

The Alien's Burden of Proof Under Section 243(h): How Clear is Clear Probability?

I. INTRODUCTION

In recent years, the immigration laws of the United States have come under severe criticism from humanitarians and nationalists alike. Much of this criticism revolves around a long standing United States policy to withhold deportation of an alien to a country in which that person's life or freedom might be threatened. This policy forms the basis for section 243(h) of the Immigration and Nationality Act of 1952.¹ Recently, the United States Supreme Court interpreted this section as requiring an alien to establish that it is more likely than not that he will be the subject of persecution upon deportation in order for relief to be granted.²

Since the beginning of this country's existence, immigrants have built and shaped the nation's character. Aliens have flocked to the United States for a variety of reasons, such as political or economic oppression in their homeland, or to attain a better standard of living through employment and educational opportunities. Beliefs in human rights and freedom have always kept the doors ajar to those seeking a better life.³ Conflicting with these humanitarian principles, however, are a number of concerns including anxiety about unemployment,⁴ and fears that the large influx of aliens

¹Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1525 (1982)) [hereinafter cited as INA].

²Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

³In the past, however, there have been some limitations on immigration such as head taxes; laws providing for the exclusion of lunatics, idiots, and convicts; literacy requirements and so on. See NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE §§ 2.2-2.3 (rev. 2d ed. 1980).

⁴An examination of United States immigration law over the years reveals a variety of concerns, such as the number of aliens allowed in the country at any one time and the social and political backgrounds of the aliens. These are just some of the concerns which have provided the impetus for change in immigration laws. The economy has always been a primary concern. As a cabinet-level advisory panel noted: "[M]igration in times of prosperity tends to be viewed as a handmaiden of economic growth but it becomes transformed into a threat in times of economic downturn." *Id.* § 2.5, at 2-8 (quoting DOMESTIC COUNCIL COMMITTEE ON ILLEGAL ALIENS, PRELIMINARY REPORT 2 (1976)). This panel pointed out that, in the long run, an increase in the the number of illegal aliens would not increase unemployment. Moreover, illegal aliens contributed much more in taxes than they took from social services. See NATIONAL LAWYERS GUILD, § 2.7, at 2-11 (citing DOMESTIC COUNCIL COMMITTEE ON ILLEGAL ALIENS, PRELIMINARY REPORT 40, 155, 159 (1976)). Commentators have criticized this economic concern noting that because aliens are consumers as well as laborers, they actually stimulate the economy: "Like citizens, they create jobs at the same time they fill them." NATIONAL LAWYERS GUILD § 2.9, at 2-14. See also Watson, *The Simpson-Mazzoli Bill: An Analysis of Selected Economic Policies*, 20 SAN DIEGO L. REV. 97, 104 (1982); *Tattered Borders*, THE NEW REPUBLIC 9, 11 (July 11, 1983).

will endanger this country's identity as one nation undivided, eventually resulting in political instability.⁵ The last one hundred years, therefore, reveals an often-changing attitude towards aliens, which at times has resulted in inconsistent application of the laws.⁶

Over the years, Congress has faced the difficult task of striking a balance between the often-conflicting policies of humanitarianism and protectionism.⁷ Section 243(h) of the Immigration and Nationality Act of 1952⁸ exemplifies Congress' attempt to balance these policies. Realizing the grave consequences of returning an alien to a country where he might be subject to persecution, Congress has attempted to codify the nation's humanitarian concerns and protect any alien from such a fate. Thus, if an alien fears persecution in a particular country, he may seek a withholding of deportation to that country under section 243(h). At the same time, however, the laws require that the alien's fear be a valid one before relief can be granted,⁹ assuring that no alien can avoid depor-

⁵*Tattered Borders*, *supra* note 4, at 9. See also Simpson, *Immigration Reform and Control*, 34 LAB. L.J. 195, 195-96 (1983). In his article, Senator Simpson warned that "uncontrolled immigration is one of the greatest threats to the future of this country." *Id.* at 195. The senator explained:

Although job market and population impacts are of great significance, I think most would agree that the national interest of the American people also includes certain even more important and fundamental aspects, such as preservation of freedom, personal safety, and political stability, as well as the political institutions which are their foundation.

Id. at 196.

⁶See NATIONAL LAWYERS GUILD, *supra* note 3, § 2.5, at 2-7. For an excellent summary of the history of immigration law in the United States see *id.* §§ 2.1-2.9. The author points out that although immigrants have contributed much to the formation of this country, "the attitude [of U.S. citizens] toward new arrivals remains one of fear." *Id.* § 2.1, at 2-1.

⁷See Watson, *supra* note 4, at 98-99. The author states:

It is the *obligation* of our legislators to assess, and then fairly balance, the needs of various individuals and groups, and then to fashion laws that neither give excessive weight to one group nor dismiss the concerns of another with trite solutions that are no more appropriate or capable of providing a proper solution today than they were when they were first introduced.

Id. (emphasis added).

⁸INA, *supra* note 1, at 8 U.S.C. § 1253(h).

⁹See, e.g., 8 C.F.R. § 208.5 (1984). This regulation states:

The burden is on the . . . applicant to establish that he/she 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.

Id.

This requirement can also be found in the INA's definition of a refugee as one who has a "well-founded fear of persecution on account of race, religion, [etc.] . . ." INA, *supra* note 1, at 8 U.S.C. § 1101(a)(42).

tation by simply claiming a fear of persecution.¹⁰ In response to changing world situations and the need for more certainty in this area, Congress has revised the language and the nature of relief found in this section many times.¹¹ Nevertheless, uncertainties remain concerning what an alien must prove to show a valid fear of persecution.

Until 1980, the Immigration and Nationality Act allowed the Attorney General to withhold deportation of any alien within the United States, who, in his opinion, would be subject to persecution on account of the alien's race, religion or political opinion.¹² The Refugee Act of 1980¹³ amended section 243(h) to eliminate the discretionary nature of this provision, requiring the Attorney General to withhold deportation upon a finding that the alien's life or freedom would be threatened upon deportation.¹⁴ Whether these changes truly lessen the burdens of those rightfully seeking section 243(h) relief has been, until recently, a source of conflict among the federal courts of the United States.

Prior to 1980, an alien was required to prove a "clear probability" that he would be singled out for persecution upon return to the designated

¹⁰This concern was clearly stated by the Ninth Circuit Court of Appeals in *Martinez-Romero v. Immigration and Naturalization Serv.*, 692 F.2d 595 (9th Cir. 1982):

If we were to agree . . . that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country some way, to stay here indefinitely.

There must be some special circumstances present before relief can be granted.

Id. at 595-96.

¹¹For discussions of the changes section 243(h) has undergone, see 1A C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 5.16b (rev. ed. 1984) [hereinafter cited as GORDON & ROSENFELD]; Note, *Political Asylum for the Haitians?*, 14 CASE W. RES. J. INT'L L. 155, 157-58 (1982) [hereinafter cited as Note, *Political Asylum*]; Note, *Persecution Abroad as Grounds for Withholding Deportation: The Standard of Proof and the Role of the Courts*, 6 FORDHAM INT'L L.J. 100, 100 n.1 (1982) [hereinafter cited as Note, *Persecution Abroad*]; Note, *Coriolan v. Immigration and Naturalization Service: A Closer Look at Immigration Law and the Political Refugee*, 6 SYRACUSE J. INT'L L. & COM. 133, 153-55 (1978) [hereinafter cited as Note, *A Closer Look*].

¹²INA, *supra* note 1, § 243(h) (codified as amended at 8 U.S.C. § 1253(h) (1976) (current version at 8 U.S.C. § 1253 (h)(1982)). Prior to 1980, section 243(h) provided:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Id.

¹³Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C. (1982)) [hereinafter cited as Refugee Act of 1980].

¹⁴As amended by the Refugee Act of 1980 section 243(h) now provides:

The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. at 8 U.S.C. § 1253(h)(1982).

country to qualify for relief under section 243(h).¹⁵ However, in 1982, the Second Circuit Court of Appeals in *Stevic v. Sava*¹⁶ determined that in light of the adoption of seemingly broader language in the 1980 amendment, the "clear probability" test was no longer the correct legal standard.¹⁷ Noting that the "clear probability" test was the method used by the Immigration and Naturalization Service (INS) to give effect to the discretionary nature of section 243(h) relief, the *Stevic* court concluded that "deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution."¹⁸

Other circuit courts disagreed,¹⁹ finding that the Refugee Act of 1980 was nothing more than "cosmetic surgery,"²⁰ and thus the alien was still required to show a "clear probability" of persecution.²¹ These decisions exemplify the uncertainty surrounding application of section 243(h) relief, and emphasize the need for direction from Congress.

The Second Circuit's decision that an alien's burden of proof is something less than clear probability was reversed by the United States Supreme Court in *Immigration and Naturalization Service v. Stevic*.²² The Supreme Court held that an alien must establish a "clear probability of persecution" in order to avoid deportation under section 243(h).²³ The Court determined that the 1980 amendment did little to change the previously employed standard of clear probability and concluded that an alien must establish it is more likely than not that he will be subject to persecution if he is deported.²⁴

It remains to be seen whether the language of the Supreme Court will provide the flexibility required by the nation's often-changing policies

¹⁵*E.g.*, *Martineau v. Immigration and Naturalization Serv. (INS)*, 556 F.2d 306, 307 (5th Cir. 1977); *Cisternas-Estay v. INS*, 531 F.2d 155, 159 (3d Cir. 1976); *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967).

¹⁶678 F.2d 401 (2d Cir. 1982), *rev'd*, *Immigration and Naturalization Serv. v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹⁷678 F.2d at 409, *rev'd*, *INS v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973). *Accord* *Reyes v. INS*, 693 F.2d 597, 600 (6th Cir. 1982) (holding that the amended language requires a showing less than "clear probability").

¹⁸678 F.2d at 409, *rev'd*, *INS v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹⁹Only six months later the Third Circuit Court of Appeals reached a very different conclusion in *Rejaie v. INS*, 691 F.2d 139 (3d Cir. 1982). This court rejected the *Stevic* court's conclusion and upheld the clear probability test for section 243(h) claims. The *Rejaie* court found that the legislative history of the Refugee Act of 1980 pointed "in one direction only," and held the alien was required to show a clear probability of persecution. *Id.* at 146. *Accord* *Marroquin v. Manriquez*, 699 F.2d 129 (3d Cir. 1983).

²⁰*Rejaie v. INS*, 691 F.2d at 146 (3d Cir. 1982).

²¹*Id.*

²²52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973), *rev'g* *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982).

²³52 U.S.L.W. at 4725.

²⁴*Id.* at 4730.

as well as the predictability and guidance necessary to provide aid and counsel to the thousands of aliens who enter this country each year. The Court made several observations regarding past applications of section 243(h) relief in arriving at its decision.²⁵ As a result, its conclusion that an alien must establish that it is more likely than not he will be subject to persecution, is subject to varying interpretations. It is hoped that courts, and administrative boards alike, giving effect to the Supreme Court's decision will recognize this possibility, and carefully follow the guidance of our nation's final arbiter.

This Note examines the important considerations that must be made before a balance between humanitarian and protectionist principles can be achieved. It is necessary to understand the deportation process and the development of the legal standards used in interpreting the immigration laws before analyzing the Supreme Court's holding. This Note will, therefore, briefly overview the deportation process and procedures involved in section 243(h) claims, and explore congressional and judicial developments that have formed current United States immigration law. After a close examination of the past conflict between the circuit courts, and the possible applications resulting from the Supreme Court's decision, this Note will review briefly the proposed Immigration Reform and Control Act of 1983,²⁶ and this bill's potential effect on the problems that have hindered the application of section 243(h) relief.

II. BACKGROUND

A. Overview of Deportation Procedure

The deportation process is carried out under the jurisdiction of the Attorney General,²⁷ who exercises his authority through the Immigration and Naturalization Service (INS), an administrative agency.²⁸ After the Attorney General decides to initiate deportation proceedings against an alien, the alien is served with notice and is ordered to show cause why he should not be deported.²⁹ A hearing before an immigration judge

²⁵See *infra* notes 159-69 and accompanying text.

²⁶See *infra* note 189.

²⁷INA, *supra* note 1, at 8 U.S.C. § 1103(a). For additional discussions of the deportation procedure see, 1A GORDON & ROSENFELD, *supra* note 11, §§ 5.1-5.21; Martin, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, 23 HARV. INT'L L.J. 357, 366-67 (1983); Note, *Section 243(h) of the Immigration and Nationality Act of 1952 as Amended by the Refugee Act of 1980: A Prognosis and a Proposal*, 13 CORNELL INT'L L.J. 291, 292-95 (1980) [hereinafter cited as Note, *Section 243(h): A Prognosis and a Proposal*]; Note, *Persecution Abroad*, *supra* note 11, at 102 nn.14-17.

²⁸The Attorney General has delegated his authority to the Commissioner of the INS to enforce all laws relating to immigration and the naturalization of aliens. 8 C.F.R. § 2.1 (1984). Discussions of the Attorney General's authority in this Note include this delegated authority.

²⁹*Id.* § 242.1(b).

follows,³⁰ in which the alien is allowed to present evidence on his own behalf,³¹ cross-examine government witnesses,³² and be represented by counsel if he so chooses.³³ The INS must establish deportability by clear, unequivocal, and convincing evidence.³⁴ If the immigration judge issues a deportation order the alien may appeal the order to the Board of Immigration Appeals (BIA).³⁵ This appeal normally exhausts the alien's administrative remedies,³⁶ and the alien may then seek judicial review.³⁷ The usual method used to invoke judicial review is to petition a federal district court for a writ of habeas corpus.³⁸ An alien may also seek review by a federal court of appeals.³⁹

During the hearing before the immigration judge, the alien may seek withholding of deportation under section 243(h).⁴⁰ The burden of establishing a likelihood of persecution rests on the alien.⁴¹ Under the pre-1980 statute, both the likelihood of persecution and the decision to withhold deportation were subject to the Attorney General's discretionary

³⁰*Id.*

³¹INA, *supra* note 1, at 8 U.S.C. § 1252(b)(3); 8 C.F.R. § 242.16(a) (1984).

³²INA, *supra* note 1, at 8 U.S.C. § 1252(b)(3); 8 C.F.R. § 242.16(a) (1984).

³³INA, *supra* note 1, at 8 U.S.C. §§ 1252(b)(2), 1362; 8 C.F.R. §§ 242.10; 242.16(a) (1984).

³⁴8 C.F.R. § 242.14(a) (1984). *Cf.* INA, *supra* note 1, at 8 U.S.C. § 1252(b)(4). To be valid a decision of deportability must be based on reasonable, substantial, and probative evidence). *See also* INA, *supra* note 1, at 8 U.S.C. § 1105a(a)(4). (Upon judicial review, the alien's petition will be determined solely upon the administrative record, and any findings of fact, if supported by reasonable, substantial, and probative evidence).

The United States Supreme Court has determined that the statutory directives cited above apply only to the scope of judicial review, and not to the burden of proof required at the administrative level. *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276, 282 (1966) *cited in* 2 GORDON & ROSENFELD, *supra* note 11, § 8.12c, at 8-115 n.47. The Court found that Congress had not decided what the proper burden of proof is at the administrative level, and held that *no* deportation order issued by the INS is valid unless it is supported by "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." 385 U.S. at 286 (footnote omitted).

³⁵8 C.F.R. § 242.21 (1984). *See generally id.* §§ 3.1-3.8. The decision of the immigration judge or officer is final unless certified to the BIA. *Id.* § 242.2. Unless the Attorney General determines that further review is warranted, the decision of the BIA is final. *See id.* §§ 3.1(d)(2). 3.1(h).

³⁶For a discussion on the general rule requiring exhaustion of administrative remedies see 2 GORDON & ROSENFELD, *supra* note 11, § 8.4b.

³⁷The statutory right to seek judicial review is found at INA, *supra* note 1, at 8 U.S.C. § 1105a(a).

³⁸Martin, *supra* note 27, at 367.

³⁹*Id.* at 367 n.58.

⁴⁰8 C.F.R. § 208.11 (1984).

⁴¹*Id.* § 242.17(c). *See, e.g.,* McMullen v. Immigration and Naturalization Serv. (INS), 658 F.2d 1312, 1317 (9th Cir. 1981); Martineau v. INS, 556 F.2d 306, 307 (5th Cir. 1977); Paul v. INS, 521 F.2d 194, 196-97 (5th Cir. 1975); Hamad v. INS, 420 F.2d 645, 647 (D.C. Cir. 1969); 1A GORDON & ROSENFELD, *supra* note 11, § 5.16b, at 5-189 to 5-192.2.

determination, and thus could not be attacked on review unless his determination constituted an abuse of that discretion.⁴²

The immigration judge usually requests an advisory opinion from the Department of State regarding the likelihood of persecution in a particular country.⁴³ Although it is not binding, such an opinion may be given "substantial weight due to its source . . . even though the State Department's opinion with respect to governments friendly with the United States may not be wholly impartial."⁴⁴ This opinion is incorporated into the hearing record unless it is deemed confidential and protected from disclosure in the interest of national security.⁴⁵ However, when a decision is based upon nondisclosed information, the decision "shall state that such information is material to the decision."⁴⁶

Claimants' attempts to cross-examine the authors of State Department reports have been denied,⁴⁷ and, in cases where the information is deemed confidential,⁴⁸ an alien often has no opportunity to refute the

⁴²See, e.g., *Fleurinor v. INS*, 585 F.2d 129, 133-34 (5th Cir. 1978); *Moghianian v. United States Dep't of Justice*, 577 F.2d 141, 142 (9th Cir. 1978). See also *Henry v. INS*, 552 F.2d 130, 131 (5th Cir. 1977); *Paul v. INS*, 521 F.2d 194, 197 (5th Cir. 1975); *Kasravi v. INS*, 400 F.2d 675, 677 (9th Cir. 1968); *Asghari v. INS*, 396 F.2d 391, 392 (9th Cir. 1968); *Namkung v. Boyd*, 226 F.2d 385, 388-89 (9th Cir. 1955). Part of the discretionary nature of this proceeding was eliminated by the 1980 Act requiring the Attorney General to withhold deportation upon a determination that the alien will be subject to persecution. See *supra* note 14 and accompanying text. Cf., *infra* notes 142-51 and accompanying text.

⁴³See 8 C.F.R. § 242.17c (1984).

⁴⁴*Martin*, *supra* note 27, at 367 (footnotes omitted). For a criticism regarding the practical effect of such a practice see *Kasravi v. INS*, 400 F.2d 675, 677 n.1 (9th Cir. 1968), quoted in *Martin*, *supra* note 27, at 367 n.61; Note, *Section 243(h): A Prognosis and a Proposal*, *supra* note 27, at 300-01; Note, *A Closer Look*, *supra* note 11, at 138-40. Although courts have approved of the consideration the INS gives to these reports, see 1A GORDON & ROSENFELD, *supra* note 11, § 5.192.1, at 5-192-1; they have also questioned the objectivity of the reports. In *Kasravi v. INS*, 400 F.2d 675, the court stated:

Such letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed.

400 F.2d at 677 n.1, quoted in part in *Martin*, *supra* note 27, at 367 n.61. See also NATIONAL LAWYERS GUILD, *supra* note 3, § 8.6, at 8-27 to 8-28 (variance in grants of asylum depending on the refugee's home country).

⁴⁵See 8 C.F.R. § 242.17(c) (1984).

⁴⁶*Id.*

⁴⁷1A GORDON & ROSENFELD, *supra* note 11, § 5.16b at 5-192.1 and cases cited therein.

⁴⁸See 8 C.F.R. § 242.17(c) (1984) (authorizing the use of non-record information if necessary in the interest of national security).

report at all.⁴⁹ Some claimants have attempted to introduce reports from other sources to rebut State Department findings but such attempts have not always been successful.⁵⁰ Thus, while the alien may present his case before the immigration judge and appeal to the BIA and the courts, proving eligibility for section 243(h) relief has been difficult given the individual alien's limited resources to gather evidence.⁵¹

B. Summary of Section 243(h): Its Legislative History

It was not until 1950 that Congress enacted a specific mandate forbidding the Attorney General from deporting any alien to a country where he would be subject to physical persecution.⁵² In 1952, Congress amended this provision to allow the Attorney General to withhold deportation *at*

⁴⁹Note, *Section 243(h): A Prognosis and a Proposal*, *supra* note 27, at 301 and n.63. See also *Zamora v. INS*, 534 F.2d 1055, 1062-63 (2d Cir. 1976) (finding that input from the Department of State should be information about conditions in the alien's country rather than recommendations about how a particular request for asylum should be resolved); 2 GORDON & ROSENFELD, *supra* note 11, § 8.17b, at 8-152 ("In [support of] the Attorney General's use of non-record information, it [has been] observed that 'the nature of the decision he must make concerning what a foreign country may do is a political issue into which the courts may not enter.'" (footnote omitted)).

⁵⁰See, e.g., *Fleurinor v. INS*, 585 F.2d 129, 132-33 (5th Cir. 1978) (holding that an Amnesty International Report on political conditions in Haiti that outlined the "wholesale disregard of fundamental human rights" by the Duvalier government did not add anything to Fleurinor's section 243(h) claim as it was not probative on the issue of the likelihood that the *individual alien* would be subject to persecution upon his return.); *In re Williams*, 16 I. & N. Dec. 697, 704 (1979) (finding that a 1976 Amnesty International Report was not "sufficiently probative" on the likelihood that this claimant would be persecuted). Cf. *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977) (reversing and remanding for reconsideration in light of an Amnesty International report).

In criticizing the weight given to State Department Reports over non-governmental reports one writer states:

The decision whether to deport ought therefore to be made on the basis of an impartial assessment of the likelihood of persecution, according due weight to the evaluations of such independent analysts as Amnesty International. The INS ought not to be influenced by political considerations, perhaps articulated by the State Department, such as the current state of relations between the United States and the country to which deportation is proposed.

Martin, *supra* note 27, at 377 (footnotes omitted). For further criticism of the use of State Department reports see *id.*

⁵¹See *infra* note 70 and accompanying text.

⁵²Subversive Activities Control Act of 1950, Pub. L. No. 81-831 ch. 1024, § 23, 64 Stat. 987, 1010 (codified as amended at 8 U.S.C. § 1253(h)(1982)).

Most courts construed this section as requiring the Attorney General to find that the alien claiming this relief would *not* be subject to persecution upon deportation. See *United States ex rel. Harisiades v. Shaughnessy*, 187 F.2d 137, 142 (2d Cir. 1951), *aff'd*, 342 U.S. 580 (1952). *But see United States ex rel. Dolenz v. Shaughnessy*, 107 F.Supp. 611, 613 (S.D.N.Y.), *aff'd*, 200 F.2d 288 (2d Cir. 1952), *cert. denied*, 345 U.S. 928 (1953). See also 1A GORDON & ROSENFELD, *supra* note 11, § 5.166, at 5-175.

his discretion if he *determined* that the alien would suffer physical persecution if deported.⁵³

In 1965, Congress broadened the language of this section by deleting "physical persecution" and allowing the Attorney General to withhold deportation if, "in his opinion[,] the alien would be subject to persecution on account of race, religion, or political opinion."⁵⁴ The purpose of this change was to aid those refugees who might be victims of persecution other than physical violence.⁵⁵

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees (1967 Protocol).⁵⁶ The 1967 Protocol incorporated most of the provisions of the United Nations Convention Relating to the Status of Refugees (1951 Convention).⁵⁷ Article 33(1) of the 1951 Convention states: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."⁵⁸

The language of the Protocol was much broader than the language used in section 243(h) and members of Congress were concerned that a potential conflict between the Protocol and existing laws would arise.⁵⁹

⁵³INA, *supra* note 1, § 243(h), Pub. L. No. 82-414, 66 Stat. 163, 214 (1952) (codified as amended at 8 U.S.C. § 1253(h)(1982)).

⁵⁴Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (1965) (codified as amended at 8 U.S.C. § 1253(h)(1982)).

⁵⁵1A GORDON & ROSENFELD, *supra* note 11, § 5.16b, at 5-176.

⁵⁶Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6257, T.I.A.S. No. 6577, 606 U.N.T.S. 268 [hereinafter cited as 1967 Protocol]. Accession is the adoption of a particular proclamation into United States laws, and has the effect of binding the United States as if an original party. For an excellent discussion of the 1967 Protocol and the effect of the United States' accession see Martin, *supra* note 27.

⁵⁷United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137 [hereinafter cited as 1951 Convention]. The 1967 Protocol incorporated virtually all of the 1951 Convention provisions. The only significant difference was that the 1967 Protocol eliminated narrow geographical limitations and the 1951 provisions that limited relief to those who had become refugees prior to January 1, 1951. See generally Martin, *supra* note 27, at 361-62.

⁵⁸1951 Convention, *supra* note 57, art. 33(1). Article 33 is entitled "Prohibition of Expulsion or Return ('Refoulement')." The only exception to this provision is when the refugee is a threat to the security of the host state or has been convicted for involvement in a "particularly serious crime." *Id.* art. 33(2). Article 1(a)(2) of the 1951 Convention, *supra* note 57, defines "Refugee" as:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return to it.

⁵⁹For a good summary of the legislative discussions leading up to the United States' accession to the 1967 Protocol see *In re Dunar*, 14 I. & N. Dec. 310 (1973).

In the legislative proceedings leading to the United States' accession to the Protocol, both the President and the State Department assured Congress that existing legislation need not be amended in order to comply with the Protocol.⁶⁰ In a statement to the Senate Foreign Relations Committee, one official said that "[t]he Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act."⁶¹ As was promised, Congress' adoption of the Protocol did little to change the the proceedings or the dispositions of section 243(h) claims.⁶²

Finally, with the enactment of the Refugee Act of 1980,⁶³ Congress substantially changed section 243(h)⁶⁴ along with other sections of the Immigration and Nationality Act of 1952, incorporating some of the 1967 Protocol language.⁶⁵ As amended by the Refugee Act of 1980, section 243(h) now provides that "[t]he Attorney General *shall not* deport or return

⁶⁰In *Dunar*, the Board related the following legislative history:

Thus, in submitting the Protocol to the President, the Secretary of State informed him that, 'United States accession to the Protocol would not impinge adversely upon the laws of this country.' The Secretary further stated:

Accession to the Protocol would promote our foreign policy interests through reaffirming, in readily understandable terms, our traditional humanitarian concerns and leadership in the field. It would also convey to the world our sympathy and firm support in behalf of those fleeing persecution. Actually, most refugees in the United States already enjoy legal and political rights which are equivalent to those which states acceding to the Convention or the Protocol are committed to extend to refugees within their territories

[T]he President stated:

. . . Given the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere.

14 I. & N. Dec. at 314 (footnotes omitted).

⁶¹S. EXEC. REPT. No. 14, 90th Cong., 2d Sess. 6 (1968), *quoted in In re Dunar*, 14 I. & N. Dec. at 317.

⁶²See *infra* notes 88-95 and accompanying text.

⁶³See *supra* note 13.

⁶⁴See *supra* notes 12 and 14.

⁶⁵One significant change was the incorporation of the 1967 Protocol's definition of "refugee" into the statute.

As amended by the Refugee Act of 1980, the INA now reads:

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

Refugee Act of 1980, *supra* note 13, 8 U.S.C. § 1101(a)(42) (Supp. 1984).

any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."⁶⁶ The Refugee Act thus removed the discretionary provisions of the prior section 243(h)⁶⁷. Nevertheless, the legislative history relevant to both the accession to the 1967 Protocol and the Refugee Act of 1980 is unclear, leaving the impact of these changes on United States immigration law uncertain.

III. CONFLICT IN THE COURTS: PAST AND PRESENT

In all section 243(h) claims, the grave consequences of returning an alien to a country where he will be subject to persecution, possibly even death, require that the alien's plea be given "fair consideration"⁶⁸ and that the immigration judge "allow the alien wide latitude in presenting his evidence."⁶⁹ Because an alien faces the difficult task of obtaining evidence that demonstrates his eligibility for section 243(h) relief,⁷⁰ the burden of proof an alien must shoulder is of great concern to all branches of government. The humanitarian principles this country prides itself

⁶⁶Refugee Act of 1980, *supra* note 13, at 8 U.S.C. § 1253(h)(1)(Supp. 1984)(emphasis added). For a detailed discussion of the legislative history of the Refugee Act of 1980 see Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981). The legislative history of section 243(h) prior to the Refugee Act of 1980 can be found at Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952*, 1976 WASH. U.L.Q. 59, 67-71.

⁶⁷For a discussion of other changes the 1980 Act made in section 243(h) see *infra* notes 101-07 and accompanying text.

⁶⁸See 1A GORDON & ROSENFELD, *supra* note 11, § 5.16b, at 5-188.

⁶⁹*Id.* § 5.16b, at 5-190 to 5-191 (citing *In re Joseph*, 13 I. & N. Dec. 70 (1968) (footnote omitted) ("technical rules of evidence ordinarily not controlling")).

⁷⁰One commentator addresses the difficulty aliens face in compiling evidence necessary to show the existence of a threat to that particular alien's life or freedom. See Note, *Section 243(h): A Prognosis and a Proposal*, *supra* note 27, at 300-01. The author states that "[a]lthough documents showing generally repressive conditions may be material, an alien's failure to produce persuasive evidence that he will be singled out for persecution is fatal to his claim. As a potential refugee living far from his homeland, an alien is in no position to produce the required evidence." *Id.* (footnotes omitted). The writer also points out the vast discrepancy in evidence available to the alien and evidence available to the government. "Whereas an alien's only evidence may be his own testimony, the INS can draw on an interagency network for information to discredit the alien's claim. The INS customarily solicits reports from the State Department [and] [i]mmigration judges may rely on these reports . . ." *Id.* at 301 (footnotes omitted). For an alien living far from home, not only is it difficult to compile the evidence required to meet a stringent burden of proof, but it becomes almost impossible to refute the evidence presented by the INS which is supported by the wealth of information available to the State Department. See *supra* notes 43-51 and accompanying text. Of even greater concern should be the criticism of some commentators that a factor often influencing the outcome of the agency hearing is the status of United States' foreign relations with the alien's country. See Martin, *supra* note 27, at 379; Note,

in preserving are threatened when these standards of proof are set at unreachable heights. On the other side of the scale, however, setting the burden of proof too low would allow any alien with an arguably valid fear of persecution to escape deportation, undermining Congress' attempts to place controls over immigration procedure.⁷¹

The United States' accession to the 1967 Protocol and the changes made in section 243(h) by the Refugee Act of 1980 have both been the bases for challenges to the restrictive "clear probability" burden of proof. An understanding of how this burden previously operated in administrative and court decisions is essential to a contemporary analysis of section 243(h).

A. *Prior to 1980: The Effect of Accession to the 1967 Protocol on Section 243(h) Claims*

Before the 1980 amendments to section 243(h), the Attorney General was authorized to exercise two types of discretion under this section.⁷² The Attorney General not only determined an alien's statutory eligibility for section 243(h) relief, but also decided whether relief should be granted once eligibility was established.⁷³ As a result, courts viewed INS decisions with deference and, in effect, limited themselves to determining whether a denial of section 243(h) relief was an abuse of discretion.⁷⁴

Section 243(h): A Prognosis and a Proposal, *supra* note 27, at 298-99; Note, *Persecution Claims-The Expanding Scope of Section 243(h) of the Immigration and Nationality Act*, 13 TEX. INT'L L.J. 327, 338 n.87 (1978) [hereinafter cited as Note, *Persecution Claims*].

⁷¹The wisdom of placing limits on immigration was noted in *Villena v. INS*, 622 F.2d 1352 (9th Cir. 1980):

The INS should have the right to be restrictive. Granting . . . motions [to reopen] too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations.

Id. at 1362 (Wallace, J., dissenting).

In *Henry v. INS*, 552 F.2d 130 (5th Cir. 1977), Judge Goldberg stated: "Our sadness at all circumscriptions of freedom, however, is no charter to disregard the procedural system created to determine the merit of such claims." *Id.* at 132.

⁷²*But see* text accompanying notes 93-94, 106-07 & 142-51 *infra*.

⁷³For support for the theory of two types of discretion see NATIONAL LAWYERS GUILD, *supra* note 3, § 10.1, at 10-8; Martin, *supra* note 27, at 371-72; Note, *Section 243(h): A Prognosis and a Proposal*, *supra* note 27, at 296-98.

This view, however, has not been espoused by all. See 2 GORDON & ROSENFELD, *supra* note 11, § 8.17b, at 8-153 to 8-154.

⁷⁴See *Moghianian v. United States Dep't of Justice*, 577 F.2d 141, 142 (9th Cir. 1978); *Pierre v. United States*, 547 F.2d 1281, 1289 (5th Cir. 1977); *Shkukani v. INS*, 435 F.2d 1378, 1380 (8th Cir.), *cert. denied*, 403 U.S. 920 (1971). See also Note, *Persecution Abroad*, *supra* note 11, at 105 n.32 and cases cited therein. Yet a few courts purported to find their

The INS requires an alien to prove by a clear probability that he would be subject to persecution to be eligible for relief under section 243(h). This standard is not found in the statutes; rather, it was developed over the years by the Attorney General to articulate the alien's burden of proof.⁷⁵ Nevertheless, the limited scope of judicial review led the courts to approve the clear probability test as the appropriate standard of proof.⁷⁶

Upon the United States' accession to the 1967 Protocol, questions arose surrounding section 243(h) relief. Although the accession to the treaty was presented to Congress and the President as a reaffirmation of "our traditional humanitarian concerns and leadership" in the field of immigration,⁷⁷ the treaty differed significantly from existing United States law.

Prior to accession, section 243(h) *allowed* the Attorney General to withhold deportation if, "in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion."⁷⁸ The Protocol differed in two important respects from section 243(h) as it existed in 1968.⁷⁹ First, withholding deportation was *mandatory* under the Protocol upon a finding of eligibility, whereas section 243(h) authorized the Attorney General to exercise discretion in granting relief, even when eligibility was established.⁸⁰

scope of review somewhat broader in section 243(h) claims—that of determining whether or not the decision to deny relief was based on substantial evidence. *See Hamad v. INS*, 420 F.2d 645 (D.C. Cir. 1969); *United States ex rel. Kordic v. Esperdy*, 386 F.2d 232 (2d Cir. 1967). *See also* Martin, *supra* note 27, at 371-72; Note, *Persecution Abroad*, *supra* note 11, at 104-06; Note, *Persecution Claims*, *supra* note 70, at 332-33.

One commentator notes that, in 1952, the United States Supreme Court stated: [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Note, *Persecution Abroad*, *supra* note 11, at 106 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (footnote omitted)).

Another commentator states that the courts held the view that "[j]udicial intervention would be proper only when the Attorney General's exercise of his powers involved denial of procedural due process, was 'arbitrary and capricious,' or evinced misconstruction of the statute." Martin, *supra* note 27, at 371-72 (footnotes omitted).

⁷⁵*See supra* notes 40-46 and accompanying text.

⁷⁶*See, e.g., Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). *See also* cases cited *infra* note 95.

⁷⁷*In re Dunar*, 14 I. & N. Dec. 301, 314 (1973) (citation omitted).

⁷⁸INA, *supra* note 1, § 243(h)(codified at 8 U.S.C. § 1253(h)(1976)). *See supra* note 13.

⁷⁹These differences are also discussed at Note, *Persecution Abroad*, *supra* note 11, at 100-01.

⁸⁰*Compare* 1967 Protocol, *supra* note 56, art. 33 ("[n]o contracting state shall expel or return . . .") with INA, *supra* note 1, § 243(h) (codified as amended at 8 U.S.C. § 1253(h) (1976) (current version at 8 U.S.C. § 1253(h) (1982)). ("The Attorney General is *authorized* to withhold deportation of any alien within the United States to any country in

A second difference was the legal standard used to determine eligibility. The Protocol defined "refugee" as one having a "well-founded fear" of persecution⁸¹ while the INS used a stricter evidentiary standard—that of "clear probability."⁸² These differences formed the basis for challenge at both the administrative level⁸³ and in the reviewing courts.⁸⁴ However, it was generally found that the accession to the Protocol did not change the strict legal standard used in section 243(h) hearings.⁸⁵

*In re Dunar*⁸⁶ was one of the first agency hearings to discuss the effect of the accession to the 1967 Protocol. The alien in that case, Dunar, appealed the order of an immigration judge denying his request for withholding of deportation under section 243(h). Dunar argued that accession to the Protocol changed both the alien's burden of proof and the nature of the Attorney General's determinations under section 243(h).⁸⁷

The Board first examined Dunar's contention that accession to the Protocol changed the alien's burden of proof under section 243(h). Dunar argued that after accession the alien need only show a well-founded fear of persecution rather than a "clear probability" of persecution. Dunar contended that a purely subjective test—looking to the alien's "own state of mind"—would be sufficient to satisfy this burden.⁸⁸

The BIA rejected the use of a purely subjective test and concluded that, as before the accession to the 1967 Protocol, some objective evidence

which *in his opinion* the alien would be subject to persecution" (emphasis added). Although pre-1980 section 243(h) spoke in terms of the Attorney General's discretion, the BIA in *In re Dunar*, 14 I. & N. Dec. 310 (1973), said "we know of none in which a finding has been made that the alien has established the clear probability that he will be persecuted and in which section 243(h) withholding has nevertheless been denied in the exercise of administrative discretion." *Id.* at 322.

⁸¹See 1951 Convention, *supra* note 57, art. 1(a)(2); *supra* note 58.

⁸²See *supra* notes 65, 75-76.

⁸³*E.g.*, *In re Dunar* 14, I. & N. Dec. 310 (1973).

⁸⁴*E.g.*, *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977); *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977).

⁸⁵See *supra* note 84 and *infra* notes 86-91 and accompanying text.

⁸⁶14 I. & N. Dec. 310 (1973).

⁸⁷The Board of Immigration Appeals prefaced its discussion of the issues raised by *Dunar* with an examination of several canons of construction regarding the effect of a treaty on an earlier enacted statute. The Board stated:

Since it supplements and incorporates the substantive provisions of the Convention, the Protocol must be regarded as a treaty, which is part of the supreme law of the land, United States Constitution, Article VI, Cl. 2. Such a treaty, being self-executing, has the force and effect of an act of Congress.

Id. at 313 (footnote and citation omitted).

The BIA noted that "[r]epeals by implication are never favored, [thus] a later treaty will not be regarded as repealing an earlier enactment by implication unless the two are absolutely incompatible" *Id.* at 314 (citing *Johnson v. Browne*, 205 U.S. 309, 321 (1907)). The Board also found that "[w]hen a statute and a treaty relate to the same subject, an attempt must be made to give effect to both, if that can be done without violating the language of either." 14 I. & N. Dec. 310.

⁸⁸*Id.* at 319.

is required to receive section 243(h) relief.⁸⁹ The Board first noted that the standard the claimant was attempting to satisfy—well-founded fear—itsself ruled out a purely subjective apprehension. “[I]f all [the alien] can show is that there is a merely conjectural possibility of persecution, his fear can hardly be characterized as ‘well-founded.’”⁹⁰ Looking to legislative history, the Board found that accession to the Protocol did not substantially change section 243(h)⁹¹ and it therefore refused to enunciate a new burden of proof. The Board concluded that “distinctions in terminology” could be reconciled on a case-by-case basis in the future.⁹²

Dunar’s second argument was that the Protocol’s mandatory language of withholding deportation required a change in the nature of the Attorney General’s determination, because section 243(h) allowed the Attorney General to exercise discretion in granting relief. The Board rejected this contention also. Noting the “humanitarian values” underlying section 243(h), the Board was not convinced that the statute actually left relief in the Attorney General’s discretion once eligibility was established.⁹³ Additionally, the Board concluded that because relief had never been denied once an alien had established a clear probability of persecution, the Protocol language “can produce no meaningful change in the way section 243(h) has been applied.”⁹⁴

After accession, most reviewing courts continued to approve the INA’s use of the clear probability test to determine whether relief should be granted under section 243(h).⁹⁵ Some courts went one step further and relied on the language in *Dunar* to hold that the clear probability and well-founded fear standards were equivalent.⁹⁶ *Dunar*, however, did not decide that these standards were equivalent.⁹⁷

⁸⁹*Id.* The Board in *Dunar* did not examine the difference in objective evidence required under either a well-founded fear standard or that of clear probability. One author suggests that under the clear probability standard the evidence must relate specifically to the individual claimant and the threat or fear of persecution must be timely, that is, it must relate to a threat currently in force. Note, *Persecution Abroad*, *supra* note 11, at 103-04. In contrast, the objective evidence required under a well-founded fear standard does not require such specificity. Thus, a well-founded fear of persecution could be demonstrated by “episodes of past persecution, evidence that other persons in similar circumstances to those of the applicant have been persecuted, and evidence of intervening events creating a risk of persecution during the applicant’s absence.” *Id.* at 109 (footnotes omitted).

⁹⁰14 I. & N. Dec. at 319.

⁹¹*Id.*

⁹²*Id.* at 320-21.

⁹³The Board explained: “It is highly probable that in referring to the Attorney General’s ‘broad discretion’ under section 243(h), the cases contemplate the manner in which the Attorney General arrives at his opinion and the limited scope of judicial review, rather than the eligibility-discretion dichotomy.” *Id.* at 322.

⁹⁴*Id.* at 323.

⁹⁵*E.g.*, *Martineau v. INS*, 556 F.2d 306 (5th Cir. 1977); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977) (and cases cited therein).

⁹⁶*E.g.*, *Rejaie v. INS*, 691 F.2d 139 (3d Cir. 1982); *Kashani v. INS*, 547 F.2d 379, 379 (7th Cir. 1977).

⁹⁷However, in *Dunar*, the BIA only rejected a purely subjective test for determining

From the legislative history leading up to accession to the Protocol it is arguable that although Congress did not contemplate any major amendments to existing laws, some changes that might be required to conform the administrative procedures surrounding deportation to the specific provisions of the Protocol were anticipated. Congress was told that although "[t]he Attorney General [would] be able to administer such provisions in conformity with the Protocol *without amendment of the Act*[,]”⁹⁸ . . . existing regulations [having] to do with deportation would permit the Attorney General sufficient flexibility to enforce the provisions of [the] convention . . . not presently contained in the Immigration and Nationality Act.”⁹⁹

The courts, however, continued to rely on the discretionary language of the statute, finding their scope of review limited to determining whether the Attorney General had abused his discretion in denying a withholding of deportation.¹⁰⁰ Arguably, it is for this reason that the question, whether accession to the 1967 Protocol altered the “clear probability” burden of proof, was not given as close an examination by the reviewing courts as the grave consequences of a denial of section 243(h) relief warranted.

B. The Effect of the Refugee Act of 1980 on Section 243(h) Claims

The Refugee Act of 1980¹⁰¹ altered section 243(h) in several ways.¹⁰² First, it incorporated the Protocol’s definition of “refugee” into the Immigration and Nationality Act of 1952.¹⁰³ Second, the Act broadened the class of aliens protected under section 243(h), by making eligible under the statute those aliens whose lives or freedom would be threatened on the basis of nationality or membership in a particular social group, as

whether an alien has a valid fear of persecution. The Board did not decide whether the two standards were equivalent. Rather, the Board noted that they were not substantially different and that any fine distinctions between the two standards could be dealt with on a case-by-case basis. 14 I. & N. Dec. 310, 321 (1973).

⁹⁸S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. 6 (1968), *quoted in In re Dunar* 14 I. & N. Dec. at 317 (*emphasis added*).

⁹⁹S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. 8 (1968), *quoted in* 14 I. & N. Dec. at 317. Moreover, a reduction in the alien’s burden of proof under section 243(h) would seem wholly consonant with congressional concerns in acceding to the Protocol. *See supra* notes 77-85 and accompanying text.

¹⁰⁰*See, e.g.,* Fleurinor v. INS, 585 F.2d 129, 133-34 (5th Cir. 1978); Henry v. INS, 552 F.2d 130, 131 (5th Cir. 1977); Kashani v. INS, 547 F.2d 376 (7th Cir. 1977); *See also* 2 GORDON & ROSENFELD, *supra* note 11, § 8.17, at 8-149. The Fifth Circuit Court of Appeals tried to find a middle ground: “It is enough to recognize that judicial review of INS decisions on persecution claims is deferential, and at the same time to remember that this review ought not to be altogether perfunctory.” Coriolan v. INS, 559 F.2d 993, 998 n.9 (5th Cir. 1977).

¹⁰¹*See supra* note 13.

¹⁰²*See infra* text accompanying notes 103-05.

¹⁰³*See supra* notes 58-65.

well as those aliens previously protected because they would be subject to persecution on account of their race, religion, or political opinion.¹⁰⁴ Third, the 1980 Act *required* the Attorney General to withhold deportation if eligibility is established under section 243(h).¹⁰⁵

Some United States courts of appeals found that by making relief mandatory, the Refugee Act of 1980 reduced the deference given to the Attorney General's determination and expanded the role of the reviewing courts.¹⁰⁶ Thus, courts would no longer be limited to reviewing solely for abuse of discretion¹⁰⁷ but would be able to review more carefully the Attorney General's determinations regarding the alien's eligibility for relief and the burden of proof the alien must shoulder in section 243(h) claims.

The courts, however, were in disagreement regarding the effect of the 1980 amendments upon either the legal standards to be applied in section 243(h) claims, or the appropriate scope of review of administrative determinations. The question, whether the alien is required to prove a clear probability of persecution in light of the 1980 statutory changes was an important, yet difficult one, difficult because of Congress' failure to satisfactorily state its intent in adopting the language of the Protocol, and important because of the grave consequences that might follow should an alien be denied section 243(h) relief.

IV. INTERPRETATION OF THE NEW SECTION 243(h)

A. Overview

In *Stevic v. Sava*,¹⁰⁸ a citizen of Yugoslavia, Stevic, entered the United States in 1976 to visit his sister, a permanent United States resident. Approximately six weeks later, his visa expired and deportation proceedings began. From that time until 1981, Stevic made attempts to avoid deportation,¹⁰⁹ including motions to the Board of Immigration Appeals

¹⁰⁴See *supra* note 14.

¹⁰⁵See *id.* Arguably, however, the Attorney General may still be allowed discretion in determining whether the alien is eligible for section 243(h) relief; that is, whether the alien's right to life or freedom would be threatened.

¹⁰⁶*Reyes v. INS*, 693 F.2d 597 (6th Cir. 1982); *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), *rev'd*, Immigration and Naturalization Serv. (INS) v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973); *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981).

¹⁰⁷In *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981), the Ninth Circuit Court of Appeals held that in light of the changes in section 243(h) brought about by the Refugee Act of 1980, factual findings under section 243(h) are subject to review under a "substantial evidence test." *Id.* at 1316. *But see* *Marroquin-Manriquez v. INS*, 699 F.2d 129, 133 n.5 (3rd Cir. 1983) (rejecting the substantial evidence test "because it ignores the necessary application of expertise" in a section 243(h) determination).

¹⁰⁸678 F.2d 401 (2d Cir. 1982), *rev'd*, Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹⁰⁹*Id.* at 402-04. However, Stevic failed to act several times when the opportunity arose. He never filed for extensions of deportation dates, or appealed the denials of his motions

(BIA) "to reopen the deportation proceedings for the purpose of filing an application for withholding of deportation . . . under Section 243(h) of the Immigration and Nationality Act of 1952."¹¹⁰ A second motion, like his first, was denied.

In denying his motion to reopen deportation proceedings, the BIA concluded that Stevic had failed to show that he would be subject to persecution if deported to Yugoslavia. "A motion to reopen based on a section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent."¹¹¹

The Second Circuit Court of Appeals held that the Refugee Act of 1980 changed the legal standard relating to application for section 243(h) relief,¹¹² and therefore reversed the BIA's denial of Stevic's motion. The Second Circuit first noted that the Refugee Act of 1980 adopted the definition of "refugee" found in the 1967 Protocol.¹¹³ The Protocol defined "refugee" as one having a "well-founded fear of persecution" and prohibited deportation of a refugee if he would be subjected to persecution upon return to a particular country.¹¹⁴ Further, the court found the Protocol language "considerably more generous than the 'clear probability' test [previously] applied under Section 243(h)."¹¹⁵ The Second Circuit emphasized the legislative history of the 1980 amendments indicating that section 243(h) was to be construed consistently with the Protocol.¹¹⁶ The court therefore found that in 1980 "the language of [United States] immigration law was explicitly conformed to that of the Protocol, notwithstanding the earlier assurances that statutory changes were not necessary to comply with the Protocol."¹¹⁷

One ground for the *Stevic* court's holding came from an examination of two provisions of the Immigration and Nationality Act of 1952 dealing

to reopen or his request for asylum. In fact, when the denial of one of his requests was based on a mistake of fact, the court noted the mistake but refused to grant relief "since no effort was made at the time either to bring the error to the Director's attention or to appeal. "We . . . decline to act on the basis of a factual error in a discretionary decision now some four and one-half years old." *Id.* at 404.

¹¹⁰*Id.* at 403. See 8 C.F.R. §242.22 (1984) (reopening or reconsideration).

¹¹¹*Stevic*, 678 F.2d at 403 (quoting the January 18, 1980 decision of the BIA denying Stevic's motion to reopen) (citations omitted), *rev'd*, Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973). On September 3, 1980, the BIA again denied a motion to reopen based on the same reasoning. *Id.*

¹¹²*Id.* at 408.

¹¹³*Id.* at 409.

¹¹⁴See *supra* note 65.

¹¹⁵*Stevic*, 678 F.2d at 405, *rev'd*, Immigration and Naturalization Serv. v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹¹⁶*Id.* at 409 (quoting H.R. REP. NO. 781, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 161).

¹¹⁷*Stevic*, 678 F.2d 405, 407, *rev'd*, INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973). See *supra* notes 98-99 and accompanying text.

with asylum for aliens: section 243(h), governing deportable aliens already in the country, and former section 203(a)(7),¹¹⁸ governing aliens outside the country seeking political asylum in the United States.

The legal standard under former section 203(a)(7) was a showing of "good reason" to fear persecution.¹¹⁹ This standard was less stringent than the clear probability requirement under section 243(h), and closely resembled the Protocol language dealing with deportable aliens.¹²⁰

The Second Circuit found the similarities between the standard under former section 203(a)(7) and the Protocol significant in light of the 1980 amendments to the INA. The court noted that the 1980 Act, and INS regulations promulgated under authority of the Act, eliminated the distinction between standards for determining eligibility under former section 203(a)(7) and section 243(h).¹²¹ The court acknowledged the legislative history indicating that the Refugee Act of 1980 would effect no major changes in the application of section 243(h),¹²² but reasoned that because the Act requires that "a uniform test of 'refugee' be applied to all aliens, [whether seeking relief under either section 203(a)(7) or section 243(h)] the legislative history indicating no major changes cannot alter the inevitable consequence that some change in administrative practice must occur."¹²³

Without clear guidance from Congress, the court was therefore faced with a choice between applying the stringent clear probability test to re-

¹¹⁸INA, *supra* note 1, § 203(a)(7) (codified as amended at 8 U.S.C. § 1153(a)(7) (1976) (current version at 8 U.S.C. § 1157 (1982)). This section provided in part:

Conditional entries shall next be made available by the Attorney General . . . to aliens who satisfy an Immigration and Naturalization Service officer . . . (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion

Id.

¹¹⁹*Stevic*, 678 F.2d at 405, *rev'd*, Immigration and Naturalization Serv. v. *Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹²⁰*Id.* The 1967 Protocol, adopting the language of the 1951 Convention, defined "refugee" as one who has a "well-founded fear of persecution." The court noted that the drafters of the 1951 Convention "believed a showing of 'good reason' to fear persecution was sufficient to prove one's status as a 'refugee.' . . . [a test that is] identical to the one used . . . to describe the . . . standard under . . . section 203(a)(7)." *Id.* (citations omitted). In other words, the standard of former section 203(a)(7) was sufficient, under the Protocol, to grant a withholding of deportation.

¹²¹*Id.* at 407-08. See Refugee Act of 1980, *supra* note 13, § 208(a), at 8 U.S.C. § 1158(a); 8 C.F.R. § 208.3 (1984).

¹²²The court said: "The Senate Report seems to assume, however, that the amendments to Section 243(h) work no major change. . . . The House report is more ambiguous" *Stevic*, 678 F.2d at 408 (citations omitted), *rev'd*, Immigration and Naturalization Serv. v. *Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹²³*Id.*

quests for asylum under both 243(h) and 203(a)(7), or applying the more lenient standard of 203(a)(7) to 243(h) claims to achieve the required single standard. The court stated that, given the humane attitude underlying the 1980 Act, "it would bring about wholly anomalous results to read the Act to impose a far more stringent legal test upon entry by refugees than had existed in prior law."¹²⁴

Another, and perhaps the most significant, basis for the *Stevic* court's holding was its conclusion that the elimination of discretionary language in section 243(h) granted the courts a broader role in the deportation process. The court found that by making section 243(h) relief mandatory upon a finding of eligibility, "the Refugee Act of 1980 calls upon courts, in construing the Act, to make an independent judgment as to the meaning of the Protocol[;] . . . a reviewing court [now] has a clear responsibility to assure that the non-discretionary exercise of Section 243(h) authority has been performed according to the correct standards of law."¹²⁵ Exercising its broader role, the Second Circuit concluded that "under Section 243(h), deportation must be withheld, upon a showing *far short of a 'clear probability'* that an individual will be singled out for persecution."¹²⁶

Less than six months after *Stevic* was decided, the Third Circuit Court of Appeals addressed the same issue as had the Second Circuit in *Stevic*: whether clear probability is the proper standard to be used in section 243(h) claims after the enactment of the Refugee Act of 1980. In *Rejaie v. Immigration and Naturalization Service*,¹²⁷ the alien petitioned for review

¹²⁴*Id.*

¹²⁵*Id.* at 409. The Second Circuit's recognition of the expanded scope of review is supported by an earlier Ninth Circuit Court of Appeals decision. *McMullen v. Immigration and Naturalization Service*, 658 F.2d 1312 (9th Cir. 1981), was one of the first cases in which a court examined the effect of the Refugee Act of 1980 on section 243(h) relief. In *McMullen*, the Ninth Circuit determined that the 1980 amendments, eliminating the discretionary language of section 243(h), required the Board to withhold deportation only upon a finding of certain facts. The Board, therefore, was required for the first time to make a factual determination in section 243(h) proceedings. *Id.* at 1316.

The Ninth Circuit recognized that factual findings of an administrative agency "are normally subject to the substantial-evidence standard of review," *id.* (citations omitted), and concluded that courts now play a broader role in reviewing section 243(h) agency determinations. "The role of the reviewing court necessarily changes when the charge to the agency changes from one of discretion to an imperative." *Id.* See also Note, *Persecution Abroad*, *supra* note 11, at 115-18 (discussing *McMullen*). Thus, the *McMullen* court held that the proper scope of review had increased from abuse of discretion to a substantial evidence test. 658 F.2d at 1316.

McMullen provides support for the *Stevic* court's conclusion that the Refugee Act of 1980 called upon the courts "to make an independent judgment as to the meaning of the Protocol." 678 F.2d at 409, *rev'd* *INS v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹²⁶*Stevic*, 678 F.2d at 409 (citation omitted) (emphasis added), *rev'd*, *Immigration and Naturalization Serv. v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹²⁷691 F.2d 139 (3d Cir. 1982). The claimant was a citizen of Iran admitted to the United States in 1978 to attend school. After failing to depart upon the expiration of his

of the BIA's denial of his second motion to reopen deportation proceedings, contending that the BIA had incorrectly required him to prove a clear probability of persecution.¹²⁸ Rejaie claimed that as a result of the passage of the Refugee Act of 1980, such a stringent burden of proof was no longer required.

The Third Circuit examined the Act and its legislative history to determine the validity of this claim. The *Rejaie* court found that "the modification of § 243(h) was effected solely for the *sake of clarity* so that its language would conform more closely with the language of the Protocol."¹²⁹ Finding no ambiguity in statements made by Congress, the *Rejaie* court determined that the Second Circuit "apparently misapprehended" the legislative history of both the Refugee Act of 1980 and the accession to the 1967 Protocol.¹³⁰ The court held¹³¹ that well-founded fear is equal to clear probability, thereby denying the alien's petition for review.¹³²

Until recently, this conflict continued in the federal courts.¹³³ In June, 1984, the United States Supreme Court attempted to end the confusion

visa, and having failed to request permission to stay, the claimant was ordered to return to Iran. *Id.* at 141-42.

¹²⁸*Id.* at 141-42.

¹²⁹*Id.* at 144 (emphasis added). The court found that "[i]n modifying section 243(h), the House clearly understood that the standards under § 243(h) and under the Protocol were the same." *Id.* The court also noted that the Board continued to use the same standards in determining eligibility as it had prior to the Refugee Act of 1980. *Id.* at 145. The court explained that the Board, while taking into consideration the alien's subjective apprehensions, still required the alien to present objective evidence demonstrating a "realistic likelihood" that he would be persecuted. *Id.*

¹³⁰*Id.* at 146.

¹³¹*Id.* at 146 (citing *Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978); *Martineau v. INS*, 556 F.2d 306 (5th Cir. 1977); *Pereira-Diaz v. INS*, 551 F.2d 1149 (9th Cir. 1977); *Zamora v. INS*, 534 F.2d 1055 (2d Cir. 1976)).

¹³²691 F.2d at 146-47.

¹³³About one month after the *Rejaie* decision, the Sixth Circuit Court of Appeals decided *Reyes v. INS*, 693 F.2d 597 (6th Cir. 1982). Unlike the Third Circuit in *Rejaie*, the Sixth Circuit recognized its broader role in reviewing the Attorney General's denial of section 243(h) relief. Reversing the BIA's denial of section 243(h) relief, the Sixth Circuit agreed with the *Stevic* holding that an alien is required to show something less than a clear probability of persecution after the 1980 amendments. 693 F.2d at 599-600. Applying the substantial evidence test the *Reyes* court held that, considering the record as a whole, the petitioner's evidence was "sufficient to bring her risk within the tenor and spirit of the new provisions of the Act." *Id.* at 600 (citing *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), *rev'd*, *INS v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973); *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981)).

Shortly after the *Reyes* decision, the Third Circuit Court of Appeals was again faced with the assertion that the Refugee Act of 1980 changed the burden of proof required of the alien in section 243(h) claims. In *Marroquin-Manriquez v. INS*, 699 F.2d 129 (3d Cir. 1983), the claimant argued that he was no longer required to show a clear probability of persecution due to the 1980 amendments. The Third Circuit relied on its decision in *Rejaie* to hold that the BIA committed no error by using the clear probability standard. *Id.* at 133. The

surrounding this statute by redefining the "clear probability" standard.¹³⁴ However, the Court's decision, although unintentionally, arguably, resulted in the creation of a new standard. That is, an alien must bring forth evidence establishing that it is more likely than not that he will be persecuted if returned to a particular country.¹³⁵

B. *The Supreme Court In Review*

The decision of the Second Circuit was reversed in *Immigration and Naturalization Service v. Stevic*.¹³⁶ There, the Supreme Court rejected Stevic's contention that the Refugee Act of 1980¹³⁷ changed the standard of proof an alien must show to become eligible for section 243(h) relief. The Court concluded that it was not Congress' intent, in amending the language of section 243(h), to lower the burden of proof required, rather the change was made simply so that the language of U.S. laws conformed more closely to that of our international obligations.¹³⁸ Thus, the Supreme Court held that an alien must establish a clear probability that he will be subject to persecution.¹³⁹

The Court went on to note that it was avoiding "any attempt to state the governing standard."¹⁴⁰ Rather, it simply established that the burden of proof required under section 243(h)—"clear probability"—calls for a showing that it is "more likely than not" the alien will be persecuted upon deportation.¹⁴¹

Interestingly, however, it appears that the Supreme Court *has* come forth with a new standard under section 243(h). Although several observations made by the Supreme Court are potential targets for criticism, implicit in the Court's definition of "clear probability" is a new standard of proof for the alien. As a result of the Court's language, an alien must now only show that it is "more likely than not" that he will be subject to persecution. Although language can be found in the opinion indicating there has been no change in the clear probability standard, a close examination of the Court's decision will reveal that clear probability now

Third Circuit also held that its scope of review was limited to determining whether the denial of section 243(h) relief was an abuse of discretion. *Id.* The court noted the *McMullen* decision, where the Ninth Circuit held the judicial scope of review was broadened by the Refugee Act of 1980. Yet it rejected this reasoning "because it ignore[d] the necessary application of expertise implicated in the determination that a fear of persecution is well-founded." *Id.* at 133 n.5.

¹³⁴INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹³⁵*Id.*

¹³⁶*Id.*

¹³⁷See *supra* note 13.

¹³⁸52 U.S.L.W. at 4726.

¹³⁹*Id.* at 4725.

¹⁴⁰*Id.* at 4730.

¹⁴¹*Id.*

simply requires the alien show persecution is more likely than not in order to be afforded relief under the section.

1. *The Scope of Judicial Review After the Refugee Act of 1980.*—It has been argued that prior to the Refugee Act of 1980, the Attorney General had two types of discretion: whether the alien was eligible to receive section 243(h) relief and, if so, whether or not such relief should be granted.¹⁴² This discretion caused the reviewing courts to view INS determinations with great deference. As a result, any standard set in the exercise of the Attorney General's first type of discretion was accepted by the reviewing courts as the appropriate standard. Only if it was determined to be a clear abuse of discretion was it rejected.¹⁴³

The Refugee Act of 1980 amended section 243(h)¹⁴⁴ so that the Attorney General is required to withhold deportation upon the appropriate showing of persecution.¹⁴⁵ The Second Circuit Court of Appeals determined that the mandatory language of the amendment broadened its scope of review.¹⁴⁶ It recognized that the courts were no longer required to adhere to the standards required by the Attorney General.

The Second Circuit was not the first to recognize the courts' increased scope of review afforded by the 1980 amendment.¹⁴⁷ In *McMullen v. Immigration and Naturalization Service*,¹⁴⁸ the Ninth Circuit Court of Appeals determined that the 1980 amendments required the Board to withhold deportation only upon a finding of certain facts. This, the court concluded, required the reviewing court's role to necessarily change.¹⁴⁹

Yet, the United States Supreme Court summarily dismissed any discussion of the possible increased role of the reviewing court. It held that "[t]he removal of the Attorney General's discretion to withhold deportation after persecution was established with the requisite degree of certainty relates to the consequences of meeting the standard, and not to the standard itself."¹⁵⁰ Implicit in this statement is the recognition that there are two levels of discretion exercised by the Attorney General in a section 243(h) proceeding. However, no attempt was made to address the issue of the reviewing court's role in section 243(h) hearings, an issue which formed one ground for the decision of the Second Circuit. Rather, the

¹⁴²See *supra* notes 42, 72-74, 93, 97 & 105 and accompanying text.

¹⁴³See *supra* note 73.

¹⁴⁴See *supra* note 14.

¹⁴⁵*Id.*

¹⁴⁶*Stevic v. Sava*, 678 F.2d 401, 409 (2d Cir. 1982), *rev'd*, *INS v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973). The court stated that "our obligation to assure observance of correct legal standards under this mandatory provision is to be contrasted with the more limited role of courts in reviewing BIA decisions under grants of discretionary authority" *Id.*

¹⁴⁷See *supra* note 125.

¹⁴⁸658 F.2d 1312 (9th Cir. 1981).

¹⁴⁹*Id.* at 1316.

¹⁵⁰*INS v. Stevic*, 52 U.S.L.W. at 4727 n.15.

Court seems to have concluded that the determination of eligibility is still entirely within the Attorney General's discretion.¹⁵¹

Leading up to the accession, Congress insisted that although no major changes need to be made to the existing laws, changes that did have to be made could be done simply within administrative applications and procedures.¹⁵² Yet, the INS adhered to a "clear probability" standard. The view espoused by the Second¹⁵³ and Ninth¹⁵⁴ Circuits, that courts now play a broader role is arguably more reasonable. For if Congress now requires that the Attorney General withhold deportation upon a showing of persecution, it follows that a reviewing court would have a duty to be certain that the Attorney General is applying the correct legal standard in determining eligibility for relief.¹⁵⁵ Taking this position, a court could not reasonably rely on a "caselaw consensus" developed during a time in which reviewing courts deferred to the Attorney General's determination.¹⁵⁶

Although the Supreme Court did not rely on the holdings of past cases for its determination, it did note that prior to 1980 many courts and administrative decisions supported the clear probability standard.¹⁵⁷ The Court implicitly rejected the proposition that after 1980 the courts were granted an increased scope of review by the elimination of discretion under amended section 243(h).¹⁵⁸ Therefore, the Court failed to adequately analyze the effect of the 1980 Act on case law developed under prior law.

¹⁵¹*Id.*

¹⁵²See *supra* notes 98-99 and accompanying text.

¹⁵³*Stevic v. Sava*, 678 F.2d 401 (1982), *rev'd*, *INS v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹⁵⁴*McMullen v. INS*, 658 F.2d 1312 (1981).

¹⁵⁵See *supra* note 146.

¹⁵⁶However, this was the view espoused by the Third Circuit in *Rejaie v. INS*, 691 F.2d 139 (1982). In *Rejaie*, the Third Circuit relied heavily on the BIA's decision in *In re Dunar*, 14 I. & N. Dec. 310 (1973), and a Seventh Circuit Court of Appeals decision, *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1973), to find a case law consensus equating clear probability with well-founded fear. *Rejaie*, 691 F.2d at 143. Both *Dunar* and *Kashani* were decided before 1980 and they are similar in reasoning. The tribunal in each case found that because the Protocol and the clear probability standard both required objective evidence of persecution, the standard under the Protocol, well-founded fear, and the clear probability test were not substantially different. In *Rejaie*, the court also noted that since the enactment of the Refugee Act of 1980, the BIA has continued to use "clear probability" and "well-founded fear" interchangeably to label the alien's burden of proof. 691 F.2d at 145 (citations omitted). The Third Circuit, therefore, based its holding that well-founded fear is equivalent to clear probability on a case law consensus *developed under prior law* and upon a statement of the INS that the Board continues to follow this consensus *despite* the 1980 amendments.

¹⁵⁷*INS v. Stevic*, 52 U.S.L.W. at 4727.

¹⁵⁸See *supra* notes 144-51 and accompanying text.

A broader scope of review would call for greater judicial scrutiny of the standards used by the Attorney General in making his determinations. By summarily dismissing any possibility that the Attorney General no longer has any discretion in determining whether an alien is eligible for relief, the Supreme Court has, arguably, relied on an area of case law which deserves little weight.

2. *Interpretations of Congressional Intent.*—In reviewing the Congressional Reports that preceded the adoption of the Refugee Act of 1980, the Supreme Court conceded that the Act was merely an attempt to clarify the then-existing immigration law. In a note, the Court quotes the same language the Third Circuit Court of Appeals relied on in *Rejaie*¹⁵⁹ to hold that the language of section 243(h) was amended by the 1980 Act merely to conform it to the Protocol—"for the sake of clarity."¹⁶⁰ Yet, the Supreme Court oversimplifies the legislative intent in amending section 243(h).

The Second Circuit in *Stevic* acknowledged the ambiguity found in expressions of congressional intent. Statements seemed to indicate that no major changes need be made to immigration law, that the amendments were made for the sake of clarity alone. However, the reports go on to note that even if changes need be made, they can be accomplished through administrative procedures.¹⁶¹ Upon a close examination, congressional understanding and intent are more ambiguous than represented by the Supreme Court in *Stevic*.

In stating that no major changes were needed, Congress seemed to assume that the protection afforded under the Protocol had always been the same as that under section 243(h).¹⁶² One report stated that amended section 243(h) "is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol."¹⁶³ It is conceivable that Congress foresaw no major changes

¹⁵⁹691 F.2d 139 (3d Cir. 1982).

¹⁶⁰52 U.S.L.W. at 4729 n.20 (quoting H.R. REP. No. 608, 96th Cong., 2d Sess. 17-18 (1979)).

¹⁶¹See *supra* notes 98-99 and accompanying text.

¹⁶²Support for this conclusion could be drawn from a statement made prior to the accession to the 1967 Protocol: "Even though the United States already meets the standards of the Protocol, formal accession would greatly facilitate our continuing diplomatic effort to promote higher standards of treatment for refugees . . ." S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 7 (1968) quoted in *In re Dunar*, 14 I. & N. Dec. 310, 315 (1973).

¹⁶³H.R. CONF. REP. No. 781, 96th Cong., 2d Sess. 20 reprinted in 1980. U.S. CODE CONG. & AD. NEWS 161, quoted in *Stevic v. Sava*, 678 F.2d at 408 (2d Cir. 1982), *rev'd*, *INS v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973). See also S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 6 (1968): "The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept [of the Protocol]. The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act." *Id.* quoted in *In re Dunar*, 14 I. & N. Dec. at 317 (emphasis added).

in the immigration laws and procedures and thus intended to rubber stamp the standard of clear probability already in use.¹⁶⁴ Conversely, Congress might have intended to leave the matter of conformity within the power of reviewing courts and agencies, to assure that procedures and regulations implementing the immigration laws be harmonized with the Protocol.¹⁶⁵ This list of possibilities is not exhaustive, yet the Supreme Court too quickly glides over the ambiguities in arriving at its conclusion that Congress did not intend for any changes in administrative practice to occur.¹⁶⁶

3. *The Meaning of Clear Probability.*—The Court began its analysis by noting that prior to 1968, “it was clear that an alien was required to demonstrate a ‘clear probability of persecution’ or a ‘likelihood of persecution’ in order to be eligible for withholding of deportation under § 243(h)”¹⁶⁷ The Court also pointed out that under section 203(a)(7) an alien seeking admission to the United States had “to establish a good reason to fear persecution.”¹⁶⁸

Noting that many courts generally continue to apply a standard of clear probability even after accession to the Protocol in 1967,¹⁶⁹ the Supreme Court determined that the Refugee Act of 1980 made no mention of the standard of proof required by the statute. “To the extent such a standard can be inferred from the bare language of the provision, it appears that a likelihood of persecution is required The section literally provides for withholding of deportation only if the alien’s life or freedom ‘would’ be threatened in the country to which he would be deported; it does not require withholding if the alien ‘might’ or ‘could’ be subject to persecution.”¹⁷⁰ The Court determined that nothing in amended sec-

¹⁶⁴See H.R. REP. NO. 608, 96th Cong., 1st Sess. 18 (1979): “Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it desirable, for the sake of clarity, to conform the language of that section to the Convention.” Significantly however, Congress did *not* take note, that prior to the amendment, the discretionary authority vested in the Attorney General caused the courts to view their role as very limited.

¹⁶⁵See *supra* note 163. The oddity that both of these conclusions can be made from the same statement lends further support to the conclusion in *Stevic* that congressional intent was ambiguous. See *Stevic v. Sava*, 678 F.2d at 408, *rev’d*, *INS v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹⁶⁶Yet even finding, that Congress did not contemplate major changes in section 243(h) or its application, does not preclude the natural evolution in construction and application of the statute. Congress did not countermand adjustments in the immigration law to take into account the amendments to section 243(h). Rather, Congress seems to have relied on the natural functions of the executive and judicial branches to assure that the substantive part of the law, whether or not it was facially changed, conformed to the Protocol. See *supra* note 163.

¹⁶⁷*INS v. Stevic*, 52 U.S.L.W. at 4726 (U.S. June 5, 1984) (No. 82-973).

¹⁶⁸*Id.* (citation omitted).

¹⁶⁹*Id.* at 4727.

¹⁷⁰*Id.* at 4727-28 (footnote omitted).

tion 243(h) "indicate[d] any diminution in the degree of certainty with which [grounds for withholding deportation] must be established."¹⁷¹

In maintaining the standard at its pre-1980 level, the Court explained that it was trying to avoid stating *any* standard.¹⁷² Yet, the Court did state its definition of "clear probability"; the Court found that the question involved under clear probability is whether "it is more likely than not that the alien would be subject to persecution."¹⁷³ The Court determined that the word "clear" is just surplusage, and ought not to be construed as causing the clear probability standard to lean closer to a clear and convincing standard.¹⁷⁴

At first glance, the Supreme Court appears simply to have reaffirmed past decisions, both on the judicial and administrative levels, requiring an alien to establish a "clear probability" of persecution. Yet, a closer examination reveals that the Court *did* establish a new standard of proof. That is, to receive section 243(h) relief, an alien must support his application with "evidence establishing that it is *more likely than not* that the alien [will] be subject to persecution on one of the specified grounds."¹⁷⁵

The Court found no merit in the contention that a clear and convincing standard had been applied by the BIA. However, inherent in its definition lies an apparent concern with clarifying the standard.¹⁷⁶ Although arguably a more likely than not standard of definition of clear probability, it does provide further guidance to a court tempted to require more than a probability of persecution. Requiring an alien to establish that it is more likely than not that he will be subject to persecution may indeed not be any different than requiring a showing of clear probability, at least in theory. Yet in practice, it is believed that the new standard of more likely than not will not only produce more reasonable and equitable results for aliens seeking section 243(h) relief, but it will also prove much simpler to apply.

4. *The Impact of the Supreme Court's Interpretation on Section 243(h) Claims.*—By defining the clear probability standard as it is to be applied in section 243(h) applications,¹⁷⁷ the Supreme Court has, arguably, established a new standard, a standard which is reasonable and workable. Because of the factual situations and the arguments facing the Court, however, the language used in reversing the Second Circuit's decision could mislead many courts.

¹⁷¹*Id.* at 4727 n.15.

¹⁷²*Id.* at 4730. The Court stated: "We have deliberately avoided any attempt to state the governing standard beyond noting that it requires that an application be supported by evidence establishing that it is *more likely than not* that the alien would be subject to persecution on one of the specified grounds." *Id.* (emphasis added).

¹⁷³*Id.*

¹⁷⁴*Id.* at 4728 n.19.

¹⁷⁵*Id.* at 4730 (emphasis added).

¹⁷⁶*Id.* at 4728 n.19.

¹⁷⁷See *supra* notes 167-76 and accompanying text.

For example, the Supreme Court interpreted the Second Circuit's decision as holding that an alien need only show a well-founded fear of persecution.¹⁷⁸ In reality, however, the Second Circuit did *not* hold this. Rather, it determined that the changes in section 243(h), brought about by the Refugee Act of 1980, required a showing "far short of a 'clear probability'."¹⁷⁹ In fact, the Second Circuit recognized the improvidence in attempting to define a more detailed standard, determining that any standard must be developed in the context of "concrete factual situations."¹⁸⁰ The Second Circuit never determined that a "well-founded fear" standard should replace the "clear probability" standard when granting section 243(h) relief.¹⁸¹

In his arguments to the Supreme Court, it appears that Stevic argued in favor of the well-founded fear standard.¹⁸² However, the Court determined that well-founded fear was a more generous standard and recognized no basis for change from a clear probability standard. As previously noted though, implicit in the Court's attempt to clarify the meaning of clear probability is the recognition of the ambiguity surrounding this section that has plagued the courts since the accession to the 1967 Protocol.

V. CALLING ON CONGRESS—THE NEED FOR REFORM.

The Immigration Reform and Control Act of 1983 is currently before Congress. This bill would revamp our nation's immigration laws.¹⁸³ The proposed legislation is an accumulation of years of research by various committees within both the executive and legislative branches.¹⁸⁴ It is also a recognition by Congress of the need to promote the national interest while at the same time maintaining the United States' policy of "traditional hospitality and charity."¹⁸⁵

The purpose of the proposed legislation is to reform the process for determining the validity of political asylum requests; make limited changes in the system for legal immigration; and to provide a controlled legalization of status program for certain undocumented aliens who have entered the United States prior to 1982.¹⁸⁶ Much of this "reform" concerns asserting control over illegal immigrants. One aspect of this control is to place

¹⁷⁸52 U.S.L.W. at 4725 (U.S. June 5, 1984) (No. 82-973).

¹⁷⁹*Stevic v. Sava*, 678 F.2d 401, 409, *rev'd*, *INS v. Stevic*, 52 U.S.L.W. 4724 (emphasis added).

¹⁸⁰*Id.*

¹⁸¹52 U.S.L.W. at 4725 (U.S. June 5, 1984) (No. 82-973).

¹⁸²*See id.*

¹⁸³At the time of this writing, the Senate version of the Act had been passed in the Senate. (S. 529). Its companion bill in the House (H. Bill 1510) was currently awaiting passage by the House.

¹⁸⁴*See H. REP. NO. 115, 98th Cong., 1st Sess., 30-32 (1983).*

¹⁸⁵*S. REP. NO. 62, 98th Cong., 2d Sess. 3 (1983).*

¹⁸⁶*See H. REP. NO. 115, 98th Cong., 1st Sess., 30-32 (1983).*

stiff penalties on employers who take advantage of the inexpensive labor illegal immigrants provide.¹⁸⁷

The Immigration Reform and Control Act of 1983, if passed, would provide some procedural efficiency in the administrative process.¹⁸⁸ The proposed bill expressly amends section 243(h) by adding paragraph 3 to read that "application for relief under this subsection shall be considered to be an application for asylum under section 208 and shall be considered in accordance with the procedures set forth in that section."¹⁸⁹ Yet neither the proposed legislation nor the congressional statements surrounding the legislation do much to clear up the ambiguities that in the past surrounded the proper burden of proof required for section 243(h) eligibility.

A House report accompanying the House version of the bill repeats the ambiguities that caused courts to reach different conclusions. It states: "The Committee is convinced that nothing in the present law, nor in the Committee Amendment, should be construed as providing *less* protection than the Protocol."¹⁹⁰

The degree of protection the 1967 Protocol was intended to afford aliens remains questionable. The conclusion reached by the Second Circuit in *Stevic v. Sava*,¹⁹¹ that conformity to the 1967 Protocol did indeed necessitate administrative changes, seems to comport more closely with statements made by Congress expressing its belief that although no *major* changes were required, our laws provided the flexibility needed in carrying out the principles found in the Protocol. This flexibility was recognized by the Supreme Court, as evidenced by its definition of clear probability that an alien must establish persecution as more likely than not.¹⁹² A more likely than not standard guarantees that the protection afforded by our existing laws will not be less than that found in the Protocol.

However, the same House report states an apparently conflicting interpretation:

That is, the Committee views the Protocol as creating no substantive or procedural rights not already existing either under current law or under the law as modified by the [bill]. The Committee thus agrees with the holding in *Pierre v. United States*, 547 F.2d 1281, 1288 (5th Cir. 1977) wherein it is stated that "accession to the Protocol by the United States was neither intended to nor had the effect of substantially altering the statutory immigration scheme."¹⁹³

¹⁸⁷*Id.*

¹⁸⁸See *infra* note 192.

¹⁸⁹H.R. 1510 98th Cong., 2d Sess. § 124(b) (1983).

¹⁹⁰H.R. No. 115, *supra* note 186, 59 (emphasis added).

¹⁹¹678 F.2d 401 (2d Cir. 1982), *rev'd*, *INS v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹⁹²*INS v. Stevic*, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

¹⁹³H.R. No. 115, *supra* note 186, 59.

This statement appears to support the conclusion that any changes wrought by the Refugee Act of 1980 were merely "cosmetic surgery"¹⁹⁴ and that Congress, in performing this "cosmetic surgery," believed the procedures and case law involving the immigration laws had always conformed to the Protocol.¹⁹⁵ Yet, as *Stevic* points out, no *substantial* changes in our laws are necessary to afford aliens the *protection* contemplated by Congress in acceding to the Protocol.¹⁹⁶

Congress seems unwilling, once again, to deal clearly with the perplexing issues surrounding the asylum-type relief found in section 243(h) and the 1967 Protocol. Thus, courts will continue to shoulder the task of trying to sort these issues and apply a proper burden of proof to the alien seeking withholding of deportation. This increases the importance and the potential impact of the decision reached by the United States Supreme Court.

VI. CONCLUSION

The United States has often welcomed large numbers of aliens who enter this country for a variety of reasons. We have prided ourselves in providing a place for those who seek freedom, or a refuge from political strife and oppression. At the same time, however, conflicting concerns have led to limits on immigration. The development of United States immigration law has been influenced by an attempt on the part of the three branches of government to balance these conflicting concerns and to arrive at a generous yet fair set of laws. This is not an easy task. The struggle that often arises between humanitarian and protectionist goals was evidenced by the failure of all three branches to state the burden of proof an alien must shoulder under section 243(h) in order to escape deportation to a country where his life or freedom might be threatened.¹⁹⁷

The Protocol and the Refugee Act of 1980 did little to clarify congressional intent regarding the proper burden of proof in a section 243(h) proceeding. Furthermore, the proposed Immigration Reform and Control Act of 1983 provides virtually no guidance to those aliens seeking relief under section 243(h). Without clear guidance from Congress, it is crucial that the courts accept the responsibility of interpreting the Supreme Court's definition of the burden of proof under section 243(h) in a manner that

¹⁹⁴*Rejaie*, 691 F.2d 139, 146 (3d Cir. 1982).

¹⁹⁵*Id.* at 143.

¹⁹⁶52 U.S.L.W. at 4726.

¹⁹⁷Each branch of government could adequately deal with the matter. For example, Congress might take a closer look at the problem of the alien's required burden of proof and *then* unambiguously articulate its intent. The Executive might require uniformity within its discretionary power of setting standards. Finally, the courts could establish a flexible, yet uniform standard that will parallel our nation's humanitarian ideals—so fundamental to our government—and produce an impartial, fair result.

preserves the humanitarian principles that have always made the United States a haven to those fleeing persecution. This cannot be accomplished if the courts adhere to archaic legal principles, developed in an era when the courts had a very limited ability to review the Attorney General's decisions under section 243(h).

Adopting the construction of clear probability similar to the one given it prior to 1980 will only undermine the humanitarian principles expressed by the executive branch of the United States government. Rather, courts should follow the lead of the Supreme Court in *Stevic*¹⁹⁸ and reaffirm those values that the United States has espoused for over two hundred years.

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¹⁹⁸INS v. Stevic, 52 U.S.L.W. 4724 (U.S. June 5, 1984) (No. 82-973).

