

CASE NOTES

Boer-Sedano v. Gonzales: The Increasing Influence of HIV/AIDS Status on Asylum Claims Based on Homosexual Identity

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I. INTRODUCTION

Jose Patricio Boer-Sedano fled his native Mexico in September 1990 because he suffered severe harassment and endured death threats as a result of his sexual orientation.¹ He entered the United States as a nonimmigrant visitor in 1990 with authorization to remain for six months.² After immigrating to San Francisco, he was diagnosed with Human Immunodeficiency Virus (HIV) in 1992 and later developed Acquired Immune Deficiency Syndrome (AIDS).³ For the past decade, Boer-Sedano worked as a waiter and busboy, and his employer provided him with health insurance that covered his treatment.⁴ The Immigration and Naturalization Service (INS) eventually learned that Boer-Sedano had overstayed his visa and attempted to remove him for failure to leave the country as his visa required.⁵ The INS placed him in removal proceedings in November 1997.⁶ Boer-Sedano admitted to overstaying his visa, but he requested asylum under the Immigration and Nationality

1. See *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1086-87 (9th Cir. 2005). The harassment included ostracism by family and friends, degrading verbal abuse at work, false arrest and detention by the police, and nine instances of being forced to perform oral sex on a “high-ranking police officer.” *Id.* at 1085, 1086. The same officer also threatened Boer-Sedano’s life by pointing a loaded gun at his head. *See id.* at 1086.

2. *See id.* at 1085. Nonimmigrant visitors are admitted to the United States for periods predetermined by the Attorney General. See 8 U.S.C. § 1184(a)(1) (2000). Nonimmigrants must agree to depart upon the expiration of their authorized periods of admission or they may fail to maintain their status. See 8 C.F.R. § 214.1(a)(3)(ii) (2005).

3. See *Boer-Sedano*, 418 F.3d at 1087.

4. *See id.*

5. *See id.* at 1085. Nonimmigrant aliens who no longer have nonimmigrant status are deportable. See 8 U.S.C. § 1227(a)(1)(c)(i). Deportability of aliens is determined in removal proceedings conducted by an immigration judge. See § 1229a(a)(1).

6. See *Boer-Sedano*, 418 F.3d at 1085.

Act (INA).⁷ He detailed his past persecution in immigration court and testified that obtaining employment and, consequently, paying for health insurance in Mexico as a gay man with AIDS would be impossible.⁸ Overlooking Boer-Sedano's serious health condition, an immigration judge (IJ) denied his request for asylum, and the Board of Immigration Appeals (BIA) affirmed the IJ's decision.⁹ Boer-Sedano then petitioned the federal circuit court for review of the BIA's decision.¹⁰ The United States Court of Appeals for the Ninth Circuit *held* that the BIA erred in affirming the IJ's denial of Boer-Sedano's asylum request, and that he had met the statutory requirements for asylum eligibility. *Boer-Sedano v. Gonzalez*, 418 F.3d 1082, 1092 (9th Cir. 2005).

II. BACKGROUND

Any alien, irrespective of his status, who either faced persecution in his country of origin or fears persecution if forced to return may seek protection in the United States by requesting asylum.¹¹ To be eligible for asylum, an individual must also demonstrate that the persecution occurred "on account of" protected characteristics, which include "race, religion, nationality, membership in a particular social group, or political opinion."¹² In defending against removal proceedings, an asylum seeker makes his initial claim in immigration court.¹³ The decision of that court may then be appealed to the BIA, which is an administrative appellate board.¹⁴ A decision by the BIA may then be appealed to a federal circuit court.¹⁵ In reviewing an asylum decision by the BIA, a federal circuit

7. *See id.* Boer-Sedano also sought two other forms of relief: (1) withholding of removal and (2) protection under the Convention Against Torture. *See id.* The court in the noted case ultimately remanded the withholding of removal claim to the Board of Immigration Appeals (BIA) for reconsideration and affirmed the decision of the immigration judge (IJ) to deny relief under the Convention Against Torture. *See id.* at 1092.

8. *See id.* at 1086-87. Further evidence in the record supports his claims that in Mexico he would face discrimination as an AIDS patient, that he would be unable to obtain the specific drugs he needed to survive, and that his health condition would greatly suffer if forced to return home. *See id.* at 1090-91.

9. *See id.* at 1086-87.

10. *See id.* at 1085.

11. *See* 8 U.S.C. § 1101(a)(42)(A) (2000). The Attorney General may grant asylum to a foreign national who has applied for asylum and qualifies as a refugee. *See id.* § 1158(c)(1)(a). The term refugee includes a foreign national "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, [his or her home] country because of persecution or a well-founded fear of persecution." *Id.* § 1101(a)(42)(A).

12. *Id.*

13. *See* 8 C.F.R. § 208.4(b)(3)(ii) (2005).

14. *See* 8 C.F.R. § 1003.1(b) (2005).

15. *See* 8 U.S.C. § 1252(b)(2).

court must use a “substantial evidence” standard.¹⁶ This standard compels the court to affirm a decision by the BIA to deny asylum unless an asylum seeker presents “evidence ‘so compelling that no reasonable factfinder could find’ that [the asylum seeker] has not established eligibility for asylum.”¹⁷

Until recently, homosexual asylum seekers in the United States faced difficulty in overcoming unfavorable immigration bars. Congress passed the initial version of the INA in 1952.¹⁸ This version excluded from admission into the United States immigrants possessing a “psychopathic personality.”¹⁹ Later, in 1965, Congress amended the law, adding the phrase “sexual deviation” to the list of grounds for exclusion.²⁰ Only in 1990 did Congress remove “sexual deviation” from the list of exclusionary grounds.²¹ Case law has only recently recognized homosexuality as a valid basis for asylum.

To establish a claim for asylum, an applicant must first show he falls into one of the five protected categories listed in the INA.²² One of these categories is membership in a particular social group, which the INA does not define.²³ In *In re Acosta*, the BIA defined the term “particular social group” to mean people “who[] share a common, immutable characteristic” which “members of the group either cannot change, or should not be required to change because [the characteristic]

16. *Njuguna v. Ashcroft*, 374 F.3d 765, 769 (9th Cir. 2004) (citing *Thomas v. Ashcroft*, 359 F.3d 1169, 1174 (9th Cir. 2004)). “Substantial evidence is more than a mere scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Turcios v. INS*, 821 F.2d 1396, 1398 (9th Cir. 1987). A federal appellate court reviews the whole record of each asylum case and considers evidence that contradicts the decision of the INS. *See id.* at 1398-99.

17. *Singh v. INS*, 134 F.3d 962, 966 (9th Cir. 1998) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992)).

18. *See* Immigration and Nationality Act, Pub. L. No. 414-477, 66 Stat. 163 (1952) (codified as amended throughout 8 U.S.C.).

19. *Id.* § 212(a)(4). Denying the naturalization request of a Canadian man who admitted engaging in same-sex sexual behavior, the United States Supreme Court found that Congress intended the INA to exclude homosexual immigrants from admission into the country. *See Boutillier v. INS*, 387 U.S. 118, 120-21 (1967). The Court declared that “[t]he legislative history of the [INA] indicates beyond a shadow of a doubt that the Congress intended the phrase ‘psychopathic personality’ to include homosexuals.” *Id.* at 120.

20. *See* Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (1965). This language was intended to explicitly exclude homosexual immigrants from entering the country. *See* S. REP. No. 89-748, at 19 (1965), *as reprinted in* 1965 U.S.C.C.A.A.N. 3328, 3337.

21. *See* Immigration and Nationality Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

22. *See* 8 U.S.C. § 1101(a)(42)(A).

23. *See id.*

is fundamental to their individual identities or consciences.”²⁴ Drawing on *Acosta*’s “immutable characteristic” language, the BIA established, in *In re Toboso-Alfonso*, that a homosexual asylum seeker may be considered a member of a particular social group.²⁵ The Ninth Circuit further clarified the definition in *Karouni v. Gonzales*, holding that “all alien homosexuals, are members of a ‘particular social group.’”²⁶

Next, an asylum seeker must prove that the particular acts claimed constitute persecution.²⁷ Circuit courts review this question of law *de novo*.²⁸ The Ninth Circuit has declared that certain actions constitute persecution for purposes of asylum. For instance, when a gay Mexican man seeking asylum testified that a police officer in Mexico anally raped him and forced him to perform oral sex, the court, in *Hernandez-Montiel v. INS* declared that the sexual assaults “undoubtedly constitute persecution.”²⁹ In addition, the court has held on numerous occasions that death threats made against an asylum applicant may constitute persecution.³⁰ After establishing that an act constitutes persecution, an individual requesting asylum must then demonstrate that either the government, people, or groups which the government cannot control committed the persecution.³¹ The Ninth Circuit explained in *Hernandez-*

24. 19 I.&N. Dec. 211, 233 (B.I.A. 1985). Some circuits have explicitly adopted this definition. *See, e.g.*, *Lukwago v. Ashcroft*, 329 F.3d 157, 171 (3d Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998). Other circuits have adopted broader definitions. *See, e.g.*, *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

25. *See* 20 I. & N. Dec. 819, 822-23 (BIA 1990) (agreeing with the IJ’s finding that a Cuban man’s homosexual identity qualified as membership in a particular social group). Decisions by the BIA do not constitute precedent until they are affirmed by a circuit court. *See Chan v. Reno*, 113 F.3d 1068, 1073 (9th Cir. 1997). However, in 1994, then-Attorney General Janet Reno declared that the decision in *Matter of Toboso-Alfonso* established precedent in proceedings where gays or lesbians seek asylum on the basis of membership in a particular group. *See Reno Designates Gay Case as Precedent*, 71 No. 25 Interpreter Releases 859, 860 (1994). Reno’s order has led to an estimated thousands of successful asylum claims by homosexual individuals. *See Victoria Neilson, On the Positive Side: Using a Foreign National’s HIV-Positive Status in Support of an Application To Remain in the United States*, 19 AIDS & PUB. POL’Y J. 45, 52 (2004).

26. 399 F.3d 1163, 1172 (9th Cir. 2005) (quoting *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2004)).

27. *See* § 1101(a)(42)(A).

28. *See Hernandez-Montiel*, 225 F.3d at 1097.

29. *Id.*

30. *See, e.g.*, *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1296 (9th Cir. 1997).

31. *See McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir. 1981), *superseded in part by statute* 8 U.S.C. § 1253(h) (2000), *as recognized in Gheblawi v. INS*, 28 F.3d 83, 85 (9th Cir. 1994) (delineating the elements necessary for withholding the deportation of a political refugee).

Montiel that, for asylum purposes, actions by police officers constitute actions of the state.³²

A finding of past persecution entitles an asylum applicant to a rebuttable presumption that he or she fears future persecution.³³ The government may rebut the presumption by proving, by a preponderance of the evidence, that either circumstances in the applicant's country of origin have fundamentally changed or that the applicant could reasonably evade future persecution by moving to another area within his home country.³⁴ When evidence suggests that persecution similar to that previously suffered by the asylum seeker is still occurring in his country of origin, then the government has not met its burden.³⁵ For the government to be able to prove that relocation is reasonable, it must consider several factors, including the applicant's "social and cultural constraints, such as age, gender, health, and social and familial ties" as the IJ considers these factors to determine whether relocation is unreasonable.³⁶ If an asylum seeker is unable to prove past persecution, he may also seek asylum based solely on a showing of a well-founded fear of future persecution if he is forced to return to his country of origin.³⁷ The asylum seeker may prevail by establishing at least a ten percent chance that he will be persecuted in the future.³⁸ The fear must be both "subjectively genuine and objectively reasonable."³⁹

32. See 225 F.3d at 1097 (describing the persecution suffered by an asylum seeker at the hand of a police officer).

33. See 8 C.F.R. § 1208.13(b)(1) (2005).

34. See § 1208.13(b)(1)(i).

35. See, e.g., *Agbuya v. INS*, 241 F.3d 1224, 1230-31 (9th Cir. 2001); *Kataria v. INS*, 232 F.3d 1107, 1115 (9th Cir. 2000). The presumption is rebutted where the government presents evidence showing that conditions in the country have changed enough that the asylum seeker no longer has a well-founded fear of persecution. See *Agbuya*, 241 F.3d at 1231.

36. See § 1208.13(b)(3). A nonexhaustive list of factors includes "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[,] [and] geographical limitations." *Id.* The Ninth Circuit found that relocation would be unreasonable for a variety of reasons. See, e.g., *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214-15 (9th Cir. 2004) (remanding the issue of reasonableness of relocation based on the applicant's age, lack of employment, and family connections); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1071 (9th Cir. 2003) (noting war, lack of food, and the importance of family ties in the decision to remand an asylum case for consideration of the reasonableness of relocation). However, the court has never considered an applicant's health status in determining that relocation would be unreasonable. See *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1090 (9th Cir. 2005).

37. See 8 U.S.C. § 1101(a)(42)(A) (2000).

38. See *Gomes v. Ashcroft*, 429 F.3d 1264, 1266 (9th Cir. 2005). "Even a ten percent chance that the applicant will be persecuted in the future is enough to establish a well-founded fear." *Id.* (quoting *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004)).

39. *Id.*

After an asylum seeker establishes that he belongs to one of the protected categories, that he either suffered persecution (and fears future persecution) or has a well-founded fear of future persecution, he must then prove the persecution is “on account of” a protected category.⁴⁰ The United States Supreme Court determined in *INS v. Elias-Zacarias* that the prosecutor’s *motive* is critical to the assessment of an asylum application.⁴¹ If no evidence exists of a legitimate purpose for the persecution, then a presumption arises that the motive for the persecution is on account of a protected ground.⁴²

III. COURT’S DECISION

In the noted case, the Ninth Circuit applied the requirements provided in the INA to review Boer-Sedano’s failed claim for asylum.⁴³ It noted several errors. First, the court noted that the IJ erred in asserting that gay men in Mexico are not members of a particular social group for asylum purposes.⁴⁴ Second, the court held that the IJ incorrectly found that Boer-Sedano had neither suffered persecution in Mexico, nor had a well-founded fear of future persecution should he be returned to Mexico.⁴⁵ Third, the court found that either the Mexican government, persons, or groups whom the government could not control subjected Boer-Sedano to persecution.⁴⁶ Finally, the court held that the IJ wrongly concluded that Boer-Sedano’s persecution was not on account of his homosexuality.⁴⁷ The Ninth Circuit then overruled the IJ’s denial of the application and remanded the proceeding to the Attorney General to decide the fate of Boer-Sedano’s asylum claim.⁴⁸

The Ninth Circuit first addressed the IJ’s conclusion that homosexual men are not members of a particular social group for asylum purposes.⁴⁹ The court noted the recent decision in *Karouni v. Gonzales*, which held that all homosexual foreign nationals are considered

40. See § 1101(a)(42)(A).

41. See 502 U.S. 478, 481-83 (1992) (rejecting a Guatemalan man’s claim for asylum, because his fear of persecution was not on account of political opinion and that his persecutors were not motivated by the victim’s political opinion).

42. See *Ratnam v. INS*, 154 F.3d 990, 995 (9th Cir. 1998).

43. See *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1087 (9th Cir. 2005) (citing § 1101(a)(42)(A)).

44. See *id.* at 1087-88.

45. See *id.* at 1088-89.

46. See *id.* at 1088. The noted case does not discuss the IJ’s finding on this issue.

47. See *id.* at 1088-89.

48. See *id.* at 1092. After an asylum applicant succeeds with his claim, the ultimate decision to grant asylum is made by the Attorney General. See 8 U.S.C. § 1158(c)(2000).

49. See *Boer-Sedano*, 418 F.3d at 1087-88.

members of a particular social group.⁵⁰ As a homosexual immigrant, Boer-Sedano satisfied this first requirement because he proved he was a member of a particular social group protected by the INA.⁵¹ Thus, the court held the IJ erred in concluding gay men in Mexico did not constitute members of a particular social group.⁵²

Next, the court reviewed the IJ's finding that Boer-Sedano did not face persecution in Mexico.⁵³ It compared the narrative of his suffering to the accounts of suffering made by asylum seekers in two other cases, both of which resulted in findings of persecution.⁵⁴ The court recognized that in both *Hernandez-Montiel v. INS* and the noted case, a police officer forced the asylum applicant to perform oral sex.⁵⁵ The court explained that because it had previously held that forced oral sex may be considered persecution, the sexual assault Boer-Sedano endured also qualified as persecution.⁵⁶ The court then concluded that the death threats made against Boer-Sedano, like the death threats suffered by the asylum applicant in *Navas v. INS*, rose to the level of persecution.⁵⁷ The court also chided the IJ for considering the threats against Boer-Sedano to be merely an "incident."⁵⁸ After its *de novo* review, the court ruled that the IJ erred in finding Boer-Sedano had not suffered persecution in Mexico.⁵⁹

The court also evaluated Boer-Sedano's claim that he feared future persecution.⁶⁰ The IJ announced several reasons why Boer-Sedano did not have a well-founded fear of future persecution, but the Ninth Circuit found each to be unpersuasive and insufficient to rebut the presumption of a well-founded fear of persecution.⁶¹

50. *See id.*

51. *See id.*

52. *See id.* at 1088.

53. *See id.*

54. *See id.* (comparing the facts in the noted case with those in *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) and *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000)).

55. *See id.*

56. *See id.*

57. *See id.*

58. *Id.* Counsel at the hearing described the death threat, but the IJ "warned her to 'classify [the incident] as it was rather than a death threat.'" *Id.*

59. *See id.*

60. *See id.* at 1089-92. Boer-Sedano proved past suffering; thus there was a presumption that he would suffer future persecution. *See id.* at 1089. Unless the government is able to rebut this presumption with evidence of changed country conditions, an asylum seeker who has established past persecution has satisfied the persecution element of an asylum claim. *See id.* at 1089-92.

61. *See id.*

The court refuted the IJ's assertions that conditions in Mexico had changed since Boer-Sedano's immigration and that no evidence of homosexual persecution existed.⁶² It cited evidence from two State Department reports describing the prevalence of violence against homosexuals in Mexico.⁶³ Additionally, it referenced numerous newspaper articles documenting ongoing police violence against homosexuals in Mexico.⁶⁴ The court held that the government's scant evidence of changed conditions in Mexico did not rebut the presumption of Boer-Sedano's well-founded fear of future persecution.⁶⁵

The IJ's belief that relocation in Mexico would be reasonable was also held to be incorrect.⁶⁶ The court emphasized that Boer-Sedano's status as a patient with HIV contributed to its holding that relocation would be unreasonable.⁶⁷ Reports and articles in the record detailed widespread "hostility towards and discrimination against HIV/AIDS patients" in Mexico.⁶⁸ In addition, the court was influenced by testimony from Boer-Sedano's doctors and corroborating news articles, describing the unavailability of his AIDS medication in Mexico.⁶⁹ Testimony about the lack of jobs and health insurance for gay men with AIDS in Mexico and the inability to import medication was also persuasive.⁷⁰ The court held that social and cultural constraints, Boer-Sedano's health status, and the likelihood of grave harm resulting from his relocation would prevent a reasonable fact finder from concluding that the government had met its burden to show that relocation back to Mexico was reasonable.⁷¹

62. *See id.* at 1089-90.

63. *See id.* In 1997, the U.S. Department of State's Bureau of Democracy, Human Rights, and Labor reported that homosexual displays of affection may subject persons to prosecution under Mexican law and that violence against homosexuals is fairly common. *See* U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, MEXICO-PROFILE OF ASYLUM CLAIMS & COUNTRY CONDITIONS 6 (1997), available at http://www.asylumlaw.org/docs/mexico/usdos97_mexico_profile.pdf. A 2001 report notes the presence of police abuse of homosexuals and those with HIV/AIDS in Mexico. *See* Bureau of Democracy, Human Rights, and Labor, *Mexico: Country Reports on Human Rights Practices* (2001), <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8320.htm>.

64. *See Boer-Sedano*, 418 F.3d at 1090.

65. *See id.*

66. *See id.* at 1091.

67. *See id.* at 1090-91.

68. *Id.* at 1090. The 2001 country report on human rights practices in Mexico indicates that violence against persons with HIV/AIDS persists and that such persons are subject to abuse and mistreatment. *See* Bureau of Democracy, Human Rights, and Labor, *supra* note 63.

69. *See Boer-Sedano*, 418 F.3d at 1091.

70. *See id.*

71. *See id.* at 1091-92.

Third, the Ninth Circuit established that a state actor persecuted Boer-Sedano.⁷² Relying on *Hernandez-Montiel v. INS*, the court declared that “[p]olice officers are the prototypical state actor for asylum purposes.”⁷³ Because Boer-Sedano was sexually assaulted by a police officer, who qualifies as a state actor, the court concluded that these assaults were “sufficient to establish state action,” which is a required showing for a successful asylum claim.⁷⁴

Lastly, the court analyzed the IJ’s conclusion that Boer-Sedano’s persecution was not on account of his sexual orientation.⁷⁵ It reviewed the evidence in the record and elucidated two reasons for its decision. First, it concluded that the police officer expressed that he was motivated by Boer-Sedano’s sexual orientation.⁷⁶ Second, the court explained that if no evidence of a legitimate purpose for Boer-Sedano’s persecution existed, then a presumption arose that the reason he was persecuted was because of a protected characteristic.⁷⁷ Accordingly, the court found that the officer’s harassment of Boer-Sedano was on account of his sexuality.⁷⁸

While the IJ ruled against Boer-Sedano on each element of his asylum claim, the Ninth Circuit, applying precedent and analyzing convincing evidence in the record, overruled the IJ’s decision.⁷⁹ The Ninth Circuit declared that Boer-Sedano met all the elements required by the INA to be eligible for asylum.⁸⁰ The court then remanded his claim to the Attorney General for evaluation—which is the final hurdle in gaining asylum in the United States.⁸¹

IV. ANALYSIS

While Boer-Sedano’s journey out of Mexico and through the U.S. justice system has been arduous, his litigation’s impact may have significant implications for future asylum seekers living with HIV or AIDS. Using well-established case law, Boer-Sedano proved the elements of his asylum claim, and the court’s judgment to overturn the IJ’s decision was, therefore, straightforward. The noted case is significant, however, because it was the first instance in which the Ninth Circuit con-

72. *See id.* at 1088.

73. *Id.*

74. *Id.*

75. *See id.* at 1088-89.

76. *See id.* at 1089.

77. *See id.*

78. *See id.*

79. *See id.* at 1087-92.

80. *See id.* at 1092.

81. *See id.*

sidered whether a gay asylum seeker's HIV or AIDS status could make relocation to the country of origin unreasonable.⁸² This precedent may open the door for asylum seekers in the Ninth and other circuits to stake their asylum claims on their status as individuals with HIV or AIDS.

As discussed, immigration policies in the United States have traditionally been inhospitable to those living with HIV or AIDS.⁸³ Federal law prevents foreigners with HIV or AIDS from entering or permanently remaining in the United States unless they obtain a waiver.⁸⁴ There are signs, however, that courts are becoming more amenable to granting asylum to applicants with HIV or AIDS. For instance, an IJ has granted asylum to a Togolese immigrant because of his membership in the particular social group of "persons who are afflicted with HIV."⁸⁵

In another such opinion, an immigration court in Baltimore granted asylum in 2000 to an HIV-positive woman from India who feared persecution if she were forced to return.⁸⁶ The IJ defined the asylum applicant's particular social group "as married women in India who have contracted HIV, who fear that their families will disown them or force them to get a divorce, and who wish to be or need to be employed."⁸⁷ The court was persuaded by evidence showing that the Indian Supreme Court prohibits people with AIDS from marrying and punishes those who disobey the order.⁸⁸

In addition to these few cases, decisions and directives from other nonjudicial bodies have recognized the significance of an asylum

82. See *id.* at 1090. The court noted that it had "not yet had occasion to consider when a petitioner's *health status*, in combination with other social and cultural constraints, [could] make relocation unreasonable." *Id.* (emphasis added).

83. See Lyn G. Shoop, Comment, *Health Based Exclusion Grounds in United States Immigration Policy: Homosexuals, HIV Infection and the Medical Examination of Aliens*, 9 J. CONTEMP. HEALTH L. & POL'Y 521, 532 (1993).

84. See, e.g., 8 U.S.C. § 1182(a)(1)(A)(i) (2000).

85. 73 No. 6 Interpreter Releases 901, 901 (July 8, 1996). The applicant testified to harsh conditions in his home country, including isolation, a lack of medication, inability to obtain employment, and community ostracism. See *id.* The IJ found the applicant had a legitimate fear of future persecution based on his status as a man with HIV. See *id.*

86. See *Ostracism, Lack of Medical Care Support HIV-Positive Asylum Quest, IJ Rules*, 78 No. 3 Interpreter Releases 233, 233-35 (Jan. 15, 2001).

87. *Id.* at 234.

88. See *id.* Other evidence indicated that individuals with HIV and AIDS in India were refused medical treatment, fired from their jobs, and ostracized from their communities. See *id.* at 234-35. Another immigration court recently granted asylum to a Haitian man who claimed to be a member of the particular social group of individuals suffering with HIV or AIDS. See Lynda Ford, *HIV Afflicted Haitians: New Hope When Seeking Asylum*, 36 U. MIAMI INTER-AM. L. REV. 293, 305-06 (2005). The court found in his favor, in part, because of the persecution he would face in Haiti because of the "superstitions and fears promulgated by the voodoo religion towards those afflicted with HIV." *Id.* at 293.

applicant's status as a patient with HIV. The INS granted asylum to a gay Brazilian man with HIV.⁸⁹ While the INS's New Jersey Asylum Office based its decision on the applicant's homosexuality, the office also heard testimony on the persecution he would suffer on account of his health condition.⁹⁰ In 1996, the INS General Counsel wrote a memorandum stating that the INS should grant asylum and other immigration relief to HIV-positive individuals.⁹¹ Although the memo did not delineate a new class of persons exempt from deportation, it did recognize that "immigration law issues involving those afflicted with HIV are relatively undeveloped" and that HIV status should be considered as a possible qualification for membership in a particular social group for asylum purposes.⁹²

Decisions such as these and the holding in the noted case indicate that U.S. immigration law is increasingly willing to extend protection to asylum seekers with HIV and AIDS. This willingness may impact homosexual asylum seekers who also have HIV or AIDS. These individuals may not only face less discrimination in the United States than in their country of origin, but they may also have the opportunity to access superior health care and vital experimental treatments. Therefore, the Ninth Circuit's willingness to consider Boer-Sedano's health status as part of its analysis of the reasonableness of relocation signifies a policy that recognizes the importance of medical care for immigrants with HIV and AIDS.⁹³

The court's decision to consider Boer-Sedano's health status has the potential effect of assisting gay asylum seekers with HIV or AIDS, because it provides additional support to their claim that relocation is unreasonable. Additionally, the decision recognizes the hardships that people living with HIV and AIDS face, and this recognition may lay the groundwork for the inclusion of HIV status as a protected group category under the INA. While Boer-Sedano's fate now rests with the Attorney General, the fates of many like him may benefit from his perseverance.

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89. See 73 No. 33 Interpreter Releases 1140, 1140 (Aug. 26, 1996).

90. See *id.*

91. See 73 No. 26 Interpreter Releases 901, 901 (July 18, 1996).

92. *Id.*

93. Such a policy has particular significance because of the circuit's influence over national immigration policy. See Peter Schuck & Theodore H. Wang, *Continuity and Change: Patterns of Litigation in the Courts, 1979-1990*, 45 STAN. L. REV. 115, 130 (1992).

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