind him and that he would be killed for being gay. He has recurring nightmares in which he sees a casket with his own body in it. CAR 125, 202-05

Mr. Soto Vega knew then that he could never live safely in Mexico. He became determined to flee to the United States, and did so in 1988 with the aid of a smuggler. CAR 135. In this country he has found a better life. He found a community in Los Angeles where many gay men live, and ultimately found a life partner (Mr. Frank Castelluccio), with whom he has resided for more than ten years. Not only has he found a partner, but his partner's family has accepted Mr. Soto Vega openly and lovingly, in a way he never experienced from his own family; indeed, his partner's family accepts them as a couple. For the first time, Mr. Soto Vega began to see the possibility of living life openly and happily as a

gay man. CAR 124, 169, 204.

Although he has found this new life, Mr. Soto Vega has continued to live with this fear that he someday may be forced to return to Mexico, where he knows what fate awaits him. The nightmares continue, and he suffers from post traumatic stress disorder as a result of his past persecution. CAR 118, 125.

In 2001, Mr. Soto Vega's mother died and, despite the fears he had, he did return to Mexico for two weeks for her funeral and bereavement period. By custom, he stayed inside the house for prayer for nine days. He only went out when necessary, to take the necessary steps to attend to the business of property transfers and other matters in connection with his mother's final affairs, and then only in groups with his family members, as all of his old fears suddenly were exacerbated, and he dreaded what could happen on the street. CAR 136-38. He returned to the United States on August 26, 2001, and timely filed his application for asylum within one year, in July, 2002. CAR 89. 185, 207.

Mr. Soto Vega still lives in fear of being forced to return permanently to Mexico. He knows that gay men are still persecuted in his native country, simply for being gay, and particularly those perceived to be effeminate, as he has been. He knows that economic opportunities are limited there and that many gay men can find no lawful work. (CAR 136.) He also knows that gay men are still being

assaulted and murdered in Mexico, that such violence is tolerated there, and that the Mexican government still does not prevent it. He knows that he cannot hide who he is, and that he could not live safely as an openly gay man if he returned. He sincerely believes that he would be persecuted and eventually killed if he were forced to return to Mexico. CAR 204-05.

Mr. Soto Vega's fear of future persecution is real and well-founded, as confirmed by the testimony of a licensed clinical social worker, who has experience treating gay men for anxiety, and who examined Mr. Soto Vega three times. CAR 115-25. Persecution against gay people, including physical violence and murder, continues in Mexico, particularly against those gay men who are perceived to be more effeminate. The violence exists throughout the country, and is tolerated and even perpetrated by government authorities. CAR 291-303, 370, 391, 395, 397, 401. Indeed, there is substantial evidence in the record that the persecution not only has continued since Mr. Soto Vega left the country, but has worsened. CAR 168.

SUMMARY OF ARGUMENT

Contrary to the decision of the IJ, Mr. Soto Vega did prove his entitlement to asylum based on his well-founded fear of persecution on account of his being gay

if he were forced to return to Mexico. The IJ erroneously failed to apply certain mandatory presumptions in Mr. Soto Vega's favor, and further applied legally erroneous standards to the proof required of both Mr. Soto Vega and the INS.

The IJ made no specific adverse credibility finding, so Mr. Soto Vega's testimony must be accepted as true. Although the IJ found that Mr. Soto Vega did prove past persecution, and thus the reasonable possibility of future persecution, the IJ erred by not requiring the INS to rebut this presumption. The IJ further erred by requiring Mr. Soto Vega to prove "conclusively" that he "would be" persecuted in the future, rather than applying the correct standard of a reasonable possibility of future persecution. The IJ further erred when he concluded that "changing" conditions in Mexico were sufficient to defeat the asylum claim, rather than requiring the INS to establish the legally required showing of a "fundamental change in circumstances." The IJ further erred when he ruled that Mr. Soto Vega could escape persecution by hiding his sexual orientation – based on the IJ's "non-evidence based assumption"[2] that people would not know that Mr. Soto Vega is gay from his appearance because the IJ claimed not to be able to tell. Such a ruling would impose restrictions on Mr. Soto Vega's speech and conduct not demanded of those who seek asylum on the basis of other characteristics, such as religious or

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[2] See Popova v. INS, 273 F.3d 1251, 1258 (9th Cir. 2001).

political beliefs. Such a ruling further would undermine completely the very reasons for granting asylum based on sexual orientation. The IJ's ruling that persecution could be avoided by internal relocation also was erroneous because Mr. Soto Vega's proof of past persecution entitled him to a presumption that relocation would be unreasonable, and the INS did not rebut this presumption. Finally, the IJ's denial of withholding of removal similarly was erroneous, because Mr. Soto Vega's proof that the police threatened to kill him entitled him to a presumption of a clear probability that his life or freedom would be threatened in the future, which entitled him to withholding of removal, and the INS failed to rebut that presumption as well.

ARGUMENT

Standard of Review

Since the Board of Immigration Appeals affirmed the decision of the Immigration Judge without opinion, this Court reviews the IJ's decision directly. Vukmiovic v. Ashcroft, 362 F.3d 1247, 1251 (9th Cir 2004). The IJ's factual findings are reviewed for substantial evidence. Melkonian v. Ashcroft, 320 F.3d 1061, 1065 (9th Cir. 2003). Factual findings that are not supported by reasonable, substantial, and probative evidence in the record are not sustained. INS v. Elias-

Zacarias, 502 U.S. 478, 481(1992).

As this Court recently explained, when – as here – the BIA has affirmed the IJ's decision without opinion, this Court will review "only the reasoning presented by the IJ," Reyes-Reyes v. Ashcroft, ___ F.3d ___, 2004 U.S. App. LEXIS 19156, *6 (Sept. 13, 2004), and "'is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.'" Id. (citing from and quoting Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947)). "In effect, when the BIA invokes its summary affirmance procedures, it pays for the opacity of its decision by taking on the 'risk [of reversal] ... in declining to articulate a different or alternate basis for the decision' should the 'reasoning proffered by the IJ [prove] faulty.'" Reyes-Reyes, supra, at *6-*7 (citing and quoting from Falcon Carriche v. Ashcroft, 335 F.3d 1009, 1014 (9th Cir. 2003) (ellipsis and alterations in original)).

Questions of law are reviewed de novo, Ladha v. INS, 215 F.3d 889, 896 (9th Cir. 2000), particularly in this posture. Reyes-Reyes, supra, at *7.

Credibility:
Mr. Soto Vega's Testimony Must Be Accepted as True

Ninth Circuit law is clear that, in the absence of a specific adverse credibility

finding, the testimony of the applicant, as well as "the reasonable inferences to be drawn therefrom," must be accepted as undisputed and true. Garcia-Martinez v. Ashcroft, 371 F.3d 1066, 1069 n. 1 (9th Cir. 2004)(quoting Zheng v. Ashcroft, 332 F.3d 1186, 1189 n. 4 (9th Cir. 2003)); Salazar-Paucar v. INS, 281 F.3d 1069, 1073 (9th Cir. 2002); Kataria v. INS, 232 F.3d 1107, 1114 (9th Cir. 2000). The IJ ruled that Mr. Soto Vega's testimony was "essentially credible." CAR 91. Since the IJ made no adverse credibility finding,[3] Mr. Soto Vega's testimony, and the reasonable inferences to be drawn from that testimony, must be accepted as true.

I. The Immigration Judge Erred as a Matter of Law by Failing to Require the INS to Rebut the Presumption of a Well-founded Fear of Persecution, and by Placing on Mr. Soto Vega the Burden of Proof Affirmatively to Establish his Well-founded Fear, After He Proved Past Persecution.

Pursuant to Sections 101(A)(42)(a) and 208(a) of the Immigration and Nationality Act ("the Act"), asylum may be granted to an applicant if he is unable or unwilling to return to his country of nationality either because (1) he was persecuted in the past; *or* (2) he has a well-founded fear of future persecution "on account of race, religion, nationality, membership in a particular social group or

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[3] See Shoafera v. INS, 228 F.3d 1070, 1075 (9th Cir. 2000)("the law of this circuit does not permit implicit adverse credibility determinations").

political opinion." 8 U.S.C. §§ 1101(a)(42)(A), 1158(a)(emphasis added) ; see also 8 C.F.R. § 208.13(b).

Thus, the first way in which an applicant may establish asylum eligibility is to show past persecution:

> In order to establish eligibility for asylum on the basis of 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). In the present case, the IJ correctly found that Mr. Soto Vega demonstrated that he had suffered "past persecution" in Mexico based on his sexual orientation. CAR 90-91.[4]

That testimony showed that, as a young person in Mexico, in addition to suffering from the refusal of authorities to take any action after he was harassed

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[4] It is now firmly established that gay men and lesbians subject to persecution in their country of nationality due to their sexual orientation are entitled to asylum on account of "membership in a particular social group." Hernandez-Montiel v. INS, 225 F.3d 1084, 1094 (9th Cir. 1999); see also Amanfi v. Ashcroft, 328 F.3d 719, 721, 727 (3rd Cir. 2003) (noting INS concession that gay people constitute a protected "social group" who may be entitled to asylum); Hernaez v. INS, 244 F.3d 752, 758 (9th Cir. 2001) (concluding that it has been clear since at least 1990 that persecution based on sexual orientation can be the basis for an asylum claim); Toboso-Alfonso, 20 I. & N. Dec. 819, 820-23 (BIA 1990) (granting asylum to Cuban man persecuted due to his membership in the particular social group of people who are gay); Attorney General Order No. 1895 (June 19, 1994) (designating the decision in Toboso-Alfonso as "precedent in all proceedings involving the same issue or issues").

and violently assaulted at school and at home based on the perception that he was gay,[5] Mr. Soto Vega was detained by police who beat him bloody and threatened to kill him if they saw him again, explaining their desire to rid the world of gay people. CAR 117, 133-34. This clearly constituted persecution. See Singh v. INS, 94 F.3d 1353, 1360 (9th Cir. 1996) (concluding there is no question that "death threats and assaults on one's life" rise to the level of persecution under the Act).[6]

When an asylum applicant proves that he was persecuted in the past, as Mr. Soto Vega did, the law creates a presumption that the applicant has a well-founded fear of future persecution. Wang v. INS, 341 F.3d 1015, 1020 (9th Cir. 2003); Chouchkov v. INS, 220 F.3d 1077, 1079, 1085 (9th Cir. 2000); Agbuya v. INS, 241 F.3d 1224, 1228 (9th Cir. 2001); 8 C.F.R. § 208.13(b)(1). Although this presumption may be rebutted if the government proves that there has been such a fundamental change in circumstances "that the applicant no longer has a well-

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[5] See CAR 127-32 (testimony of Mr. Soto Vega) and CAR 110, 114, 116-17 (testimony of expert witness Ralph Pearlman, Ph.D., a licensed clinical social worker who evaluated Mr. Soto Vega after interviewing him on three occasions). See also CAR 422-33 (report of Dr. Pearlman).

[6] Expert testimony confirmed, in addition, that Mr. Soto Vega still fears persecution and death in Mexico and suffers, among other things, from ongoing nightmares of looking into a casket containing his body. CAR 115, 118-19, 124-25, 147-48, 151, 167, 428, 432.

founded fear of persecution if he were to return," id., the INS bore and now the DHS bears the burden to rebut this presumption by a preponderance of the evidence. Wang, supra, 341 F.3d at 1020; Lim v. INS, 224 F.3d 929, 936 (9th Cir. 2000) ("A finding of past persecution raises a regulatory presumption of future persecution and flips the burden of proof to the INS to show that conditions have changed to such a degree that the inference is invalid."); Chouchkov, supra, 220 F.3d at 1085; Singh v. INS, supra, 94 F.3d at 1361.

In the present case, after making an express finding that Mr. Soto Vega had established past persecution, and even stating that this "does show a reasonable possibility of actually suffering such persecution in the future," CAR 91, the IJ failed to apply this presumption at all. As soon as this presumption was triggered, Mr. Soto Vega legally was not required to make any further showing. Rather, it was incumbent upon the INS affirmatively to produce a preponderance of evidence to show such a fundamental change as to render Mr. Soto Vega's fear of future persecution no longer well-founded. The INS completely failed to do so. The government did not introduce any documentary evidence of country conditions, and indeed never made even the slightest reference to any changes in country conditions in closing argument to the IJ. CAR 177-78. The IJ's failure to require the government to rebut the presumption was error as a matter of law, requiring

reversal.

The IJ further erred by wrongly placing the burden of proof on Mr. Soto Vega (rather than the INS) to show that his fear of future persecution was well-founded and that conditions in Mexico have not changed. The Immigration Court explained:

> the problem I have with his case is not the past persecution, but it is the future persecution. *The respondent must show* a clear probability that life or freedom would be threatened on account of his membership in this social group. *He must show* a well-founded fear of persecution....

CAR 91 (emphasis added). The IJ thereafter concluded that "*I don't believe that respondent has produced sufficient evidence* to show that he would be persecuted if he returned to Mexico." CAR 94 (emphasis added). Thus, the Immigration Court expressly placed *on the asylum applicant* the burden of showing future persecution rather than requiring the INS to overcome the presumption that he has a well-founded fear of such persecution. This was clear error, requiring reversal. See Mendoza-Manimbao v. Ashcroft, 298 F.3d 852, 860 (9th Cir. 2002) (reversing denial of asylum because burden of proof was placed on asylum applicant to show well-founded fear of future persecution after he had established past persecution, rather than on INS to refute the presumption of a well-founded fear); Osorio v. INS, 99 F.3d 928, 932 (9th Cir. 1996) ("Failure to recognize the existence of a

presumption in ... favor [of an asylum applicant who has shown past persecution] ... constitutes an abuse of discretion" requiring reversal).

The IJ's error is particularly evident in this case because the INS failed to submit any admissible evidence to rebut the presumption.[7] Where the INS has "presented no evidence to rebut the presumption" arising from a finding of past persecution, it "has not met its burden" and denial of asylum must be reversed Wang, supra, 341 F.3d at 1020; accord Baballah v. Ashcroft, 335 F.3d 981, 992 (9th Cir. 2003), amended, 367 F.3d 1067(2004); Ruano v. Ashcroft, 301 F.3d 1155, 1159 (9th Cir. 2002).

Mr. Soto Vega, therefore, established his statutory entitlement to asylum by the first method set forth in 8 C.F.R. § 208.13(b)(1), since he proved past persecution and the government failed to rebut the resulting presumption that he had a well-founded fear of future persecution. The IJ's failure to grant asylum on this basis was wrong as a matter of law and accordingly must be reversed.[8]

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[7] The INS sought only to introduce two internet articles but, even as to these, it failed to submit them in a timely fashion and they were excluded by the Immigration Court. See CAR 171-73. To the extent the INS seeks to rely on the evidence submitted by Mr. Soto Vega, that evidence, as a matter of law, cannot be found to have rebutted the presumption that Mr. Soto Vega had a well-founded fear of future persecution, as shown in Section III of this brief, below.

[8] Indeed, as shown in Section VI of this brief, below, the evidence submitted by Mr. Soto Vega was so strong, and the INS's failure to rebut the

II. The Immigration Judge Also Erred as a Matter of Law by Further Imposing the Wrong Legal Standard in Requiring Mr. Soto Vega to Show Conclusively that He "Would Be" Persecuted on Return to Mexico.

As previously discussed, the regulations under the Act provide two, *alternative* methods of establishing asylum eligibility. If an applicant cannot show past persecution, he nevertheless can produce evidence to establish a well-founded fear of persecution in the future. 8 C.F.R. § 208.13(b)(2). Although not required to make such a showing since he had shown past persecution, the evidence Mr. Soto Vega presented nevertheless entitled him to asylum under this alternative approach. The IJ committed further legal error, however, by also applying the wrong standard of proof in his ruling on this alternative basis for asylum.

Under 8 C.F.R. § 208.13(b)(2), an applicant's proof regarding future persecution must pass a two-part test, containing both a subjective and an objective requirement. The subjective test is satisfied when the asylum applicant gives credible testimony as to his own genuine fear of persecution. "The objective component of this test requires showing 'by credible, direct, and specific evidence in the record, that persecution is a reasonable possibility." Agbuya, supra, 241

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presumptions the law mandates be applied in Mr. Soto Vega's favor was so glaring, that Mr. Soto Vega meets even the higher standard for entitlement to withholding of removal.

F.3d at 1228 (quoting Meza-Manay v. INS, 139 F.3d 759, 763 (9th Cir. 1998) and Singh v. Ilchert, 63 F.3d 1501, 1506 (9th Cir. 1995)). An applicant is not required to make this showing to a certainty; rather "[t]o satisfy the objective component of the well-founded fear test, an applicant *need only produce credible evidence that persecution is a 'reasonable possibility.'*" Melkonian, supra, 320 F.3d at 1069 (emphasis added; internal citations omitted).

Even though the proper application of the presumption should have eliminated the need to consider whether Mr. Soto Vega affirmatively established a well-founded fear under this two-pronged test, Mr. Soto Vega nevertheless directly did establish such a fear. Mr. Soto Vega testified extensively about the terrors he harbors to this day based on the persecution he suffered throughout his childhood and adolescence, but particularly about the incident in which the police beat him bloody and threatened to kill him because he is gay. Mr. Soto Vega described the permanent emotional scars he carries, and also described how he fears the same violence at the hands of the authorities if he were forced to return to Mexico, including his utter dread that he eventually would be killed there. CAR 147-48. Since there was no adverse credibility finding, this testimony must be accepted, and thus Mr. Soto Vega met the subjective test. Moreover, even though corroborating evidence is not required, the testimony of Dr. Pearlman further established that Mr.

Soto Vega's fear is ongoing, severe, and genuine. CAR 117-19, 124-25.

Mr. Soto Vega also satisfied the objective part of the test by independently producing credible, substantial and probative evidence that his fear of future persecution is well-founded. First, he testified that he was perceived to be effeminate in Mexico, CAR 127, 198, 199, that he knows gay men are still being persecuted in Mexico, and that he knows that it is not safe for him to live openly as a gay man in Mexico. CAR 147. Second, he produced voluminous and current documentary evidence concerning country conditions, showing that gay men in Mexico, particularly those perceived to be effeminate, continually are subjected to persecution, including violence and even murder. This extensive documentary evidence showed further that this violence often is perpetrated by, or – at a minimum – tolerated by, governmental authorities. CAR 291-303, 370, 391, 395, 397, 401. The specifics of this documentary evidence are discussed in detail in Section III of this brief, below. Third, Jose Alarcon,[9] who has interviewed several hundred gay Mexican men in his position as an attorney for an HIV legal services agency in Los Angeles and whom the IJ expressly found credible, CAR 91, 167-68, 462, testified that the persecution of gay men in Mexico is not only widespread and

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[9] While the transcript of the hearing before the IJ refers to Mr. Alarcon as "Joey Alarcone," CAR 167, this was a phonetic spelling, CAR 106, and Mr. Alarcon's resume reflects the correct spelling of his name. See CAR 462.

continuing, but that it has gotten "more extreme." CAR 168. All of this evidence compels the conclusion that Mr. Soto Vega showed that persecution of gay men in Mexico, and indeed his own further persecution at the hands of anti-gay Mexican government authorities, was a "reasonable possibility."

Notwithstanding this showing, the IJ denied asylum by committing two further legal errors, both of which require reversal. The IJ initially gave a correct description of the different standards for asylum and for withholding of removal:

> The Supreme Court has held the terms well-founded fear and clear probability are significantly different, and the burden of proof required to establish eligibility for asylum is lower than that required for withholding of deportation.

CAR 90. Despite this initially correct articulation, the IJ then committed error by ruling, in connection with the asylum claim, that "[t]he respondent must show a *clear probability* that life or freedom *would be* threatened." CAR 91 (emphasis added). In so holding, the IJ conflated the requirement for establishing eligibility for withholding of removal with eligibility for asylum. The only requirement for asylum is a well-founded fear of future persecution, not the clear probability standard. See Melkonian, supra, 320 F.3d at 1069.

Compounding this error, the IJ wrongly ruled that the well-founded fear of future persecution must be established *conclusively*. Once again, the IJ started out with the correct legal standard, but then went on to impose a condition of

conclusiveness not required by the law, stating: "the fact that he was persecuted previously *does show a reasonable possibility* of actually suffering such persecution in the future, *but it is not conclusive.*" CAR 91 (emphasis added). The IJ thus denied asylum because Mr. Soto Vega had not shown that "he *would be* persecuted" on his return to Mexico. CAR 94 (emphasis added).

The IJ's requirement that Mr. Soto Vega show that he "would be" persecuted was clearly erroneous. Fear of future persecution will be considered well-founded even if persecution is not more likely than not to occur. INS v. Cardoza-Fonesca, 480 U.S. 421, 431 (1987). "One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place." Id. Even a 10% possibility of persecution may constitute a well-founded fear. Id. If it is known that one in every ten people in the asylum applicant's situation in his native country is persecuted, "it would only be too apparent that anyone who has managed to escape from the country in question will have a 'well-founded fear of being persecuted' upon his eventual return." Id. (citation omitted). As Melkonian held, under this second approach to proving a well-founded fear, all that is required is a showing that persecution is a "reasonable possibility," not the conclusive certainty required of Mr. Soto Vega by the IJ in this case.

Because the IJ himself concluded that Mr. Soto Vega showed "a reasonable

possibility of actually suffering such persecution [on account of his sexual orientation] in the future" (CAR 91), it was clear error to deny his application for asylum. See Rodriguez v. INS, 841 F.2d 865, 870 (9th Cir. 1987) (reversing denial of asylum where applicants erroneously were required to show that they "would be" persecuted). This error also mandates reversal of the denial of asylum below.

III. The Immigration Judge Further Erred as a Matter of Law When He Denied Asylum Based on "Changing" Country Conditions in Mexico Rather than Requiring the INS to Establish the Legally Required, Individualized Showing of Such a "Fundamental Change in Circumstances" as to Negate the Well-Founded Fear of Future Persecution.

As discussed above, Mr. Soto Vega unequivocally established past persecution by agents of the government, thus triggering the presumption of a well-founded fear of future persecution. For this presumption to be overcome, the law requires the INS to show, by a preponderance of the evidence, that there has been such "a fundamental change in circumstances" in Mexico "that the applicant no longer has a well-founded fear of persecution." See Gui v. INS, 280 F.3d 1217, 1228 (9th Cir. 2002); Popova, supra, 273 F.3d at 1259; 8 C.F.R. § 208.13(b)(a)(i)(A). The INS, however, made absolutely no attempt to rebut the presumption. The only documents concerning country conditions in the record are

those submitted by Mr. Soto Vega, not by the INS, see CAR 171-73, 207-412, and the INS failed even to refer to any of these documents, or to country conditions, in its closing argument. See CAR 176-78. Such a total failure by the INS to demonstrate changed country conditions requires reversal.

Indeed, under these circumstances, the government is not even entitled on remand to a second chance, as part of further proceedings, to meet its legal obligation to rebut this presumption, having failed to do so in the first instance: "If the INS has not met its burden of production [with regard to changed country conditions], it is not necessary to remand this case to the BIA for further findings on this issue." Popova, supra, 273 F.3d at 1259. That is particularly so here, where the INS did not even file a brief with the BIA addressing country conditions (or any other matter). See Baballah, supra, 367 F.3d at 1070, n.11 (finding no need to remand to consider whether changed country conditions rebut presumptive fear of future persecution where the INS failed to present evidence of changed conditions and failed to argue before the IJ or the BIA that changed country conditions would eliminate asylum applicant's fear of future persecution; "[i]n these circumstances, to provide the INS with another opportunity to present evidence of changed country conditions, when it twice had the chance, but failed

to do so, would be exceptionally unfair.").[10]

Despite this total failure of the INS to meet its burden, the IJ sua sponte discussed the country conditions documents submitted by Mr. Soto Vega. The IJ's own discussion, however, demonstrates that, as a matter of law, the presumption that Mr. Soto Vega has a well-founded fear of future persecution was not overcome. At the outset of the IJ's discussion of this issue in his ruling, the IJ explicitly found that "In the documents that were submitted by the respondent to show conditions in Mexico, the conditions are *somewhat inconclusive*, I find." CAR 93(emphasis added). This very statement shows the error of the IJ's reliance on these documents to deny asylum. As demonstrated by Gui and Popova, the law requires that the INS show "by a preponderance of the evidence" that there has been such a "fundamental change in circumstances" that the applicant's fear can no longer said to be reasonable. An explicit finding that the "conditions are somewhat inconclusive" cannot be found even to approach this high standard.

After initially finding the country condition documents to be inconclusive,

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[10] See also Hoxha v. Ashcroft, 319 F.3d 1179, 1198 n. 7 (9th Cir. 2003) (expressing concern "that constant remands to the BIA to consider the impact of changed country conditions occurring during the period of litigation of an asylum case would create a 'Zeno's Paradox' where final resolution [of the case] would never be reached.") (quoting Avetova-Elisseva v. INS, 213 F.3d 1192, 1198 n. 9 (9th Cir. 2000)).

the most that the IJ found was that "conditions *are changing* in Mexico." CAR 94(emphasis added). This is not enough; a "fundamental change" is required; a showing that "country conditions *have changed* to such an extent that the applicant no longer has a well-founded fear that he would be persecuted if he were to return." Navas v. INS, 217 F.3d 646, 657 (9th Cir. 2000) (emphasis added); see also Duarte de Guinac v. INS, 179 F.3d 1156, 1159 (9th Cir. 1999) (what must be shown on rebuttal is that "country conditions have *so changed* that it is no longer more likely than not that the applicant would be persecuted there.") (emphasis added).

Furthermore, a generalized showing of country conditions is not enough. The presumption can only be overcome by specific facts, relevant to the applicant in question, that his individual fear is no longer well-founded. Borja v. INS, 175 F.3d 732, 738 (9th Cir. 1999)(en banc)("Our cases hold that individualized analysis of how changed conditions will affect the specific petitioner's situation is required. Information about general changes in the country is not sufficient"); Popova, supra, 273 F.3d at 1260 (INS's failure to introduce evidence showing that there had been a change in country conditions that would affect the asylum applicant "individually" means that presumption of future persecution stands "unrebutted"). This error in failing to apply the correct legal standard likewise

requires reversal of the ruling below.

Moreover, even to the extent the INS might now seek to rely on the country condition reports submitted by Mr. Soto Vega, the IJ's conclusion that country conditions "are changing" in Mexico was fatally flawed by an improperly selective reading of those reports. See Gonzales-Neyra v. INS, 122 F.3d 1293, 1296 (9th Cir. 1997), as amended, 133 F.3d 726 (1998) (selective reliance on State Department reports is insufficient to establish changed country conditions).

Indeed, the very portions of the country reports relied on by the IJ to conclude that conditions have changed in Mexico (CAR 93), were relied on just five years ago in Hernandez-Montiel, supra, as evidence "susceptible of no other conclusion" but that persecution of gay men by the Mexican police persists, 225 F.3d at 1097; see also id. at 1097 (stating that it is "misguided" to read this report otherwise) and 1099 (remanding to BIA with instructions to grant asylum application of gay man persecuted in Mexico because "nothing in the record," which included the very same country reports relied on by the IJ in the present case, rebutted the presumption that there was a well-founded fear of future persecution). For this additional reason, reversal of the IJ's denial of asylum should be ordered. See, e.g., Ruano, supra, 301 F.3d at 1161 (noting that State Department report offered by INS could not show fundamental change in

circumstances in Guatemala that would rebut the presumption that an asylum applicant had a well-founded fear of persecution when a similar country report already had been held insufficient to show this in another case).

The IJ cited only one other document from the voluminous materials submitted by Mr. Soto Vega, "Questions & Answer Series - Mexico: Update on Treatment of Homosexuals," dated May of 2000, distributed by INS Resource Information Center. CAR 288-324. Once again, the IJ cited selectively from this report; what the IJ selectively chose to emphasize, as well as what he selectively chose to ignore, demonstrate two aspects of the legal error committed regarding country conditions.

First, the IJ cited statements from the report that homosexual magazines are sold in kiosks in major cities in Mexico; that gay pride parades and gay bars operate freely in larger cities; that homosexuals take part in debates on television; that the political parties permit gays to participate; and that a high ranking public official is openly bisexual. CAR 93-94. That the IJ relied on these portions of the report highlights the principle enunciated in Borja, supra, and Popova, supra, that only an *individualized* analysis of how changed conditions affects *the specific applicant's* situation can overcome the presumption, and that general changes in the country are not sufficient. The fact that gay-themed magazines are sold openly

in large cities, or that gay bars exist, or that gays appear on television and a single high-ranking public official is known to be bisexual have absolutely no relevance to the persecution suffered by Mr. Soto Vega. He lived in a small town, he never tried to be on television, and he certainly was not a high-ranking public official. The most egregious, and, for the purpose of this asylum application, the most significant instance of persecution Mr. Soto Vega suffered was the beating and threats on his life by the police, agents of the government. None of the references from this report cited by the IJ addressed the fact of police violence against gay men. Thus, the IJ's discussion of generalized country conditions fails, as a matter of law, to meet the test set forth in Popova and Borja, and accordingly must be reversed.

Second, what the IJ failed to address was the substantial evidence throughout this report that persecution of homosexuals in Mexico remained widespread, even as of the time of that report. For example, the report explains:

> Yet the social environment in most of Mexico remains repressive, and often dangerous. Machista ideals of manly appearance and behavior contributes to extreme prejudices against effeminate men, and often to violence against them. The Roman Catholic teaching that homosexuality is a sin further contributes to intolerance, and is seen by many to provide moral sanction for mistreatment. To live an undisturbed gay or lesbian lifestyle in most of Mexico, one has to hide it....

> ... the potential for violence against homosexuals, especially effeminate men and transvestites, is inherent to the culture of machismo.

CAR 291-92. The report further notes that,

> Anti-homosexual prejudice does, however, affect the criminal justice system. According to criminologist Rafael Ruiz, prosecutors are less likely to assign high priority to homicide cases if they believe victims are homosexual, and courts are more likely to hand down harsher sentences if they believe convicts are homosexual.

CAR 295. As for physical violence, the report concludes that,

> Though reported killings of gay men, by or with the tacit approval of, local authorities have declined sharply since the early 1990's, most of Mexico remains a hostile and potentially dangerous place for those who are public about their sexual orientation, *especially effeminate men*.... The fact that reporting killings of gay men ... have dropped dramatically does not mean that societal attitudes have changed, or that men or women can lead openly homosexual lives without fear of physical abuse and harassment.

CAR 295(emphasis added). The report adds that,

> Openly gay or effeminate individuals who are not transvestites and do not engage in prostitution also face daunting challenges, including violence.

CAR 303.

While this document arguably shows that there has been some improvement in some respects, it likewise indicates that violence against gay men, especially those perceived to be effeminate, still exists, including killings by or condoned by

governmental authorities.[11] Numerous cases have held that similar country condition documents, showing the continued existence of violence against a particular group, even though also showing significant declines in the incidence of such violence, are insufficient to show the necessary "fundamental change" to deny asylum. See, e.g., Mashiri v. Ashcroft, ___F.3d___, 2004 U.S App. LEXIS 19773, *25-*26 (9th Cir. Sept. 22, 2004)(State Department report documenting declining but continued violence and police abuse is insufficient to show fundamental change); Lim, supra, 224 F.3d at 935 (country condition reports showing that, although current tide of violence might be receding, it still existed, do not rebut well-founded fear of future persecution); Kataria, supra, 232 F.3d at 1115 (country condition report indicating that killings continued, even though at dramatically reduced rate, was not sufficient to show fundamental change, and therefore INS had not rebutted presumption and was not entitled to attempt to do so on remand). Thus, this document alone proves that there has not been the fundamental change required to rebut the presumption that Mr. Soto Vega has a well-founded fear of future persecution on account of his sexual orientation.

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[11] Even though the document questioned the high number of anti-gay homicides reported in one study, the document in no way concluded that such killings did not continue, and, indeed, the document recognized that "it is likely that homicides of homosexuals are underreported, to avoid unwanted publicity by their families." CAR 294.

Furthermore, the record contains a number of documents, dated after this May, 2000 report, that unequivocally show substantial evidence of continued violence throughout Mexico against those who are gay. The "U.S. Department of State Country Reports on Human Rights Practices-2001, Mexico" cites Amnesty International's conclusion that gay men and women "frequently are victims of abuse and violence," and cites to reports of an average of 3 killings per month in Mexico on account of sexual orientation (including 103 such murders in Mexico City alone between 1995 and 2000), as well as other incidents of police abuse specifically targeting gay men and lesbians. CAR 270. There is documentation of arbitrary arrests, and physical abuse by police in Monterrey, Mexico in April, 2001, including incidents in which police threatened individuals that they would shoot them if the individuals reported the abuse. CAR 397, 401. In April, 2002 in Aguasalientes, Mexico, after the police raided gay bars and made massive arrests, the mayor claimed to be "ready to fight all faggots in Aguasalientes," CAR 391, and ordered the arrest of "anyone with homosexual appearance." CAR 395.

This documentary evidence shows that, despite the possibility that there may have been some improvement in country conditions, violence and persecution against gay men still exists, and exists throughout Mexico. This reality of continued persecution of gays was confirmed by the unrebutted testimony of Jose

Alarcon, who based his testimony on interviews with hundreds of gay male Mexican immigrants, that "conditions are getting worse in Mexico" and that the problems gay men encounter in Mexico have gotten "more extreme." CAR 168. There can be no doubt, therefore, that there was absolutely no showing of a fundamental change in circumstances sufficient to deny asylum.

Though not dealing with country conditions per se, the IJ seemed to suggest, albeit only implicitly, that Mr. Soto Vega's two-week visit to his hometown for his mother's funeral showed that "conditions are changing" in Mexico. See CAR 92, 94. Because Mr. Soto Vega's family let him handle some of the business matters in concluding his mother's final affairs, and because his family let him accompany them in a group, the IJ concluded that "at least his family's attitudes have changed somewhat with respect to his being homosexual." CAR 92.

Like the IJ's discussion of the country condition reports, however, the IJ's own words undermine his conclusion that this evidence supports the denial of Mr. Soto Vega's asylum claim. First, the IJ determined only that the family's attitudes have "changed somewhat," again hardly approaching the "fundamental change" standard. Second, a two-week period of bereavement around the death of Mr. Soto Vega's mother can hardly be considered representative of normal conditions. As the undisputed testimony showed, for nine days of this time, the family was inside

the home, in traditional prayer, and the only time Mr. Soto Vega went out with the family was to attend to his mother's final business matters, trying to "avoid confrontation at all cost" with those who had been aggressive toward him. CAR 136-41. No reasonable fact finder could say that such a period shows the normal conditions under which Mr. Soto Vega would live were he forced to return to Mexico.

Likewise, the fact that "nothing happened to him" for a period of two weeks does not rebut the presumption of a well-founded fear. See Cardenas v. INS, 294 F.3d 1062, 1067 (9th Cir. 2002) (ability to live six months in country free of threats did not undermine well-founded fear of persecution); Lim, supra, 224 F.3d at 935 (ability to live in country six years without harm after receiving death threats did not vanquish asylum claim).

Perhaps most importantly, the IJ's conclusion that this "changing" family attitude somehow defeats the asylum claim is unsupportable for two important reasons. First, the IJ never addressed the most significant and severe persecution Mr. Soto Vega experienced – his beating and the death threats made to him by the police. That Mr. Soto Vega's family's attitudes toward his sexual orientation may have changed (which there was not even any direct testimony about) cannot in any way be considered substantial evidence of a fundamental change in circumstances

to rebut Mr. Soto Vega's well-founded fear based on the persecution he and others have suffered at the hands of other anti-gay assailants whom the police are unable or unwilling to control and at the hands of the police themselves.

Second, the IJ's conclusion that this changing family attitude defeats the asylum claim also is undermined by the IJ's determination that Mr. Soto Vega would have to relocate to some other community where it might not be known that he was gay. CAR 92-93. The only reason for suggesting such relocation would have to be the belief that, even if his family members' attitudes had changed, Mr. Soto Vega remained at risk for persecution in his home town at the hands of someone other than his family members. As a consequence, the possibility that his family may now be more accepting of his sexual orientation cannot negate Mr. Soto Vega's reasonable fear of persecution by others, especially the police.[12]

Thus, the presumption that Mr. Soto Vega's fear of future persecution is well-founded was not overcome in this case, and the IJ's denial of asylum must be reversed.[13]

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[12] The subject of relocation is discussed in more detail in Section V of this brief, below.

[13] Even if Mr. Soto Vega had not shown a well-founded fear of persecution, the severity of his past persecution (involving numerous serious assaults that Mexican authorities either would not address or themselves engaged in) independently made it an abuse of discretion not to grant him asylum. See 8

IV. The Immigration Judge's Conclusion that Mr. Soto Vega Could and Should Avoid Persecution by Trying to Hide the Fact that He is Gay is Wrong as a Matter of Law and Independently Requires Reversal.

On top of the other errors described above, and perhaps most disturbingly, the IJ improperly denied asylum based on the IJ's assessment that Mr. Soto Vega might be able to avoid future persecution on account of his sexual orientation if only he kept his appearance and conduct from making it "obvious" that he is gay. CAR 093 ("it seems to me that if he returned to Mexico in some other community, that it would not be obvious that he would be homosexual unless he made that ... obvious himself.").

This specious reasoning fundamentally controverts the essential premise of entitlement to asylum and wrongly blames the victim for his persecution. By imposing on Mr. Soto Vega an obligation to hide or change his conduct in order to avoid persecution – an obligation not imposed on those who have sought asylum based on other characteristics, such as religion or political belief – the IJ

C.F.R. § 208.13(b)(1)(iii)(A). The same is true regarding what should have been humanitarian concerns about the acute psychological distress Mr. Soto Vega unquestionably would suffer in Mexico, wrenched away from the life he and Mr. Castelluccio have built in their more than a decade together in the United States, and returned to a country in which Mr. Soto Vega has not lived for sixteen years, as he has grown used to interacting openly with others as a gay man. See id., § 208.13(b)(1)(iii)(B); see generally Belishta v. Ashcroft, 378 F.3d 1078, 1080-21 (9th Cir. 2004).

improperly demanded that Mr. Soto Vega alter aspects of the very characteristic that, because he was persecuted on that basis, entitled him to asylum in the first place. Furthermore, the IJ's conclusion that Mr. Soto Vega somehow could achieve this misrepresentation about who he is was not supported by reasonable, substantial and probative evidence, and therefore cannot be sustained.

A. Applicants cannot be denied asylum based on a view that they should hide the characteristics that underlie their claim to asylum.

Asylum is granted to those who belong to a "particular social group" when they have a common characteristic that they either cannot change or that they "should not be required to change because it is fundamental to their individual identities or consciences." Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985), overruled in part by Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987) (clarifying that it is enough if a potential persecutor "could become aware" that the asylum applicant possesses a belief or characteristic that the persecutor seeks to overcome by some punishment). In Hernandez-Montiel, supra, this Court explained that "sexual orientation and sexual identity [which in that case were held to include one's dress and appearance] are immutable; they are so fundamental to one's identity that *a person should not be required to abandon them*." 225 F.3d at 1093 (emphasis added). In the present case, however, the IJ denied asylum based

on the theory that Mr. Soto Vega could avoid persecution in Mexico if he kept it hidden that he is gay. The IJ seemed to think this was possible because he

> didn't see anything in [Mr. Soto Vega's] appearance, his dress, his manner, his demeanor, his gestures, his voice, or anything of that nature that remotely approached some of the stereotypical things that society assesses to gays, whether those are legitimate or not. I certainly would not be able to tell, just from his testimony and his appearance here in Court today that he was homosexual.

CAR 91-92.

The fact that the IJ was wrong to rely on such factors to determine whether someone is gay, or might be perceived in another country to be gay, is dealt with in the following section. The point to be recognized first, however, is that others might come to believe that Mr. Soto Vega is gay in a wide variety of ways – such as knowing of him from when he previously lived in Mexico, his being in a relationship with another man,[14] his not being married to a woman, his association with other gay people, his frequenting of gay business establishments, potential

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[14] Indeed, Mr. Soto Vega already has a same-sex partner with whom he has lived for more than ten years, and with whom he bought a house, cared for their two dogs and two cats, and ran an antique and flower business in Los Angeles. CAR 169, 204. See also CAR 413-14 (statement of Mr. Soto Vega's partner, who is an American citizen, that they "have privately exchanged vows and rings" and, in their hearts, "are a married couple who works together, who loves, who dreams and who struggles daily just like everyone else."). The right to establish and maintain intimate personal relationships, including same-sex relationships such as this, is a part of the right of liberty with which governments may not interfere. See Lawrence v. Texas, 539 U.S. 558, 573-75 (2003).

involvement in lesbian and gay political or social activities, and statements he might make about his life.[15]

Numerous cases establish that Mr. Soto Vega cannot be required to change how he lives his life or to avoid activities that might reveal his sexual orientation to others in order to avoid persecution. For example, in Singh v. Ilchert, 801 F. Supp. 313 (N.D. Cal. 1992), the court rejected the argument that a Sikh asylum applicant could avoid further persecution by relocating to another part of India, explaining that "petitioner's ability to avoid further persecution by relocating inconspicuously may be limited by his manner of religious dress and his inability to speak the languages and dialects of other regions in India." Id. at 321. The court did not countenance reasoning that the asylum applicant could keep from making his religion obvious by modifying his religious practices or affiliations.[16] Likewise, in Matter of S-A-, 22 I & N. Dec. 1328 (BIA 2000), a liberal Muslim Moroccan

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[15] See Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co., 24 Cal. 3d 458, 488, 156 Cal. Rptr. 14, 32, 595 P.2d 592, 610 (1979) (explaining that an important aspect of gay political activity is for gay people to "come out of the closet," to acknowledge their sexual orientation, and to associate with others in working for equal rights).

[16] See also Najafi v. INS, 104 F.3d 943, 949 (7th Cir. 1997) (noting that one's identity (in that case as a Christian) can become known to others through one's practices, associations, and statements, and not denying asylum based on the possibility of refraining from these activities in order to avoid persecution).

woman who had been persecuted on account of her religious beliefs was granted asylum because of her well-founded fear that, were she forced to return, she likely would face severe and possibly fatal persecution. She was granted asylum even though it would not have been "obvious" from looking at her that she held more liberal religious views than others in Morocco and regardless of whether she might be able to relocate to another town and then act in a way that would keep those views hidden. In the same way, in Navas, supra, a man who was persecuted in El Salvador for distributing political materials and because of his association with family members who were active in dissident political groups was granted asylum. The court did not consider whether he might avoid persecution by relocating to another part of the country and thereafter working to keep his political opinions and associations from being "obvious." 217 F.3d at 652, 662-63.[17]

Under the law, persecution on account of race, religion, nationality, membership in a particular social group or political opinion is the very basis for asylum. If one establishes past persecution on any of these grounds, a presumption arises that there is a well-founded fear of future persecution, entitling the applicant

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[17] See also Tarubac v. INS, 182 F.3d 1114, 1120 (9th Cir. 1999)(reversing denial of asylum to woman persecuted for her opposition to communism in the Philippines without consideration of whether she might avoid the authorities who knew of her political views and thereafter keep those views to herself).

to asylum. As a result, it is improper to deny asylum in situations where the person's race, religion, nationality, political opinion or membership in a particular social group (including being gay) might not be entirely obvious from observation because the asylum applicant theoretically could take steps to try to keep that characteristic hidden. People have a right to continue to engage in activities, associations, and speech that reveal the characteristic that led to the persecution that was the basis for seeking asylum in the first place. It is these very activities – including associations and speech that might reveal one's sexual orientation – that are part of what is "fundamental to [these asylum applicants'] individual identities or consciences" and that therefore cannot be required to be changed. Acosta, supra; Hernandez-Montiel, supra. Accordingly, it was error for the IJ to rely on the reasoning that Mr. Soto Vega should keep it from being "obvious" that he was gay in order to avoid persecution in the future, even if such a change in appearance and behavior were possible.

The High Court of Australia recently considered precisely this issue, and its decision is persuasive and instructive.[18] See Appellant S395/2002 v. Minister for Immigration and Multiculatural Affairs, 2003 HCA 71, 203 A.L.R. 112 (Dec. 9,

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[18] See Lawrence, supra, 539 U.S. at 573, 576-77 (considering decisions of other nations in resolving human rights issues).

2003) (available in LEXIS/Australia Reported Cases, Combined library). In that case, two gay men from Bangladesh sought asylum in Australia, pursuant to the 1951 Convention relating to the Status of Refugees (which is similar to the Immigration and Naturalization Act in the instant case) to avoid persecution on account of their being gay if returned to Bangladesh. The lower court had denied their asylum claim based on his finding that they could live discreetly in Bangladesh, and avoid persecution by hiding the fact that they were gay.

The High Court of Australia ("HCA") rejected this conclusion and reversed the lower court. As explained in the opinion of Justices McHugh and Kirby, "persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality." Id. at ¶ 40. As their opinion went on to say: "Nor would [the Convention] give protection to membership of many a 'particular social group' if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution." Id. Instead, it would "undermine the object of the Convention" if a country required asylum seekers "to hide their membership of particular social groups" as a condition of protecting them from persecution. Id. at ¶ 41.

Justices Gummow and Hayne of the Australia High Court agreed:

> [I]t is no answer to a claim for protection as a refugee to say to an applicant [persecuted based on disfavored political or religious beliefs] that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning.

Id. at ¶ 80.

And, as their opinion further explained:

> to say that an applicant for protection is 'expected' to live discreetly is both wrong and irrelevant to the task to be undertaken by the tribunal if it is intended as a statement of what the applicant *must* do. The tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection. Moreover, the use of such language will often reveal that consideration of the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than the range of behaviour and activities of life which may be informed or affected by sexual identity.

Id. at ¶ 82 (emphasis in original).[19]

This reasoning of the Australian High Court is equally applicable to the instant case. As that court recognized, denying relief on the rationale set forth in the IJ's decision would undermine the very premise of asylum. A dramatic example highlights the perils of accepting such a rationale. Consider the situation

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[19] Accord, Lawrence, supra, 539 U.S. at 567 (to reduce the right to liberty of gay people to no more than "the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

of a persecuted Jew from occupied Netherlands who might have sought asylum during World War II. Just as Mr. Soto Vega was told that he could escape the Mexican police carrying out their threat to kill him if he would hide who he is and simply not make it "obvious" that he is gay, CAR 93, the IJ's rationale might justify denying asylum to Dutch Jews, who analogously might be told that all they needed to do to survive the Nazi efforts to kill them was to try to "pass" by not disclosing their religion, not associating with other Jews, and not engaging publicly in Jewish religious or cultural practices. Or perhaps they could try to hide, like Anne Frank and her family, in a secluded attic.[20]

Even if concealment of the characteristics giving rise to a claim for asylum were possible, to deny protection to those who are entitled to refugee status based on a requirement that they conceal those characteristics – which their persecutors *wrongly* sought to suppress – perversely would twist asylum law beyond all recognition by making the United States complicit in the persecutors' wrongful suppression of those characteristics. As a result, this Court should reverse the decision of the IJ below and remand this case to the Attorney General for him to

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[20] Even though there is evidence in the record of government involvement in vast numbers of murders of gay men in Mexico, Petitioner does not seek to equate the persecution he experienced and still fears with that faced by Jews during the Holocaust, but rather to illustrate, in stark terms, the unacceptability of the rationale underlying the IJ's decision.

exercise his discretion to grant Mr. Soto Vega asylum.

B. The Immigration Judge's "non-evidence based assumption" that Mr. Soto Vega did not appear gay by virtue of his speech and mannerisms is not "substantial evidence" supporting a denial of asylum and, as a matter of law, the IJ's decision must be reversed for this reason as well.

The IJ based his denial of asylum in part on his expressed inability "to recognize the fact that respondent was homosexual" because the IJ did not think Mr. Soto Vega's appearance, dress, mannerisms or voice conformed to the "stereotypical things that society assesses to gays." The IJ also believed that "most people" similarly would share his own stereotypes and not be able to recognize that Mr. Soto Vega is gay. CAR 91.

This personal observation was not based on any evidence, argument or objection presented by the INS as to whether Mr. Soto Vega would or would not be able to hide his status as a gay man in Mexico. Indeed it is nothing more than a "non-evidence based assumption" that this Court roundly has criticized and repeatedly has ruled can never be a substitute for the substantial evidence required by law to support a denial of asylum.[21] See Popova, supra, 273 F.3d at 1258 ("... a

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[21] While immigration judges, like other lower tribunal fact-finders, may be presumed to have an expertise entitled to deference in the judging of demeanor as to credibility, there is no basis for believing they have any expertise at all in judging cues regarding individuals' sexual orientation.

'non-evidence based assumption[]' regarding conduct in another culture ... does not amount to 'substantial evidence' in support of the BIA's conclusion."); Lopez-Reyes v. INS, 79 F.3d 908, 912 (9th Cir. 1996) ("[The immigration judge's] conclusion ... based on a personal conjecture about what guerillas likely would and would not do ... is not a substitute for substantial evidence...."). The IJ's articulated assumptions about the "stereotypically" gay dress, speech, and mannerisms of gay men – particularly those in Mexico – are just that: assumptions. Not only were they the grossest of generalizations, but even the IJ recognized that such assumptions may not be legitimate. CAR 91-92.

Despite this recognition, the IJ nevertheless attributed these same assumptions to "most people" who might encounter Mr. Soto Vega. CAR 91. Such conjecture and speculation unquestionably are impermissible in immigration cases: "We have said it before and we say it again: conjecture and speculation *can never replace substantial evidence.*" Maini v. INS, 212 F.3d 1167, 1175 (9th Cir. 2000)(citing Cordon-Garcia v. INS, 204 F.3d 985, 993 (9th Cir. 2000), and Lopez-Reyes v. INS, supra, 79 F.3d at 912).

Regardless of whether the IJ could discern Mr. Soto Vega's being gay based on his appearance, the evidence clearly established that Mr. Soto Vega *had been* identified as gay – and *was* persecuted on that basis – throughout his growing up in

Mexico by classmates, family members, school authorities, and the police, and that he continued to fear this would occur on any return to Mexico. CAR 116-17, 127-33, 147-48, 151.

The evidence also included testimony of Jose Alarcon (found to be "believable and credible" by the IJ, CAR 91), who had interviewed several hundred gay men in Mexico, that Mr. Soto Vega *would* be recognized in Mexico as being gay, based on his physical appearance and information that would be available upon speaking with him. CAR 168.

It is simply immaterial whether a particular immigration judge believes a gay man is recognizable as such from certain stereotypes, especially those held by an American judge; the relevant analysis is what Mr. Soto Vega would experience in Mexico. Others might bring a different sensibility to the range of how different gay people look and act,[22] particularly in another country where social cues

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[22] There is a common belief that some people have a better sense of "gaydar" (an ability to discern sometimes subtle cues about other people's sexual orientation) than others. See Mary Coombs, Interrogating Identity, 11 Berkeley Women's L.J. 222, 232 n.57 (1995); Peter Nicolas, "They Say He's Gay": The Admissibility of Evidence of Sexual Orientation, 37 Ga. L. Rev. 793, 884 (Spring 2003); Nalini Ambady, et al., Accuracy of Judgments of Sexual Orientation from Thin Slices of Behavior, 77(3) J. Personality & Soc. Psychol. 538, 543, 545 (1999).

regarding being gay may be different.[23]

The Ninth Circuit specifically has pointed out the dangers of cultural bias in asylum cases. In Chouchkov, supra, this Court found that the BIA had "made several assumptions that lack evidentiary support." 220 F.3d at 1083. Further, this Court said, "non-evidence-based assumptions about conduct in the context of other cultures must be closely scrutinized.... [I]t is highly advisable to avoid assumptions regarding the way other societies operate. Time and again ... assumptions of this nature have proven to be totally wrong." Id. at n.15. More fundamentally, as explained above, the principles of asylum mean that Mr. Soto Vega has a right to dress, act, and speak as he pleases with regard to his sexual orientation without putting his life, or his ability to obtain protection against persecution on that basis, at risk.[24]

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[23] See Hernandez-Montiel, supra, 225 F.3d at 1089 (discussing expert testimony on different social construction of homosexuality in Mexico than in the United States).

[24] One fallacy underlying the IJ's reasoning is highlighted by the police beating of Mr. Soto Vega and his cousin, which occurred in the major city of Guadalajara, not in Mr. Soto Vega's small home town from which the IJ suggested Mr. Soto Vega could relocate with safety. Although the Mexican police might not have been sure initially that Mr. Soto Vega and his cousin were gay, when the officers learned the two had been at an address known to be frequented by gay people, the officers immediately began using anti-gay slurs and violently assaulting Mr. Soto Vega and his cousin. CAR 133, 201-02. Thus, even if some people in Mexico might not be aware that Mr. Soto Vega is gay by looking at him, they might well figure it out from his activities and his answers to questions,

V. The Immigration Judge's Determination that Mr. Soto Vega Could Avoid Persecution through Internal Relocation within Mexico, in the Absence of Any Showing by the INS That Such Relocation Would Be Reasonable, Also Was Wrong as a Matter of Law.

In addition to the incorrect assumption that Mr. Soto Vega would not be recognized as gay upon relocation, a second reason further makes the IJ's relocation determination reversible error. As an initial matter, the law in this Circuit is that, "where the applicant has established a well-founded fear of persecution at the hands of the government" – as Mr. Soto Vega has – a presumption arises that "the threat exists nationwide and therefore that internal relocation is unreasonable." Melkonian, supra, 320 F.3d at 1070; see also Singh v. Ilchert, supra, 63 F.3d. at 1511 (government bodies, like national police forces, are presumed to have "the ability to persecute the applicant throughout the country."); Singh v. Moschorak, 53 F.3d 1031, 1034 (9th Cir. 1995).[25] As with the presumption of a well-founded fear of future persecution, the applicant bears no burden to make any showing as to the unreasonableness of relocation once this presumption is triggered; rather the burden of proof shifts to the INS: "The INS can

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notwithstanding attempts to conceal the fact.

[25] In addition, where, as in this case, the record fails to demonstrate that the government adequately would protect an applicant from persecution by others, persecution also regularly is considered country-wide. Cordon-Garcia, supra, 204 F.3d at 993; see also Hernandez-Montiel supra, 225 F.3d at 1099.

rebut this presumption only by establishing, by a preponderance of the evidence, that, under all of the circumstances, it would be *reasonable* for the applicant to *relocate*." Garcia-Martinez, supra, 371 F.3d at 1074 n. 4 (emphasis in original; internal quotation marks and citations omitted); see 8 C.F.R. § 208.13(b)(3)(ii).

Upon Mr. Soto Vega's showing of past persecution that the police perpetrated or would not control, he was entitled to this presumption. The IJ's conclusory statement that, if Mr. Soto Vega "returned to Mexico in some other community," he might avoid persecution, CAR 93, was totally without foundation. But, beyond that, there was absolutely no evidence to overcome the presumption that to demand relocation would be unreasonable, let alone an INS showing, by a preponderance of the evidence, that it would be reasonable to require Mr. Soto Vega to relocate in Mexico, under all circumstances. See Melkonian, supra, 320 F.3d at 1069; Lim, supra, 224 F.3d at 935.[26] As a result, any reliance on the

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[26] Mr. Soto Vega has not lived in Mexico since 1988, CAR 202, and he testified to the difficulties gay men like him have finding legal work there. CAR 136. As this Court explained in Knezevic v. Ashcroft, 367 F.3d 1206, 1214 (9th Cir. 2004), to expect those who have been persecuted "to start their lives over again in a new town, with no property, no home, no family, and no means of earning a living is not only unreasonable, but exceptionally harsh." Moreover, there was no evidence that Mr. Soto Vega has any family in Mexico outside of Tuxpan. To the contrary, those he now considers family are all in the United States. CAR 124, 169, 204. Under these circumstances, the INS cannot be found to have rebutted the presumption that it would be unreasonable to require Mr. Soto Vega to relocate to a different location in Mexico, especially when the INS failed

possibility of relocation was erroneous as a matter of law, and is yet another reason why the denial of asylum to Mr. Soto Vega must be reversed.

VI. The Immigration Judge's Determination that Mr. Soto Vega Was Not Entitled to Withholding of Removal Additionally Was Wrong as a Matter of Law, Because Mr. Soto Vega's Proof that His Life and Freedom Had Been Threatened in the Past Created a Presumption of a Clear Probability that His Life or Freedom Similarly Would Be Threatened in the Future, Thereby Entitling Him to Withholding of Removal, and the INS Failed to Rebut that Presumption.

The IJ's denial of withholding of removal also was wrong as a matter of law. Initially, the IJ correctly stated the general principle that there is a higher standard to show entitlement to withholding than entitlement to asylum: an applicant must show a clear probability that his life or freedom will be threatened upon return to his country of origin to be entitled to withholding. What the IJ failed to recognize, however, is that proof that an applicant's life or freedom was threatened in the past gives rise to a presumption of a clear probability that he will be similarly threatened in the future. As this Court held in Singh v. Ilchert, supra,

> For purposes of withholding of deportation, the presumption is similar. Once the applicant establishes initially that "his life or freedom was threatened in the proposed country of deportation," then: "it shall be presumed that his life or freedom would be threatened on

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to argue the point to either of the tribunals below or produce any evidence in rebuttal.

return to that country...."

Id, 63 F.3d at 1510 (quoting from 8 C.F.R. § 208.16(b)(2)). As with other presumption in this area, once this presumption attaches, the applicant has no further burden of proof; rather the burden of proof shifts to the government to prove, by a preponderance of evidence, that there has been such a fundamental change in country conditions that the applicant no longer would be persecuted there. Singh v. Ilchert, supra, 63 F.3d at 1510. As the Court in that case went on to explain,

> Under the regulations, once the applicant has established that he experienced persecution in the past, the only relevant question is whether conditions in the country have so *changed* that the threat no longer exists upon his return. There is no burden on the applicant to show that his *past* experience reflected conditions nationwide.

Id. (emphasis in original). This principle consistently has been upheld in this Circuit, see Deloso v. Ashcroft, 378 F. 3d 907, 916 (9th Cir. 2004); Salaam v. INS, 229 F. 3d 1234, 1240 (9th Cir. 2000); Hernandez-Montiel, supra, 225 F.3d at 1099, and applies in this case to require reversal of the IJ's denial of withholding.

Thus, Mr. Soto Vega's testimony that the police not only beat him because he was gay, but also threatened to kill him (CAR 117, 133-34) triggered the presumption that his life or freedom would be threatened on return to Mexico. The INS made no attempt to rebut this presumption. And, even the IJ made no mention

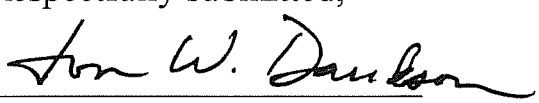
of this presumption, or any evidence that could rebut it, in his selective reading of the country condition documents. Since the INS totally failed to address this issue, much less show any evidence to rebut the presumption, the denial of withholding below also must be reversed as a matter of law.

CONCLUSION

The errors in this matter were serious, controverted well-established principles of immigration law, and improperly subjected Mr. Soto Vega to requirements not imposed on those seeking asylum based on persecution on account of characteristics other than sexual orientation. For all of the reasons set forth above, Mr. Soto Vega prays that the BIA's order adopting the IJ's decision to deny asylum be reversed and remanded to the Attorney General only for the exercise of discretion to grant asylum, and that the BIA's order adopting the IJ's decision to deny withholding be reversed and remanded with direction to grant withholding of removal.

Dated: October 25, 2004

Respectfully submitted,



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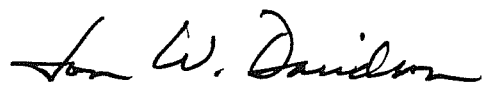
CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7) OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND NINTH CIRCUIT RULE 32-1

1. The undersigned attorney of record for Petitioner hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1 because this brief contains 13,838 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using WordPerfect Version 9 in 14 point font in Times New Roman style.

Dated: October 25, 2004



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ADDENDUM OF RELEVANT PARTS OF STATUTES AND REGULATIONS

Pursuant to Rule 28-2.7 of the Ninth Circuit's Rules, set forth below are relevant parts of statutes and regulations that may require study in determining the issues presented in Petitioner's Opening Brief:

8 U.S.C. § 1101(a)(42)(a)

> The term "refugee" means (A) 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act [8 U.S.C. § 1157(e)]) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, 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.

8 U.S.C. § 1158(a)

Authority to apply for asylum.

(1) In general. Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b) [8 U.S.C. § 1225].

(2) Exceptions.

(A) Safe third country. Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit. Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications. Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances. An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General

either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(3) Limitation on judicial review. No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

8 U.S.C. § 1158(d)(5)(A)(iv)

any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 240 [8 U.S.C. § 1229a], whichever is later;

8 U.S.C. § 1252(a)

Applicable provisions.

(1) General orders of removal. Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 235(b)(1) [8 U.S.C. § 1225(b)(1)]) is governed only by chapter 158 of title 28 of the United States Code [28 U.S.C. §§ 2341 et seq.], except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

8 U.S.C. § 1252(b)

Requirements for review of orders of removal. With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline. The petition for review must be filed not later than 30 days after the date of the final order of removal.

Eligibility. 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.

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. 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.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(2) Well-founded fear of persecution.

(i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail

himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

8 C.F.R. § 1003.1(b)

Appellate jurisdiction. Appeals may be filed with the Board of Immigration Appeals from the following:

...

(3) Decisions of Immigration Judges in removal proceedings....

...

(9) Decisions of Immigration Judges in asylum proceedings....

8 C.F.R. § 1003.3(a)(1)

Appeal from decision of an immigration judge. A party affected by a decision of an immigration judge which may be appealed to the Board under this chapter shall be given notice of the opportunity for filing an appeal. An appeal from a decision of an immigration judge shall be taken by filing a Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26) directly with the Board, within the time specified in §§ 1003.38. The appealing parties are only those parties who are covered by the decision of an immigration judge and who are specifically named on the Notice of Appeal. The appeal must reflect proof of service of a copy of the appeal and all attachments on the opposing party. An appeal is not properly filed unless it is received at

the Board, along with all required documents, fees or fee waiver requests, and proof of service, within the time specified in the governing sections of this chapter. A Notice of Appeal may not be filed by any party who has waived appeal pursuant to § 1003.39.

8 C.F.R. § 1003.38(b)

The Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR-26) shall be filed directly with the Board of Immigration Appeals within 30 calendar days after the stating of an Immigration Judge's oral decision or the mailing of an Immigration Judge's written decision. If the final date for filing falls on a Saturday, Sunday, or legal holiday, this appeal time shall be extended to the next business day. A Notice of Appeal (Form EOIR-26) may not be filed by any party who has waived appeal.

8 C.F.R. § 1003.38(c)

The date of filing of the Notice of Appeal (Form EOIR-26) shall be the date the Notice is received by the Board.

8 C.F.R. § 1240.15

Pursuant to 8 CFR part 1003, an appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals, except that no appeal shall lie from an order of removal entered in absentia. The procedures regarding the filing of a Form EOIR 26, Notice of Appeal, fees, and briefs are set forth in §§ 1003.3, 1003.31, and 1003.38 of this chapter. An appeal shall be filed within 30 calendar days after the mailing of a written decision, the stating of an oral decision, or the service of a summary decision. The filing date is defined as the date of receipt of the Notice of Appeal by the Board of Immigration Appeals. The reasons for the appeal shall be stated in the Notice of Appeal in accordance with the provisions of § 1003.3(b) of this chapter. Failure

to do so may constitute a ground for dismissal of the appeal by the Board pursuant to § 1003.1(d)(2) of this chapter.

PROOF OF SERVICE BY MAIL

I, TITO GOMEZ, declare:

that I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to the within-entitled action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Boulevard, Suite 1300, Los Angeles, California 90010.

On October 25, 2004, I served copies of the attached document, described as OPENING BRIEF OF PETITIONER on the opposing parties of record in this matter, *Jorge Soto Vega v. John Ashcroft*, which does not yet have a Ninth Circuit case file number but was Immigration File No. A 95 880 786, into the United States Postal Service mail, by placing true and correct copies in sealed envelopes in the mail with adequate postage thereon addressed to the following:

John Ashcroft
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

David E. Dauenheimer, Attorney
Richard M. Evans, Attorney
U.S. Department of Justice
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
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Clerk, U.S. Department of Homeland Security
(for delivery to the Hon. John D. Taylor, Judge)
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Interim Field Office Director for Detention & Removal
Bureau of Immigration and Customs Enforcement
Los Angeles District Office
300 North Los Angeles Street, Room 1001
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on October 25, 2004, at Los Angeles, California.

Tito Gomez