

FEBRUARY 2011
ESSAY QUESTIONS 1, 2 AND 3



California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead,

try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

In 2004, Tess, a widow, executed a valid will leaving her estate to her children, Abel, Bernice, and Cassie *per stirpes*.

In 2009, Tess, Abel, and Bernice quarreled and Tess decided to draft a new will. She went to an office supply store, got a preprinted will form, and filled in the following in her own handwriting:

Because my son Abel and daughter Bernice have been unkind to me, I specifically disinherit them. I give and bequeath all my property to University.

Tess signed and dated the form. No one was present when she signed and dated the form and hence no one signed as a witness to her signature. At the time, she was addicted to prescription pain killers and was an alcoholic.

In 2010, Cassie adopted David as her son. Soon thereafter, Cassie died, survived by David.

In 2011, Tess died, leaving an estate worth \$1,000,000.

Tess's 2009 will has been offered for probate.

(1) What arguments can Abel and Bernice reasonably make in objecting to the validity of Tess's 2009 will? Discuss.

(2) Does David have any claim to a share of Tess's estate? Discuss.

Answer according to California law.

Question 2

Out of a sense of patriotism, Charles enlisted in the United States Army. Charles had risen to the rank of Captain.

Shortly after that promotion, after serious reflection, Charles began to rethink his previous religious, philosophical, and political views. He modified the religious preference he listed on his Army records from "Christian" to "Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You." Charles concluded that his belief did not prohibit his assignment to duty in Country A, but it did preclude his assignment to duty in Country B.

Federal law requires military personnel to accept any assignment to duty, but when Charles was assigned to duty in Country B, he declined to go, and was charged with refusing to deploy. Since the charges were brought, Charles has frequently criticized American involvement in Country B.

Charles wishes to raise a defense against the refusal to deploy charge based solely on (1) the Free Exercise Clause and (2) the Establishment Clause of the First Amendment to the United States Constitution.

What is the likelihood of Charles prevailing? Discuss.

Question 3

Leo owned three consecutive lots on Main Street. At one end, Lot 1 contained an office building, The Towers, leased to various tenants; in the middle, Lot 2 was a lot posted for use solely by the tenants and guests of the other two lots for parking; at the other end, Lot 3 contained a restaurant, The Grill, operated by Leo.

In 2008, Leo leased The Grill to Thelma for 15 years at rent of \$1,000 per month under a written lease providing in relevant part: "Tenant shall operate only a restaurant on the premises. Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease. Tenant and his or her guests shall have the right to use Lot 2 for parking."

In March 2009, Thelma assigned the lease to The Grill to Andrew after he had reviewed it. The lease did not contain any provision restricting assignment. Although Leo did not express consent to the assignment, he nevertheless accepted monthly rental payments from Andrew.

In April 2010, Leo sold Lot 1 and Lot 2 to Barbara after she had inspected both lots. Barbara immediately recorded the deeds. Leo retained ownership of Lot 3.

In June 2010, Leo informed Andrew that, within a month, he intended to open a restaurant across the street from The Grill.

Also in June 2010, Barbara announced plans to close the parking lot on Lot 2 and to construct an office building there. There is no other lot available for parking within three blocks of The Grill.

1. Andrew has filed a lawsuit against Leo, claiming that he breached the provision of the lease stating, "Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease." How is the court likely to rule on Andrew's claim? Discuss.

2. Andrew has filed a lawsuit against Barbara, claiming that she breached the provision of the lease stating, "Tenant and his or her guests shall have the right to use Lot 2 for parking." How is the court likely to rule on Andrew's claim? Discuss.



February 2011

**California
Bar
Examination**

Performance Test A

INSTRUCTIONS AND FILE

ENVIROSCAN, INC. v. STRUCTURAL ENVIRONMENTAL SAFETY AGENCY

Instructions..... i

FILE

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ENVIROSCAN, INC. v. STRUCTURAL ENVIRONMENTAL SAFETY AGENCY

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

State of Columbia
STRUCTURAL ENVIRONMENTAL SAFETY AGENCY
Legal Unit

MEMORANDUM

To: Applicant

From: Marla Brevette, Chief Counsel

Subject: Enviroscan, Inc. v. Structural Environmental Safety Agency

Date: February 22, 2011

Last year the Legislature enacted Columbia Professions Code § 14752 authorizing the Structural Environmental Safety Agency (“SESA”) to certify as Residential Specialists persons and businesses that install and operate residential environmental monitoring systems. Deputy Counsel Raymond Barkley has set forth the background in a memorandum that I have included with these materials.

We have been served with the first petition for a writ of mandate challenging the decision of SESA’s Specialty Certification Board to deny an application for certification as a Residential Specialist under the new law: *Enviroscan, Inc. v. SESA*.

Please draft an objective memorandum that analyzes the legal and factual issues related to each of the four Grounds of Relief asserted in Enviroscan’s petition. Be sure to include in your memorandum an analysis of which party (SESA or Enviroscan) is likely to prevail on each of these grounds.

State of Columbia
STRUCTURAL ENVIRONMENTAL SAFETY AGENCY
Legal Unit

MEMORANDUM

TO: Staff
FROM: Raymond Barkley, Deputy Counsel
Date: December 28, 2010

SESA is a statewide agency which, under Columbia Professions Code § 14700 *et seq.*, regulates and licenses Environmental Abatement Contractors (“contractors”) engaged in the business of detecting, remedying, abating, and removing toxic and other environmental hazards in commercial, industrial, and residential structures. Newly enacted Professions Code § 14752 directs SESA to develop and implement a program for certifying Residential Specialists from among contractors already licensed by the SESA.

Recent advances in technology include the development of highly effective monitoring systems consisting of programmable computerized devices designed to detect and isolate toxic and other structural environmental hazards. This technology has created expanded business opportunities for contractors in the trade to enter into the residential market to detect and control hazards commonly found in homes and that are harmful, particularly to children. Contractors in the business of installing, maintaining, and operating these devices (“residential systems”) also typically offer the service of monitoring and programming the systems from remote locations. The privacy and security implications of such expansion into private homes and the accompanying remote monitoring and programming services prompted the Legislature to authorize SESA to identify and certify qualified specialists in the field.

All contractors engaged in the structural environmental toxic and hazard abatement business are required to be licensed by the SESA as Environmental

Abatement Contractors. That license allows them, and their employees working under their direction and supervision, to engage lawfully in the business, including the business of installing, servicing, monitoring, and programming residential systems. The new legislation does not prevent licensed contractors from continuing to do so. However, it does require that, before any such contractors can hold themselves out as “specialists” in the field, they must be certified as such by the SESA. From the contractors’ perspective, there is significant economic value in being able to advertise that they have qualified for and have received State approval as “specialists.”

The statute directs SESA to establish a five-person Specialty Certification Board and to implement a certification procedure. The legislative history of Professions Code § 14752 makes it clear that, because of the privacy and safety implications of the use of residential systems in private homes, SESA is granted extremely broad discretion in carrying out this mandate and in establishing the standards for certification. In view of the fact that certification carries with it the imprimatur of the State of Columbia, SESA should apply strict standards in granting certification. This admonition is implicit in SESA’s Regulations for Application and Certification as Residential Specialist, which have been approved under the applicable provisions of the Administrative Procedures Act and properly disseminated to all interested parties.

SESA takes the position that all decisions of the agency granting or denying certification are final and subject only to narrow, limited review by the courts under Columbia Code of Civil Procedure § 1085.

1 Albert Marsden, SBN 40811
2 MARSDEN, MARKS, & JAMES LLP
3 One Plaza Place, Suite 2700
4 Astoria, Columbia 98720
5 Telephone: (502) 872-7108

6 SUPERIOR COURT OF THE STATE OF COLUMBIA
7 CALEB COUNTY

9 ENVIROSCAN, INC.,
10 a Columbia Corporation,

11 Petitioner,

12 v.

13 STATE OF COLUMBIA, STRUCTURAL
14 ENVIRONMENTAL SAFETY AGENCY,
15 an administrative agency of the
16 State of Columbia,

17 Respondent.

Case No.: 10047-06

**PETITION FOR WRIT OF MANDATE
UNDER COLUMBIA CODE OF CIVIL
PROCEDURE § 1094.5**

18 Petitioner, Enviroscan, Inc., a corporation duly authorized and existing under the laws of
19 the State of Columbia, petitions this Court for a writ of administrative mandate under
20 Columbia Code of Civil Procedure (“C.C.P.”) § 1094.5.

21 **I. STATEMENT OF FACTS**

22
23 Petitioner has been an Environmental Abatement Contractor licensed by the Structural
24 Environmental Safety Agency (“SESA”) continuously and in good standing since 2001.
25 On February 22, 2010, Petitioner filed with SESA an application for certification as a
26 Residential Specialist as authorized by Columbia Professions Code § 14752 and
27 SESA’s regulations, Columbia Code of Regulations § 101.752.
28

1 Despite the fact that Petitioner's application was complete and sufficient in all particulars
2 and that Petitioner was in all respects qualified for certification as a Residential
3 Specialist, SESA's Specialty Certification Board denied Petitioner's application on
4 June 21, 2010. SESA ignored substantial and persuasive evidence of Petitioner's
5 qualifications in the record before the Board and refused to allow Petitioner to present
6 its case at an evidentiary hearing and to augment the record with additional evidence to
7 rebut evidence placed in the record by SESA's investigator.
8

9 **II. THE ADMINISTRATIVE RECORD**

10 Petitioner has filed in support of this petition the administrative record of the
11 proceedings before SESA and the Specialty Certification Board. The record consists of:
12

- 13 • The SESA Report of Investigation dated April 16, 2010.
- 14 • The SESA Letter of Notification and attached minutes of the Specialty
15 Certification Board dated June 21, 2010.
- 16 • The Enviroscan, Inc. letter dated July 12, 2010.
- 17 • The minutes of the Specialty Certification Board meeting dated September 10,
18 2010.

19 **III. GROUNDS FOR RELIEF**

20 The grounds for relief are:
21

22 1. That this petition be treated as one arising under C.C.P. § 1094.5
23 because, under § 1094.5(a):

- 24 (a) SESA was required to receive any and all evidence presented by
25 Petitioner at the proceedings below;
- 26 (b) Certification is granted or denied by SESA based on the exercise of
27 discretion by the Specialty Certification Board; and
- 28 (c) The Specialty Certification Board was required to give Petitioner the
opportunity to be heard at an evidentiary hearing.

State of Columbia
STRUCTURAL ENVIRONMENTAL SAFETY AGENCY
Office of Field Investigations

REPORT OF INVESTIGATION:

Investigator: Rodney Bellamy, Senior Investigator III

Subject: Application for Certification as Residential Specialist

Applicant: Enviroscan, Inc.
17525 Industrial Way, Bldg. 7
Darbyville, Columbia 98755

Environmental Abatement Contractor's License # 107562

Principal: Elroy Riggins, President and Chief Executive Officer

Date: April 16, 2010

Summary of Report and Findings

This investigation was carried out pursuant to SESA Regulations governing the application for certification as Residential Specialist, pursuant to Columbia Code of Regulations § 101.752.

Application No.: RS 244-06

Date Application Received: February 22, 2010

Dates of Investigation: Commenced on March 19, 2010.

Summary: This investigator conducted the investigation in accordance with all steps specified in the SESA Manual for Field Investigations. This contractor has been in the environmental hazards abatement business since 2001, and holds a valid SESA Environmental Abatement Contractor's license # 107562, issued June 14, 2001.

Opening Conference: The initial contact was with Elroy Riggins, President and CEO of Enviroscan. He is an earthy, plainspoken person. I held an opening conference in which we discussed the following:

- a) We reviewed Enviroscan's application, and I told Mr. Riggins that, on the face of it, the application appeared to contain all the items required by the Columbia Code of Regulations. I handed him a copy of the Columbia Code of Regulations, which he stated he had already reviewed in the process of preparing and submitting his application.
- b) I told him I would take steps to verify all the information contained in the application, including seeking written verification from any and all sources and conducting oral interviews with customers, vendors, competitors, and employees.
- c) I told him that, up to the time of the completion of my investigation, he was encouraged under Section 4 of the Columbia Code of Regulations (Statement of Qualifications and Additional Evidence) to submit any and all additional information he believed might be helpful. I also told him I would advise him of any negative information received and give him an opportunity to submit further information. He stated he was confident that he had already submitted everything necessary for certification.

Review of Application: Enviroscan's application appears to satisfy all the technical requirements of the Columbia Code of Regulations. However, this investigator reports the following "exceptions," which are supported by backup documentation accompanying this report:

- a) Enviroscan technically satisfies the requirement of Columbia Code of Regulations Section 1(b)(2) for 60 hours training of its technicians, but information from suppliers and vendors of residential systems reveals that none of that training occurred within the past three years. Enviroscan's vendors and suppliers all said that in the last couple of years technologically more advanced residential systems have come

on the market, making more current training desirable. Although Enviroscan's application does not specifically say that its employees have received more recent training, this investigator has been unable to confirm that they have.

- b) Regarding Columbia Code of Regulations Section 2(c), two Enviroscan customers have filed civil actions alleging faulty installation. No judgments have been entered against the contractor; both actions were settled by the contractor's insurance company for undisclosed amounts. Enviroscan's application does not mention this.
- c) Regarding the surety bonding requirements in Columbia Code of Regulations Section 3, Enviroscan was unable to verify that all of its installation and service employees are bonded. There have been instances in the past two years where bonds were denied to at least three employees for reasons relating to criminal records.
- d) Statements taken from two of Enviroscan's current systems and parts vendors classify Enviroscan as "slow to pay." One of them ships to Enviroscan on a C.O.D. basis only.
- e) Enviroscan has filed a mechanic's lien on the home of a customer for the customer's failure to pay the balance due on the installation of a system. The customer says Enviroscan departed from the specifications that the customer ordered and that Mr. Riggins refuses to discuss it. The customer says she learned from the Enviroscan employee who did the installation that he was ordered by Mr. Riggins to install a Detecto system because the supplier of the HomeSafe system (which is the one the customer says she ordered) would not ship to Enviroscan on credit.

Closure: On April 2, 2010, I spoke with Mr. Riggins by telephone and discussed with him in detail the "exceptions" noted above, telling him all names, dates, and sources regarding these exceptions and inviting him to submit to me any information he wished by way of explanation or rebuttal of the "exceptions" within

the next 10 days. He stated he was in a very “busy season” but would do the “best I can.”

This investigator received no further information from Enviroscan or Mr. Riggins within the 10-day period. Thus, the investigation is closed, and this report is submitted to the Specialty Certification Board for its consideration in connection with Enviroscan’s application for certification.

Date: April 16, 2010

Rodney Bellamy

Rodney Bellamy, Senior Investigator III

State of Columbia
STRUCTURAL ENVIRONMENTAL SAFETY AGENCY
Specialty Certification Board
404 State Building
P.O. Box 6523
Astoria, Columbia 98720-6523

June 21, 2010

Mr. Elroy Riggins
President and Chief Executive Officer
Enviroscan, Inc.
17525 Industrial Way, Bldg. 7
Darbyville, Columbia, 98755

Re: Enviroscan, Inc.
Application No. RS 244-06

Dear Mr. Riggins:

I am instructed by the Specialty Certification Board of the Structural Environmental Safety Agency to inform you that, at its regular meeting on June 15, 2010, the Board considered your application for certification as a Residential Specialist.

I regret to inform you that the Board DENIED your application for the reasons stated in the copy of the Board's minutes, which are attached to this letter.

The minutes and the record upon which this decision was based will be made available to you for inspection and copying. If you wish to inspect and copy the record, please contact me by telephone so we can make the necessary arrangements.

Very truly yours,

Imelda Galano

Imelda Galano
Secretary to the Board

Attachment to Notification Letter

SESA – Specialty Certification Board

Minutes of June 15, 2010 Regular Board Meeting

At its regular quarterly meeting on June 15, 2010, the Board, with all members present, considered and took action upon the following applications for certification as Residential Specialists:

* * *

Application of Enviroscan, Inc. (Application No. RS 244-06): Upon review by the Board of the Record, including all supporting documents, the Board, by unanimous vote, DENIES the application. The Record reveals customer and vendor dissatisfaction with contractor, questionable currency of training, and employee bonding issues such that the Board does not believe contractor should be allowed to represent to the consuming public that contractor has the State's approval as a Residential Specialist.

* * *

Imelda Galano

Imelda Galano, Secretary

SESA, Specialty Certification Board

ENVIROSCAN, INC.
WHEN YOUR SAFETY IS AT STAKE
17525 INDUSTRIAL WAY, BLDG. 7
DARBYVILLE, COLUMBIA 98755
TEL: (502)877-6542

July 12, 2010

Specialty Certification Board, SESA
404 State Building
P.O. Box 6523
Astoria, Columbia 98720-6523

Re: Enviroscan, Inc.
Application No. RS 244-06

Dear Secretary Galano and Members of the Board:

You have arbitrarily refused to certify my company as a Residential Specialist. I was unable to attend the Board's meeting, but if I had been there, I could have set the record straight. I hereby request that you reopen the record and allow me to appear before you to come forth with the truth in this matter.

Your investigator, Rodney Bellamy, told me about a few negative statements he got from customers and suppliers about my service and I told him they were totally off-base. He said he would hold the file open for 10 days until I could come up with evidence to disprove those lies. I told him that it would be easy for me to disprove them, but that he caught me at a particularly busy time in my business, and that I needed more than 10 days.

Denial of my certification will end up costing me a lot of lost business. What your investigator failed to put in his report is that Enviroscan is the largest single installer of residential monitoring systems in the Darbyville metropolitan area. I have been in business for over 10 years. I would have been able to present evidence that your failure to certify Enviroscan as a Residential Specialist will result in a loss of at least \$250,000 a year in current business, as well as a loss of new and existing commercial/industrial business.

If you do not reopen the record and allow me a hearing, I will sue you all the way up to the Supreme Court!

Sincerely,

Elroy Riggins

Elroy Riggins
President of Enviroscan

SESA – Specialty Certification Board
Minutes of September 10, 2010 Regular Board Meeting

At its regular quarterly meeting on September 10, 2010, the Board, with all members present, considered and took action on the following matters:

* * *

Letter from Enviroscan, Inc., dated July 12, 2010: The Board took under submission the letter from Enviroscan, Inc. dated July 12, 2010 and treated it as (1) a request for reconsideration and (2) a request to augment the record. The Board DENIED both requests.

* * *

Imelda Galano
Imelda Galano, Secretary
SESA, Specialty Certification Board



February 2011

**California
Bar
Examination**

Performance Test A

LIBRARY

ENVIROSCAN, INC. v. STRUCTURAL ENVIRONMENTAL SAFETY AGENCY

LIBRARY

Selected Columbia Codes	1	
<i>Butler v. State Pension Commission</i> (Columbia Supreme Court, 1995).....	7	
<i>Darnell v. Columbia Board of Funeral Directors</i> (Columbia Supreme Court, 2001).....	11	

Columbia Professions Code § 14700 et seq.

* * *

§ 14752. The Structural Environmental Safety Agency (“SESA”) shall establish a five-member Specialty Certification Board (“Board”) and shall implement standards and procedures for the certification of Residential Specialists. All persons certified as Residential Specialists must be SESA-licensed Environmental Abatement Contractors who, because of their superior skills and experience in installing, servicing, monitoring, and programming residential systems, shall, by reason of such certification, be authorized to hold themselves out as specialists certified by the State of Columbia. The Board shall consist of two members representing manufacturers and vendors of residential systems, two members representing SESA-licensed contractors, and one unaffiliated public member. The Board shall act upon the basis of a written evidentiary record without the requirement for a hearing. SESA shall have broad discretion in determining and applying the criteria for certification.

Columbia Code of Civil Procedure

Writs of Mandate

§ 1085 Ordinary Mandamus. A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person to compel performance of an act which the law specially imposes as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.

§ 1094.5 Administrative Mandamus.

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the

inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with the respondent's points and authorities, or may be ordered to be filed by the court.

- (b) The inquiry in such a case shall extend to whether the respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.
- (c) Where it is claimed that the findings are not supported by the evidence, in cases where the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record.

§ 1100. Evidentiary Record. In any proceeding on a writ of mandate under Columbia Code of Civil Procedure § 1085 or § 1094.5 where the court finds that there is: (a) relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was produced but improperly excluded from the record below or (b) irrelevant and unduly prejudicial evidence that was included in the record below, the court may remand the case to the inferior tribunal, corporation, board, or officer to be reconsidered in light of that evidence, or in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit or exclude the evidence at the hearing on the writ without remanding the case.

**REGULATIONS
FOR APPLICATION AND CERTIFICATION AS
RESIDENTIAL SPECIALIST**

Columbia Code of Regulations § 101.752

Preamble: The purpose of these regulations is to specify the requirements and procedures for certification by the Specialty Certification Board (“Board”) pursuant to Columbia Professions Code § 14752. The Legislature has determined that it is in the interest of the consuming public that persons who are licensed by the Structural Environmental Safety Agency (“SESA”) and who are specially skilled and qualified in the field of installing, servicing, monitoring, and programming residential environmental monitoring systems (“residential systems”) may be certified as “Residential Specialists” and may lawfully hold themselves out as specialists certified by the State of Columbia as such. Only persons who hold current and valid licenses issued by the SESA as environmental abatement contractors may apply for certification as specialists. The following procedures and requirements are designed to ensure to the maximum extent possible that only persons who meet strict standards shall be certified as Residential Specialists under Professions Code § 14752.

Section 1. Application and Qualifications

(a) Persons applying for certification as Residential Specialists shall obtain, complete, and submit the official application form issued and approved by the SESA.

(b) The contractor shall furnish complete and satisfactory evidence of the following requirements:

(1) For at least five years preceding the date of the application the contractor has been continuously engaged in the business of installing and servicing residential systems, including monitoring such systems;

(2) The contractor has received from manufacturers, suppliers, or vendors of residential systems no less than 60 hours of training in installing, servicing, monitoring, and programming such systems;

(3) A description of the systems the contractor typically handles and the services the contractor furnishes;

(4) The contractor has and can maintain an experienced staffing level adequate to service customers promptly and responsively within the geographical area in which the business is conducted.

Section 2. Representations

The contractor shall declare under penalty of perjury the following:

- (a) That, as of the date of the application, the contractor is in good standing with and current in payment to the contractor's suppliers, vendors, and employees;
- (b) That the contractor has not within the past five years been convicted of any criminal offense (not including minor traffic violations);
- (c) That no civil action filed against the contractor within the past five years for recovery of damages in any way related to the conduct of his home security contracting business resulted in a judgment for damages against the contractor; and
- (d) That the contractor has not within the past five years of the date of the application been denied certification as a Residential Specialist.

Section 3. Bond

The contractor shall furnish evidence that all employees of contractor who install, monitor, program, and service residential systems are bonded and that the contractor otherwise maintains an adequate surety bond against customer, supplier, and vendor losses incurred in the conduct of the contractor's business.

Section 4. Statement of Qualifications and Additional Evidence

The contractor shall submit with the application a written, signed statement explaining the contractor's special qualifications and may, in addition to the items required in Sections 1, 2, and 3, above, submit any and all further documentary evidence the contractor believes reflects favorably on the contractor's qualifications and skill and that will inform the Board thereof, including, without limitation, certificates of training or achievement, written statements from customers, vendors, suppliers, manufacturers, and other documentation attesting to the contractor's skill and qualifications.

Section 5. Investigation

Investigators employed by SESA will conduct an investigation of the matters set forth in the application and accompanying documents submitted by the contractor and shall prepare a written report of the results of the investigation.

Section 6. The Record

Upon completion of the investigation referred to in Section 5, the entire record shall be submitted to the Secretary of the Board to be compiled for presentation to the members of the Board for review and consideration.

Section 7. Board Meeting, Deliberation, and Decision

At the regular meetings of the Board, which shall be no less than quarterly and open to all interested parties, the Board shall review and discuss the record of each candidate presented pursuant to Section 6, above.

The Board's deliberations shall be based solely on the record before it. There shall be no evidentiary hearing or other oral presentation by the candidates under consideration or their representatives.

The Board shall, upon completion of its review and discussion of each such record, vote on whether to certify the candidate under consideration. An affirmative vote of the majority of the Board shall be required to certify any candidate for certification. In any case in which the result of the vote is that the candidate shall not be certified, the Board shall state the reasons for its decision, and the Secretary of the Board shall note said reasons in the minutes of the meeting. The decision of the Board shall be final.

Within 10 days of the Board's decision, the Board shall issue the certifications of the successful candidates and shall serve notice of the denials of certification on the unsuccessful candidates. In the case of the latter, the notice shall include a statement informing the unsuccessful candidates that the record described in Section 6, above,

and the minutes stating the reasons for the denial are available for inspection and copying by the candidates.

Butler v. State Pension Commission
Columbia Supreme Court (1995)

Professor Emeritus James Butler (“Butler”) sought a writ of mandate against the State Pension Commission (“Commission”) challenging its decision denying his request to be allowed to participate in an enhanced retirement plan. The Commission is a statewide agency of the Columbia state government that regulates and administers the retirement plans of its member entities. The Superior Court issued a peremptory writ of mandate directing the Commission to reconsider its decision. The Commission appealed.

Butler had taken an early retirement in 1990 from Maloney College, a member entity of the state retirement system, which in 1992 adopted an enhancement to the retirement plan that if applied to Butler would have increased his annuity by 15%. Butler applied to the Commission for the enhanced benefit, claiming that the terms of the plan under which he retired provided that he would automatically be eligible to receive any future enhancements; or that, at the very least, there was an ambiguity in the terms which should be resolved in his favor. His application was denied by the Commission. With his petition for mandamus, Butler lodged the record of the proceedings before the Commission and sought to introduce documentary evidence to supplement the record, i.e., evidence that he had not presented when he submitted his application to the Commission. The trial court accepted the new evidence over the Commission’s objection.

The proper method of obtaining judicial review of a public agency decision is by instituting a proceeding for a writ of mandate, or, as it is sometimes called, mandamus.¹ The statutes provide for two types of review by mandate: ordinary mandamus (Columbia Code of Civil Procedure [“C.C.P.”] § 1085) and administrative mandamus (C.C.P. § 1094.5).

¹ Although the term “writ” is of old usage, there is no mystery to it. A writ of mandate is, simply put, an order of a reviewing court commanding that an inferior tribunal or agency do or refrain from doing an act that it is either duty-bound to perform or duty-bound to refrain from performing. It is in the nature of a mandatory or prohibitory injunction.

Judicial review via administrative mandate is available only if the agency decision under scrutiny resulted from a proceeding in which by law: (1) a hearing is required to be given at the agency level, (2) evidence is required to be taken, and (3) discretion in the determination of the facts is vested in the agency. Unless all three elements are present, ordinary mandamus is the procedure for reviewing the agency decision. The retirement plan under which Butler retired, and under which he seeks to obtain the enhanced benefit, provides that all entitlement decisions are made by the Commission upon review of the application and record of the participant seeking to obtain a benefit without an evidentiary hearing. Thus, the Commission was not required to hold an evidentiary hearing and Butler's petition was necessarily one under § 1085.

The Standard of Review: There are subtle differences in the scopes of judicial review for ordinary and administrative mandate. In general, when review is sought by means of ordinary mandate under § 1085, the inquiry by the reviewing court is limited to whether the decision being challenged was “arbitrary, capricious, or entirely lacking in evidentiary support.”

When review is sought by means of administrative mandamus under § 1094.5, the standard of review is whether “substantial evidence” supports the decision.

The Commission asserts correctly that the instant case is a § 1085 petition for ordinary mandate and argues that the trial court erred in applying the substantial evidence standard of review. The Commission also argues that the trial court erred in admitting new evidence that was outside the record in the proceedings before the Commission.

In this particular case, the applicable standard of review is something of a hybrid. Although the regulations (i.e., the terms of the plan) do not provide for an administrative hearing, the plan itself provides that any reviewing court shall apply the substantial evidence standard. But for this provision in the language of the retirement plan, the court would have been limited to the “arbitrary and capricious or entirely lacking in evidence” standard. If there were any credible evidence to support the decision,

including reasonable inferences drawn from the record — even if it amounts to merely a “scintilla,” the court would have had to defer almost entirely to the agency’s expertise.

However, because of the language in the retirement plan directing a reviewing court to apply the substantial evidence standard, the court below was required to apply the substantial evidence standard in reviewing the record. The record consisted of Butler’s application for benefits, the staff’s review and recommendation, and the Commission’s minutes of its decision to deny the application. The task for the court was to determine whether there was substantial evidence in the record to support the denial; i.e., “substantial evidence” means more than a mere “scintilla” but less than the “weight of the evidence.”

Nevertheless, this expansion in the standard of review did not change the fact that the petition remains one for ordinary mandamus under § 1085. In such a case, the reviewing court does not sit as a trier of fact in a hearing *de novo*. Rather, the court’s function is to determine as a question of law whether, under the applicable standard of review (in this particular case the substantial evidence standard), there was adequate evidence to support the agency’s decision. In all cases, the court is required to indulge the rule of appellate review that the agency’s decision is entitled to deference and is imbued with a presumption of correctness, especially when the enabling legislation confers broad discretion upon the agency. With these rules in mind, we find that there was substantial evidence to support the Commission’s decision.

New Evidence: Regarding Butler’s effort to introduce evidence that he did not proffer during the agency proceedings below, case law has developed three principles relative to the rejection or admissibility of new evidence in mandamus proceedings, applicable equally in § 1085 and § 1094.5 cases: (1) if it should appear from the record that “irrelevant and unduly prejudicial” evidence had been received by the agency, the complaining party should not be foreclosed from objecting to its admission at the court hearing on the petition for mandate; (2) if the agency improperly refused to receive admissible evidence timely proffered, the litigant should not be foreclosed from offering

it at the court hearing on the petition; and (3) if a party seeks to introduce additional evidence not included in either of the foregoing categories, the court may receive it upon a showing that, exercising reasonable diligence, the petitioner could not have acquired and introduced the newly-acquired evidence at the time of the agency proceedings. (See C.C.P. § 1100.) As an additional gloss on these three principles, the courts also consider whether the practices and regulations of the agency tend to discourage or encourage the petitioner to submit all evidence available to him/her in proceedings before the agency. If the agency is receptive to the liberal presentation of evidence by the petitioner at the agency proceedings, the burden on the petitioner to make the requisite showing of a justification for the later admission of evidence not earlier proffered is greater.

Butler's additional proffer falls into the third category. Our review of the record and Butler's rationale for offering the new evidence discloses that he did not make a showing that, in the exercise of reasonable diligence, he could not have produced the documents at the agency level. It appears that the documents were readily available to him at all times but that only belatedly did he conclude they might help him advance his case. The trial court erred in admitting and considering them.

As we have noted above, terms of the retirement plan allowed the court to apply the substantial evidence standard. However, we believe the court went beyond that and determined, based on its own independent evaluation of the evidence, that the Commission erred. Our review of the record shows that there was substantial evidence to support the Commission's decision. The inquiry should have ended there. It was not appropriate for the trial court to go further and determine whether, based on its own independent review of the record, it would have decided otherwise.

Accordingly, we vacate the peremptory writ of mandate issued below and deny Butler's petition.

Darnell v. Columbia Board of Funeral Directors
Columbia Supreme Court (2001)

In this appeal from the denial of a writ of mandate by the Superior Court, we are asked to declare the law on a question of first impression: When is it, in cases arising under Columbia Code of Civil Procedure (“C.C.P.”) § 1085 and § 1094.5, that the reviewing courts are required: (1) to apply their independent judgment to the evidence in the record upon which the administrative agency relied in making its decision; and (2) to decide the writ petition upon their independent view of the weight of the evidence in the record?

The instant case arises from decisions of the State Bureau of Embalmers (“Bureau”) and its parent agency, the Columbia Board of Funeral Directors (“Board”). James Darnell, an embalmer duly licensed by the Board, had a number of complaints lodged against him for practices that allegedly exceeded the lawful and acceptable practices prescribed by the Bureau regulations. After review and investigation of the complaints, the Bureau concluded that the complaints were meritorious. Without a hearing and in accordance with Bureau regulations, it suspended Darnell’s license, the consequence of which was that he could no longer lawfully engage in the embalming business. Darnell appealed the Bureau’s decision to the Board, which, after a full evidentiary hearing required by the Board’s regulations, affirmed the Bureau’s suspension decision and revoked Darnell’s license.

Darnell filed a petition for a peremptory and alternative writ of mandate against the Bureau under C.C.P. § 1085 and against the Board under § 1094.5, in each case seeking a writ directing both agencies to vacate their decisions and reinstate his license. The trial court, reviewing the agency record under the “arbitrary and capricious” standard of review, denied the petition.

We assume for present purposes that there is nothing inconsistent in Darnell’s two claims – one for ordinary mandamus against the Bureau and the other against the

Board under § 1094.5. Ordinary mandamus under § 1085 lies to review the decision of a statewide administrative agency, such as the Bureau, which is not required to grant an evidentiary hearing before taking action, and administrative mandamus under § 1094.5 lies to review the decision of an agency, such as the Board, made after a required evidentiary hearing.

Although it may be unnecessary for Darnell to bring the claims in tandem – because a § 1094.5 petition alone, if granted against the Board, would accomplish the petitioner’s goal of reinstatement of his license – there is nothing to prohibit it. Indeed, for purposes of the present case, the presence of both types of claims helps to illustrate the similarities and differences in the judicial standards of review applicable to each type of proceeding. In both cases, irrespective of which section applies to the case under review, the ultimate question for the reviewing court is whether the agency decision was an abuse of discretion.¹

In the ordinary § 1085 case, the case law clearly is that when the agency regulations properly do not require that the agency grant an evidentiary hearing, the reviewing court is limited to examining the record of the agency’s action to determine whether the agency’s action was “arbitrary, capricious, or entirely lacking in evidentiary support.” In the § 1094.5 cases, the issue is more complicated.

Columbia Code of Civil Procedure § 1094.5(c) provides essentially that, in the usual § 1094.5 case, the court reviews the record to determine whether the agency’s findings are supported by substantial evidence, but that “in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence.” However, § 1094.5 is silent on when it is that the court is “authorized by law to exercise its independent judgment” and decide the case on the

¹ A court should not dismiss a § 1085 case merely because it is filed as a § 1094.5 petition. Rather, it should deem it filed under the appropriate section and proceed with its analysis as if the petition had been filed under the correct section.

basis of the weight of the evidence. That is the question before us, and we hold that this is such a case.

Irrespective of which of § 1085 or § 1094.5 applies, the question whether the court is authorized to exercise its independent judgment on the record as a whole depends on whether the decision affects a fundamental vested right of the individual. If the decision does affect a fundamental vested right, the court must exercise its independent judgment. There are two parts to the question: (1) is the right fundamental? and (2) is the right vested?

In determining whether the right in question is fundamental, the courts engage in a two-step analysis of the nature of the right to the individual. The first step is whether the right is a basic one which will suffer substantial interference by the action of the administrative agency if the right is abridged. Rights that bear directly on one's ability to work and make a living are *per se* fundamental. The second step is whether the fundamental right is already possessed by and vested in the individual at the time of the adverse agency action, or whether it is a right that the person is merely applying to acquire.

In the case where one is merely applying to acquire the right, since the administrative agency endowed with the power to exercise discretion must engage in the delicate task of determining whether the person applying for the right qualifies for the sought right, the courts have deferred to the administrative expertise of the agency. However, if the right has already been acquired by the individual and if the right is fundamental, the courts have held that the loss of it is sufficiently vital to the individual to compel a full and independent review of the adverse agency decision. The abrogation of such a right is too important to the individual to relegate it to exclusive administrative power of extinction.

The courts do not alone weigh the economic aspect of it, but also the effect of it in human terms and the importance of it to the individual. This approach is particularly

evident in instances such as this, where the practice of one's trade or profession is at stake. As this court held in *Markum v. State Board* (1987), "[i]t necessarily follows that the court to which the application for mandate is made to secure the restoration of a professional license must exercise its independent judgment on the facts. This protection is needed to overcome the likely prejudices of the licensing body against maverick and unconventional practitioners who are pushing the edges of the envelope." Clearly, the right to practice a trade or profession is a fundamental right.

If the individual already possesses the right by virtue of a license issued by the agency, the agency's subsequent revocation of the right calls for an independent judgment review of the facts underlying the revocation decision. If, on the other hand, the individual is merely seeking to obtain the right, the courts have largely deferred to the administrative expertise of the agency unless it lacks evidentiary support in the record. This is particularly so in instances where, as here, the agency has broad discretionary powers.

Accordingly, when a vested fundamental right is at stake, the independent judgment rule applies in both § 1085 and § 1094.5 proceedings. In other words, irrespective of which section the writ petition is brought under, if a vested fundamental right is at stake, the reviewing court must apply its independent judgment to the facts in the record as a whole.

A further and concomitant consequence of the requirement that the court exercise its independent judgment is that the court's inquiry then shifts from the "arbitrary and capricious" standard (usually applicable in a § 1085 petition) and the "substantial evidence" standard (usually applicable in a § 1094.5 petition) to the weight of the evidence standard, i.e., whether in either case the agency decision was supported by the weight of the evidence. Essentially, then, the court conducts something of a trial *de novo*, determines as a trier of fact, based on its independent review of the agency record, where the weight of the evidence lies and decides the case as if of first impression.

The revocation of Darnell's license involved a vested fundamental right. The Superior Court erred in failing to apply the independent judgment/weight of the evidence standard of review.

Accordingly, we reverse and remand for further proceedings consistent with this decision.

FEBRUARY 2011
ESSAY QUESTIONS 4, 5 AND 6



California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead,

try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 4

Gayle is 16 years old and attends high school in School District.

One day, Gayle's teacher was relaxing in the teacher's lounge during the first ten minutes of class time, as he usually did, leaving the students unsupervised. School District had long been aware of the teacher's practice, but had done nothing about it.

That day, in the teacher's absence, Gayle walked out of class and out of school. She got into her car and drove to the house of an adult friend, Frances. Gayle had promised Frances that, for \$10, she would help her move some paintings.

Arriving at Frances' house, Gayle carelessly parked her car several feet from the curb and entered the house. She came out later, carrying paintings to her car. In a patrol vehicle, Paula, a police officer, spotted Gayle's car. Frances caught sight of the patrol vehicle and told Gayle, "Quick, move your car to the curb."

Gayle jumped into her car just as Paula was walking towards it. Suddenly, without looking, Gayle swung her car toward the curb, hitting and severely injuring Paula.

After Paula was transported to a hospital, she was visited by her husband, Harry. Shocked at Paula's condition, Harry collapsed and suffered a broken arm in the fall.

1. Under what theory or theories, if any, might Paula bring an action for damages against (a) Gayle, (b) Frances, and (c) School District, and how is she likely to fare? Discuss.
2. Under what theory or theories, if any, might Harry bring an action for damages against any defendant, and how is he likely to fare? Discuss.

Question 5

Bob owns 51 percent of the shares of Corp., a California corporation. Cate owns 30 percent. Others own the remaining shares.

Bob and Cate have entered into a shareholder agreement stating they would vote their shares together on all matters, and that, if they fail to agree, Dave will arbitrate their dispute and Dave's decision will be binding. Bob and Cate also executed perpetual irrevocable proxies granting Dave the power to vote their shares in accordance with the terms of the shareholder agreement. Attorney Al handled Corp.'s incorporation and drafted the shareholder agreement and the proxies.

Bob and Cate have been able to elect the entire board of directors every year. The board currently consists of Bob, Cate, and Bob's wife, Wanda. Bob and Wanda decided, as directors, to sell substantially all of Corp.'s assets to Bob's sister, Sally. Cate thinks the price is too low. Bob claims he no longer regards their shareholder agreement as binding. He has gone to Al for advice in the matter, and Al has agreed to provide it.

At the shareholders' meeting at which the matter is to be put to a vote, Bob announces he is voting his shares in favor of the sale. Dave says that since Bob and Cate disagree, he is voting the shares against the sale.

1. Is the shareholder agreement between Bob and Cate enforceable? Discuss.
2. Are the perpetual proxies executed by Bob and Cate enforceable? Discuss.
3. Would any sale of Corp.'s assets to Sally be voidable? Discuss.
4. What ethical violations, if any, has Al committed? Discuss. Answer according to California and ABA authorities.

Question 6

Green's Grocery Outlet ("Green's") sponsors a lawful weekly lottery. For one dollar, a player picks six numbers. All persons who select the six winning numbers drawn at random share equally in the prize pool.

Each week, for the past two years, Andrew has played the same numbers—3, 8, 10, 12, 13, and 23—which represent the birth dates of his children.

On June 1, Andrew purchased his weekly lottery ticket. Barney, a clerk employed by Green's, asked, "The usual numbers, Andrew?" Andrew replied, "Of course."

Barney entered the numbers on the computer that generates the lottery ticket and gave the ticket to Andrew. Without examining the ticket, Andrew placed it in his pocket. Unbeknownst to either Andrew or Barney, Barney had accidentally entered the number "7" on the computer rather than the number "8."

The winning lottery numbers that week were Andrew's "usual" numbers. Much to his horror, Andrew discovered Barney's error when he showed his wife the "winning" ticket. Andrew filed suit against Green's seeking to reform his lottery ticket by changing the "7" to an "8." Green's cross-complained seeking rescission.

1. At trial, Green's objects to Andrew's testimony about (a) Barney's question, (b) Andrew's answer, and (c) Andrew's attempt to explain what the phrase "the usual numbers" means. Should the court admit the testimony? Discuss. Answer according to California law.

2. How should the court rule on each party's claim for relief? Discuss.



February 2011

**California
Bar
Examination**

Performance Test B

INSTRUCTIONS AND FILE

IN RE SANTOS

Instructions..... i

FILE

Memorandum from Raymond Brescia to Applicant..... 1

Memorandum from Gregory Mandel Regarding Persuasive Briefs and Memoranda 2

Transcript of Immigration Hearing Before Immigration Judge Harriet Stoneman..... 4

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Transcript of Oral Opinion of Immigration Judge Harriet Stoneman
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IN RE SANTOS

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Brescia & Kahler

Attorneys-at-Law
12 Manning Blvd.
Avrill Park, Columbia

Date: February 24, 2011
To: Applicant
From: Raymond Brescia
Re: In re Maria Santos

This firm represents individuals seeking asylum in the United States. Maria Santos seeks review by the Board of Immigration Appeals (“BIA”) of the immigration judge’s (“IJ”) decision denying her application for asylum. Our position on appeal is that she has established her eligibility for asylum because her testimony and documentary evidence support her position that she has suffered and would continue to suffer persecution in Colombia on account of her political opinion.

Please draft a persuasive memorandum of points and authorities that argues that the IJ’s decision should be reversed. The regulations provide the framework for the issues that have to be addressed on appeal. In your memorandum, be sure to address each of the regulatory requirements for establishing the right to asylum, show how the available facts support our client’s position, indicate how the IJ erred, and show why the BIA should reverse.

Brescia & Kahler

Attorneys-at-Law
12 Manning Blvd.
Avrill Park, Columbia

DATE: August 21, 2009
TO: Attorneys
FROM: Gregory Mandel
RE: Persuasive Briefs and Memoranda

The law in our field of practice, representing individuals seeking asylum in the U.S., is heavily laden with detailed statutes and regulations that set forth the elements of the analytical framework for arguing a case. In writing briefs and memoranda of points and authorities, it is particularly important to carefully parse the statutes and regulations into their components and apply the facts to each of them.

As usual, the brief should contain a very short statement of facts, carefully selecting the facts that are pertinent to our case. The object is to highlight the facts that support our client, not simply to regurgitate all the known facts.

Following the Statement of Facts, the Argument should begin. This office follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, Improper: THE APPLICANT WAS PERSECUTED IN HER HOME COUNTRY. Proper: THE APPLICANT SUFFERED PERSECUTION BY THE GOVERNMENT BECAUSE OF HER FREQUENT STATEMENTS CRITICIZING THE GOVERNMENT'S LAND REFORM POLICY.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should

generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs. Attorneys should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

1 **TRANSCRIPT OF IMMIGRATION HEARING BEFORE IMMIGRATION JUDGE**

2 **HARRIET STONEMAN**

3 February 18, 2011

4
5 **Direct Examination of Maria Santos**

6
7 **Q [By Mr. Raymond Brescia]:** Would you state your name for the record?

8 **A [By Ms. Maria Santos]:** Maria Santos.

9 **Q:** Where do you live?

10 **A:** 8897 India Road, Avrill Park.

11 **Q:** Where were you born?

12 **A:** I am a native and citizen of Colombia.

13 **Q:** When did you most recently come to the United States?

14 **A:** I was admitted to the United States on August 29, 2007, as a nonimmigrant
15 B-2 visitor. I was authorized to stay until February 28, 2008.

16 **Q:** Obviously you did not leave.

17 **A:** No, on June 29, 2008, I filed this application for asylum.

18 **Q:** Why are you seeking asylum?

19 **A:** I was politically persecuted by the Revolutionary Armed Forces of Colombia.

20 **Q:** Is that the group referred to as the FARC?

21 **A:** Yes.

22 **Q:** Are you a member of a political party?

23 **A:** I have been an active member of the Colombian Liberal Party and various
24 other political and social groups for my entire adult life. I was formerly married to
25 the Colombian ambassador to Peru and often met with Colombian political
26 leaders in Bogotá.

27 **Q:** When did this persecution begin?

28 **A:** In 2000, while studying law, I joined the New Democratic Force, a group
29 devoted to advancing democratic government in Colombia.

30 **Q:** What types of activities did you engage in for this group?

1 **A:** I traveled to Mosquera, a town on the outskirts of Bogotá, to speak with
2 teenagers in support of the democratic leadership of Colombia and against
3 joining rebel groups such as FARC.

4 **Q:** Anything else?

5 **A:** I also raised funds on behalf of impoverished people in Mosquera and
6 assisted in efforts to construct new schools there.

7 **Q:** Did you belong to any other groups?

8 **A:** In 2004, after completing my law degree, I founded Ayuda Con Amor, which is
9 Help With Love, in English. It is an organization that raised money to assist the
10 poor in Mosquera and other municipalities surrounding Bogotá.

11 **Q:** Did you engage in any other activities?

12 **A:** By 2005, I was regularly holding meetings with citizens of Mosquera to
13 discuss local political affairs. I also campaigned for the reelection of the mayor of
14 Mosquera, who opposed FARC's presence in the region. It is these activities that
15 made me a political target of FARC.

16 **Q:** What do you mean?

17 **A:** Soon after I began traveling to Mosquera to hold meetings, I started receiving
18 threats by mail and telephone, warning me that FARC would retaliate if I did not
19 end my political activities.

20 **Q:** Did FARC ever confront you in person?

21 **A:** In November of 2005, I had my first face-to-face encounter with FARC rebels.
22 I was driving away from my home in Bogotá and three men dressed in
23 camouflage and wearing FARC bracelets stopped my car.

24 **Q:** What happened?

25 **A:** The men surrounded my vehicle. One of them forced me out of my car by my
26 hair. He threw me face-first onto the ground, and jammed his foot into my back.

27 **Q:** Do you know who this person was?

28 **A:** He identified himself as Commander Julian from the Fifth Front of the FARC.

29 **Q:** Did he say anything?

1 **A:** He called me foul names because of my work in support of the Colombian
2 government. He said I was an “enemy of the people,” warned me that I would be
3 killed if I was caught again in Mosquera.

4 **Q:** Then what happened?

5 **A:** They left and I was taken to the hospital and treated for wounds to my face
6 and back.

7 **Q:** Did you do anything else as a result of this confrontation?

8 **A:** I moved to my parents’ farm outside of Bogotá for a time and had a bulletproof
9 door installed in my apartment in Bogotá.

10 **Q:** Let me show you what has been marked as Petitioner’s Exhibits 1 and 2. Do
11 you recognize them?

12 **A:** Exhibit 1 is the bill from the emergency room where I was treated after the
13 confrontation. Exhibit 2 is a receipt for the purchase and installation of the
14 bulletproof door.

15 **Q:** Did you stop traveling to Mosquera?

16 **A:** No, but I tried to be less visible. For example, I used several different vehicles
17 for transportation and often refrained from speaking publicly.

18 **Q:** Were there any other threats?

19 **A:** Yes, I received several phone threats at my parents' farm. In July of 2006, I
20 returned to Bogotá to find red graffiti reading “Death to Help With Love” painted
21 on my apartment door. The next time I went to Mosquera, I found similar graffiti
22 threatening the organization I founded painted on the main square.

23 **Q:** How did these things make you feel?

24 **A:** I was very anxious. I was afraid the FARC rebels would carry out their threats.

25 **Q:** How did you deal with your anxiety and fear?

26 **A:** I visited a psychiatrist for two months, and in the two months that followed, I
27 left Colombia on at least three occasions to evade detection by FARC rebels,
28 and in part, I guess, to relieve the increasing stresses of my Colombian life.

29 **Q:** Where did you go?

30 **A:** I traveled to the United States once in August of 2006 and twice in September
31 of 2006.

1 **Q:** But you went back to Colombia?

2 **A:** Yes, despite the threats I was determined to continue my political and
3 philanthropic activities.

4 **Q:** Did the threats resume?

5 **A:** Yes. On December 1, 2006, several FARC members showed up at the farm
6 looking for me. I was not there, but the groundskeeper and long-time family
7 friend, Mario, was there alone with his son. They demanded to know where I
8 was.

9 **Q:** Did Mario tell them?

10 **A:** No. Mario resisted and the men began torturing him. When Mario continued to
11 refuse to disclose my location, the men shot Mario to death in the presence of his
12 son.

13 **Q:** What happened next?

14 **A:** As the result of Mario's killing, I again sought psychiatric help. My family
15 encouraged me to leave Colombia.

16 **Q:** Did you leave?

17 **A:** No. I attempted to change my appearance by cutting my hair and dyeing it
18 black and resolved to continue my work in Mosquera.

19 **Q:** Did this work?

20 **A:** No. On December 10, 2006, I quietly planned to make a trip to Mosquera with
21 several members of Help With Love to deliver grants to several children in
22 Mosquera. I told no one of our plans. On the way to the meeting, the bus I was
23 riding stopped at a grocery store where I knew the owner.

24 **Q:** What happened?

25 **A:** I entered the store and found the owner unusually quiet, but nervously
26 attempting to communicate something to me. At that point, a man who had been
27 loitering in the store stepped up and shot the store owner. Then about nine other
28 men appeared. They identified themselves as members of FARC and read aloud
29 a list of four wanted individuals, including me.

30 **Q:** Then what happened?

1 **A:** One of them said to me, “We've told you not to show yourself again, you
2 bourgeois witch.” The men then took me into the back, forced me onto the
3 ground, and began beating me with the butts of their guns.

4 **Q:** And then?

5 **A:** Eventually, the men loaded me into a van. One told me that they were going
6 to a camp in the mountains, where I would first meet the local FARC commander
7 and then be killed.

8 **Q:** Did you reach this camp?

9 **A:** No. After the van traveled about two miles, I heard gunshots, and the van
10 stopped. The FARC men left the van and engaged in a gunfight with the
11 Colombian military. One Colombian soldier ran up to the van and freed me. I was
12 eventually airlifted out by helicopter to a hospital in Bogotá and treated for trauma
13 and wounds to my face and thorax.

14 **Q:** Let me show you what has been marked as Petitioner’s Exhibit 3. Do you
15 recognize it?

16 **A:** Exhibit 3 is the bill from the emergency room where I was treated after being
17 rescued.

18 **Q:** What did you do after this?

19 **A:** My anxiety grew worse, so in March of 2007, I left Colombia to spend some
20 time in the United States, but returned to Colombia and stayed for several more
21 months. I continued to receive threatening phone calls.

22 **Q:** Did you ever report any of this to the police?

23 **A:** On August 1, 2007, I reported everything to the police.

24 **Q:** Why did you wait so long?

25 **A:** I decided not to report anything to the police on an earlier occasion
26 because I feared that it would lead to more retaliation.

27 **Q:** So, how long after did you stay in Colombia?

28 **A:** At the strong encouragement of my family, I fled to the United States on
29 August 29, 2007. But FARC continues to look for me. While my mother lay sick in
30 the hospital for an extended time, a FARC rebel telephoned my mother's doctor
31 to determine whether I had visited her.

1 **Q:** Do you wish to go back to Colombia?

2 **A:** It is my most treasured hope to return to Colombia--particularly to be with my
3 mother. But my fear of being killed by FARC has caused me to remain in the
4 United States.

5 **Q:** Thank you. We submit Petitioner's Exhibits 1, 2, and 3 as part of the record.
6

7 **Cross-Examination**

8 **Q [By Mr. Paul Finkelman]:** Just so I understand, during the time period
9 described in your testimony, you left Colombia a total of 5 times, correct?

10 **A: [By Santos]:** Yes.

11 **Q:** Four of those trips were to the United States, correct?

12 **A:** Yes.

13 **Q:** One trip was to the Dominican Republic?

14 **A:** Yes.

15 **Q:** On the trip to the Dominican Republic, you stayed at a resort on the beach?

16 **A:** Yes.

17 **Q:** You don't have family in the Dominican Republic, do you?

18 **A:** No.

19 **Q:** This was a vacation, correct?

20 **A:** As I said, I was under great stress. I needed to get away.

21 **Q:** Despite everything you claim occurred, you returned to Colombia after each of
22 these trips?

23 **A:** All but the last.

24 **Q:** FARC has never threatened your mother, has it?

25 **A:** No.

26 **Q:** She has never been tortured or threatened for failing to reveal your
27 whereabouts, has she?

28 **A:** No.

29 **Q:** You consider yourself a philanthropist, correct?

30 **A:** Yes.

31 **Q:** You raised money to assist the poor?

1 **A:** Yes.

2 **Q:** You bought food?

3 **A:** Yes.

4 **Q:** Clothing?

5 **A:** Yes.

6 **Q:** That was because you cared about the poor?

7 **A:** Of course.

8 **Q:** Your concern is not about the politics the poor may have, it's about being
9 hungry?

10 **A:** Yes.

11 **Q:** I assume, just as in the United States, the need to do that work is an
12 embarrassment to people, whether they are the government or other people in
13 power?

14 **A:** It is just reality.

15 **Q:** Thank you. No further questions. We submit the Government's Exhibit A, the
16 State Department's Colombia Country Reports on Human Rights Practices as
17 part of the record as evidence of, among other things, the improving condition of
18 the political turmoil in Colombia.

Country Reports on Human Rights Practices - 2007
Released by the Bureau of Democracy, Human Rights, and Labor
March 11, 2008

Colombia is a constitutional, multiparty democracy with a population of approximately 44.8 million. In May 2006 independent presidential candidate Alvaro Uribe was reelected in elections that were considered generally free and fair. The 43-year internal armed conflict continued between the government and terrorist organizations, particularly the Revolutionary Armed Forces of Colombia ("FARC"). While civilian authorities generally maintained effective control of the security forces, there were instances in which elements of the security forces acted in violation of state policy.

The FARC committed the following human rights abuses: political killings; killings of off-duty members of the public security forces and local officials; kidnappings and forced disappearances; massive forced displacements; subornation and intimidation of judges, prosecutors, and witnesses; infringement on citizens' privacy rights; restrictions on freedom of movement; widespread recruitment of child soldiers; attacks against human rights activists; and harassment, intimidation, and killings of teachers and trade unionists.

RESPECT FOR HUMAN RIGHTS

Section 1: Respect for the Integrity of the Person, Including Freedom From:

a. Arbitrary or Unlawful Deprivation of Life

Political and unlawful killings remained an extremely serious problem, and there were periodic reports that members of the security forces committed extrajudicial killings during the internal armed conflict.

Guerrillas, notably the FARC, committed unlawful killings. The Jesuit-founded Center for Popular Research and Education, a local human rights

nongovernmental organization, claimed there were at least 238 political and unlawful killings, committed by all actors, during the first six months of the year, 77 more than reported in the same period in 2006.

Some members of government security forces, including enlisted personnel, noncommissioned officers, and senior officials, in violation of orders from the president and the military high command, collaborated with or tolerated the activities of new illegal groups or paramilitary members who refused to demobilize. Such collaboration often facilitated unlawful killings and may have involved direct participation in paramilitary atrocities. Some reports suggested that tacit nonaggression pacts between local military officers and paramilitaries, who refused to demobilize, or new illegal groups existed in certain regions. Reports also indicated that members of the security forces assisted, or sought the assistance of, criminal groups. Impunity for these military personnel remained a problem.

b. Disappearance

Although kidnapping, both for ransom and for political reasons, continued to diminish it remained a serious problem. According to the Presidential Program for Human Rights, there were 289 kidnappings during the first eight months of the year, compared with 476 in the same period in 2006.

c. Use of Excessive Force and Other Abuses in Internal Conflicts

The country's 43-year-long internal armed conflict, involving government forces ... terrorist groups, and new illegal groups continued. The conflict and narcotics trafficking, which both fueled and prospered from the conflict, were the central causes of multiple violations of human rights.

FARC guerrillas killed journalists, religious leaders, candidates for public office, local elected officials and politicians, alleged paramilitary collaborators, and members of government security forces.

The FARC also killed persons it suspected of collaborating with government authorities or paramilitary groups. According to the government's tracking system, the FARC killed 130 demobilized paramilitaries during the year.

FARC continued to take hostages for ransom. The FARC also kidnapped politicians, prominent citizens, and members of the security forces to use as pawns in a prisoner exchange. The National Indigenous Organization stated that through July the FARC kidnapped 12 indigenous persons.

Section 2: Respect for Civil Liberties, Including:

a. Freedom of Movement, Internally Displaced Persons, Protection of Refugees, and Stateless Persons

The law provides for freedom of movement within the country, and while the government generally respected these rights in practice, there were exceptions. Military operations and occupation of certain rural areas restricted freedom of movement in conflict areas. Enhanced government security presence along major highways reduced the number of kidnappings.

The internal armed conflict was the major cause of internal displacement. In the first nine months of the year, the government's internal welfare and foreign coordination agency registered 140,183 newly displaced persons, compared with 110,302 during 2006.

* * *

1 Even assuming she fears persecution, however, as with her claim of past
2 persecution, she has failed to establish that such fear flows from one of the five
3 enumerated categories as opposed to her charitable work that embarrasses
4 whoever is in power. The application for asylum is therefore DENIED.



February 2011

**California
Bar
Examination**

Performance Test B

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Immigration and Naturalization Act
8 United States Code

§ 1101. Definitions

(a) (42) The term “refugee” means (A) any person who is outside any country of such person's nationality ... 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....

* * *

§ 1158. Asylum

....

(b) Conditions for granting asylum.

(1) In general.

(A)

(B) Burden of proof.

(i) In general. The burden of proof is on the applicant to establish that the applicant is a refugee.... To establish that the applicant is a refugee ... the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was, or will be, at least one central reason for persecuting the applicant.

(ii) Sustaining burden. The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden,

the trier of fact may weigh the credible testimony along with other evidence of record....

(iii) Credibility determination. Considering the totality of the circumstances, and all relevant factors, there is no presumption of credibility; however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

Code of Federal Regulations
8 C.F.R. § 208

§ 208.13 Establishing asylum eligibility.

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in the Immigration and Naturalization Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

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

(i) Discretionary referral or denial. Except as provided in paragraph (b)(2)(iii) of this section, an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality on account of

race, religion, nationality, membership in a particular social group, or political opinion; or

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

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

(2) Well-founded fear of persecution.

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

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

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

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of that country because of such fear.

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

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, an immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

(3) Reasonableness of internal relocation. For purposes of determinations under this section, immigration judges should consider whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.

Rodriguez v. U.S. Attorney General
United States Court of Appeals, 15th Circuit (2007)

Jesus Julio Rodriguez seeks review of the Board of Immigration Appeals' ("BIA") affirmance of the immigration judge's ("IJ") decision denying his applications for asylum. Rodriguez argues on appeal that he established his eligibility for asylum through his testimony and documentary support that he suffered persecution in Colombia on account of his political opinion.

Rodriguez, a native and citizen of Colombia, entered the United States on February 14, 2002 as a nonimmigrant visitor with authorization to remain until August 13, 2002. Rodriguez remained past his authorized date and the former Immigration and Naturalization Service ("INS")¹ issued him a notice to appear pursuant to the Immigration and Naturalization Act (INA) § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B). In February 2003, Rodriguez filed an application for asylum.

At Rodriguez's hearing before the IJ, he testified that he was a member of the Colombian liberal party and supported the campaign of Noemi Sanin for President. As part of his membership, Rodriguez passed out fliers and drove his car with mounted loudspeakers on top of it. Rodriguez stated that his problems in Colombia and with the Revolutionary Armed Forces of Colombia ("FARC") began in 1998 when the FARC came to his farm and requested an 80 million pesos war tax, which Rodriguez never paid. Rodriguez reported the incident to the police, who instructed him to install telephones at his farm and city apartment.

Rodriguez further testified that, in January 2001, members of the FARC came to his shop and asked him to hide boxes for them in his shop. Rodriguez declined to store the boxes. Thereafter, Rodriguez began receiving threatening phone calls

¹ The INS was abolished on March 1, 2003, and replaced with the Department of Homeland Security ("DHS"). This case, however, was initiated while the INS was still in existence. Therefore, we refer to the INS rather than the DHS as the relevant agency.

from the FARC, in which the FARC told Rodriguez that he was not cooperating with them, that he was their enemy and a war objector, and that he would be killed because he had warned the police. Rodriguez testified that he received approximately two or three calls per day from January until May or June 2001. In May 2001, members of the FARC followed him in his car and caused him to drive into a pothole and flip his car over. Thereafter, Rodriguez left for the United States, but returned to Colombia in December 2001 because he thought the situation had calmed. In January 2002, members of the FARC again followed Rodriguez in his car. Rodriguez believed that the people following him wanted to kill him because he never cooperated with them. Rodriguez also stated that he came to the United States, rather than moving to another Colombian city, because a move to another city would have been difficult for him as he did not know anyone in another city.

On cross-examination, Rodriguez testified that his move to the United States was easier because he has family here. He further stated that his wife and children remain in Colombia and they have not experienced any problems since he left. With regard to the 80 million pesos war tax that the FARC requested, Rodriguez stated that the FARC demanded a war tax from “everybody.”

The IJ denied Rodriguez's application for asylum and ordered Rodriguez removed to Colombia. In an oral decision, the IJ found that Rodriguez's testimony was “vague, general, and lacked specific detail.” The IJ noted that Rodriguez did not indicate where or how often he participated in activities in support of Sanin's campaign or any other political activities, or whether he held any positions with the Liberal Party, of which he claimed he was a member. The IJ further found that Rodriguez did not provide details regarding the incident where the FARC stopped him on the road in 1998 and requested the war tax, specifically, whether Rodriguez was stopped in a roadblock along with other people or whether he had been singled out by the FARC. The IJ also found that Rodriguez provided few details of the incident concerning the storage of the

FARC's boxes or the two instances where Rodriguez was followed by FARC members in an automobile.

As to Rodriguez's assertion that the FARC asked him and everyone else in his area to pay the war tax, the IJ found that nothing in the record indicated that the FARC's demand was tied to any of the five enumerated categories of eligibility for asylum. The IJ made the same finding with regard to the FARC's demand for Rodriguez to store their boxes in his shop. The IJ also noted that Rodriguez's wife and children remained in Colombia without incident since he came to the United States, and that Rodriguez did not attempt to relocate within Colombia because he did not know anyone in any other location. The IJ thus concluded that Rodriguez failed to establish that he had a well-founded fear of persecution in Colombia on account of one of the five enumerated factors for asylum.

To establish eligibility for asylum, the petitioner has the burden of proving that he is a "refugee." If the petitioner establishes past persecution, there is a rebuttable presumption that the petitioner has a well-founded fear of future persecution. However, where the petitioner cannot demonstrate past persecution, he may establish a well-founded fear of future persecution by showing that his fear of persecution is subjectively genuine and objectively reasonable. The subjective component is generally satisfied by the applicant's credible testimony that he or she genuinely fears persecution.

The objective component of an asylum applicant's well-founded fear of persecution does not require proof that persecution is more likely than not; even a one in ten chance of persecution may establish a well-founded fear. Indeed, so long as an objective situation is established by the evidence it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.

However, the petitioner's past persecution or well-founded fear of future persecution must be on account of a protected activity. In order to demonstrate a sufficient connection between future persecution and the protected activity, an alien is required to present specific, detailed facts showing a good reason to fear that he or she will be singled out for persecution on account of such a protected activity. Specifically, it must be established that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment; (2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

The IJ's finding that Rodriguez did not suffer past persecution or have a well-founded fear of future persecution on account of his political opinion is supported by substantial evidence in the record. Rodriguez testified that: (1) he participated in the Liberal Party and supported Noemi Sanin for president; (2) members of the FARC demanded that he pay a war tax, which tax Rodriguez acknowledged that the FARC requested from everyone; (3) he sought help from the police after the FARC demanded the tax and the police helped him by instructing him to install a telephone; (4) members of the FARC demanded that Rodriguez store their boxes in his shop and Rodriguez refused; (5) thereafter, he received numerous threatening phone calls from the FARC; and (6) during two separate occasions, people whom Rodriguez believed to be members of the FARC followed him in his car and once caused him to crash.

Similarly, the evidence in the record does not compel the finding that Rodriguez had a well-founded fear of future persecution on account of his political opinion. Rodriguez's testimony did not establish a sufficient connection between his political opinion and his fear that he would suffer future persecution because of that opinion. Moreover, Rodriguez acknowledged that his wife and children still live in Colombia without incident and that he did not attempt to relocate within

Colombia. It is not unreasonable to require a refugee who has an internal resettlement alternative in his own country to pursue that option before seeking permanent resettlement in the United States, or at least to establish that such an option is unavailable.

The petition for review is denied.

Mazariegos v. U.S. Attorney General
United States Court of Appeals, 15th Circuit (2001)

This is a petition for review of a decision by the Board of Immigration Appeals (“BIA”) of the Immigration and Naturalization Service (“INS”) denying an application for asylum. Mazariegos is a Guatemalan citizen who entered the United States on November 29, 1994 without formal admission or parole. On April 18, 1997, Mazariegos applied to the INS for asylum, asserting that if he were returned to Guatemala he would be persecuted by guerrillas retaliating against him for his service in the Guatemalan army.

Before an Immigration Judge (“IJ”), Mazariegos testified that he served in the Guatemalan Armed Forces between 1989 and 1992 as a “soldier first class.” During his service, he was in combat against guerrilla forces fighting the Guatemalan government as part of that country's 36-year civil war. He testified that a month after his discharge “about six” men recognized to be guerrillas from a group called Unidad Revolucionario Nacional Guatemala (“URNG”) forced entry into his parents' home in a rural area of Guatemala at a time when he was alone. The guerrillas were dressed in green uniforms and carried weapons. The men beat him, causing a laceration to his head requiring eleven stitches as well as a broken nose and fractures to both kneecaps. He said that the guerrillas told him that he “had to leave, and they would give me an opportunity to leave within a year and a half. If I didn't do that they would not only kill me but they would kill my parents also.” Mazariegos also said that the guerrillas told him they were attacking him because he “had been involved in military service.” When asked by counsel why the guerrillas might have singled him out, Mazariegos said that he, presumably unlike others, “followed the orders that I was given by the officers in my zone.”

Mazariegos said that he did not report this incident to the police. Instead, he reported it to his former military commanders who, according to Mazariegos, told

him that they could not protect him because he was no longer in the commanders' zone. Mazariegos said that some six months after the incident the guerrillas again came to his parents' house looking for him. It appears that the guerrillas may have threatened him or his parents on one or more occasions.

Despite these threats, Mazariegos did not leave the area where the incident occurred. Instead, he was able to avoid any further direct contact with the guerrillas by alternately staying at a friend's house and staying with his family. Mazariegos testified that he believed the guerrillas would seek him out and kill him were he to return to Guatemala. When asked why he never tried to relocate to a city or even another rural area in Guatemala, Mazariegos replied: "Well, it's that they, one way or another, are going to seek you out and find where you happen to be."

A February 1997 U.S. State Department report on human rights conditions in Guatemala during 1996, which was introduced into the administrative record, advised that "[p]eace talks between the Government and [URNG] resulted in a negotiated end of the 36-year-long civil war, with a final peace accord signed in December." Notwithstanding the report, Mazariegos testified that he believed the peace accord was not for the group with which he had problems.

The IJ denied Mazariegos's requests for asylum. The IJ found that Mazariegos failed to establish that he was a "refugee" within the meaning of the Immigration and Naturalization Act ("INA"). Specifically, the IJ found that Mazariegos "really has not provided his native country an opportunity to protect him from this group." The IJ noted that Mazariegos failed to report his assault to the police, and did not attempt to relocate to a more urban area "where he could seek the protection of the police." Thus, the IJ concluded that Mazariegos had failed to establish a well-founded fear of persecution because he offered "no evidence to indicate that the threat in this particular case exists against him countrywide other than his own statements." The IJ added that "[i]n light of [Mazariegos's] low-level role in the

army the Court finds that it's not plausible to believe that the threat exists against him on a countrywide basis in Guatemala.” The IJ also highlighted the State Department report, observing that it indicated a “final peace accord” in Guatemala as of December 1996 and hence “there is little likelihood of [Mazariegos] facing persecution if he were to return” to Guatemala.

Mazariegos appealed the denial of his asylum request to the BIA. The BIA review of the IJ decision is *de novo*. The appropriate standard of review for this court is different but also well-settled: the BIA's factual determination that Mazariegos is not entitled to asylum must be upheld if it is supported by substantial evidence. We have described the substantial evidence test as deferential, and have emphasized we may not re-weigh the evidence from scratch. Thus, a denial of asylum may be reversed only if the evidence presented by the applicant is so powerful that a reasonable fact finder would have to conclude that the requisite fear of persecution exists.

The issue on appeal is whether the BIA erred by denying Mazariegos's requests for asylum. Mazariegos argues in essence that there is no substantial evidence for the BIA's finding that his persecution was not “on account of” his political opinion. On the record of the present case, we conclude that the BIA did not err by interpreting the INA and the regulations to require that Mazariegos, an alien seeking asylum on the basis of non-governmental persecution, face a threat of persecution country-wide. The statute itself and the regulations speak consistently in terms of the geopolitical unit “country.” Moreover, where the alleged persecutors are not affiliated with the government, it is not unreasonable to require a refugee who has an internal resettlement alternative in his own country to pursue that option before seeking permanent resettlement in the United States or at least to establish that such an option is unavailable.

There is ample evidence supporting the conclusion that the threat of persecution to Mazariegos is limited to one area of Guatemala, if it still exists anywhere in the

country. First, Mazariegos has never had any direct contact with the guerrillas except for the single incident that occurred in his parents' home — an incident that occurred over eight years ago. Second, Mazariegos lived unharmed for over two-and-one-half years in the specific area where the incident occurred, without any further contact with the guerrillas. Third, Mazariegos was a fairly low-level soldier who does not appear to have played any especially notorious role in the war. We cannot say on this record that he is a high-profile target, or that guerrillas outside the vicinity of his home are likely to identify and pursue him. Fourth, Mazariegos himself testified that his father told him that the bulk of the guerrillas' strength was actually outside Guatemala, in the Chiapas region of Mexico. Fifth, Mazariegos has never contacted the local police or national law enforcement authorities to obtain protection from the guerrillas, and therefore cannot argue persuasively that the Guatemalan government is unable or unwilling to protect him. Finally, according to the U.S. State Department, the civil war has long since been resolved, and the Guatemalan government signed a peace accord in 1996 (after Mazariegos fled the country) with the specific rebel group that Mazariegos says attacked him in 1992.

Petition for review denied.