UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
FORT SNELLING, MINNESOTA

In the Matter of: [redacted]	
Respondent	**In Removal Proceedings**
File Number: [redacted]	

ATTACHMENT OF LEGAL AUTHORITY

I. Asylum

A. General Provisions

Respondent carries the initial burdens of proof and persuasion for establishing his eligibility for asylum. *See* INA § 208(b)(1)(B); 8 C.F.R. § 1208.13(a). To establish eligibility, Respondent must meet the definition of a "refugee," defined as an individual who is unwilling or unable to return to his country of nationality because of past persecution or because he has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(a). Although the protected ground does not need to be the sole reason for the persecution, it must be at least one central reason. *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212-14 (BIA 2007).

If Respondent can establish that he suffered past persecution, then he is entitled to a rebuttable presumption that his fear of future persecution is "well-founded." *See* 8 C.F.R. § 1208.13(b)(1). The government can rebut this presumption if a preponderance of the evidence shows either: (1) that there has been a "fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution" in his native country; or (2) that he "could avoid persecution by relocating to another part" of the country and that "it would be reasonable to expect the applicant to do so." *See* 8 C.F.R. § 1208.13(b)(1)(i)-(ii); *see also Bushira v. Gonzales*, 442 F.3d 626, 631 (8th Cir. 2006); *Matter of D-I-M-*, 24 I&N Dec. 448, 450-51 (BIA 2008).

If Respondent's fear of persecution is unrelated to past persecution, he bears the burden of establishing that the fear is well-founded. *See* 8 C.F.R. § 1208.13(b)(1). Respondent has a well-founded fear of future persecution if: (1) he has a fear of persecution in his country of nationality or, if stateless, in his country of last habitual residence, on account of race, religion, nationality,

membership in a particular social group, or political opinion; (2) there is a reasonable possibility of suffering such persecution if he were to return to that country; and (3) he is unable or unwilling to return to, or avail himself of the protection of, that country because of such fear. *See* 8 C.F.R. § 1208.13(b)(2)(i).

A future threat to life or freedom can be established by demonstrating either an individualized risk or a pattern of persecution of similarly situated persons based on one of the five protected grounds. 8 C.F.R. § 1208.16(b)(2); *Thu v. Holder*, 596 F.3d 994, 999 (8th Cir. 2010). A well-founded fear of persecution does not exist where the applicant could avoid persecution by relocating to another part of the country and such relocation would be reasonable. *See* 8 C.F.R. § 1208.13(b)(2)(ii). In other words, the applicant's fear of persecution must be country-wide. *Mohamed v. Ashcroft*, 396 F.3d 999, 1003 (8th Cir. 2005); *Matter of Acosta*, 19 I&N Dec. at 235.

Further, an applicant must present credible evidence that demonstrates that the feared harm is of a level that amounts to persecution, that the harm is on account of a protected characteristic, that the persecutor could become aware or already is aware of the characteristic, and that the persecutor has the means and inclination to persecute. *Matter of Y-B-*, 21 I&N Dec. 1136, 1149 (BIA 1998). A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. *Yu An Li v. Holder*, 745 F.3d 336, 340 (8th Cir. 2014). To demonstrate a subjective fear of persecution, an applicant must demonstrate a genuine apprehension or awareness of the risk of persecution. *Acosta*, 19 I&N Dec. at 221. To satisfy the objective element, the applicant's subjective fear must be supported by " 'credible, direct, and specific evidence that a reasonable person in the alien's position would fear persecution if returned to the alien's country.' " *Damkan v. Holder*, 592 F.3d 846, 850 (8th Cir. 2010) (quoting *Mamana v. Gonzales*, 436 F.3d 966, 968 (8th Cir. 2006)). A ten percent chance of future persecution can be sufficient to meet the asylum requirements. *Cardoza-Fonseca*, 480 U.S. at 431; *Bellido v. Ashcroft*, 367 F.3d 840, 845 n.7 (8th Cir. 2004).

Asylum, unlike withholding of removal, may be denied in the exercise of discretion to an alien who establishes statutory eligibility for relief. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987); *Matter of Mogharrabi*, 19 I&N Dec. 439, 447 (BIA 1987).

B. One-Year Filing Deadline

An applicant must demonstrate by clear and convincing evidence that his asylum application has been filed within one year of arrival in the United States. INA § 208(a)(2)(B). If the applicant filed more than one year after his arrival in the United States, he must show either the existence of changed circumstances which materially affect his eligibility for asylum or that extraordinary circumstances prevented him from filing in a timely manner. INA § 208(a)(2)(D). Changed circumstances may include changes in country conditions or changes in the applicant's personal circumstances. 8 C.F.R. § 1208.4(a)(4)(i)(A)-(B). An applicant has a reasonable time to file his application after such changed circumstances occur. 8 C.F.R. § 1208.4(a)(4)(ii). Extraordinary circumstances are events or factors that caused the failure to meet the one-year deadline. 8 C.F.R. § 1208.4(a)(5). To show an extraordinary circumstance, the applicant must show "that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the

application within the 1-year period, and that the delay was reasonable under the circumstances." 8 C.F.R. § 1208.4(a)(5). Examples include serious illness, mental or physical disability, ineffective assistance of counsel, and maintaining lawful status or parole until a reasonable period before the filing of the asylum application. 8 C.F.R. § 1208.4(a)(5)(i)-(iv). This list is illustrative but not exhaustive. 8 C.F.R. § 1208.4(a)(5).

C. Aggravated Felony Bar

Asylum is not available for applicants who have committed certain crimes or represent a danger to the security of the United States. See INA § 208(b)(2)(A)(i)-(v). In particular, an applicant who has been convicted of a particularly serious crime, including any aggravated felony, is ineligible for asylum. INA § 208(b)(2)(A)(ii)-(iii); INA § 208(b)(2)(B)(i).

D. Persecution

The Eighth Circuit has defined past persecution as "'the infliction or threat of death, torture, or injury to one's person or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion.'" *Litvinov v. Holder*, 605 F.3d 548, 553 (8th Cir. 2010) (quoting *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628 (8th Cir. 2008)). Persecution within the meaning of the INA "does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional." *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997). Low-level intimidation and harassment alone do not rise to the level of persecution, *Alavez-Hernandez v. Holder*, 714 F.3d 1063, 1067 (8th Cir. 2013), nor does harm arising from general conditions such as anarchy, civil war, or mob violence. *Agha v. Holder*, 743 F.3d 609, 617 (8th Cir. 2014). Even minor beatings or limited detentions do not usually rise to the level of past persecution. *Bhosale v. Mukasey*, 549 F.3d 732, 735 (8th Cir. 2008); *Kondakova v. Ashcroft*, 383 F.3d 792, 797 (8th Cir. 2004). For example, the Eighth Circuit has held that "minor beatings and brief detentions, even detentions lasting two to three days, do not amount to political persecution, even if government officials are motivated by political animus." *Eusebio v. Ashcroft*, 361 F.3d 1088, 1090 (8th Cir. 2004). Rather, "'persecution is an extreme concept.'" *Litvinov*, 605 F.3d at 553. Non-physical harm or economic discrimination can be persecution if the effects are extreme. *See Matter of T-Z-*, 24 I&N Dec. 163, 171-173 (BIA 2007); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *overruled in part on other grounds*. Persecution is also treated cumulatively. *See Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008); *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998).

E. Particular Social Group

One qualifying type of persecution is persecution on account of the applicant's membership in a particular social group. A particular social group requires members have an immutable characteristic. *Matter of W-G-R-*, 26 I&N Dec. 208, 210 (BIA 2014). An immutable characteristic is one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Acosta*, 19 I&N Dec. at 233.

The group must also be socially distinct and particular. *W-G-R-*, 26 I&N Dec. at 212. Particularity requires that the group is distinct enough that it "would be recognized, in the society in question, as a discrete class of persons." *Id.* at 214 (quoting *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008)). This particularity inquiry may require looking into the culture and society of Respondent's home country to determine if the class is discrete and not amorphous. *Id.* Social distinction is not determined by the persecutor's perception but "exists where the relevant society perceives, considers, or recognizes the group as a distinct social group." *Id.* at 217-18. Social distinction does not require "ocular" visibility. *Id.* at 216. "An applicant's burden includes demonstrating the existence of a cognizable particular social group, his membership in that particular social group, and a risk of persecution *on account of* his membership in the specified particular social group." *W-G-R-*, 26 I&N Dec. at 223. A group cannot be circularly defined by the fact that it suffers persecution. *Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006).

F. Government Unwilling or Unable to Control

To constitute persecution, the alleged harm must also be inflicted by the government or actors the government is "unwilling or unable to control." *Cubillos v. Holder*, 565 F.3d 1054, 1057 (8th Cir. 2009) (citing *Flores-Calderon v. Gonzalez*, 472 F.3d 1040, 1043 (8th Cir. 2007)). To establish persecution by private actors, the applicant must show more than just that the government has difficulty controlling private behavior, rather he must demonstrate that the government condoned the private behavior or at least demonstrated a complete helplessness to protect the victims. *Salman v. Holder*, 687 F.3d 991, 995 (8th Cir. 2012).

II. Withholding of Removal

To establish eligibility for withholding of removal, Respondent must show that there is a "clear probability" that his life or freedom would be threatened on account of the applicant's race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 241(b)(3)(C); *Antonio-Fuentes v. Holder*, 764 F.3d 902, 904 (8th Cir. 2014). Put another way, withholding of removal will be granted only if an applicant proves that it is more likely than not that he would be persecuted upon return to his country. *Goswell-Renner v. Holder*, 762 F.3d 696, 700 (8th Cir. 2014). Although the protected ground does not need to be the sole reason for the persecution, it must be at least one central reason. *J-B-N- & S-M-*, 24 I&N Dec. at 212-14. In other words, the protected ground cannot be "incidental, tangential, superficial, or subordinate to another reason." *Id.* at 214.

While asylum and withholding claims rely on the same factual basis, there is a heavier burden of proof for withholding of removal relief. *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989).

III. Convention Against Torture

For asylum applications filed on or after April 1, 1997, the applicant shall also be considered for eligibility for relief under article 3 of the Convention Against Torture (CAT). *See* 8 C.F.R. § 1208.13(c)(1). The burden of proof is on the applicant to establish that it is more likely

than not that he would be tortured if removed to the proposed country of removal. *See* 8 C.F.R. § 1208.16(c)(2). The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. *Id.*

"Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a). "A public official 'acts under color of law when he misuses power possessed by virtue of ... law and made possible only because he was clothed with the authority of ... law.' " *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009), quoting *United States v. Colbert,* 172 F.3d 594, 596 (8th Cir. 1999). "Acquiescence" requires that the public official have prior awareness of the activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7). It is not sufficient to show that the government is aware of the torture and is simply powerless to stop it. *See Ramirez-Peyro v. Gonzalez*, 477 F.3d 637, 639 (8th Cir. 2007). However, a government's willful blindness toward the torture of citizens by third parties amounts to unlawful acquiescence. *Gallimore v. Holder*, 715 F.3d 687, 689 (8th Cir. 2013).

In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to: evidence of past torture inflicted upon the applicant; evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and other relevant information regarding conditions in the country of removal. *See* 8 C.F.R. § 1208.16(c)(3).

A pattern of human-rights violations alone is not sufficient to show that a particular person would be in danger of being subjected to torture upon his return to that country; rather, "[s]pecific grounds must exist that indicate the individual would be *personally* at risk." *Matter of S-V-*, 22 I&N Dec. 1306, 1313 (BIA 2000) (emphasis added) (citation omitted). Eligibility for relief cannot be established by stringing together a series of suppositions to show that torture is more likely than not to occur unless the evidence shows that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-918 (AG 2006).

Dated: [redacted]

Monte G. Miller
Immigration Judge