

On the Positive Side: Using a Foreign National's HIV-Positive Status in Support of an Application to Remain in the United States

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ABSTRACT

Since 1987, the United States has maintained a restrictionist and discriminatory policy toward foreign nationals who are HIV positive. This policy can only be waived in limited circumstances. In most instances, testing positive for HIV makes it difficult or impossible for a foreign national to visit or obtain permanent residence in the United States. This article discusses two unusual cases where, in direct contrast to general immigration policy, a foreign national's HIV-positive status actually helped the individual to obtain lawful immigration status in the United States. The first part of this article describes the parameters of immigration law as it applies to HIV-positive individuals. The second part focuses on two cases in which two immigration judges granted legal status to foreign nationals be-

cause of their HIV-positive status. Finally, part three calls for a change in the law to allow a greater number of foreign nationals, whose lives would be in jeopardy if they returned to their home countries, to remain lawfully in the United States, where they can obtain lifesaving medical treatment and become productive members of society.

THE LEGAL LANDSCAPE

The HIV Bar to Admission

Under federal law, most foreign nationals who are HIV positive are "inadmissible"¹ to the United States. The law effectively bars HIV-positive foreign nationals from entering or remaining in the United States permanently. Visitors who disclose their HIV status² will not be permitted to enter the United States, unless they first apply for and obtain a waiver.³ Likewise, HIV-positive foreign nationals who wish to obtain legal permanent residence will have their applications denied unless they apply for and are granted a special HIV waiver.⁴ To be eligible, the legal per-

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manent resident applicant must show: (1) he or she has a qualifying relative,⁵ (2) the danger to the public health of the United States created by his or her admission is minimal, (3) the possibility of the spread of the infection created by his or her admission is minimal, and finally (4) there will be no cost incurred by any level of government agency of the United States without prior consent of that agency.⁶ Foreign nationals who have been granted asylum in the U.S. can apply for an HIV waiver on humanitarian grounds without having a qualifying relative.⁷

Many foreign nationals are able to obtain legal permanent residence through the diversity visa lottery program,⁸ and many more are able to obtain their residence through employment.⁹ However, if they are HIV positive, their applications for permanent residence will be denied unless they happen to also have a qualifying relative. Even if the foreign national has an excellent job, with full health insurance, and would be engaged in important work that furthers the national interest of the United States, under our current law there is no mechanism for him or her to remain in the United States as a permanent resident unless he or she has a relative, which qualifies him or her to apply for the waiver.

Many scholars have called for an end to this outmoded policy.¹⁰ President Clinton vowed to change this rule soon after entering office. His efforts to remove HIV from the list of excludable illnesses led to a bitter fight in Congress, the result of which was a codification of HIV as a ground of exclusion into the Immigration and Nationality Act (INA) itself.¹¹ As the current Bush administration calls for the compassionate treatment of HIV-positive individuals around the world,¹² this overt discrimination against HIV-positive foreign nationals at home seems particularly outdated and inhumane. While there has been some speculation that the administration may make some future shift on this policy,¹³ many practitioners feel that there is unlikely to be any change in the near future.

The Concept of Hardship in Immigration Law

At the same time that those with HIV have been systematically denied the ability to obtain legal permanent residence through the most common channels in the United States, there has existed a contravening force in immigration law in which "hardship" to a foreign national can help him or her to remain in the United States.¹⁴ With changes in the INA enacted in 1996, the reach of this concept was greatly diminished. Prior to 1996, a foreign national in deportation proceedings could apply for "suspension of deportation," and obtain permanent residence in the United States if he or she could show that he or she had been continuously present in the United States for seven years, was a person of good moral character, and that deportation would lead to "extreme hardship" to the foreign national or to a qualifying relative.¹⁵ Under current law, foreign nationals must have resided in the United States for 10 years, and the "extreme hardship to self" category has been replaced with a requirement to demonstrate "extreme and exceptionally unusual hardship" to a U.S. citizen or legal permanent resident who is an immediate relative, rather than to the foreign national.¹⁶

Likewise, prior to the 1996 amendments to the act, foreign nationals could apply for a form of humanitarian relief known as extended voluntary departure (EVD). Under EVD, undocumented foreign nationals who were present in the United States who could show that they were terminally ill, possessed good moral character, and were too sick to travel could receive a limited lawful status for

Acronyms Used in this Article

BIA	Board of Immigration Appeals
CAT	Convention against Torture (treaty)
EVD	extended voluntary departure
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service

a two-year period, which they could continue to renew as long as they met the requirements for EVD. Changes in the 1996 law eliminated this form of relief,¹⁷ and while advocates have attempted with limited success to apply for a similar form of humanitarian relief known as “deferred action,”¹⁸ after 11 September 2001 this form of relief has been increasingly denied, leaving its applicants vulnerable to potential removal.

Fleeing Persecution

In this bleak landscape for the HIV-positive foreign national, there does remain some hope. Under limited circumstances, a foreign national’s HIV-positive status can actually be the basis for a grant of legal status in the United States. Under both international law and American law, a foreign national who is fleeing persecution on account of race, religion, nationality, membership in a particular social group, or political opinion¹⁹ may be eligible to obtain asylum in the United States, allowing him or her to remain here indefinitely and eventually obtain legal permanent residence.

The INA does not define “membership in a social group,” and the category has therefore been used to encompass asylum claims that do not fit into the other traditionally recognized grounds. The Board of Immigration Appeals (BIA) has nonetheless narrowed the definition to “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”²⁰ The Ninth Circuit Court of Appeals has defined a “particular social group” as “one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”²¹

In general, categories that are extremely broad, such as “working class, urban males of military age who maintained political neutrality” have been found not to constitute a “particular social group.”²² Likewise, “taxi driv-

ers” do not meet the definition, because this is merely an occupation, which is not immutable.²³ On the other hand, “sexual orientation” has been recognized as a particular social group.²⁴ Sometimes the BIA takes what appears to be an enormous category, such as “women,” and narrows it considerably, so that the social group definition actually includes the feared persecution. For example, in *Matter of Kasinga*,²⁵ an asylum case based on female genital mutilation, the BIA defined the “particular social group” as “members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice.”²⁶

It seems clear that if an immigration court relies only upon the “immutable characteristic” definition, that HIV-positive status should qualify as a “particular social group” since, at this point, there is no cure for HIV and anyone who tests positive will continue to test positive for the rest of their lives. On the other hand, it is rare that the BIA recognizes such a broad category of individuals, especially since HIV-positive individuals often do not form voluntary associations. Indeed, in countries where HIV-positive status is highly stigmatized, it is unlikely that HIV-positive individuals would even form support groups or seek medical care together.

In addition to the difficulty of proving that individuals who are all infected with the same virus are members of a social group, HIV-positive asylum seekers must also prove that upon return to their country, they would face persecution, not mere hardship. Persecution is defined as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”²⁷ The persecution must be inflicted either by the government or by persons or organizations that the government is unable or unwilling to control.²⁸ Additionally, the persecution must exist country-wide.²⁹ Thus it generally would not be sufficient for an asylum applicant to demonstrate that he or she comes from a country with an underdeveloped

healthcare system and that his or her death would be imminent if he or she were returned to his or her country.³⁰ Rather, the asylum applicant must prove that he or she would suffer persecution, either directly from the government or from individuals whom the government is unwilling or unable to control.

Despite the difficulties in fitting such claims within existing asylum law, there have been some successful claims for asylum based on HIV status.³¹ It is possible to apply for asylum on more than one ground simultaneously. Thus, for example, grants of asylum for applicants based both on persecution suffered because of their sexual orientation and HIV status are not uncommon. Grants of asylum applications based solely on HIV status are far more unusual.³²

TWO UNREPORTED CASES THAT GRANTED RELIEF BASED ON HIV STATUS

A Successful Asylum Claim

In December 2000, an immigration judge granted asylum to an HIV-positive woman from India.³³ In that case, the immigration judge seemed to understand that defining the "particular social group" narrowly would make it more likely to withstand review. Thus, the "social group" was not a broad category, such as "HIV-positive individuals," but instead was narrowed to be "married women in India who have contracted HIV, who fear that their families will disown them or force them to get a divorce, and who wish to or need to be employed."³⁴ The immigration judge included the potential grounds for persecution within his definition of the particular social group, that the applicant's HIV status could make her be disowned by her family, be forced to divorce her husband, and be unable to find employment.

As discussed above, a finding simply that medical treatment is unavailable would most likely be insufficient to make out a claim for asylum. Thus, not surprisingly, this is exactly the argument which the Immigration and

Naturalization Service (INS) made against the applicant.³⁵ The immigration judge did not base his decision on potential hardship to the applicant, however. Instead the judge relied heavily on a 1998 decision by the Supreme Court in India that prohibited people with HIV from marrying and that subjected violators of this law to punishment including possible imprisonment. The Indian Supreme Court decision provided the critical link for the immigration judge between private discrimination and stigmatization and governmental persecution. The immigration judge wrote, "This Court finds that punishment for being married, refusal to render medical aid, firing or refusing to hire a person, and forcing someone to leave their community or their state, due to their HIV status, when viewed cumulatively amounts to persecution."³⁶ The court went on to find that the persecution comes both directly from the government, because of the Indian Supreme Court decision, and from others whom the government is unable or unwilling to control. Even though the applicant had not suffered past persecution in India, the court found the fear of future persecution under these circumstances to be sufficient to qualify her for asylum.

In this case, ironically, the applicant was fortunate to come from a country where the government itself had issued a judicial decision institutionalizing discrimination against people with HIV. Asylum cases are often most difficult to prove in countries where there are laws on the books that purport to protect categories of individuals even though in reality the government either fails to protect them or persecutes them directly. There may be few countries where HIV-positive individuals face such blatant government discrimination and, indeed, possible criminalization, as in India, but this case provides an excellent example of how a foreign national's HIV-positive status can help fit her within a category of relief which is recognized under United States immigration law. With so few options open to HIV-positive foreign nationals, it is essential for immigration judges, the BIA, and federal

courts to read the law broadly and consider the policy rationale underlying humanitarian forms of relief, namely to prevent suffering and potential death if the individual is returned to her country.

A Successful Claim Under the Convention Against Torture

In 1994 the United States signed onto the Convention against Torture (CAT) treaty.³⁷ This treaty prohibits countries from returning foreign nationals to their home countries if the applicant establishes that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal.”³⁸ The applicant must also demonstrate that the act will be committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”³⁹ With changes in the law that have made it virtually impossible for foreign nationals with serious criminal convictions to obtain any other relief in removal proceedings,⁴⁰ CAT applications are frequently filed as a matter of last resort.

Perhaps because foreign nationals who are most likely to file for CAT are those whom the United States most wants to remove from the country,⁴¹ CAT has been granted under only the most limited circumstances.⁴² In the *Matter of J-E*,⁴³ the BIA held that a Haitian applicant was not eligible for CAT relief even though it was undisputed that upon his removal to Haiti he would be detained indefinitely under deplorable prison conditions. Finding that Haiti had a legitimate penological interest in detaining returning criminals, and that the Haitian government did not intend to torture the prisoners, the BIA found that the applicant failed to meet the criteria for CAT relief.⁴⁴

With this ruling, and other rulings that narrow the availability of CAT,⁴⁵ it seems nearly impossible for an alien to succeed with a CAT application. Yet, on 3 October 2003, an immigration judge in New York granted CAT relief to an HIV-positive Haitian man upon

finding that his removal would amount to a death sentence.

In *Matter of W.*, the alien had applied both for CAT relief and for a discretionary waiver of his past criminal conduct, known as 212c relief.⁴⁶ This form of relief was also eliminated by the 1996 revisions of the INA. Although the case was decided in 2003, because the applicant’s convictions predate the 1996 tightening of the law, he was eligible to apply under the older, more liberal rules.⁴⁷ The immigration judge denied the 212c relief, stating that “the Court is not convinced that the Respondent presented sufficient equities to overcome the extremely serious nature of his numerous convictions involving controlled substances and robbery.”⁴⁸ Under former section 212c of the INA, in addition to proving statutory eligibility for relief, which the respondent in this case did, the immigration judge must also find that the respondent merits a favorable exercise of the judge’s discretion. In this case, the judge found that the respondent’s extensive criminal record was too heavy a negative factor for the favorable factors to merit relief. The judge concluded, “In sum, the Court finds that the Respondent has established sufficiently unusual and outstanding equities, but in spite of that, the adverse factors stemming from his past criminal conduct outweigh those factors.”⁴⁹

After denying the respondent’s application for 212c relief, the court went on to consider W.’s application for relief under CAT. Unlike 212c relief, relief under CAT is mandatory, not discretionary, meaning that if an immigration judge finds that an applicant meets the very high standard for relief under CAT, the relief must be granted without regard to negative factors that may be present in the applicant’s case.⁵⁰

The immigration judge was bound by several precedent decisions which had already been issued by the BIA finding that Haiti’s policy of detaining citizens who were returned for criminal convictions in substandard prisons did not constitute torture under CAT.⁵¹ Although the cases decided by the BIA ac-

knowledge that criminal deportees are detained upon their return to Haiti, sometimes for weeks, it found also that Haiti's detention policy was not formed with the intent to inflict torture. In *Matter of W.*, the immigration judge found the added fact of W.'s end-stage AIDS to be a sufficiently aggravating factor to distinguish the case from the precedent decisions denying CAT to Haitian applicants who would face indefinite detention upon removal. The court wrote:

Although the Haitian Government may not specifically intend to subject the Respondent to death by detaining him upon his return to Haiti, there is no doubt that they are aware that the detainment of a person in the last stages of AIDS will result in his rapid death and cause extreme mental distress. It is also evident that they will do little to nothing to make his passing more humane or even provide him with minimal medical treatment.⁵²

In reaching its conclusion to grant CAT relief, the court considered several factors. The court noted that U.S. Department of State reports documented that arbitrary detention, police beating, and torturing of prisoners in Haiti are common and that the country has a poor human rights record.⁵³ The immigration judge also found it significant that the Haitian government offered no protections against discrimination to individuals who are HIV positive or living with AIDS.⁵⁴

The immigration judge concluded that the combination of a detention policy that served no legitimate government purpose, coupled with the government's knowledge of the respondent's HIV status, record of discrimination against HIV-positive individuals, and prison conditions that would lead to a hastened death for respondent, amounted to conditions of torture. The court wrote:

It is evident deferral of removal pursuant to Article 3 of the CAT was promulgated to protect people such as the Respon-

dent. To return the Respondent to Haiti would inevitably result in him dying a torturous death in a detention center, where he would be denied medical treatment and even clean food and water. This Court has no doubt that such an act is torture. Haitian officials subjecting individuals suffering from HIV/AIDS to conditions where they are denied even basic medical care form an intent to inflict severe physical or mental suffering upon them. Accordingly, this Court finds that petitioner has stated a valid claim for deferral of removal under the CAT and that he is more likely than not to be tortured upon his removal to Haiti.⁵⁵

Here the immigration court is able to use the fact that the respondent has AIDS to distinguish the case before him from the precedent that would seem to prohibit a CAT grant based on Haitian prison conditions. Focusing on the likely outcome that the respondent would die very shortly if returned to Haiti, the judge found that such government acquiescence in the respondent's death would constitute torture.

CONCLUSION: A CALL TO BROADEN THE LAW

In 1996, Congress essentially removed hardship as a potential ground for relief from immigration law. In the cases discussed above, the immigration judges took small steps toward restoring hardship as a basis for immigration status. In those cases, the immigration judges recognized that the applicants' HIV-positive status would make the consequences of their removal to their countries so dire that they warranted relief. In most instances, however, the HIV-positive asylum seeker would be unable to prove direct government persecution because there would not be such a blatantly discriminatory case on point, as that of the Indian Supreme Court. Likewise, unless an applicant for CAT relief can prove that his or her government will indefinitely imprison

him or her, the “mere” fact that returning to his or her country and lack of advanced medical treatment will lead to hastened death, will probably not meet the definition of torture under CAT.

Immigration judges, the BIA, and federal courts must understand the human terms of the removal of hardship-based relief from the INA. With the loss of suspension of deportation and extended voluntary departure as options, many foreign nationals will have no choice but to apply for asylum or relief under CAT. In many instances, the ability to remain in the United States will literally determine whether the applicant lives or dies. The survival of a foreign national should not be dependent upon whether the facts of his or her case can somehow be molded to fit into a very narrowly defined category of relief. Asylum and CAT exist to prevent individuals from being returned to countries where they could face persecution or torture; they should be expanded to protect people living with AIDS who will die if they are forced to return to their countries. Unless Congress restores hardship-based forms of relief to the INA, it is critical that adjudicators continue to expand relief under asylum and CAT to encompass HIV-based claims and protect foreign nationals from removal to countries where their lives would be at risk.

NOTES

1. Section 212(a)(1)(A)(i) of the Immigration & Nationality Act (INA), 8 U.S.C. § 1182(a)(1)(A)(i).

2. There is no medical examination for foreign nationals visiting the U.S., but they are asked whether they have “a communicable disease of public health significance.” INA § 212(a)(1)(A)(i).

In reality, since there is no medical examination, most foreign visitors probably do not disclose their HIV-positive status.

3. Applicants for nonimmigrant or temporary visas can enter the United States under one of two possible waiver policies. One is a

10-day, blanket event waiver for events that are deemed in the public interest and are likely to have many HIV-positive participants. Examples include medical conferences focusing on HIV research and the Gay Games. Individuals may also apply for a 30-day waiver to visit family, conduct business, or receive medical treatment in the United States. This waiver can be much more difficult to obtain, however, because the applicant must prove that she or he has sufficient assets to cover any medical expenses which might arise while in the United States. J. Williams, “INS Memorandum on Medical Examinations, Vaccination Requirements, Waivers of Medical Grounds of Inadmissibility, and Designation of Civil Surgeons and Revocation of Such Designation,” (hereinafter “INS Memorandum”) 17 October 2002, HQ 70/21/1.1-P; available on AILA Infonet, document no. 03031763, pp. 25-26, on file with the author.

4. INA § 212(g), 8 U.S.C. § 1182(g).

5. The foreign national must have a relative who is a U.S. citizen or legal permanent resident: spouse, child, or, if the foreign national is unmarried, parent. INA § 212(g), 8 U.S.C. § 1182(g). There is no recognition of same-sex relationships under U.S. immigration law. As a result, gay men and lesbians who are HIV positive are particularly hard-hit by the HIV ban because they are not eligible for a waiver based on having a U.S. citizen or legal permanent resident spouse.

6. “INS Memorandum,” see note 3 above, pp. 14-24.

7. INA § 209(c), 8 U.S.C. § 1159(c).

8. Under INA § 203(c), 8 U.S.C. § 1153(c), 50,000 immigrant visas are set aside annually for residents of countries that are considered underrepresented in U.S. immigration. These applicants need only have a high school degree or equivalent to be considered in a lottery that allows them to apply for a “green card.” U.S. Department of State Visa Bulletin, March 2004, http://travel.state.gov/visa_bulletin.html.

9. Section 201 of the INA, 8 U.S.C. § 1151, sets aside a minimum of 140,000 visas for em-

ployment-based preference immigrants. The level for family-based preference immigrants is 226,000. U.S. Department of State Visa Bulletin, March 2004, http://travel.state.gov/visa_bulletin.html (accessed 25 February 2004).

10. See P. A. Barta, "Lambskin Borders: an Argument for the Abolition of the United States Exclusion of HIV-positive Immigrants," *Georgetown Immigration Law Journal* 12 (Winter 1998):323; Lia Macko, "Acquiring a Better Global Vision: an Argument Against the United States' Current Exclusion of HIV-infected Immigrants," *Georgetown Immigration Law Journal* 9 (Summer 1995): 545; A. A. Khan, "United States Immigration Policy and HIV: Projecting Blame," *Hamline Journal of Public Law and Policy* 15 (Winter 1994): 123.

11. Barta, see note 10 above, pp. 335-336. By contrast, other diseases that render a foreign national inadmissible are promulgated by the Department of Health and Human Services and can be removed or added to the list as DHHS deems appropriate. The other diseases that currently render a foreign national inadmissible are infectious tuberculosis, infectious Hansen's disease, and infectious syphilis. "INS Memorandum," see note 3 above, p. 24.

12. See, e.g., "Bush's AIDS Initiative," *New York Times*, 16 February 2004, citing President Bush's 2003 promise to expend \$15 billion on the global fight against AIDS.

13. See J. Rauch, "Bad Blood, To fight AIDS, lift the ban on immigrants with HIV," *National Journal*, 12 January 2004. Also available online, <http://www.reason.com/rauch/011204.shtml> (accessed 3 December 2004).

14. I. Kurzban, *Immigration Law Sourcebook*, 8th ed. (Washington, D.C.: American Immigration Law Foundation, 2002), 699-705.

15. *Ibid.*, 710-1.

16. INA § 240A(b) *et seq.*, 8 U.S.C. § 1229b(b), *et seq.*

17. See R. Lilienthal, "Old Hurdles Hammer New Options for Battered Immigrant Women," 62 *Brooklyn Law Review* (1996): 1595, footnote 234, citing G. Pendleton, "Im-

migration Relief for Women and Children Suffering Abuse," in *Domestic Violence in Immigrant and Refugee Communities: Asserting the Rights of Battered Women*, 2nd ed., ed. D. L. Jang et al. (San Francisco, Calif.: Family Violence Prevention Fund, 1997). Voluntary departure still exists as a form of relief from removal proceedings, allowing a foreign national to depart the U.S. on his or her own rather than being physically removed by the U.S. government, but there is no longer an affirmative mechanism to apply for EVD.

18. "Deferred action" is a humanitarian, quasi-legal status in which the action of removing the foreign national from the United States is "deferred," meaning that the successful applicant can remain in the U.S. as long as the status remains in effect. Deferred Action does not lead to legal permanent residence. Kurzban, see note 14 above, pp. 718-19.

19. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

20. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

21. *Hernandez-Montiel v. INS*, 225 F. 3d 1084, 1093 (9th Cir. 2000).

22. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

23. *Matter of Acosta*, see note 20 above, p. 233.

24. In 1994, Attorney General Janet Reno designated the 1990 Board of Immigration Appeals (BIA) case *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) as precedent for INS asylum officers, immigration judges, and the BIA to follow, which has led to hundreds, perhaps thousands, of successful asylum claims on this basis.

25. 21 I. & N. Dec. 357 (BIA 1996).

26. *Ibid.*, 357.

27. *Matter of Acosta*, see note 20 above, p. 222.

28. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

29. 8 C.F.R. § 208.13(b)(1)(i)(A)&(B).

30. This was the standard under the old suspension of deportation law, which has been

eliminated. See note 15, above.

31. See D. D. Stempniak, "Seeking Asylum Status for HIV-positive Aliens Based on Membership in a Persecuted Social Group: an Alternative to Overturning the United States' Exclusion of HIV-positive Aliens from Immigration," 24 *Southern Illinois University Law Journal* (Fall 1999): 121.

32. There was one case in which asylum was granted by an immigration court in October 1995. Unfortunately, the article that mentions this case does not provide details of the circumstances. See A. Helton, Criteria and Procedures for Refugee Protection in the United States 1275 PLI/Corp 229 (2001).

33. While the decision itself is officially unreported, and therefore has no precedential value, at least details of the case are reported at *Ostracism, Lack of Medical Care Support HIV-Positive Alien's Asylum Quest, IJ Rules*, 78 No. 3 Interrel 233 (15 January 2001). Discussion of the two other successful cases follows.

34. *Ibid.*, 234.

35. The former Immigration and Naturalization Service has been eliminated and its functions have been distributed between various agencies within the new Department of Homeland Security (DHS).

36. See note 33 above, pp. 234-5.

37. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 19 (1988), 1465 U.N.T.S. 112. See S. L. David, "A Foul Immigration Policy: U.S. Misinterpretation of the Non-Refoulement Obligation under the Convention Against Torture," 19 *New York Law School Journal of Human Rights* (Summer 2003): 769-70.

38. 8 C.F.R. § 208.16(c)(2).

39. 8 C.F.R. § 208.18(a)(7).

40. Most foreign nationals convicted of felonies after 1996 are ineligible to apply for most forms of relief from removal proceedings. Aggravated felons are barred from applying for asylum, INA § 208(b)(2), 8 U.S.C. § 1158(b)(2), withholding of removal INA §

241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii), or cancellation of removal INA § 240A(c), 8 U.S.C. § 1229b(c).

41. That is, because CAT is the only form of relief available for most aggravated felons, and because the removal of aggravated felons is an enforcement priority for the U.S. government, almost by definition, immigration judges will be predisposed against these applications from the start.

42. Of 17,660 that were completed in 2001, CAT relief was granted in only 4.4 percent of the cases. See David, see note 37 above, p. 770.

43. 23 I. & N. Dec. 291 (B.I.A. 2002).

44. *Ibid.*

45. David, see note 37 above, p. 780.

46. Like all decisions of the immigration court, this decision is unpublished, but a copy is on file with the author, redacted to protect the foreign national's confidentiality. The immigration judge's decision was affirmed without opinion by the BIA in an unpublished, nonprecedential decision, also on file with the author.

47. See Kurzban, see note 14 above, pp. 83-84.

48. *Matter of W.*, see note 46 above, p. 13.

49. *Ibid.*, 15.

50. See *Outline of Asylum, Withholding of Removal, and the Convention Against Torture*, SG088 ALI-ABA 207, 212 (2002).

51. See *Matter of J-E-*; *Matter of Y-L, A-G, R-S-R*, 23 I. & N. Dec. 270 (A.G. 2002).

52. *Matter of W.*, see note 46 above, p. 18.

53. *Ibid.*, p. 19.

54. *Ibid.*, p. 18.

55. *Ibid.*, p. 20.