NEW YORK CITY BAR

COMMITTEE ON IMMIGRATION & NATIONALITY LAW

MARK R. VON STERNBERG
CHAIR
1011 FIRST AVENUE
NEW YORK, NY 10022
12TH FLOOR
Phone: (212) 419-3763
Fax: (212) 751-3197
mark.vonsternberg@archny.org

ANA POTTRATZ ACOSTA
SECRETARY
308 WEST 46TH STREET
NEW YORK, NY 10036
3RD FLOOR
Phone: (212) 265-1826
Fax: (212) 265-2238
apottratz@lssny.org

April 6, 2011

U.S. Department of Homeland Security
Office of the General Counsel
ATTN: DHS Retrospective Review
245 Murray Lane, Mail Stop 0485
Washington, DC 20528

Re: **DHS Retrospective Review**
U.S. Department of Homeland Security
DOCKET NO. DHS-2011-0015

Dear Sir/Madam:

I. Introduction

I write on behalf of the Immigration and Nationality Law Committee of the Bar Association of the City of New York in order to respond to your request for comments with respect to significant areas of the regulations pertaining to immigration and located at 8 CFR Part 1001 et seq., which may be in need of revision. The within recommendations contain the views of the Committee. Although the proposed comment period, which expires on April 13, 2011, did not leave us sufficient time within which to prepare comments on the regulations as a whole, we are offering proposals on one vital aspect of the regulatory provisions, which has long been neglected. On December 7, 2000 regulations were proposed for comment that would have provided a normative framework for deciding asylum cases based on the "social group" ground of refugee protection. It is the Committee's recommendation that these proposed interim regulations be revisited and, with the suggested changes outlined below, republished for comment and eventual adoption.

II. The Interim Rule of December 7, 2000 and Proposed Changes

Two developments point forcefully to the conclusion that revision at this point in time would be both constructive and timely. The first of these is the favorable outcomes in both Matter of R-A-, 24 I. & N. Dec. 629 (AG 2008) and Matter of L-R-, (IJ San Francisco, Ca. Aug. 4, 2010). While these cases signal a fresh doctrinal approach to gender-based asylum claims based on

domestic violence, they do not constitute precedent decisions and have left no discernable framework upon which future decisions can be predicated. The principal sources of the law today in the area of domestic violence are persuasive only and consist in part of the briefs submitted by the Department of Homeland Security in pending litigation and, to a lesser extent, the December 7, 2000 regulations themselves. The Supplementary Information section of the proposed interim regulation made it evident that Matter of R-A- should be reversed, and the rationale of the December 7, 2000 proposed rule could, with some revisions, easily be adopted as a formal basis of decision today.

To some extent, the December 7, 2000 proposal incorporated a version of the "social perceptions" test, which has been used in the past by the United Nations High Commissioner for Refugees in social group determinations. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000). As will be elaborated upon below, the "social perceptions" test has now been adopted and, with critical variations, transmuted by the Board of Immigration Appeals in its development of the case law. It is essential, in the Committee's view, that the new regulation clarify that the "social perceptions" test is based on an attitude of society, and not (as is presently maintained by the Board), on whether the group has features which are visible to the naked eye. As also will be made clear below, the regulations should reflect that the attitude towards the group is such that it does not receive equal treatment as compared with other members of the national community.

The other development making adoption of an interim regulation desirable is the Board of Immigration Appeals' denial of asylum claims based on social group membership where the claimant has refused to be co-opted by criminal gangs. In these determinations, the Board has engaged in an unfortunate adoption of the "social visibility" and "particularity" criteria to social group recognition. See Matter of C-A-, 23 I. & N. 951 (BIA 2006); Matter of S-E-G-, 24 I. & N. 579 (BIA 2008) and Matter of E-A-G-, 24 I. & N. 541 (BIA 2008). Although some federal courts of appeal have acceded to the Board's new formulation, Gomez-Benitez v. Mukasey, 295 Fed. Appx. 814 (11th Cir. 2008); Santos-Lemus v. Mukasey, 542 F.3d 738 (9th Cir. 2008), a growing number of circuits have questioned it and determined it to be aberrant. Gatimi v. Holder, 578 F. 3d 611 (7th Cir. 2009); Urbina-Mejia v. Holder, No. 09-3567 (6th Cir. Mar. 5, 2010). The Seventh Circuit has unquestionably assumed the lead here, ruling, for instance, that the "social visibility" criterion is radically inconsistent with the Board's more established jurisprudence in this area without overruling its earlier case law. As the Committee has urged in administrative litigation before the Attorney General, the basic framework for social group should remain the Acosta criteria, namely, immutable characteristics, associations so fundamental to the asylum seeker's identity or conscience that she should not be constrained to relinquish them, and past associations which have become immutable through the passage of time. [1] Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985).

The December 7, 2000 proposed rule contained a version of the "social perceptions" test which could be applied by adjudicators on a voluntary basis. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000). The Committee sees no immediate concerns with readopting this proposed standard, provided that it is made clear that (1) the criterion is voluntary only, -- not mandatory; and (2) that the "social perceptions" test be framed in the following terms: "A conception of the group within society under which the group is subject to a lower level of human rights protection than are other members of the national community".

The proposed regulations should contain two other features in the Committee's view. First, they should make it clear that the notion of attributed characteristics and beliefs applies to the social

[1] The Committee's earlier brief can be found at http://www.immigrantlawcentermn.org/documents/City_Bar_NY_AG_letter-brief.PDF

group ground of refugee protection just as it applies to the other four grounds. Amanfi v. Ashcroft, 328 F.3d 719 (3rd Cir. 2003). Although the social perceptions test bears similarities to attributed membership in a social group, the two approaches are not coterminous. Among the more salient distinctions which exist is that, while the "social perceptions" test inquires into societal attitudes towards the putative group, attributed membership in a social group looks to the outlook of the persecutor and asks whether the persecutor perceives the applicant in a hostile light.

The other feature which the Committee asks be included within the proposed regulation is a methodological one: no application based on membership in a particular social group should be denied until all possible configurations of social group have been exhausted. This approach is consistent with the "liberal" interpretation of the term "refugee", including (1) the benefit of the doubt principal, (2) the "well-founded fear of persecution" criterion as developed in the Supreme Court's ruling in Cardoza Fonseca v. INS, 480 U.S. 421 (1987), and finally (3) the broad doctrinal view that the claimant is not obligated to identify the precise motivation of her persecutor. [2]

Thank you very much for your consideration in this matter.

Very truly yours,

Mark R. von Sternberg, Chair*

Nicole Feit, Secretary
Nicole Abruzzo
Sheila M. Aresty
Lisa Bagley
Ann C. Barcher
Philip M. Caal
Laura Capelin
Jennifer L. Colyer
Sara Nicole Cross
Fasih Ud Din
Veronica E. Frösen
Richard A. Geduldig
Jennifer Ismat
Myriam Jaidi
Anil Kalhan
Jeeyoung Kim
Lisa M. Koenig
Eva Kozlowska
Tracy J. Lawson
Eugene M. Lynch
Tanisha L. Massie
Humberto Mendieta
Jonathan Robert Nelson
Edmund M. O'Toole

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[2] For more detail on these arguments, please see the Amicus Curiae Brief of the Committee in Matter of S-E-G-.
* Principal drafter.

Jessica Palumbo **
Jeri E. Powell
Visuvanathan Rudrakumaran
Gregory A. Scopino
Kisshia Simmons-Grant
Brooke Skartvedt
John A. Stahl
Alice B. Stock
John J. Tobin
Felicia Zeidman

Staff Member
Suzanne Tomatore

Student Member
Sabrina Gillespie
Elizabeth Kamens
Cathy Ng
Joy Ziegeweid

** Participating author