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Economic Mistreatment as Persecution in Asylum Claims: Towards a Consistent Standard

Jonathan L. Falkler†

Under section 208(b) of the Immigration and Nationality Act ("INA"), the Attorney General or Secretary of Homeland Security may grant asylum to an alien determined to be a refugee. The INA defines a refugee as a person who is unable or unwilling to return to his country of origin "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." Courts have applied inconsistent standards for determining what level of mistreatment qualifies as persecution, and this inconsistency is best illustrated by examining how they have handled claims based on economic hardship.

The imposition of extreme economic hardship has been recognized as "a form of persecution and independent ground for asylum." Courts have endorsed three basic standards to determine when economic mistreatment rises to the level of persecution. The first standard was developed under a prior version of the INA, and it requires that economic mistreatment be "so se-
vere as to deprive a person of all means of earning a livelihood."\(^4\) A subsequent modification to the INA resulted in a second standard requiring that an applicant demonstrate "a probability of deliberate imposition of substantial economic disadvantage" based on one of the protected grounds enumerated in the statute.\(^5\) The third standard employed by courts requires that applicants demonstrate "economic restrictions so severe that they constitute a threat to an individual's life or freedom."\(^6\)

It is essential to establish a single standard for evaluating economic mistreatment claims so that similarly situated aliens are treated alike.\(^7\) This Comment will review the various standards in light of the text and purpose of the INA. Part I provides an overview of the law relating to asylum claims and outlines the development of the three major standards for establishing persecution in claims based on economic mistreatment. Part II considers whether these standards are consistent with the legislative purpose of the INA's asylum provision. This includes an analysis of the text and structure of the INA, as well as a discussion of relevant legislative history. In Part II, the Comment contrasts the standard for establishing "persecution" under section 208(b) with the threat to "life or freedom" standard required for withholding of removal under section 241(b)(3)(A).\(^8\) Determining that there is no basis for equating the two, the Comment explains that the proper standard for economic persecution in asylum claims should not require a showing of threat to "life or freedom" but instead should only require the same level of mistreatment necessary to establish persecution generally. The Comment concludes that the appropriate standard would require deliberate imposition of economic disadvantage sufficiently severe so as to

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5 Kovac v INS, 407 F2d 102, 107 (9th Cir 1969). Though the Ninth Circuit later strengthened their standard to require that economic mistreatment threaten life or freedom, see Zehatye v Gonzales, 453 F3d 1182, 1186 (9th Cir 2006), other circuits have continued to apply the original Kovac standard. See, for example, Capric, 355 F3d at 1092.

6 Matter of Acosta, 19 INS Dec 211, 222 (BIA 1985), overruled in part by Matter of Mogharrabi, 19 INS Dec 439, 439 (BIA 1987) (overruling Acosta insofar as it held that the "clear probability" standard for withholding of deportation was not meaningfully different from the "well-founded fear" standard used to evaluate asylum claims).

7 One of the purposes behind the Refugee Act of 1980, described in a letter from Senator Ted Kennedy, was "to establish a long range refugee policy . . . which will treat all refugees fairly and assist all refugees equally." S Rep No 96-256, 96th Cong, 1st Sess 2 (1979).

8 8 USC § 1231(b)(3) (2000).
threaten the infliction of substantial harm or suffering but not necessarily “life or freedom.”

I. STATUTORY PROVISIONS AND CASE LAW PERTAINING TO ASYLUM

This Part provides an overview of INA provisions and existing case law relevant to determining the proper standard for economic persecution in asylum claims. First, it outlines the statutory scheme used in deciding asylum claims and compares this to the scheme used in related claims for withholding of removal. Tracing the development of these claims provides insight into their proper relationship as well as points of confusion that have led courts to employ disparate economic persecution standards in asylum cases. Next, this Part provides context for evaluating the development of case law in this area by reviewing jurisdictional matters and applicable standards of review for asylum claims. Finally, this Part examines the history of the persecution standard and how this standard has been applied to claims of asylum based on economic mistreatment.

A. Asylum and Withholding of Removal

It is important to consider the asylum standard in light of its relationship to withholding of removal claims, as there is substantial overlap in the statutory language for these two forms of relief. Additionally, the two claims are often considered together in deportation proceedings. Still, critical distinctions must be recognized in order to avoid conflation of the two standards.

Section 208(b) of the INA permits the Attorney General or Secretary of Homeland Security to grant asylum to an alien based on his determination that “such alien is a refugee within the meaning of section 101(a)(42)(A).”9 Section 101(a)(42)(A) defines a refugee as any person unable or unwilling to return to his or her country of origin “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.”10 An application for asylum may be made independently within a year of entry into the United States, or during deportation proceedings.11

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A claim for withholding of removal, on the other hand, is only available to noncitizens in deportation proceedings. Section 241(b)(3)(A) of the INA states that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country on account of race, religion, nationality, membership in a particular social group, or political opinion."[13]

An application for asylum is automatically construed as concurrent with an application for withholding of removal, and if asylum is denied then the withholding claim must be considered. As a result, these claims are often considered together. There are several important distinctions, however, between the relief granted by asylum and that granted by withholding of removal. First, while a grant of asylum is discretionary, withholding of removal constitutes mandatory relief. Additionally, if asylum is granted, the alien is admitted into the United States indefinitely. Asylum holders may petition to bring family members to the United States, petition to obtain a refugee travel document, and apply for adjustment to permanent residence status after having been "physically present" in the United States for at least one year. On the other hand, an alien granted withholding of removal does not gain legal entry into the

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12 INA § 241(b)(3)(A), 8 USC § 1231(b)(3)(A) (2000). This provision previously appeared in INA § 243(h) and was referred to as "withholding of deportation." Many practitioners and courts continue to use this terminology. For consistency, this claim is referred to as "withholding of removal" or simply "withholding" throughout this Comment.

13 Id.

14 8 CFR § 1208.3(b) (2006).

15 See, for example, Daneshvar v Ashcroft, 355 F3d 615, 629 (6th Cir 2004) (holding that petitioner was ineligible for asylum and/or withholding of deportation); Capric, 355 F3d at 1095 (stating that if an asylum applicant's claim fails, his withholding of deportation claim will also necessarily fail).


17 See INA § 208(c)(1)(A), 8 USC § 1158(c)(1)(A) (2000 & Supp 2006) (providing that if an alien is granted asylum, the Attorney General "shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence").

18 See INA § 207(c), 8 USC § 1157(c) (2000) (entitling a spouse or child of a refugee to the same admission status as such refugee, with some limitations).

19 See INA § 223(a), 8 USC § 1203(a) (2000) (providing that a lawfully admitted alien who intends to depart temporarily may apply for a permit to reenter the United States).

20 See INA § 209(a)–(b), 8 USC § 1159(a)–(b) (2000 & Supp 2006) (granting adjustment of status for refugees who meet certain requirements).
United States, and the alien may be removed to their native country when the threat to life or freedom subsides.\(^{21}\) Furthermore, a grant of withholding does not prevent removal to a third country where the alien does not face a relevant threat.\(^{22}\)

It is well established that a claim for withholding of removal carries a higher evidentiary burden than one for asylum. Two Supreme Court cases clarify this distinction. In the first case, INS \textit{v} Stevic,\(^ {23}\) the Supreme Court upheld a “clear probability” standard for withholding of removal claims.\(^ {24}\) The Court stated that an applicant must present evidence “establishing that it is \textit{more likely than not} that the alien would be subject to persecution on one of the specified grounds.”\(^ {25}\) In the second case, INS \textit{v} Cardoza-Fonseca,\(^ {26}\) the Court addressed the evidentiary standard for asylum eligibility.\(^ {27}\) Based on the text and legislative history of the INA, the Court concluded that the two provisions require different evidentiary burdens.\(^ {28}\) It held that the Immigration Judge and the Board of Immigration Appeals (“BIA”) were incorrect in holding asylum applicants to the more strict “clear probability” standard.\(^ {29}\) However, the task of interpreting the exact requirement for the “well-founded fear” standard was left for the agency to develop through case-by-case adjudication.\(^ {30}\) In a subsequent case, the BIA adopted a test significantly broader than the “clear probability” standard, stating that an applicant for asylum must show “that a reasonable person in his circumstances would fear persecution.”\(^ {31}\)

The major similarity between the asylum and withholding provisions is that applicants must show that they face some level of mistreatment based on one of five protected grounds. In \textit{Car-}
doza-Fonseca, the Supreme Court outlined a significant difference in the evidentiary standards based on the text and legislative history of the INA. The evidentiary standards differentiate claims based on the likelihood of mistreatment. In Part II, this Comment explains that the same principles require differentiating based on what is referred to herein as the substantive standard: the level of mistreatment necessary to establish "persecution" in asylum claims or a threat to "life or freedom" in withholding claims. Part II presents substantial evidence suggesting that the "persecution or well-founded fear of persecution" language qualifying an applicant for refugee status—and therefore asylum eligibility—requires a broader substantive standard than the threat to "life or freedom" language in the withholding provision.

B. Judicial Hierarchy and Appellate Review

Outlining the judicial hierarchy and applicable standards of review for asylum cases provides necessary background for understanding the development of case law in this area. Asylum officers in the Department of Homeland Security's Office of International Affairs have initial jurisdiction to review asylum applications filed by noncitizens present in the United States who are not in removal proceedings. If asylum is denied, and the applicant appears to be inadmissible or deportable, then the officer refers the application to an Immigration Judge ("IJ"). In deportation proceedings, IJs have jurisdiction to review applications for both asylum and withholding of removal.

The BIA acts as an appellate body, consisting of attorneys appointed by the Attorney General to act as the Attorney General's delegates, with jurisdiction to review decisions of IJs in asylum proceedings. In appeals from IJ decisions, they review findings of fact for clear error. They review questions of law, discretion, and judgment de novo. Decisions of the BIA are binding on all officers of the Department of Homeland Security

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33 8 CFR § 208.2(a) (2006).
34 8 CFR § 208.14(c) (2006).
35 See 8 CFR §§ 208.2(b), 1208.2(b) (2006).
37 Id at (d)(3)(i).
38 Id at (d)(3)(ii).
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and IJs. The federal courts of appeals have exclusive jurisdiction to review decisions by the BIA relating to asylum and withholding of removal. The discretionary decision to deny asylum is "conclusive unless manifestly contrary to the law and an abuse of discretion." The BIA's factual determinations are reviewed under the substantial evidence standard and must be upheld "unless any reasonable adjudicator would be compelled to conclude to the contrary." Legal conclusions are reviewed de novo, but the court must defer to the BIA's interpretation of the INA where appropriate under administrative law principles of deference.

The degree of deference owed to the BIA's interpretation of the persecution standard in the INA is an unsettled issue, but some basic principles of administrative law provide guidance. In Chevron USA, Inc v Natural Resources Defense Council, Inc, the Supreme Court outlined the procedure for determining when courts must defer to agency interpretations of the statutes they are charged with administering. At step one, courts use traditional tools of statutory interpretation to determine whether "Congress has directly spoken to the precise question at issue." If Congress's intent is clear, then courts and the agency must adhere to Congress's unambiguous intent. However, if the courts determine that Congress has not directly spoken to the issue, then they proceed to step two, which asks whether the agency's interpretation is based on a "permissible construction of the statute." Courts may not substitute their own interpretation for that of the agency, provided the agency's interpretation is a reasonable one. At this second step, courts consider a number of factors in their reasonableness determination, including an agency's consistency in its interpretation of particular provi-

39 8 CFR § 1003.1(g) (2006) (stating the BIA decisions are binding but can be overruled by the Attorney General).
41 Id at (b)(4)(D).
42 Id at (b)(4)(B).
43 Ahmed v Ashcroft, 396 F3d 1011, 1014 (8th Cir 2005) ("We review the Board's legal conclusions de novo, but we defer to the agency's interpretation of the law it administers where appropriate under administrative law principles.").
45 Id at 842–45.
46 Id at 842.
47 Id at 842–43.
48 Chevron, 467 US at 843.
49 Id at 844.
sion over time. In Cardoza-Fonseca, the Court stated that “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view.”

C. History of the Persecution Standard in the INA

“Persecution” is not statutorily defined in the INA and so its meaning has primarily been developed through case-by-case adjudication. Efforts to establish a consistent standard have been frustrated by multiple changes to the language of the INA. Because the section 208(b) asylum provision was added to the INA by the Refugee Act of 1980, the earliest cases addressed the persecution standard exclusively in the context of withholding of removal under what was then section 243(h). Prior to 1965, the INA required that an applicant for withholding of removal demonstrate that he would suffer “physical persecution” if deported. A 1965 amendment removed the phrase “physical persecution” and replaced it with “persecution on account of race, religion, or political opinion.” With this revision, the word “physical” was removed from section 243(h). The language of this section was again modified with the passing of the Refugee Act of 1980, this time removing any reference to “persecution” and instead requiring a determination that the “alien’s life or freedom would be threatened” by deportation. Therefore, the current standard for withholding of removal does not explicitly contain the term “persecution” at all.

The Refugee Act of 1980 also added the asylum provision to the INA, providing that an alien may be granted asylum based on a determination by the Attorney General that the applicant is

52 See INA § 243(h), Pub L No 82-414, 66 Stat 163, 214 (1952) (The 1952 version of section 243(h) enacted by the INA stated: “The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.”).
53 See Act of Oct 3, 1965 § 11(f), Pub L No 89-236, 79 Stat 911, 918 (1965) (“Section 324(h) is amended by striking out ‘physical persecution’ and inserting in lieu thereof ‘persecution on account of race, religion, or political opinion’. “). See also Li v Attorney General of the United States, 400 F3d 157, 165 (3d Cir 2005) (reviewing the amendments to the INA and the resulting evolution of the persecution standard).
54 See Refugee Act § 202, 94 Stat at 107 (amending section 243(h) of the INA).
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The standard for refugee status—and therefore asylum eligibility—introduced by the Act requires that applicants demonstrate they are unwilling or unable to return to their country of origin because of "persecution or well-founded fear of persecution" on account of protected grounds. Notably, with the enactment of the Refugee Act of 1980, the addition of this language occurred simultaneously with the removal of "persecution" from the withholding of removal provision. The amended withholding provision does not make reference to refugee status or persecution. The asylum provision of the INA was enacted to bring the statute in accordance with the 1967 United Nations Protocol Relating to the Status of Refugees ("United Nations Protocol").

D. Existing Economic Persecution Standards

The courts have used several different standards to define when economic mistreatment can qualify as "persecution" under the INA. Furthermore, the BIA itself has cited each of the conflicting standards in recent asylum cases. The conflicting standards illustrate the degree to which courts have failed to establish a consistent definition of "persecution" under the INA.

1. The Dunat standard.

The first standard for evaluating economic persecution claims was developed under the pre-1965 version of the INA. In this version, the petitioner had to demonstrate he would be subjected to "physical persecution" in order to qualify for withholding of removal. In 1961, the Third Circuit noted that this language required that "the alien would be subject not only to persecution, but to physical persecution" defined as "confinement, torture or death inflicted on account of race, religion, or political viewpoint." Later that year, in Dunat v Hurney, the Third

55 See Refugee Act § 201(b), 94 Stat at 105 (adding the asylum provision, section 208, to the INA)
56 See Refugee Act § 201(a), 94 Stat at 102 (adding the definition of refugee to the INA at section 101(a)(42)).
58 See Cardoza-Fonseca, 480 US at 436–37 ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees[,]"), citing HR Conf Rep 96-781 at 19 (1980); HR Rep No 96-608 at 9 (1979); S Rep No 96-256 at 4 (1979).
Circuit held that a man qualified for withholding of removal because he would be denied "an opportunity to earn a livelihood," which the court stated was "the equivalent of a sentence to death by means of slow starvation." The court established that this extreme economic hardship could qualify as persecution based on the physical consequences of such deprivation.

The BIA cited the Dunat standard extensively throughout the 1960s and appears to have adopted this standard for economic persecution during that time. The BIA held Dunat to stand for the proposition that "economic proscription so severe as to deprive a person of all means of earning a livelihood may amount to physical persecution." The Dunat standard was based on statutory language requiring "physical persecution" and therefore may be considered to have been superseded by the removal of the word "physical" by the 1965 amendments. However, the BIA has employed this standard in determining asylum eligibility as recently as 1991.

2. The Kovac standard.

The BIA has also applied a more relaxed persecution standard first established by the Ninth Circuit. Following the 1965 amendment removing the "physical" persecution requirement, the Ninth Circuit determined that "Congress intended to effect a significant, broadening change in section 243(h) which would lighten the burden imposed on applicants for asylum by removing the requirement that they show threatened bodily harm." Of particular relevance, the circuit court noted that "[t]he burden of showing a probable denial of all means of earning a livelihood arose from the necessity of showing bodily harm." The Ninth

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60 297 F2d 744 (3d Cir 1961).
61 Id at 746.
62 See, for example, Matter of Nagy, 11 INS Dec 888, 890 (BIA 1966) (determining there was no economic persecution because the "record does not support a claim of complete deprivation of economic opportunity within the scope of the Dunat case"); Matter of Vardjan, 10 INS Dec 567, 575 (BIA 1964) (citing Dunat for the proposition that "[o]nly total proscription of employment" qualifies as physical persecution); Matter of Eusaph, 10 INS Dec at 454 (citing Dunat as a judicial determination "that economic proscription so severe as to deprive a person of all means of earning a livelihood may amount to physical persecution"); Matter of Banjeglav, 10 INS Dec 351, 353 (BIA 1963) (same).
64 See Matter of D-L- & A-M-, 20 INS Dec 409, 414 (BIA 1991) (finding an applicant had not established a well-founded fear of persecution because he was not in a situation "so severe as to deprive him of a livelihood"), citing Dunat, 297 F2d at 753.
65 Kovac, 407 F2d at 106.
66 Id at 106–07.
Circuit concluded that "a probability of deliberate imposition of substantial economic disadvantage upon an alien for reasons of race, religion, or political opinion is sufficient to confer upon the Attorney General the discretion to withhold deportation."\(^{67}\)

Though the Ninth Circuit did not use this "substantial economic disadvantage" standard in their most recent case addressing economic persecution,\(^{68}\) other circuits continue to employ this standard.\(^{69}\) The BIA has also referenced this standard in considering economic persecution.\(^ {70}\)

3. The Acosta standard.

In Matter of Acosta,\(^{71}\) the BIA construed the term "persecution" to include "economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom."\(^{72}\) The court cited Dunat as a case in support of this proposition.\(^{73}\) In Acosta the BIA was not directly confronted with an economic persecution question, but was giving examples to demonstrate instances in which persecution had been found. Though the statement is contained in dicta, it has since been adopted by several circuits as a threshold standard for determining when economic mistreatment qualifies as persecution.\(^ {74}\)

E. The BIA's Adoption of the Economic Persecution Standards

The BIA has been inconsistent in formulating the standard used to determine when economic mistreatment amounts to persecution. Cases in the early sixties consistently cited the Dunat standard requiring deprivation of "all means of earning a livelihood."\(^{75}\) After the 1965 amendment, the court began to cite Kovac and the "substantial economic deprivation" standard.\(^ {76}\) However,

\(^{67}\) Id at 107 (emphasis added).
\(^{68}\) See Part I F.
\(^{69}\) Id.
\(^{70}\) See Matter of Barrera, 19 INS Dec 837, 847 (BIA 1989) (holding that an applicant did not establish eligibility for asylum under the Kovac standard because he failed to allege denial of "employment, education, housing, permission to travel, or other benefits of this sort"); Matter of H-M., 20 INS Dec 683, 687 (BIA 1993) (finding no persecution but appearing to accept Kovac as the correct standard where invoked by the applicant).
\(^{71}\) 19 INS Dec 211 (BIA 1985).
\(^{72}\) Id at 222.
\(^{73}\) Id.
\(^{74}\) See Part I F.
\(^{75}\) See notes 62 and 63.
\(^{76}\) See note 70.
the court continued to intermittently cite *Dunat*. In *Acosta*, the BIA might have created a new standard, though it is far from clear that this was an intentional reinterpretation, as it cited the *Dunat* case as an example of its construction. Further complicating matters, the BIA has considered the *Kovac* standard in a case published after *Acosta*. The BIA has also continued to cite to *Dunat* after its decision in *Acosta*. Therefore, since its statement of the *Acosta* “threat to life or freedom” standard, the BIA has cited to each of the three standards.

F. The Circuit Split

A review of recent circuit court opinions highlights the confusion created by the BIA’s inconsistency. There is a circuit split regarding the proper standard for establishing economic-based persecution. Some circuits have adopted a standard similar to *Acosta*, requiring a threat to life or freedom. Others have adopted a standard closer to *Kovac*, requiring a showing of economic mistreatment that imposes substantial or severe harm, but not necessarily rising to a threat to life or freedom. The Second Circuit has remanded to the BIA for clarification on the proper standard to apply. Though some circuits have changed their standard over time, this Section focuses only on the most recent cases in each circuit addressing economic persecution claims.

1. Courts adopting the *Acosta* standard.

The Third, Fourth, Eighth, and Ninth Circuits have applied the *Acosta* “threat to life or freedom” standard in reviewing claims of economic persecution. Recognizing that *Acosta* did not

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77 See, for example, *Matter of D-L-& A-M-*, 20 INS Dec at 414 (determining that an applicant had not established persecution because he retained the ability to make a living, citing *Dunat*); *Acosta*, 19 INS Dec at 222 (citing *Dunat* in outlining the standard for persecution used prior to 1980, and subsequently stating that the same interpretation is appropriate after the Refugee Act of 1980.)

78 19 INS Dec at 222.

79 See *Matter of H-M-*, 20 INS Dec at 687 (analyzing the economic persecution claim under the *Kovac* standard cited by the respondent).

80 See *Matter of D-L-& A-M-*, 20 INS Dec at 414 (stating that the applicant failed to show that economic persecution was “so severe as to deprive him of a livelihood.”), citing *Dunat*, 297 F2d at 753.

81 See Part I F 1.

82 See Part I F 2.

83 See Part I F 3.
deal directly with the issue of economic persecution and therefore
did not control, the Third Circuit nonetheless adopted the stan-
dard and held that "deliberate imposition of severe economic dis-
advantage which threatens a petitioner's life or freedom may
constitute persecution." Furthermore, the court stated that
"such disadvantage might, for instance, involve the deprivation
of liberty, food, housing, employment, and other essentials of
life." In its most recent case addressing economic persecution,
Hen v Attorney General of the United States, the Third Circuit
restated its position, stating that "[p]ersecution requires threats
to life, confinement, torture, and economic restrictions so severe
that they constitute a threat to life or freedom."

Though the Eighth Circuit did not directly cite Acosta, it in-
voked a substantially similar standard in reviewing a denial of
asylum and withholding of removal. In Ahmed v Ashcroft, the
Court stated that economic discrimination rises to the level of
persecution if "such sanctions are sufficiently harsh to constitute
a threat to life or freedom."

The Ninth Circuit adopted the Acosta standard in its most
recent case addressing economic persecution, thus limiting the
broader standard that it created in Kovac. In Zehatye v Gonzales,
the Ninth Circuit reviewed the asylum claim of an Eritrean
woman who claimed that she suffered substantial economic dis-
advantage when the government seized her father's carpentry
business and trade license and forced her family to live with rela-
tives because of her family's religious beliefs. The court stated
that "substantial economic deprivation that constitutes a threat
to life or freedom can constitute persecution" but that "mere eco-
nomic disadvantage alone, does not rise to the level of persecu-
tion." Therefore, the court determined that "[a]lthough Ze-

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84 Li v Attorney General of the United States, 400 F3d 157, 168 (3d Cir 2005) ("In-
formed by the reasoning of these cases, we hold that the deliberate imposition of severe
economic disadvantage which threatens a petitioner's life or freedom may constitute
persecution. (This is the Acosta standard.").
85 Id (citation omitted).
86 2007 WL 1147055 (3d Cir).
87 Id at *2, citing Lie v Ashcroft, 396 F3d 530, 536 (3d Cir 2005).
88 396 F3d 1011 (8th Cir 2005).
89 Id at 1014. See also Minwalla v INS, 706 F2d 831, 835 (8th Cir 1983) (stating
"[p]ersecution requires a showing of a threat to one's life or freedom[,]" and that "eco-
nomic detriment is not sufficient") (citation omitted).
90 453 F3d 1182 (9th Cir 2006).
91 Id at 1186.
hatye's case evokes sympathy, it does not compel a finding of past persecution."92

In Li v Gonzales,93 the Fourth Circuit reviewed an application for asylum and withholding of removal and stated that "the term 'persecution' includes actions less severe than threats to life or freedom . . . ."94 However, later in the opinion the court noted that "economic sanctions" constitute persecution "only if such sanctions are sufficiently harsh to constitute a threat to life or freedom."95 Therefore, the Fourth Circuit appears to have created an exception specifically for purely economic sanctions, requiring that they meet the higher threshold of "a threat to life or freedom" to classify as persecution under the INA.

2. Courts adopting the Kovac standard.

The Fifth, Sixth, Seventh, and Tenth Circuits apply a less demanding standard, one most in accordance with Kovac. In Koval v Gonzales,96 the Seventh Circuit specifically rejected the "life or freedom" standard, stating that "this court repeatedly has explained that the conduct 'need not necessarily threaten the petitioner's life or freedom,' but must 'rise above the level of mere harassment.'"97 The court held that an applicant need not demonstrate a "total deprivation of livelihood," but must merely show a "probability of deliberate imposition of substantial economic disadvantage" in order to qualify for asylum.98 In Satriawan v Gonzales,99 the Tenth Circuit applied an identical standard, also defining economic persecution as "the deliberate imposition of substantial economic disadvantage."100 The Fifth Circuit has also recently applied this standard, noting that "to establish persecution, the alien's harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."101 Similarly, the Sixth

92 Id at 1185–86.
93 405 F3d 171 (4th Cir 2005).
94 Id at 177 (citation omitted).
95 Id (emphasis added).
96 418 F3d 798 (7th Cir 2005).
97 Id at 805, citing Borca v INS, 77 F3d 210, 214 (7th Cir 1996).
98 Koval, 418 F3d at 806.
99 2007 WL 1113966 (10th Cir).
100 Id at *2, quoting Liao v United States Department of Justice, 293 F3d 61, 70 (2d Cir 2002).
101 Tesfamichael v Gonzales, 469 F3d 109 (5th Cir 2006), citing Abdel-Masieh v INS,
Circuit has stated that “the petitioner does not have to prove that he would be deprived of all means of employment in order to show persecution” but must show the potential persecution is “purposeful, direct and substantial.”

3. Remanding to the BIA for clarification.

Most recently, in *Mirzoyan v Gonzales*, the Second Circuit remanded for clarification based on the fact that the BIA did not identify the statutory construction of the word “persecution” as it was used to assess the claim of economic persecution. After stating that they must defer to the BIA’s reasonable construction of the immigration laws, the court concluded that the decision below gave “no indication as to what standard was applied to Mirzoyan’s claim of economic persecution.” Furthermore, the court noted that the BIA had not in past cases applied a consistent standard that could be presumed to have been applied in Mirzoyan. The court then explained that the outcome of this case could well depend on the standard used, and it remanded for clarification on the standard used by the BIA for economic persecution claims. This case is currently pending.

4. Summary of the circuit split.

This circuit split illustrates the degree to which courts have come to different conclusions as to when economic mistreatment qualifies as persecution. Additionally, it demonstrates that courts generally disagree over whether persecution is synonymous with a threat to life or freedom. While the Seventh Circuit clearly states that persecution is broader than threats to life or freedom, other circuits have used the phrases interchangea-
bly. Remanding in *Mirzoyan*, the Second Circuit emphasized the degree to which the BIA itself has conflated the standards. The next Part of this Comment demonstrates that a careful analysis of the INA using traditional tools of statutory interpretation demands that these two substantive standards be construed as distinct.

II. DETERMINING THE APPROPRIATE STANDARD FOR ESTABLISHING ECONOMIC PERSECUTION

In this Part, the Comment proposes a standard for defining economic persecution in asylum cases. This Part first explains that present circumstances do not necessarily require deference to any existing BIA interpretation of the economic persecution standard. Next, this Part considers the propriety of the three major formulations for determining asylum eligibility based on economic mistreatment. Presented first is the inapplicability of the *Dunat* standard based on the changes in statutory language. Next, the necessity of distinguishing the two remaining standards is explained. The *Acosta* and *Kovac* standards are then evaluated based on their consistency with the asylum provision of the INA. Following an evaluation of the standards, this Part explains that the current version of the INA does not require claims based on economic mistreatment be handled any differently than persecution claims generally. This Part concludes by describing an appropriate standard for use in evaluating asylum claims based on economic mistreatment.

109 See, for example, *Pavlovich v Gonzales*, 476 F3d 613, 619 (8th Cir 2007) (asserting that an applicant for withholding of removal "must show a 'clear probability' of persecution" followed by a statement that "[a] threat to 'life or freedom' is that statutory standard for withholding of removal"); *Majd v Gonzales*, 446 F3d 590, 595–96 (5th Cir 2006) (acknowledging the "life or freedom" standard for withholding of removal and then stating, "an alien must demonstrate an objective 'clear probability' of persecution in the proposed country of removal" and proceeding to apply the same substantive standard for both claims) (emphasis added); *Zepeda-Melendez v INS*, 741 F2d 285, 289 (9th Cir 1984) (explicitly equating the phrase "threat to life or freedom" with "a likelihood of persecution" and evaluating a withholding of removal claim primarily employing the term "persecution").

110 See *Mirzoyan*, 457 F3d at 221–22 (discussing the various standards applied by the BIA and concluding that "as far as we can determine from a review of BIA decisions, the BIA has not applied a consistent standard").
A. Deference to the BIA's Interpretation of Economic Persecution

Established principles of administrative law dictate that courts likely owe little deference to any of the current standards for economic persecution endorsed by the BIA. Furthermore, deference may not be due even if the BIA announces a new interpretation on remand in *Mirzoyan*, depending on the reasonableness of the standard they adopt.

Based on BIA's endorsement of inconsistent standards, it is probably not the case that standards adopted in its existing cases must be granted heightened deference. The Supreme Court has held that inconsistent interpretation by an agency can weigh against granting heightened deference. In the case of economic persecution, the BIA has not only changed its interpretation, but it has continually substituted past interpretations for those more recently adopted without explanation. Inconsistency, however, is not necessarily fatal and merely determines that the interpretation is "entitled to considerably less deference." In *Good Samaritan v Shalala*, the Supreme Court deferred to an inconsistent agency interpretation where it was "at least as plausible as competing ones." Therefore, deference could still favor a persuasive standard adopted by the BIA. However, even if a fully reasoned standard is adopted by the BIA in *Mirzoyan* (currently on remand), the courts will be required to grant deference to that standard only to the extent that they find that it is consistent with congressional intent as interpreted using the traditional tools of statutory construction. Most importantly, because a court need not grant heightened deference to an inconsistent

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111 See *Cardoza-Fonseca*, 480 US at 446 n 30 ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.") (citations omitted). See also *Good Samaritan v Shalala*, 508 US 402, 416–17 (1993) (stating that "the consistency of an agency's position is a factor in assessing the weight that position is due").

112 See Part I E.


115 Id at 417.

116 In *Cardoza-Fonseca* the Court refused deference to an agency interpretation that resulted in identical evidentiary standards under these two sections. 480 US at 446. The Court held that the question of whether these standards were identical was a pure question of statutory interpretation for the courts to decide, and it held that deference would not be granted where the agency interpretation was contrary to clear Congressional intent. Id.
agency interpretation, circuit courts continue to enjoy considerable discretion in evaluating the propriety of the persecution standards adopted by the BIA.

B. Evaluating the Economic Persecution Standards

This Section contains an evaluation of the three economic persecution standards cited by the BIA and circuit courts. First, the *Dunat* standard is dismissed as inapplicable because it was developed under a prior version of the INA requiring a significantly different standard. Next, the two remaining standards—based on *Acosta* and *Kovac*—are compared, and the importance of distinguishing between these two standards is explained. Finally, the two standards are considered in light of the text, general structure, and legislative history of the INA.

1. Inapplicability of the *Dunat* standard.

The *Dunat* standard, requiring deprivation of all opportunity to earn a livelihood, is easily dismissed as inapplicable under the current version of the INA. This standard should no longer be considered in any capacity because it was developed under a prior version of the INA which required “physical persecution.” This standard was specifically developed so that economic mistreatment could be understood as mistreatment leading to physical ramifications (such as starvation).\(^\text{117}\) Removal of the “physical” aspect of persecution reflects a clear shift in the intended scope of the statute.\(^\text{118}\) This amendment followed repeated criticisms of the narrowness of the restriction to “physical” persecution.\(^\text{119}\) These criticisms included specific references to rulings which held that “reducing a workman to the lowest stage of ability to work, and thereby depriving him of opportunity of providing for himself and his family, [is] not ‘physical.’”\(^\text{120}\) Congressman Feighan, who proposed the amendment and was floor manager of the bill, expressed his approval of this criticism.\(^\text{121}\) This indicates

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\(^\text{117}\) See *Dunat*, 297 F3d at 746.

\(^\text{118}\) See *Kovac*, 407 F2d at 106 (“[I]t seems beyond argument that by deleting the word ‘physical,’ Congress intended to effect a significant, broadening change in section 243(h) which would lighten the burden imposed on applicants for asylum by removing the requirement that they show threatened bodily harm.”).

\(^\text{119}\) Id (citations omitted).

\(^\text{120}\) Id.

\(^\text{121}\) *Hearings on HR 7700 Before Subcommittee of the House Judiciary Committee, 88th Cong, 2d Sess* 3 860–61 (1964).
that the amendment was intended to directly affect the adjudication of economic mistreatment claims. To require applicants to demonstrate a level of economic persecution that would lead to physical detriment ignores the driving force behind this significant statutory change. For this reason, the Dunat standard should no longer be used in the context of defining economic persecution.

2. The Acosta and Kovac standards: practically the same?

Turning to the Acosta "threat to life or freedom" and the Kovac "substantial economic deprivation" standards, it is important to consider whether they can be differentiated as a practical matter, or if the standards themselves are sufficiently vague such that their meanings converge. In some instances, it could be argued that where substantial economic deprivation is imposed on an individual, that person's freedom (broadly defined) is inherently threatened. Therefore, through employing a broad definition of freedom it is reasonable to speculate that in practice the standards could overlap.

However, the Seventh Circuit has determined that the standards are significantly different, and in invoking the "substantial economic deprivation" standard it specifically stated that conduct "need not necessarily threaten the petitioner's life or freedom."122 Furthermore, the Second Circuit recently faced a situation in which the applicable standard could well be outcome determinative. In Mirzoyan, the Court stated that the applicant "likely could not prevail under the standard referenced in Acosta, or under the similarly stringent Dunat standard of Matter of D-L- & A-M., but might prevail under the Kovac standard."123 This case in particular demonstrates that adoption of a particular standard will have a meaningful effect. Establishing one of these as a definitive standard is therefore essential to ensure that similarly situated aliens are treated alike.

3. Determining an appropriate standard.

The standard for determining economic persecution drawn from Acosta requires "economic deprivation or restrictions so severe that they constitute a threat to an individual's life or free-

122 Koval, 418 F3d at 805 (citation omitted).
123 457 F3d at 223.
In considering this standard, it is important to recognize that the "threat to life or freedom" language directly parallels that used in the withholding of removal provision under INA § 241(b)(3). This standard is therefore clearly applicable in considering withholding of removal claims. However, it is not clear that this is the correct standard for evaluating economic persecution in the context of an asylum application under INA § 208(b). The asylum provision does not make any reference to such a threat and contains only a potentially more broad reference to "persecution." Therefore, it is necessary to establish whether the "persecution" language should be considered as analogous to a "threat to life or freedom."

a) A broader conception of persecution under § 208(b). Courts often use the terms "persecution" and "threat to life or freedom" interchangeably when discussing asylum and withholding of removal claims. However, some courts have indicated that distinguishing between the standards is appropriate. In Stevic, the Supreme Court compared the pre-1980 version of INA § 243(h) requiring only "persecution" to the "life or freedom" standard found in the later version as adopted from the United Nations Protocol. The Court referred to the "persecuted" standard as "a seemingly broader concept than threats to 'life or freedom.'" Rejecting an argument that "life or freedom" was the broader standard, the Court noted that to the contrary "one might argue that the concept of 'persecution' is broad enough to encompass matters other than threats to 'life or freedom.'" The Court suggested that deprivation of property might be an example of an item covered by the persecution standard exclusively.

Lower courts have also found persecution to be a broader concept than threats to life or freedom. The Seventh Circuit has consistently held that persecution includes actions less severe than threats to life or freedom. The Seventh Circuit has held that the term persecution can include "detention, arrest, interro-

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124 Acosta, 19 INS Dec at 222.
125 See note 109 for examples.
126 467 US at 428 n 22.
127 Id.
128 Id.
129 Id.
130 See Koval, 418 F3d at 805 (asserting that "[a]lthough the INA does not define 'persecution,' this court repeatedly has explained that the conduct 'need not necessarily threaten the petitioner's life or freedom,' but must 'rise above the level of mere harassment'"), citing Borca, 77 F3d at 214.
ECONOMIC MISTREATMENT AS PERSECUTION

The plain language of the statute supports a distinction between the two standards. The revision by the Refugee Act of 1980 replaced the "persecution" standard in section 243(h) with a threat to "life or freedom" while simultaneously enacting section 208(b) and its reference to "persecution" on account of protected grounds. The Cardoza-Fonseca Court noted the significance of the fact "that in enacting the 1980 Act Congress did not amend the standard of eligibility for relief under § 243(h). While the terms 'refugee' and hence 'well-founded fear' were made an integral part of the § 208(b) procedure, they continued to play no part in § 243(h)."134 Where Congress uses particular language in one section of a statute and omits similar language in another section of the same act, it is presumed that Congress acts intentionally and purposefully.135 Here, the presumption is strengthened by the fact that changes to the language of the respective sections were made simultaneously with the enactment of the Refugee Act of 1980. The disparate language contained in the text of these two sections requires different substantive standards for eligibility.

131 Gjerazi v Gonzales, 435 F3d 800, 808 (7th Cir 2006), citing Capric v Ashcroft, 355 F3d 1075, 1084 (7th Cir 2004) (citations omitted).
132 Fatin v INS, 12 F3d 1233, 1242 (3d Cir 1993).
133 See Acosta, 19 INS Dec at 222–23 (adopting the pre-Refugee Act construction of persecution in which the term was construed to mean "either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive").
134 480 US at 430.
A careful analysis of the legislative history of the INA reveals that the "persecution" standard was intended to encompass a broader range of claims than merely those establishing a threat to "life or freedom." In making the modifications to the INA though the Refugee Act of 1980, Congress sought to bring the Act in conformance with the 1967 United Nations Protocol Relating to the Status of Refugees. Congress adopted the definition for "refugee" from the United Nations Protocol, and the Conference Committee Report states that the definition was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." Accordingly, it is appropriate to seek guidance from the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook") when interpreting the definition of "refugee." The definition of "refugee" is critical, because the INA provides that any alien who qualifies as a refugee may be granted asylum. The UNHCR Handbook clearly considers the persecution standard referenced in the refugee definition to encompass more than merely threats to life or freedom. It states: "it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution" but also that "[o]ther serious violations of human rights ... would also constitute persecution." These "other serious violations" are thus considered to be outside the scope of threats to "life or freedom." The UNHCR Handbook goes on to explain conditions in which actions less severe than threats to life or freedom may qualify as persecution, including certain penal prosecutions, some forms of discrimination including those...

136 Protocol Relating to the Status of Refugees, 19 UST 6223, TIAS No 6577 (1967). See Cardoza-Fonseca, 480 US at 436 ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.").
139 Cardoza-Fonseca, 480 US at 438-39 (assessing the analysis set forth in the UNHCR Handbook regarding the definition of "refugee").
140 UNHCR Handbook at 10 (cited in note 138).
141 See id at 11 ("penal prosecution for a reason mentioned in the definition (for example, in respect of 'illegal' religious instruction given to a child) may in itself amount to
leading to restrictions on a right to earn a livelihood, a right to practice religion, or to access educational facilities, certain “severe penalties” imposed based on illegal departure from a country of origin, and certain measures that destroy the economic existence of a particular section of the population. These conditions do not necessarily threaten the life or freedom of an applicant, but the UNHCR Handbook suggests that they can still amount to persecution. In another section, the handbook uses “persecution endangering [an applicant’s] life or freedom” as an example of “very severe persecution.” Again, this illustrates an understanding that the term persecution encompasses more than merely threats to life or freedom. The UNHCR Handbook also describes the possibility of an alien meeting the persecution standard on “cumulative grounds” combining “various measures not in themselves amounting to persecution” with “other adverse factors.” In these passages, the UNHCR Handbook clearly conveys an understanding that threats to life or freedom comprise a narrower class of acts than those classified as persecution.

was based on Article 33, which states that “[n]o contracting State shall expel or return a refugee ... where his life or freedom would be threatened” on account of protected grounds.\textsuperscript{148} If one had to demonstrate a threat to life or freedom to qualify as a refugee, then the phrase “where his life or freedom would be threatened” in Article 33 would be superfluous. The Article could merely state that no State shall expel a refugee. Instead, Article 33 recognizes that the class of noncitizens who qualify for withholding because they face a threat to life or freedom is a subset of those who qualify as refugees.

Recent legislation provides further support for establishing a clear distinction between qualifying for refugee status based on “persecution” in the asylum context and demonstrating a “threat to life or freedom” to qualify for withholding of removal. With the enactment of the REAL ID Act of 2005, Congress revisited the asylum and withholding provisions of the INA.\textsuperscript{149} The REAL ID Act adds subsections to both provisions that detail the burden of proof on the applicant. Section 208(b)(i) of the asylum provision in the INA was amended by the REAL ID Act to provide that “the burden of proof is on the applicant to establish that the applicant is a refugee within the meaning of section 101(a)(42)(A).”\textsuperscript{150} In contrast, the addition to the withholding provision, INA § 241(b)(3)(C), states that “[i]n determining whether an alien has demonstrated that the alien’s life or freedom would be threatened ... the trier of fact shall determine whether the alien has sustained the alien’s burden of proof.”\textsuperscript{151} Thus, the current statutory regime continues to consistently use references to the refugee definition (requiring persecution) exclusively in the context of asylum, and references to “life or freedom” only when discussing withholding of removal. Furthermore, the House Report on the REAL ID Act does not use “persecution” interchangeably with “life or freedom.” Though the Report does not explicitly address distinctions between the substantive standards, it does not conflate the two.\textsuperscript{152} The Report employs the “threat to life or freedom” language exclusively in addressing

\textsuperscript{148} Convention Relating to the Status of Refugees, 189 UNTS 150 (1954).

\textsuperscript{149} Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub L No 109-13, 119 Stat 231 (May 11, 2005)

\textsuperscript{150} INA § 208(b)(1), 8 USC § 1158(b)(1) (2000 & Supp 2006) (emphasis added).


claims for withholding, and only refers to a showing of "persecution" in reference to asylum claims.\textsuperscript{153}

The general structure of the INA also suggests that Congress intended a lower threshold standard for asylum eligibility. In discussing the evidentiary standard, the \textit{Cardoza-Fonseca} Court stated that it was consistent with the United Nations Protocol to interpret the INA as establishing "a broad class of refugees who are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger."\textsuperscript{154} The Court also stated that "the legislative history of the 1980 Act makes it perfectly clear that Congress did not intend the class of aliens who qualify as refugees to be coextensive with the class who qualify for §243(h) [withholding of removal] relief."\textsuperscript{155} The Court noted that Congress had declined to enact the Senate version of the bill which would have made a refugee ineligible for asylum unless "his deportation or return would be prohibited by § 243(h)."\textsuperscript{156} The Supreme Court's interpretation of the legislative history in \textit{Cardoza-Fonseca} suggests that Congress intended for a broader class of aliens—specifically known as refugees—to qualify for the discretionary grant of asylum when compared to the group of noncitizens that could qualify for withholding of removal.

It is true that the lower evidentiary burden for asylum established in \textit{Cardoza-Fonseca} already provides that the class of aliens qualifying for asylum will be broader. However, establishing a lower substantive standard would accomplish this in a manner that is equally appropriate, if not more so. The two relevant criteria when considering a grant of asylum are (1) the degree of certainty that a person will face mistreatment based on protected grounds, and (2) the severity of the mistreatment itself. The Supreme Court has already determined that the INA permits a broader class of people to qualify for asylum by imposing on them a lower evidentiary burden.\textsuperscript{157} In order to be eligible for asylum applicants must merely show a "well-founded fear" as opposed to a "clear probability" of persecution. This differentiates applicants based on the relative certainty with which they will

\textsuperscript{153} Id.
\textsuperscript{154} \textit{Cardoza-Fonseca}, 480 US at 424.
\textsuperscript{155} Id.
\textsuperscript{156} Id at 432–33.
\textsuperscript{157} See Part I A.
face persecution. This distinction ensures that only those meeting the higher standard will be granted mandatory relief in the form of withholding, while those meeting the lower standard can still be considered for a discretionary grant of asylum. However, this only allows differentiation along one of the criteria listed above.

Providing different substantive standards for the two provisions permits differentiation based on the other relevant factor: the severity of potential mistreatment. Because the degree of mistreatment is clearly as relevant in determining whether to grant relief, the substantive standard should provide for differentiation across this criterion. Currently, because of differentiation in the evidentiary standard, those who face something less than a clear probability of mistreatment that would threaten life or freedom can be eligible for asylum but not withholding of removal. If the substantive standards are also differentiated, those who face less severe economic mistreatment—that which does not necessarily reach the level of a threat to life or freedom—would similarly be eligible for asylum only. This differentiation allows applicants to be considered for asylum based on an assessment of both relevant factors, without requiring that a larger set be granted mandatory relief in the form of withholding. The general structure of the INA, combined with the disparate language of the two sections and careful interpretation of the persecution language provides strong evidence that different substantive standards are necessary in order to align the asylum determination with the Congressional intent behind the INA.

b) Acosta and Kovac revisited. The preceding discussion of the text and legislative history of the INA provides the necessary background to interpret the propriety of the Acosta and Kovac standards. Acosta has been read to require economic mistreatment threatening "life or freedom" to establish asylum eligibility. As a preliminary matter, this represents a fundamental misreading of the statement in the case. Acosta addresses the issue in a general discussion of the proper construction of the term "persecution." The BIA states, "[the harm or suffering inflicted] could consist of economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom." Thus, in Acosta the BIA merely states that such harm or suffering could establish persecution, but not that such severity is necessary. The BIA does not establish this as a threshold standard.

158 19 INS Dec at 222 (emphasis added).
Furthermore, the agency cites *Dunat*, a case decided prior to the removal of the physical qualification to the persecution standard. The change in statutory language has since been read to eliminate the premise upon which *Dunat* was decided. These elements provide little support for reading *Acosta* to establish a threshold standard for deciding economic mistreatment claims.

Additionally, the "threat to life or freedom" standard attributed to *Acosta* is itself without merit. This standard does not adequately differentiate between the asylum and withholding provisions of the INA. The text of the INA only requires that an applicant establish a likelihood of persecution in order to qualify as a refugee for the purposes of establishing asylum eligibility. The persecution standard, as outlined in the UNHCR Handbook, encompasses a broader class of mistreatment than "threats to life or freedom." The entirety of the legislative history represents an understanding that a threat to life or freedom is sufficient but not necessary to qualify as persecution. Requiring a showing of economic mistreatment so severe as to constitute a threat to life or freedom should be confined to claims for withholding of removal, where the INA explicitly requires an alien to show that their "life or freedom would be threatened" by deportation.

The *Kovac* standard, which requires "a probability of deliberate imposition of substantial economic disadvantage," is the most appropriate standard that has been applied to economic mistreatment claims. This standard ensures that persecution based on economic mistreatment is not confined to merely threats to life or freedom. Requiring "deliberate imposition" ensures that the treatment is actually persecution in the sense that it is intentionally directed at an individual, and not simply a reflection of general economic disadvantages in a particular country. Requiring that the economic disadvantage imposed on an individual be "substantial" suggests that mere harassment does not qualify, and it ensures that the persecution standard is not overly broad. Of course, this standard still leaves considerable discretion to the courts in deciding when particular circumstances meet these requirements. This is consistent with the history of the persecution standard, which permits case-by-case determination of whether particular circumstances warrant refugee status.

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159 See Part II B 1.
C. Economic Mistreatment as Persecution

Under the current version of the INA, there is no justification for requiring a higher burden from applicants relying on economic mistreatment than is required to establish persecution generally. The Fourth Circuit appears to be the only circuit specifically expressing such a distinction. In *Li*, the court describes persecution as including actions less severe than those that threaten life or freedom but then announces that economic sanctions qualify as persecution “only if” they threaten “life or freedom.”\(^{160}\) However, the cases cited by the court for the second proposition merely describe the possibility that such harsh economic sanctions could constitute persecution, and not that the persecution language requires this as a threshold standard.\(^{161}\) The exclusive language “only if” is added by the court without explanation. Therefore, it is unclear whether the court simply misinterpreted the underlying cases, or intended to announce a new standard exclusive to economic mistreatment. In either case, the court does not put forth an explanation for why economic persecution should be differentiated from persecution generally.

It is well established that Congress intended to broaden the definition of persecution when they removed the word “physical” from the withholding of removal portion of the INA in 1965.\(^{162}\) This change indicates that the *Dunat* standard, requiring that economic persecution generate physical repercussions, is unconvincing under the current version of the statute. Moreover, the UNHCR Handbook outlines a broad range of prejudicial actions that can qualify as persecution, including economic measures.\(^{163}\) Because persecution generally has been interpreted to cover many actions beyond those that threaten life or freedom, there is no plausible reason as to why persecution based on economic mistreatment cannot fit comfortably within a traditional interpretation of the persecution requirement. Therefore economic-

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\(^{160}\) 405 F.3d at 177.

\(^{161}\) See *Ahmed*, 396 F.3d at 1014 (“Economic discrimination has been held to rise to the level of persecution if such sanctions are sufficiently harsh to constitute a threat to life or freedom.”) (emphasis added); *Stevic*, 467 US at 418 (“[Persecution] has also been construed to encompass economic sanctions sufficiently harsh to constitute a threat to life or freedom.”).

\(^{162}\) See, for example, *Kovac*, 407 F.2d at 106 (“[I]t seems beyond argument that by deleting the word ‘physical,’ Congress intended to effect a significant, broadening change in section 243(h) which would lighten the burden imposed on applicants for asylum by removing the requirement that they show threatened bodily harm.”).

\(^{163}\) See UNHCR Handbook at 10–12 (cited in note 138).
based persecution does not require a standard beyond that which is articulated by courts in persecution cases generally.

D. A Proposed Standard

Having established that (1) the standard for “persecution” under asylum eligibility should be broader than the “life or freedom” standard under the withholding provision and (2) that there is no basis for treating economic mistreatment differently than persecution generally, it is clear that the appropriate standard for establishing that economic mistreatment constitutes persecution should be similar to the standard adopted in *Kovac*. Persecution should be found where there is a deliberate imposition of economic disadvantage sufficiently severe so as to threaten the infliction of substantial harm or suffering. This requires actions beyond “mere harassment” but not necessarily threatening “life or freedom.”

This standard comports with the text and legislative history of the INA. The text of the asylum provision clearly states that an applicant for asylum must only demonstrate that they qualify as a refugee by showing “persecution” on account of protected grounds.\(^{164}\) This text directly contrasts with the withholding of removal provision requiring a threat to “life or freedom.”\(^{165}\) Subsequent revisions to the statute have preserved this textual distinction.\(^{166}\) Additionally, the legislative history of the INA supports reading the asylum persecution standard as encompassing acts beyond threats to life or freedom.\(^{167}\) The UNHCR Handbook, which provides guidance for administering the Protocol upon which the Refugee Act of 1980 was based, clearly conveys an understanding that actions threatening life or freedom are a subset of those that qualify as persecution.\(^{168}\) Requiring asylum applicants to bear the burden of the “life or freedom” standard ignores these sources indicating that persecution is a broader concept. However, requiring applicants to show that they face mistreatment sufficiently severe so as to threaten the infliction of substantial harm or suffering prevents the persecution standard from become too broad, while preserving the distinction between asylum and withholding claims.

\(^{164}\) See Part I A.

\(^{165}\) Id.

\(^{166}\) See Part II B 3 a.

\(^{167}\) Id.

\(^{168}\) Id.
The INA, Congressional Reports, and the UNHCR Handbook all use the two standards consistently, and apply the “threat to life or freedom” standard exclusively in the context of withholding. The BIA and the courts appear to be alone in conflating the standards. This is perhaps because of lingering citations to Du nat, without consideration that this case was decided prior to the amendment removing the “physical persecution” requirement. Further confusion is provided by the fact that the withholding of removal portion of the INA did contain a reference to “persecution” prior to 1980. Some courts note that persecution may include threats to life or freedom, which is technically correct but presents yet another point of confusion when such statements are later construed as announcing a threshold standard.\textsuperscript{169} Having established that the “life or freedom” standard is appropriately applied only in withholding claims, this Comment suggests that the BIA and courts should employ caution in using the phrase to reference asylum eligibility. At a minimum, courts should qualify their use of the phrase, noting that demonstrating a threat to life or freedom is sufficient to establish persecution but not necessary. Careful consideration of the use of these statutory terms can ensure that aliens are not held to an inappropriately high standard to establish asylum eligibility.

Courts should properly grant asylum where an applicant has a well-founded fear of facing the deliberate imposition of economic disadvantage sufficiently severe so as to threaten the infliction of substantial harm or suffering. Though it is certainly much easier to announce an abstract standard than to apply it in actual cases, this proposed standard provides the necessary guidance for the BIA and courts to adjudicate individual claims fairly. As where the Cardoza-Fonseca Court established the general standards for the evidentiary burden, the BIA may give concrete meaning to remaining ambiguity through case-by-case adjudication so long as it does not confuse the standards of sections 208(b) and 241(b)(3)(A).\textsuperscript{170} By making this one distinction clear,

\textsuperscript{169} See, for example, Li, 400 F3d at 168 (“we hold that the deliberate imposition of severe economic disadvantage which threatens a petitioner’s life or freedom may constitute persecution”).

\textsuperscript{170} In Cardoza-Fonseca, the court stated that “[t]here is obviously some ambiguity in a term like ‘well-founded fear’ which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling ‘any gap left, implicitly or explicitly, by Congress’ the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.” 480 US at 448. The court determined that its role was merely to announce that the standards could not be identical, and that the agency could proceed to set forth a detailed description for ap-
courts can take a substantial step forward in ensuring that aliens attempting to show persecution—economic or otherwise—for the purpose of asylum eligibility are treated alike and are not held to an inappropriately high standard.

CONCLUSION

By establishing a consistent standard to be applied to all economic persecution claims, courts can ensure that similarly situated aliens are treated alike. Though this Comment focuses on addressing economic mistreatment, the discussion has broader implications for assessing all persecution claims under asylum law. In addressing these claims, courts have conflated the standards for asylum and withholding of removal, improperly equating "persecution" with "a threat to life or freedom." These recent economic mistreatment cases have merely brought this unsettled issue to the forefront. Permitting applicants to qualify for asylum based on a level of mistreatment less severe than that which threatens their life or freedom ensures that the discretionary grant of asylum properly applies to a broader group of aliens than those that qualify for withholding of removal. This interpretation is consistent with the text and legislative history of the INA. Asylum should be available to any alien with a well-founded fear of facing the deliberate imposition of substantial harm or suffering on account of their race, religion, nationality, membership in a particular social group, or political opinion. Further interpretation of the persecution standard as it applies to asylum claims should be developed by the BIA, guided by the notion that it should encompass more than merely situations threatening an applicant's life or freedom.