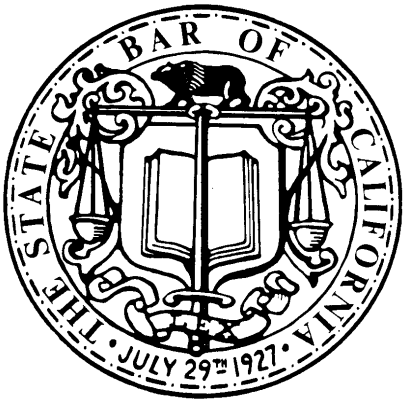

California Bar Examination

Performance Test And Selected Answers

February 2011

THE STATE BAR OF CALIFORNIA OFFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO CALIFORNIA 94105 1639 • (415) 538 2303
1149 SOUTH HILL STREET • LOS ANGELES CALIFORNIA 90015-2299 • (213) 765 – 1500

PERFORMANCE TEST SELECTED ANSWERS

FEBRUARY 2011 CALIFORNIA BAR EXAMINATION

This publication contains two selected answers for each performance test from the February 2011 California Bar Examination.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of the authors.

FEBRUARY 2011

California
Bar
Examination

Performance Test A

INSTRUCTIONS AND FILE

ENVIROSCAN, INC. v. STRUCTURAL ENVIRONMENTAL SAFETY AGENCY

FILE

ENVIROSCAN, INC. v. STRUCTURAL ENVIRONMENTAL SAFETY AGENCY

INSTRUCTIONS

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

State of Columbia
STRUCTURAL ENVIRONMENTAL SAFETY AGENCY
Legal Unit

MEMORANDUM

To: Applicant

From: Marla Brevette, Chief Counsel

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

Date: February 22, 2011

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

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

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

State of Columbia
STRUCTURAL ENVIRONMENTAL SAFETY AGENCY
Legal Unit

MEMORANDUM

TO: Staff

FROM: Raymond Barkley, Deputy Counsel

Date: December 28, 2010

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

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

All contractors engaged in the structural environmental toxic and hazard abatement business are required to be licensed by the SESA as Environmental Abatement Contractors. That license allows them, and their employees working under their

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

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

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

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

SUPERIOR COURT OF THE STATE OF COLUMBIA

CALEB COUNTY

ENVIROSCAN, INC., a Columbia Corporation, Petitioner, v. STATE OF COLUMBIA, STRUCTURAL ENVIRONMENTAL SAFETY AGENCY, an administrative agency of the State of Columbia, Respondent.	Case No.: 10047-06 **PETITION FOR WRIT OF MANDATE UNDER COLUMBIA CODE OF CIVIL PROCEDURE § 1094.5**

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

I. STATEMENT OF FACTS

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

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

II. THE ADMINISTRATIVE RECORD

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

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

III. GROUNDS FOR RELIEF

The grounds for relief are:

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

(a) SESA was required to receive any and all evidence presented by Petitioner at the proceedings below;

(b) Certification is granted or denied by SESA based on the exercise of discretion by the Specialty Certification Board; and

(c) The Specialty Certification Board was required to give Petitioner the opportunity to be heard at an evidentiary hearing.

2. That, in reviewing the decision of the Specialty Certification Board denying Petitioner's application for certification, the Court should apply its independent judgment and find that by the weight of the evidence the denial of certification was an abuse of discretion. In the alternative, and at a minimum, the court should review the record and conclude that no substantial evidence exists in the record to support the denial of Petitioner's application for certification.

3. That the Court allow Petitioner to introduce evidence that SESA and the Specialty Certification Board improperly refused to receive and consider during the proceedings below. In this regard, Petitioner intends to present additional evidentiary proof to support each of the grounds for relief at the hearing before the Court on this matter.

4. That, at the hearing, the Court exclude the evidence in the record concerning: (a) the alleged inadequacy of the training of Petitioner's technicians and (b) the civil actions against Petitioner that were settled, on the grounds that these items of evidence are irrelevant and unduly prejudicial because they exceed the SESA regulations.

IV. CONCLUSION

Based on the foregoing, the Court should grant the Petition for a writ of mandate pursuant to Columbia Code of Civil Procedure § 1094.5.

Date: February 11, 2011

MARSDEN, MARKS & JAMES, LLP

By /s/

Albert Marsden

Attorneys for Petitioner, Enviroscan, Inc.

State of Columbia
STRUCTURAL ENVIRONMENTAL SAFETY AGENCY
Office of Field Investigations

REPORT OF INVESTIGATION:

Investigator: Rodney Bellamy, Senior Investigator III

Subject: Application for Certification as Residential Specialist

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

Environmental Abatement Contractor's License # 107562

Principal: Elroy Riggins, President and Chief Executive Officer

Date: April 16, 2010

Summary of Report and Findings

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

Application No.: RS 244-06

Date Application Received: February 22, 2010

Dates of Investigation: Commenced on March 19, 2010.

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

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

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

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

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

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

b) Regarding Columbia Code of Regulations Section 2(c), two Enviroscan customers have filed civil actions alleging faulty installation. No judgments have been entered against the contractor; both actions were settled by the contractor's insurance company for undisclosed amounts. Enviroscan's application does not mention this.

c) Regarding the surety bonding requirements in Columbia Code of Regulations Section 3, Enviroscan was unable to verify that all of its installation and service employees are bonded. There have been instances in the past two years where bonds were denied to at least three employees for reasons relating to criminal records.

d) Statements taken from two of Enviroscan's current systems and parts vendors classify Enviroscan as "slow to pay." One of them ships to Enviroscan on a C.O.D. basis only.

e) Enviroscan has filed a mechanic's lien on the home of a customer for the customer's failure to pay the balance due on the installation of a system. The customer says Enviroscan departed from the specifications that the customer ordered and that Mr. Riggins refuses to discuss it. The customer says she learned from the Enviroscan employee who did the installation that he was ordered by Mr. Riggins to install a Detecto system because the supplier of the HomeSafe system (which is the one the customer says she ordered) would not ship to Enviroscan on credit.

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

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

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

Date: April 16, 2010 Rodney Bellamy

Rodney Bellamy, Senior Investigator III

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

June 21, 2010

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

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

Dear Mr. Riggins:

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

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

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

Imelda Galano

Imelda Galano
Secretary to the Board

Attachment to Notification Letter

SESA – Specialty Certification Board
Minutes of June 15, 2010 Regular Board Meeting

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

*** * ***

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

*** * ***

Imelda Galano

Imelda Galano, Secretary
SESA, Specialty Certification Board

ENVIROSCAN, INC.

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

July 12, 2010

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

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

Dear Secretary Galano and Members of the Board:

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

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

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

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

Sincerely,

Elroy Riggins

Elroy Riggins
President of Enviroscan

SESA – Specialty Certification Board

Minutes of September 10, 2010 Regular Board Meeting

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

*** * ***

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

*** * ***

Imelda Galano

Imelda Galano, Secretary
SESA, Specialty Certification Board

FEBRUARY 2011

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LIBRARY

ENVIROSCAN, INC. v. STRUCTURAL ENVIRONMENTAL SAFETY AGENCY

LIBRARY

Columbia Professions Code § 14700 *et seq.*

*** * ***

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

Columbia Code of Civil Procedure

Writs of Mandate

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

§ 1094.5 Administrative Mandamus.

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case

shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with the respondent's points and authorities, or may be ordered to be filed by the court.

(b) The inquiry in such a case shall extend to whether the respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases where the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record.

§ 1100. Evidentiary Record. In any proceeding on a writ of mandate under Columbia Code of Civil Procedure § 1085 or § 1094.5 where the court finds that there is:

(a) relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was produced but improperly excluded from the record below or (b) irrelevant and unduly prejudicial evidence that was included in the record below, the court may remand the case to the inferior tribunal, corporation, board, or officer to be reconsidered in light of that evidence, or in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit or exclude the evidence at the hearing on the writ without remanding the case.

REGULATIONS FOR APPLICATION AND CERTIFICATION AS RESIDENTIAL SPECIALIST

Columbia Code of Regulations § 101.752

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

Section 1. Application and Qualifications

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

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

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

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

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

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

Section 2. Representations

The contractor shall declare under penalty of perjury the following:

(a) That, as of the date of the application, the contractor is in good standing with and current in payment to the contractor's suppliers, vendors, and employees;

(b) That the contractor has not within the past five years been convicted of any criminal offense (not including minor traffic violations);

(c) That no civil action filed against the contractor within the past five years for recovery of damages in any way related to the conduct of his home security contracting business resulted in a judgment for damages against the contractor; and

(d) That the contractor has not within the past five years of the date of the application been denied certification as a Residential Specialist.

Section 3. Bond

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

Section 4. Statement of Qualifications and Additional Evidence

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

customers, vendors, suppliers, manufacturers, and other documentation attesting to the contractor's skill and qualifications.

Section 5. Investigation

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

Section 6. The Record

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

Section 7. Board Meeting, Deliberation, and Decision

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

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

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

Within 10 days of the Board's decision, the Board shall issue the certifications of the successful candidates and shall serve notice of the denials of certification on

the unsuccessful candidates. In the case of the latter, the notice shall include a statement informing the unsuccessful candidates that the record described in Section 6, above, and the minutes stating the reasons for the denial are available for inspection and copying by the candidates.

Butler v. State Pension Commission

Columbia Supreme Court (1995)

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

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

The proper method of obtaining judicial review of a public agency decision is by instituting a proceeding for a writ of mandate, or, as it is sometimes called, mandamus.[1] The statutes provide for two types of review by mandate: ordinary

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

mandamus (Columbia Code of Civil Procedure ["C.C.P."] § 1085) and administrative mandamus (C.C.P. § 1094.5).

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

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

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

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

In this particular case, the applicable standard of review is something of a hybrid. Although the regulations (i.e., the terms of the plan) do not provide for an administrative hearing, the plan itself provides that any reviewing court shall apply the substantial evidence standard. But for this provision in the language of the retirement plan, the court would have been limited to the "arbitrary and capricious or entirely lacking in evidence" standard. If there were any credible evidence to support the decision, including reasonable inferences drawn from the record — even if it amounts to merely a "scintilla," the court would have had to defer almost entirely to the agency's expertise.

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

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

New Evidence: Regarding Butler's effort to introduce evidence that he did not proffer during the agency proceedings below, case law has developed three principles relative to the rejection or admissibility of new evidence in mandamus proceedings, applicable equally in § 1085 and § 1094.5 cases: (1) if it should appear from the record that "irrelevant and unduly prejudicial" evidence had been received by the agency, the complaining party should not be foreclosed from objecting to its admission at the court hearing on the petition for mandate; (2) if the agency improperly refused to receive admissible evidence timely proffered, the litigant should not be foreclosed from offering it at the court hearing on the petition; and (3) if a party seeks to introduce additional evidence not included in either of the foregoing categories, the court may receive it upon a showing that, exercising reasonable diligence, the petitioner could not have acquired and introduced the newly-acquired evidence at the time of the agency proceedings. (*See* C.C.P. § 1100.) As an additional gloss on these three principles, the courts also consider whether the practices and regulations of the agency tend to discourage or encourage the petitioner to submit all evidence available to him/her in proceedings before the agency. If the agency is receptive to the liberal presentation of evidence by the petitioner at the agency proceedings, the burden on the petitioner to make the requisite showing of a justification for the later admission of evidence not earlier proffered is greater.

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

As we have noted above, terms of the retirement plan allowed the court to apply the substantial evidence standard. However, we believe the court went beyond

that and determined, based on its own independent evaluation of the evidence, that the Commission erred. Our review of the record shows that there was substantial evidence to support the Commission's decision. The inquiry should have ended there. It was not appropriate for the trial court to go further and determine whether, based on its own independent review of the record, it would have decided otherwise.

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

Darnell v. Columbia Board of Funeral Directors

Columbia Supreme Court (2001)

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

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

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

We assume for present purposes that there is nothing inconsistent in Darnell's two claims – one for ordinary mandamus against the Bureau and the other against the Board under § 1094.5. Ordinary mandamus under § 1085 lies to review the decision of a statewide administrative agency, such as the Bureau, which is not required to grant an evidentiary hearing before taking action, and administrative mandamus under § 1094.5 lies to review the decision of an agency, such as the Board, made after a required evidentiary hearing.

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

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

Columbia Code of Civil Procedure § 1094.5(c) provides essentially that, in the usual § 1094.5 case, the court reviews the record to determine whether the agency's findings are supported by substantial evidence, but that "in cases in

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

which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence." However, § 1094.5 is silent on when it is that the court is "authorized by law to exercise its independent judgment" and decide the case on the basis of the weight of the evidence. That is the question before us, and we hold that this is such a case.

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

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

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

adverse agency decision. The abrogation of such a right is too important to the individual to relegate it to exclusive administrative power of extinction.

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

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

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

A further and concomitant consequence of the requirement that the court exercise its independent judgment is that the court's inquiry then shifts from the "arbitrary and capricious" standard (usually applicable in a § 1085 petition) and

the “substantial evidence” standard (usually applicable in a § 1094.5 petition) to the weight of the evidence standard, i.e., whether in either case the agency decision was supported by the weight of the evidence. Essentially, then, the court conducts something of a trial *de novo*, determines as a trier of fact, based on its independent review of the agency record, where the weight of the evidence lies and decides the case as if of first impression.

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

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

Answer 1 to Performance Test A

Memorandum

To: **Marla Brevette, Chief Counsel, SESA**

From: **Applicant**

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

Date: **February 22, 2011**

As you know, we have been served with the first petition for a writ of mandate challenging the decision of SESA's Specialty Certification Board to deny an application for certification as a Residential Specialist under the new law. That application was received by, and the writ of mandate was served by, Enviroscan, Inc. We received Enviroscan's application for Certification as Residential Specialist on February 22, 2010. Pursuant to that application we performed an investigation beginning on March 19, 2010. After the investigation, based on the record findings in the investigation and by unanimous vote of the SESA Speciality Certification Board that application was denied on June 15, 2010. The denial was reported to Mr. Elroy Riggins of Enviroscan, Inc. on June 21, 2010, approximately six days after the decision. Pursuant to your request for an objective memorandum, I have analyzed the legal and factual issues relating to each of the four grounds of relief asserted in Enviroscan's petition below. Each ground for relief has been set forth under a separate heading. I have also made a determination as to whether SESA or Enviroscan is likely to prevail on each of these grounds.

(1) Ground One: That the petition be treated as one arising under CCP Section 1094.5.

The Petitioner (Enviroscan) correctly identifies the elements for a writ of mandate under Section 1094.5, an Administrative Mandamus, namely that (i) by law the agency was required to provide a hearing, (ii) evidence was required to be taken, and (iii) discretion in the determination of the facts was vested in the agency. If these elements are present, the Petitioner is entitled to an Administrative Mandamus. See Columbia Code of Civil Procedure Section 1094.5. See also *Butler v. State Pension Commission*. In *Butler*, the court set

forth these exact requirements for an administrative mandate as well, in accord with the statute. It is important to determine whether the Petitioner is entitled to review under an Ordinary Mandate or an Administrative Mandate because the standard for review, to be discussed below, may be different depending on whether it is an Administrative or an Ordinary. CCP Sections 1085 and 1094.5; *Butler*. If the Petitioner is not entitled to an Administrative Mandamus the Petitioner is entitled to an Ordinary Mandamus. That the Petitioner filed the petition for writ of mandate under Section 1094.5 is not determinative and if Petitioner is not entitled to relief under that section, the case should be deemed filed under the appropriate section (Section 1085 - Ordinary Mandamus) and the court should proceed with its analysis as if the petition had been filed under the correction section. *See Darnell*.

Thus, it must be determined whether three requirements are present entitling Petitioner to relief under CCP Section 1094.5.

(i) Is a hearing required by the agency? Under Section 14752 of the Columbia Professions Code, the authorizing statute for SESA, the Board shall act upon the basis of a written evidentiary record "without the requirement for a hearing." The Board meeting at which they review and discuss the record of each candidate is "open to all interested parties." However, the Board's deliberations are based solely on the record before it and "no evidentiary hearing or other oral presentation by the candidates under consideration or their representatives" shall be made. Reg Section 7. Thus, absolutely no hearing is required by the agency in its review of applications for the certification of Residential Specialists. The Petitioner will fail to show this element is present.

(ii) Is evidence required to be taken? Yes, under Professions Code 14752 the agency is required to act on the basis of a written evidentiary record. In addition, the Regulations for Application and Certification As Residential Specialist specifically state that the applicant contractor shall furnish complete and satisfactory evidence of the applicant’s qualifications (Reg Section 1), evidence that all employees are bonded (Section 3) and, in addition to these required items, any and all further documentary evidence the contractor believes reflects favorably on the contractor's qualifications and skill (Section 4). An investigation is made on the basis of matters set forth in the application and the accompanying documents submitted by the contractor (Section 5). Finally, the entire evidentiary record shall be submitted to the board and the Board's deliberations shall be based solely on the record before it - on the evidence obtained as part of the application process (Sections 6-7). Thus, evidence is required to be taken. This element for relief is satisfied by the Petitioner.

(iii) Does the agency have broad discretion? The Authorizing statute for SESA states specifically that SESA shall have broad discretion in determining and applying the criteria for certification. Professions Code 14752. In addition, in the materials received from Raymond Barkley, Deputy Counsel, he specifically stated that the legislative history of Professions Code 14572 makes it clear that, because of the privacy and safety implications of the use of residential systems in private homes, SESA is granted *extremely broad discretion* in carrying out this mandate and in establishing the standards for certification. As such, this element for relief is satisfied by Petitioner.

However, because no hearing is required under the authorizing statute or under the Regulations for Application and Certification As Residential Specialist, the Petitioner will fail to meet the first prong for relief under CCP Section 1094.5 and thus will not be entitled to Administrative Mandamus. This result was affirmed in *Butler v. State Pension Commission*. In that court the [court] stated that the "proper method of obtaining judicial review of a public agency decision is by instituting a proceeding for a writ of mandate, or, as it is sometimes called, mandamus." *Butler*. As we know from the CCP, the CCP provides for two types of review, ordinary and administrative mandamus. The court found where the agency was not required to hold an evidentiary hearing, the petition is "necessarily one under Section 1085." As such, Petitioner's request for writ of mandate should have been filed under Section 1085 and not Section 1094.5. However, where the petitioner files under the wrong section, the court will deem that it is filed under the correct section and proceed with its analysis as such.

On these facts, Petitioner has lost a showing on the first of his Grounds for Relief: that Petitioner is entitled to an Administrative Mandamus under Section 1094.5. Thus Petitioner is only entitled to an Ordinary Mandamus under Section 1085. *Thus the Court must deny the first Grounds for Relief requested by Petitioner*.

(2) Ground 2: That, in reviewing the decision of the Specialty Certification Board, the court should apply its independent judgment and find by the weight of the evidence the denial for certification was an abuse of discretion; or in the alternative, review the record and conclude that no substantial evidence exists in the record to support the denial of Petitioner's application for certification.

Petitioner's second Ground for Relief relates to the level of review of the court reviewing the agency's decision. Here the Petitioner requests either a

"weight of the evidence" review, or at the very least, a "substantial evidence" review. The level of review depends first on the type of mandate requested - Ordinary or Administrative, and second on the rights involved.

Standards of Review

The ultimate question for the reviewing court is whether the agency decision was an abuse of discretion. *Darnell*. The standard for that review depends on the type of mandamus.

Administrative: The inquiry under an Administrative Mandate extends to whether the respondent has proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required [by] law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. Where it is claimed that the findings are not supported by the evidence, the standard of review may be one of the following: (i) where the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence or (ii) abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record. CCP 1094.5. Here Petitioner is claiming that the findings are not supported by the evidence, so one of (i) or (ii) would apply if an Administrative Mandate were the appropriate relief.

Ordinary: Where Petitioner fails to meet the requirements for an Administrative Mandate, however, he will be heard under the requirements for an Ordinary Mandate. The standard for review under an Ordinary Mandate is set forth in both *Darnell* and *Butler* as an "inquiry by the reviewing court . . . to whether the decision being challenged was 'arbitrary, capricious, or entirely lacking in evidentiary support." *Butler* and *Darnell*. In *Butler*, the court was presented with a "hybrid" standard which is not present here. In that case, the agency was required to use the "substantial evidence" standard and so the court applied a hybrid. Here, no such issue exists - the regulations for SESA do not require the court's review use the "substantial evidence" standard. In fact, as Mr. Barkley set forth, the agency's decisions are final and subject only to narrow, limited review by the courts under Section 1085 (Ordinary Mandamus). Thus, under the present facts based on the requirements for an Ordinary Mandamus review, the "arbitrary and capricious" standard must be used.

Fundamental Right: However, as discussed in *Darnell*, irrespective of whether Ordinary or Administrative Mandamus applies, the question whether the court is authorized to exercise its independent judgment on the record as a whole depends on whether the decision affects a fundamental vested right of the individual. This means that the court may be required to use a "trial type - de novo" review of an agency's actions, contrary to the requirements of even the Ordinary Mandamus, and apply its "independent judgment." To determine whether the court must do so, *Darnell* court set forth a two part test: (1) Is the right fundamental? and (2) Is the right vested? *Darnell*.

Is the right fundamental?

Is the right a "basic one which will suffer substantial interference by the action of the administrative agency if the right is abridged?" *Darnell*. Per se fundamental rights are those that bear directly on one's ability to work and make a living. *See Darnell*. Here the right is to a "specialist" certification. The SESA "specialist" certification does not interfere with licensed contractors from continuing to engage lawfully in the business. *Darnell*. It merely requires that before any contractors hold themselves out as "specialists" that they obtain certification. Petitioner did state in its letter to SESA after it was denied certification that they are the "largest single installer of residential monitoring systems in the Darbyville metropolitan area," that they have been in the business for more than 10 years, and that it will result in a certain loss of at least "$250,000 per year in current business" and even more in future business. Thus they may actually be able to show that the agency's ruling interferes with its right to continue to do business and thus may interfere with its ability to work and make a living. Mr. Barkley's letter even indicates that there is a "significant economic value" in being able to advertise that they have qualified as "specialists." However, Petitioner is still permitted to engage lawfully in the field and continue working as it has been over the past ten years.

Is the right vested?

The issue here is whether the fundamental right is "already possessed by and vested in the individual" at the time of the adverse finding or whether it is a right that the person is "merely applying to acquire." Here the Petitioner is applying to obtain the specialist certification; that certification is not being taken away. Thus, assuming the Petitioner is asserting a fundamental right, where one is merely applying to acquire the right, the courts "have deferred to the administrative expertise of the agency." Where the right is fundamental and where the right has already been acquired (vested) the courts have held that the loss is sufficiently vital to compel a full and independent review of the adverse

agency opinion. Here, though, where Petitioner is merely applying to acquire a right, the court will defer to the administrative expertise of SESA unless it lacks evidentiary support in the record. This is particularly so where, as here, the agency has broad discretionary powers. *Darnell*.

Thus, the standard of review is that of an Ordinary Mandamus and is the "arbitrary and capricious standard". The court will use the arbitrary and capricious standard of review instead of the "independent judgment" or "substantial evidence" standards. *Thus the court must deny the second Grounds for Relief requested by Petitioner*.

(3) Ground 3: That the Court allow Petitioner to introduce evidence that SESA and the Specialty Certification Board improperly refused to receive and consider during the proceedings below. In this regard, Petitioner intends to present additional evidentiary proof to support each of the grounds for relief at the hearing before the court on this matter.

Is additional evidence admissible?

Under CCP 1100, the court may remand the case if there is (i) relevant evidence [that], in the exercise of reasonable diligence, could not have been produced or that was produced but improperly excluded from the record below or (ii) irrelevant and unduly prejudicial evidence that was included in the record below. If the court is authorized by law to "exercise its independent judgment on the evidence" the court may admit or exclude the evidence without so remanding. Here the standard is not one of "independent judgment" so the question appears to be whether, based on the additional evidence or the irrelevant evidence, the court may remand the case. However, in *Butler*, the court stated principles relative to the rejection or admissibility of new evidence into the mandamus proceedings (applicable to Sections 1085 and 1094.5) and not on remand. With respect to additional evidence, (i) if the agency improperly refused to receive admissible evidence timely proffered, the litigant should not be foreclosed from offering that evidence at the court hearing or (ii) if a party seeks to introduce additional evidence not included in either of the foregoing categories, the court may receive it upon a showing that exercising reasonable diligence, the petitioner could not have acquired and introduced the newly-acquired evidence at the time of the agency proceedings. *Butler*.

With respect to the additional evidence there are two questions: first whether there was evidence the agency improperly refused to receive and second whether the party may be permitted to introduce additional new evidence (not previously offered).

As to whether the agency improperly refused to receive evidence of Petitioner, the agency did not refuse any of Petitioner's evidence. It merely made its decision within the 10 day time frame it told Petitioner it would. In addition, when making its determination, the court considers whether the practices and regulations of the agency tend to discourage or encourage the petitioner to submit all evidence available to him/her in proceedings before the agency. *Butler*. In the present case, the agency (SESA) provided at least two opportunities for Petitioner to present evidence available to him. First, at the application stage, the agency specifically calls for the applicant to submit evidence showing sufficiency of the qualifications and "any and all further documentary evidence the contractor believes reflects favorably on the contractor's qualifications." Again on April 2, 2010, Mr. Bellamy (of SESA) spoke with Mr. Riggins and invited him to submit any information he wished by way of explanation or rebuttal of the "exceptions" noted in my report" within 10 days. Mr. Riggins stated he was busy but that he would try. After 10 days SESA did not refuse the evidence; it merely made a decision on the record it had. Mr. Riggins had failed to provide any further evidence. Thus, as here, where the agency encourages the Petitioner [to] submit additional evidence, the Petitioner should not now be able to submit evidence that with "reasonable diligence" could have [been] submitted at the time of the agency proceedings. There is no suggestion that Mr. Riggins made any attempt to submit additional evidence before this writ petition. Thus the first part of Petitioner's third grounds for relief must be denied - he should not be permitted to submit evidence that SESA allegedly refused to receive and consider.

As to whether additional new evidence should be admitted, the question is whether in the exercise of reasonable diligence, Mr. Riggins could have procured the documents at the agency level. The court will again consider that the agency encouraged the Petitioner to submit all evidence available to him. Mr. Riggins must show that somehow he recently came across new evidence and could not have obtained such evidence during the agency proceedings with reasonable diligence. Where, as here, the documents were readily available at all times but only belatedly did Mr. Riggins conclude they might help him advance his case, such new evidence will not be admitted. Mr. Riggins made no attempt to acquire additional documents for SESA's review during the agency proceedings and as such should not be permitted to belatedly offer them into evidence in the court's proceedings on the writ of mandate. *Butler*.

As such, Petitioner's third Grounds for Relief should be denied and no additional evidence should be permitted.

(4) Ground Four: That the Court exclude the evidence in the record concerning (a) the alleged inadequacy of the training of Petitioner's technicians, and (b) the civil actions against Petitioner that were settled, on the grounds that these items of evidence are irrelevant and unduly prejudicial because they exceed the SESA regulations.

For "irrelevant and unduly prejudicial" evidence that has been received by the agency, the complaining party should not be foreclosed from objecting to its admission at the court hearing on the petition. *Butler*. This is in accord with CCP Section 1100. The question then is whether (a) and (b) above are irrelevant and unfairly prejudicial. The court again views this question in the light of whether the agency encourages the petitioner to submit all evidence available to him. Again, SESA specifically prompts applicants to submit any and all favorable evidence (Section 4). The investigator also asked Mr. Riggins if he wanted to submit any evidence to rebut the "exceptions" noted in SESA's report.

Is the evidence Irrelevant and Unfairly Prejudicial thus permitted petitioner to object to its admission?

(a) Inadequacy of Training: The evidence regarding the lack of training in the last year is directly relevant to both requirements (2) and (4) under Regulation Section 1 - that contractor receive no less than 60 hours of training and that contractor has and can maintain an experienced staffing level adequate to service customers. That Petitioner has been unable to provide training over the past three years indicates that requirement (2) that 60 hours of training be provided was not met. It also indicates that Petitioner does not have the manpower or experience to provide the training or that he maintains an "experienced staffing level." Without training, it's possible his staff is inexperienced. Thus the adequacy of training evidence is relevant. It is also not unduly prejudicial. That the trainings haven't occurred over the past three years does not indicate that the application should be outright denied; it is just one of the requirements. Mr. Riggins could have rebutted it as well. In addition, Mr. Riggins was told that the investigator would interview suppliers and vendors so this evidence should not come as a surprise to him. That it may be prejudicial to Petitioner's case does not mean it should be excluded. Because the evidence is relevant it should remain in the record and be heard by the court in the writ hearing.

(b) Civil Settlements: The evidence that the Petitioner asks the court to exclude is in fact relevant. Pursuant to Section 2 of the regulations, the contractor (Petitioner) must certify that "no civil action" has been filed against contractor within the past five years for recovery of damages. The two civil

actions that Petitioner notes were regarding faulty installations, which relates directly to "the conduct of his home security contracting business." However, Section 2 only requires contractor to certify as to civil suits that "resulted in a judgment." These civil suits resulted in settlements and no judgments, and so are irrelevant to the contractor's declaration under Section 2. They are also highly prejudicial as they indicate that Petitioner has been sued before, even though it is not a specific requirement that no suits have occurred (only that no judgments have occurred). In any event, the Board minutes do not suggest that the Board relied on the civil settlements. Thus the evidence with respect to the settlements is irrelevant and highly prejudicial and Petitioner should not be foreclosed from having that evidence excluded.

Thus, Petitioner's Fourth Grounds for Relief should be denied in part and granted in part. SESA will lose on its argument that the civil settlements should be included.

CONCLUSION: Based on the Petitioner's Grounds for Relief, Petitioner requests that the court grant its writ of mandate pursuant to CCP Section 1094.5.

We have determined that the proper grounds for relief is under CCP Section 1085, writ of Ordinary Mandamus. The standard of review is that of an Ordinary Mandamus and is the "arbitrary and capricious standard" and we must determine whether under the applicable standard of review (arbitrary and capricious), there was adequate evidence to support the agency's decision." *Butler*. Under the "arbitrary" standard of review, if there were any credible evidence to support the decision, including reasonable inferences drawn from the record - even if it amounts to merely a "scintilla," the court must defer almost entirely to the agency's expertise. *Butler*. The requirements to obtain the "specialist" certification are simple and the review will be based on whether there was even a "scintilla" of evidence for each. If there is, the court must defer to SESA. The requirements are set forth in Regulations Section 1.

First, for at least five years preceding the date of the application, the contractor has been continuously engaged in the business of installing and servicing residential systems, including monitoring such systems. Second, the contractor has received from manufacturers, suppliers, or vendors no less than 60 hours of training in installing, servicing, monitoring, and programming such systems. Third, a description of the systems the contractor typically handles and the services the contractor furnishes must be provided. Fourth and finally, the contractor has and can maintain an experienced staffing level adequate to service customers promptly and responsively within the geographical area in which the business is conducted. In addition, the Petitioner (applicant) is

required to declare that the contractor is in good standing, and in the past five years has not been convicted of any criminal offense, no civil action has been filed and the contractor has not been denied certification as a Residential Specialist. The contractor must also furnish evidence that all employees of the contractor are bonded and that the contractor otherwise maintains an adequate surety bond.

Based on the evidence in the record, even excluding the civil suit settlements, the court must deny Petitioner request for relief. Petitioner has been in good standing for at least five years (10 years it appears to have been in business) and the Petitioner provided a description of its systems (or at least the report of the investigator indicates as much). However, there is evidence to indicate that 60 hours of training has not occurred. It is also possible based on the inadequate training that it may not maintain an experienced staffing level. Even assuming these two elements were met, the contractor's declaration made pursuant to Reg. Section 2 may be inaccurate. The contractor appears to be late or "slow to pay" some of its customers. In addition, there was a mechanic's lien filed by one of its customers. Thus it does not appear that Petitioner is in good standing with its customers. The civil settlements are not in the record, so the court may not consider these. Notably, the Board minutes to not appear to suggest that the Board relied on the civil settlements either. Otherwise, it also appears that perhaps not all of Petitioner's installation and service employees are bonded. There is indication that at least three were denied bonds. Without any evidence rebutting the evidence on the record, there is adequate evidence to support the agency's decision - there is a "scintilla" of evidence if not more for the agency's decision. *The court therefore must defer to the expertise of the agency and deny the petition for writ of mandate. SESA will succeed in having the writ of mandate denied*.

Answer 2 to Performance Test A

To: Marla Brevette, Chief Counsel

From: Applicant

Subject: Enviroscan, Inc. v. Structural Environmental Safety Agency: Analysis of Grounds for Relief in Enviroscan Petition

Date: February 22, 2011

Abstract:

This memorandum provides an objective analysis of the legal and factual issues related to each of the four Grounds of Relief asserted in Enviroscan's petition, filed February 11, 2011.

Enviroscan's petition

Analysis:

Enviroscan's petition raises four Grounds of Relief: (1) that the petition be treated as one arising under C.C.P. sec. 1094.5; (2) that the court should apply its independent judgment in reviewing the decision, or in the alternative review the record under the "substantial evidence" standard; (3) that petitioner be allowed to introduce evidence not considered below; and (4) that certain record evidence purportedly irrelevant and prejudicial be excluded. Each of these four Grounds is discussed below.

(1) Whether the Petition properly arises under CCP sec. 1094.5

The CCP "provide[s] for two types of review by mandate: ordinary mandamus [sec. 1085] and administrative mandamus [sec. 1094.5]." *Butler v. State Pension Comm'n*, (Col. Sup. Ct. 1995). Here, Enviroscan petitions the court under the administrative mandamus provision, i.e., sec. 1094.5. (See Petition ("Pet.")). Further, Enviroscan's first Ground for Relief is that the court expressly find that sec. 1094.5 is the proper provision for review of Enviroscan's petition.

In support of Enviroscan's argument, Enviroscan ("E") asserts three facts: (a) that SESA was required to receive any and all evidence that E

presented below; (b) that certification is granted or denied by SESA based on the exercise of discretion by the SCB; and (c) that the SCB was required to give petitioner the opportunity to be heard at an evidentiary hearing. However, as to (c), Enviroscan is in error. The SCB was not required to provide the opportunity for an evidentiary hearing. Further, because no hearing was in fact required, E's petition is not properly styled as a petition under sec. 1094.5 for administrative mandamus.

(a) No evidentiary hearing is required by the SCB.

Despite Enviroscan's allegation that the SCB was required to give E the opportunity to be heard at an evidentiary hearing, no such hearing was required. Section 14752, which establishes the SCB, expressly provides that, "The Board [i.e., the SCB] shall act upon the basis of a written evidentiary record without the requirement for a hearing." E has pointed to no authority, nor has any been found, which contradicts the express language of sec. 14752.

(b) Because no hearing is required, E's petition should have been styled as one for relief under sec. 1085.

Section 1094.5 provides in relevant part that writs may be issued thereunder for review of a "final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given." As noted above, there is no hearing requirement under sec. 14752. Hence, section 1094.5 is inapplicable. As the court in *Butler* confirms, "[j]udicial review via administrative mandate is available only if the agency decision under scrutiny resulted from a proceeding in which by law . . . a hearing is required to be given at the agency level. . . [Otherwise], ordinary mandamus is the procedure for reviewing the agency decision." See id. (Holding that because "the Commission was not required to hold an evidentiary hearing [the] petition was necessarily one under sec. 1085.").

(c) Although filed under the inapposite provision of the CCP, E's petition should not be dismissed.

As explained above, E's first Ground of Relief will be denied, because the petition is properly one for ordinary mandamus, not administrative mandamus. While this impacts E's remaining grounds for relief, as further described below, it is not grounds for dismissal of the entire petition. In *Darnell v. Columbia Board of Funeral Directors*, (Col. Sup. Ct. 2001), the court explained that, "A court should not dismiss a sec. 1085 case merely because it is filed as a sec. 1094 petition. Rather it should deem it filed under the appropriate section and proceed with its analysis as if the petition had been filed under the correct section." Id. at n.1.

Accordingly, the court will treat E's petition as if filed under sec. 1085. For purposes of the analysis below, E's remaining Grounds for Relief are also examined as if contained in a properly filed petition for ordinary mandamus, as they will be reviewed as such by the court.

(2) Whether the court should apply its "independent judgment" to the record, or alternatively, whether "substantial evidence" is the proper standard

(a) Whether the court will apply its independent judgment to the record

In *Darnell*, the court squarely faced the issue of whether a court is authorized to exercise its independent judgment on the record as a whole, as E seeks the court to do here. There, the court explained that, irrespective of which CCP section a petition is filed under, a court will only review a record using its independent judgment in a case where "the decision affects a fundamental vested right of the individual." In *Darnell*, the court set forth a straight forward two-part standard to determine whether a fundamental vested right is sought: (1) is the right fundamental; and (2) is the right vested.

(i) Whether E's right is fundamental is debatable.

According to the *Darnell* court, a right is "fundamental" if it is "a basic one which will suffer substantial interference by the action of the administrative agency." *Darnell* specifically held that "[r]ights that bear directly on one's ability to work and make a living are per se fundamental." To determine whether a right is fundamental, the court can look at the economic aspect, but must also weigh the effect of the right "in human terms" and in its "importance" "to the individual," particularly "where the practice of one's trade or profession is at stake."

Here, of course, the right at issue is the right of E to obtain a specialty certification as a "Residential Specialist." While failure to obtain this certification certainly does not preclude E from working or making a living, it does bear on his ability to do so. Indeed, as Raymond Barkley of this Office points out in his memo, "there is significant economic value in being able to advertise that they have qualified for and have received State approval as 'specialists.'" E raises the same point in its letter to the SESA, observing that "[d]enial of [a] certification will end up costing [E] a lot of lost business," potentially "a loss of at least $250,000 a year in current business, as well as a loss of new and existing commercial/industrial business." Thus E will assert a significant economic interest in a certificate. Further, E will likely be able to assert facts as to its importance "in human terms" to E's employees, such as president Elroy Riggins (for instance, judging by the tone of his letter to the SESA board, he has quite a

personal interest in obtaining the certificate). If supported, these facts would allow E to argue, perhaps successfully, that E's right in a certificate is fundamental, thus meeting the first step of the *Darnell* standard.

(ii) Under *Darnell*, E's right is not vested.

However, *Darnell* requires that the fundamental right also be "vested." Based on the language of the court in *Darnell*, E would not be able to show that this step is met. Whether a right is vested is determined by whether it "is already possessed by and vested in the individual at the time of the adverse agency action, or whether it is a right that the person is merely applying to acquire." In other words, a right is only vested if it is capable of being lost, and a right is not vested if petitioner is merely seeking a particular right "If the individual already possesses the right by virtue of a license issued by the agency, the agency's subsequent revocation of the right calls for an independent judgment review of the facts underlying the revocation decision." *Darnell*; cf. id. (quoting Markum, "[i]t necessarily follows that the court to which the application for mandate is made to secure the restoration of a professional license must exercise its independent judgment on the facts"). Here, E is seeking a specialty certificate in the first instance. E does not already possess such certificate, nor has he ever had such certificate, so he is not seeking review of its revocation, or denial of its restoration. Hence, E's right is not vested.

(iii) Because E's right is not a "fundamental vested right," the court will not apply its independent judgment of the facts in the record.

As explained above, a court will only apply its independent judgment when reviewing the denial of a fundamental vested right. As further explained, E's right, while arguably "fundamental," is not "vested" because it is not yet earned; E seeks a new right for the first time. Hence, the independent judgment standard is inappropriate for the review of E's petition. Indeed, application of the independent judgment standard to E's petition would likely be reversible error. See *Butler* (on review of sec. 1085 petition based on the denial of an enhanced benefit, explaining that it is "not appropriate for the trial court to go further and determine whether, based on its own independent review of the record, it would have decided otherwise").

(b) Whether the court should review the record based on the substantial evidence standard

(i) The proper standard for review of a sec. 1085 petition is the "arbitrary and capricious" standard.

In *Butler*, the court explained: "In general, when review is sought by means of ordinary mandate under sec. 1085, the inquiry by the reviewing court is limited to whether the decision being challenged was 'arbitrary, capricious, or entirely lacking in evidentiary support." By contrast, in sec. 1094.5 review, the standard is "whether 'substantial evidence' supports the decision." In its second Ground for Relief, E seeks as an alternative to the independent judgment standard that the court apply the "substantial evidence" standard. While E raised its petition under sec. 1094.5, as explained above, that section is inappropriate, and review is properly sought under section 1085. Accordingly, the proper standard is whether the decision was arbitrary and capricious.

(ii) The limited exception in *Butler* for 1085 review of regulations explicitly providing for substantial evidence review is inapplicable.

Although, as a general matter, petitions arising under 1085 are reviewed using the arbitrary and capricious standard, *Butler* created one exception where the regulations at issue provided explicitly for substantial evidence review. As *Butler* notes, "[b]ut for this provision in the language of the [regulations], the court would have been limited to the 'arbitrary and capricious or entirely lacking in evidence' standard." Here, the applicable regulation, CCR sec. 101.752, contains no such language. Indeed, it states that "[t]he decision of the Board shall be final." This evidences legislative intent for the court to exercise minimal review of the SCB's actions, not higher scrutiny. Similarly, CPC sec. 14752 expressly states that "SESA shall have broad discretion in determining and applying the criteria for certification."

(iii) Under the arbitrary and capricious standard, the SCB's decision will not be vacated as long as there was "any credible evidence" in its support.

Accordingly, under *Butler*, the court should apply neither the independent judgment standard, nor the substantial evidence standard. Rather, the reviewing court's review must be limited to the "arbitrary and capricious or entirely lacking in evidence" standard. Under this standard "[i]f there were any credible evidence to support the decision, including reasonable inferences drawn from the record--even if it amounts to merely a 'scintilla,'" the court must defer to the agency's expertise. *Butler*.

E's Second Ground for Relief should therefore be denied.

(3) Whether the court will allow E to introduce evidence not considered by the SCB

(a) The court in *Butler* set forth three principles relative to the introduction of new evidence not in the record below.

In *Butler*, the court set forth three principles relative to the rejection or admissibility of new evidence in mandamus proceedings. These principles are equally applicable in sec. 1085 and sec. 1094.5 proceedings. Applicable here is the principle that new evidence may be introduced if the agency "improperly refused to receive admissible evidence timely proffered." New evidence may also be introduced if it could not have been acquired and introduced below "exercising reasonable diligence." In making this determination, the court will also consider "whether the practices and regulations of the agency tend to discourage or encourage the petitioner to submit all evidence available to him/her in proceedings before the agency."

(i) The SCB did not improperly refuse to receive admissible evidence timely proffered.

E was given several opportunities to supply the SCB with evidence supporting its application for certification. In an opening conference following the initial application, the SCB senior investigator Mr. Bellamy specifically advised E that the submission of any and all additional helpful information was encouraged. (Invest. Rept.) Subsequently, Bellamy spoke with E's representative regarding certain "exceptions" to his application, and again invited him to submit any information to explain or rebut these exceptions. E was given a 10 day window. According to the report, E stated that he was busy, and would do the best he could. Although it has not been determined what SCB's policies are regarding extensions of deadlines, and whether an extension would have been afforded E upon request or for good cause, according to Bellamy, E merely stated that he was very busy and would do the best he could. According to E, E's representative stated that he would have a difficult time complying with a 10 day period, and needed more time. However from the record it appears that no extension was sought, and no further information or communication was received during the period. Additionally, while there is no evidentiary hearing or presentation allowed at the SCB hearing itself, all interested parties are allowed to attend the hearing. E did not attend, nor did E raise any further complaint regarding the need to submit further evidence until following E's denial of a certificate.

On these facts, the court would not likely determine that the SCB improperly refused to receive admissible evidence timely proffered. E exclaims that he "could" have set the record straight, but he made no attempt to do so. His mere assertion that he "needed more time" should be considered insufficient without tangible factual support. As by his own admission the president of the largest installer of residential monitoring systems in the area, E could have assigned a deputy to gather the evidence or seek an extension.

(ii) E makes no showing that the evidence it seeks to introduce was unavailable to it with reasonable diligence during the proper time for submission.

As above, several times E was invited to submit evidence in E's support, but failed to do so. The evidence E seeks to introduce now appears to be evidence that E had available to it during the proper time for submission, but because of E's own scheduling constraints, E failed to do so. It does not appear from the record or the petition that E has further evidence that was discovered after the time for submission, that could not have been discovered earlier with reasonable diligence. Similar to the petitioner in *Butler*, with E "the documents were readily available to him at all times but that only belatedly did he conclude they might help him advance his case." E initially stated he "had already submitted everything necessary for certification" (Invest. Rept.), and only later did he explain that had he been at the hearing, he "could have set the record straight." (E ltr. to SCB).

(iii) The practices and regulations of the agency do not appear to discourage the submission of evidence.

As set forth above, E was advised several times to submit evidence to the Board in his support. E's failure to submit evidence was not a result of any particular difficulty or onerous condition, besides the 10-day limit as already discussed. And again, while evidence is not allowed to be submitted at the SCB hearing itself, the hearing is intended to review and make a decision on the evidence discovered and submitted during the investigation phase. A court would likely find it reasonable that the agency cut off the time to submit evidence at some point before the final decision, and there do not appear to be strong grounds here to challenge the cutoff date chosen by the SCB.

Indeed, here the multiple explicit invitations to support E's application with evidence, particularly the invitation to do so to rebut the "exceptions" would likely be found to be active encouragement by the agency to submit evidence. Thus, under *Butler*, the burden on E to introduce this evidence now should be high, "If

the agency is receptive to the liberal presentation of evidence by the petitioner at the agency proceedings, the burden on the petitioner to make the requisite showing of a justification for the later admission of evidence not earlier proffered is greater."

(4) Whether the court will exclude evidence already in the record, as irrelevant or unduly prejudicial

Butler explains that if "irrelevant and unduly prejudicial" evidence was received by the agency, petitioner should not be foreclosed from objecting to its admission on review. Here, E wishes to have the court exclude evidence in the record concerning (a) the inadequacy of training of E's technicians; and (b) the civil actions against E that were settled. (Compl.)

(a) The court would consider whether the evidence E complains [about] is "irrelevant and unduly prejudicial" should have been excluded.

Neither *Butler* nor *Darnell* sets forth the standard for what constitutes irrelevant and unduly prejudicial evidence, or discusses whether there is any initial hurdle to getting a court to review particular evidence to see whether it should have been excluded below. *Butler* only discusses, in dicta, that a petitioner should not be foreclosed from objecting to the admission of such evidence at the court hearing on mandate. Further research is therefore needed, but likely the court would review the evidence complained about by E, to determine whether it is irrelevant and unduly prejudicial.

(b) The evidence complained of by E would likely not be found to be irrelevant or unduly prejudicial.

The CCR, sec. 101.752, sets forth the qualifications and standards for the application for certification. Amongst the qualifications are that contractors must have received "no less than 60 hours in training." Likewise, applicants must declare, under penalty of perjury, whether any civil actions have been filed against contractors. Hence, E's assertions that evidence that the alleged inadequacy of training and the civil actions that were settled is irrelevant and highly prejudicial would likely not be looked on favorably by the reviewing court.

E asserts that such evidence exceeds the SESA regulations. As shown above, the SESA regulations call expressly for evidence of training and civil actions. Although E may be correct that whether the 60 hours of training were received recently is different than whether they were received at all, which arguably is what the regulations inquire about; and similarly that E may be correct that settlements against contractors differs technically from civil actions

that resulted in judgments for damages, the evidence pertains closely to these requirements. E will have a hard argument showing that they are entirely irrelevant or prejudicial, however it is for the court to decide. Likely the court will not decide in E's favor on this Ground for Relief either.

FEBRUARY 2011

California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

IN RE SANTOS

FILE

IN RE SANTOS

INSTRUCTIONS

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

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

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

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

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

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

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

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

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

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

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

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

TRANSCRIPT OF IMMIGRATION HEARING BEFORE IMMIGRATION JUDGE HARRIET STONEMAN

February 18, 2011

Direct Examination of Maria Santos

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

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

Q: Where do you live?

A: 8897 India Road, Avrill Park.

Q: Where were you born?

A: I am a native and citizen of Colombia.

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

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

Q: Obviously you did not leave.

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

Q: Why are you seeking asylum?

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

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

A: Yes.

Q: Are you a member of a political party?

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

Q: When did this persecution begin?

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

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

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

Q: Anything else?

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

Q: Did you belong to any other groups?

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

Q: Did you engage in any other activities?

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

Q: What do you mean?

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

Q: Did FARC ever confront you in person?

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

Q: What happened?

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

Q: Do you know who this person was?

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

Q: Did he say anything?

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

Q: Then what happened?

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

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

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

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

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

Q: Did you stop traveling to Mosquera?

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

Q: Were there any other threats?

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

Q: How did these things make you feel?

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

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

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

Q: Where did you go?

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

Q: But you went back to Colombia?

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

Q: Did the threats resume?

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

Q: Did Mario tell them?

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

Q: What happened next?

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

Q: Did you leave?

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

Q: Did this work?

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

Q: What happened?

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

Q: Then what happened?

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

Q: And then?

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

Q: Did you reach this camp?

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

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

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

Q: What did you do after this?

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

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

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

Q: Why did you wait so long?

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

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

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

Q: Do you wish to go back to Colombia?

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

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

Cross-Examination

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

A: [By Santos]: Yes.

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

A: Yes.

Q: One trip was to the Dominican Republic?

A: Yes.

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

A: Yes.

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

A: No.

Q: This was a vacation, correct?

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

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

A: All but the last.

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

A: No.

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

A: No.

Q: You consider yourself a philanthropist, correct?

A: Yes.

Q: You raised money to assist the poor?

A: Yes.

Q: You bought food?

A: Yes.

Q: Clothing?

A: Yes.

Q: That was because you cared about the poor?

A: Of course.

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

A: Yes.

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

A: It is just reality.

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

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

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

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

RESPECT FOR HUMAN RIGHTS

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

a. Arbitrary or Unlawful Deprivation of Life

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

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

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

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

b. Disappearance

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

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

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

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

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

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

Section 2: Respect for Civil Liberties, Including:

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

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

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

* * *

TRANSCRIPT OF ORAL OPINION OF IMMIGRATION JUDGE HARRIET STONEMAN
IN THE MATTER OF MARIA SANTOS

February 23, 2011

BY THE JUDGE: Good afternoon Ms. Santos, Mr. Brescia, Mr. Finkelman. This is an asylum case, in which I have been asked to determine whether Maria Santos, a Colombian lawyer and political activist, was politically persecuted by the Revolutionary Armed Forces of Colombia ("FARC").

While I find her testimony was credible and consistent with her application, I deny the application. Ms. Santos is ineligible for asylum because she failed to establish either past persecution or a well-founded fear of future persecution on account of one of the statutorily protected grounds.

There is no doubt Ms. Santos has suffered. The transcript of the hearing reveals testimony, including repeated death threats, the murder of her friend Mario, and the eventual kidnapping and beating of Petitioner. Ms. Santos did have some injuries that were documented. Nevertheless these events do not amount to persecution in the past as defined by the statute and regulations.

Even assuming she had established past persecution, I find Ms. Santos failed to demonstrate a subjective fear of future persecution. The record is clear that there were numerous instances of Ms. Santos returning to Colombia after receiving threats from FARC, and this undermined her testimony that she feared persecution. The Court understands the explanation that she used to come to the United States many times. Yet, the Court does not understand how it is that the respondent traveled not one, not two, not three, not four, but five times back to her country if she contends that she would be harmed there. The fact of these many departures and reentries to her country significantly undermine any subjective fear of persecution if she were to return at this time.

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

FEBRUARY 2011

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Immigration and Naturalization Act

8 United States Code

§ 1101. Definitions

(a) (42) The term “refugee” means (A) any person who is outside any country of such person's nationality … and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion….

* * *

§ 1158. Asylum

….

(b) Conditions for granting asylum.

(1) In general.

(A) ….

(B) Burden of proof.

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

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

(iii) Credibility determination. Considering the totality of the circumstances, and all relevant factors, there is no presumption of

credibility; however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

Code of Federal Regulations

8 C.F.R. § 208

§ 208.13 Establishing asylum eligibility.

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

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

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

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

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality on account of race, religion, nationality, membership in a particular social group, or political opinion; or

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

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

(2) Well-founded fear of persecution.

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

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

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

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

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

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

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

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

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

Rodriguez v. U.S. Attorney General

United States Court of Appeals, 15th Circuit (2007)

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

Rodriguez, a native and citizen of Colombia, entered the United States on February 14, 2002 as a nonimmigrant visitor with authorization to remain until August 13, 2002. Rodriguez remained past his authorized date and the former Immigration and Naturalization Service ("INS")[2] issued him a notice to appear pursuant to the Immigration and Naturalization Act (INA) § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B). In February 2003, Rodriguez filed an application for asylum.

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

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

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

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

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

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

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

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

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

However, the petitioner's past persecution or well-founded fear of future persecution must be on account of a protected activity. In order to demonstrate a sufficient connection between future persecution and the protected activity, an alien is required to present specific, detailed facts showing a good reason to fear that he or she will be singled out for persecution on account of such a protected activity. Specifically, it must

be established that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment; (2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

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

Similarly, the evidence in the record does not compel the finding that Rodriguez had a well-founded fear of future persecution on account of his political opinion. Rodriguez's testimony did not establish a sufficient connection between his political opinion and his fear that he would suffer future persecution because of that opinion. Moreover, Rodriguez acknowledged that his wife and children still live in Colombia without incident and that he did not attempt to relocate within Colombia. It is not unreasonable to require a refugee who has an internal resettlement alternative in his own country to pursue that option before seeking permanent resettlement in the United States, or at least to establish that such an option is unavailable.

The petition for review is denied.

Mazariegos v. U.S. Attorney General

United States Court of Appeals, 15th Circuit (2001)

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

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

Mazariegos said that he did not report this incident to the police. Instead, he reported it to his former military commanders who, according to Mazariegos, told him that they could not protect him because he was no longer in the commanders' zone. Mazariegos said that some six months after the incident the guerrillas again came to his parents'

house looking for him. It appears that the guerrillas may have threatened him or his parents on one or more occasions.

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

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

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

accord” in Guatemala as of December 1996 and hence “there is little likelihood of [Mazariegos] facing persecution if he were to return” to Guatemala.

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

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

There is ample evidence supporting the conclusion that the threat of persecution to Mazariegos is limited to one area of Guatemala, if it still exists anywhere in the country. First, Mazariegos has never had any direct contact with the guerrillas except for the single incident that occurred in his parents' home — an incident that occurred over eight years ago. Second, Mazariegos lived unharmed for over two-and-one-half years in the specific area where the incident occurred, without any further contact with the guerrillas. Third, Mazariegos was a fairly low-level soldier who does not appear to have played any

especially notorious role in the war. We cannot say on this record that he is a high-profile target, or that guerrillas outside the vicinity of his home are likely to identify and pursue him. Fourth, Mazariegos himself testified that his father told him that the bulk of the guerrillas' strength was actually outside Guatemala, in the Chiapas region of Mexico. Fifth, Mazariegos has never contacted the local police or national law enforcement authorities to obtain protection from the guerrillas, and therefore cannot argue persuasively that the Guatemalan government is unable or unwilling to protect him. Finally, according to the U.S. State Department, the civil war has long since been resolved, and the Guatemalan government signed a peace accord in 1996 (after Mazariegos fled the country) with the specific rebel group that Mazariegos says attacked him in 1992.

Petition for review denied.

Answer 1 to Performance Test B

DATE: February 24, 2011

TO: Board of Immigration Appeals

FROM: Applicant

RE: Memorandum of Points and Authorities in the matter of "In re Maria Santos"

I. Statement of Facts

Maria Santos, a native and citizen of Colombia, has faced severe persecution and violence in Colombia at the hands of the Revolutionary Armed Forces of Colombia (the "FARC") on account of her political opinion and affiliation with various political organizations. The threats first began in 2005, soon after Ms. Santos began holding meetings with citizens of Mosquera, a town on the outskirts of Bogota, to discuss local political affairs and to campaign for the re-election of the town's mayor, a known opponent of the FARC's presence in the region. Thereafter, Ms. Santos began receiving threats by mail and telephone warning her that FARC would retaliate if she did not end her political activities. The threats escalated into a violent face-to-face encounter in November 2005 when Ms. Santos was captured outside of Bogota by three FARC soldiers who forced her to the ground, physically assaulted and threatened [her] with death if caught again in Mosquera.

Ms. Santos attempted to move from her home in Bogota to her parents' farm, but the FARC discovered she was at the farm and the threats continued, both at the farm and at Ms. Santos' apartment in Bogota. The threats also continued in Mosquera, via menacing graffiti painted on the main square targeting Ms. Santos' organization. The threats erupted into violence on two further occasions: once when FARC members showed up at Ms. Santos' parents' farm and brutally tortured and eventually shot and killed the groundskeeper in front of his son for refusing to disclose Ms. Santos' location; and a second time when Ms. Santos herself was apprehended on a bus and the FARC shot and killed an innocent bystander, brutally beat Ms. Santos and then kidnapped her in a van in order to take her into the mountains to kill her. Ms. Santos was rescued

during the final encounter and airlifted to a hospital for treatment. However, the threats did not end there, but continued throughout 2007, via phone calls directly to Ms. Santos and even to her mother.

As a result of this past persecution, Ms. Santos has twice been treated in the hospital and has twice sought psychiatric help. She has attempted to move from Bogota to other locations, and has even attempted to change her appearance, but the FARC continue to find her, threaten her and violently persecute her for her political actions. Finally, Ms. Santos fled Colombia and arrived in the United States on August 29, 2007. She now seeks asylum because of her brutal past persecution in Colombia and her fear of future persecution if forced to return to Colombia.

II. Ms. Santos is entitled to asylum in the United States because she is a "refugee" as defined in the INA Sec. 1101(a)(42) because she is outside Colombia, her country of nationality, and is unable or unwilling to return to, and is unable or unwilling to avail herself of the protection of, Colombia because of her persecution and well-founded fear of persecution on account of her political opinion.

Ms. Santos is entitled to asylum in the United States because she meets all of the requirements for asylum as stated in the Immigration and Naturalization Act ("INA") and the Code of Federal Regulations ("CFR"). Therefore, the decision of the immigration judge ("IJ") denying Ms. Santos' application of asylum should be reversed by the Board of Immigration Appeals ("BIA"). In Mazariegos, the United States Court of Appeals for the 15th Circuit noted that in reviewing the decision of an IJ, the BIA decides the matter de novo.

Sec. 1101(a)(42) provides five grounds for asylum, one of which being the applicant's political opinion. Pursuant to Sec. 1158 of the INA, the testimony of the applicant may be sufficient to sustain the applicant's burden (without corroboration) of proving that the applicant's political opinion was, or will be, at least one central reason for persecuting

the applicant, so long as the applicant's testimony is credible, persuasive and refers to specific and sufficient facts to demonstrate such showing.

1. Ms. Santos' testimony is credible because no adverse credibility determination has been explicitly made by the IJ

Pursuant [to] Sec. 1158(b)(1)(B)(iii), if no adverse credibility determination is explicitly made, the applicant shall have a rebuttable presumption of credibility on appeal. In Ms. Santos' hearing with Judge Harriet, the IJ who denied her application, no adverse credibility determination was made. In fact, Judge Harriet explicitly stated that she finds her testimony credible and consistent with her application. Therefore, in accordance with CFR Section 208.13(a), Ms. Santos's testimony is sufficient on its own to establish her status as a refugee without the need for corroboration.

2. Ms. Santos has established, by persuasive testimony with reference to specific and sufficient facts, that she has suffered persecution in Colombia in the past by the FARC on account of her political opinion

Sec. 208.13(b)(1) grants an applicant a ground for asylum if she can establish past persecution. Additionally, an applicant who has been found to have established past persecution shall also be presumed to have a well-founded fear of persecution.

In order to demonstrate a sufficient connection between past or future persecution and the protected activity, Rodriguez held that an alien is required to present specific, detailed facts showing a good reason to fear that she will be singled out for persecution on account of such protected activity. There is a four part test to determine if the alien has met this burden, requiring the alien to establish that: (1) She possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment, (2) the persecutor is already aware, or could become aware, that she possesses this belief or characteristic, (3) the persecutor has the capability of punishing her, and (4) the persecutor has the inclination to punish her.

In the present action, Ms. Santos is asserting a claim for asylum based upon her political opinion, a protected activity under INA Sec. 1101(a)(42). Ms. Santos is an active political member in Colombia. She was an active member of the Colombian Liberal Party and various other political and social groups for her entire adult life. She was also married to the Colombian ambassador to Peru and often met with Colombian political leaders in Bogota. As such, she had extensive political connections in Colombia and used these connections to her advantage in her own political goals. In 2000, Ms. Santos joined the New Democratic Force, a group devoted to advancing democratic government in Colombia, and engaged in outreach activities in Mosquera by speaking with teenagers in support of the democratic leadership in Colombia and against joining rebel groups such as FARC. She also regularly held meetings with citizens of Mosquera to discuss local political affairs and campaigned for the re-election of the mayor of Mosquera, a well-known opponent of the FARC. As a result of these activities, Ms. Santos possesses a political belief which the FARC seeks to overcome by means of punishment because they oppose those who oppose them.

The FARC is aware of Ms. Santos' political activities because as a result of her open activism Ms. Santos began receiving violent and deadly threats from members of the FARC. The threats began in 2005 and continued through 2007. Indeed, even though Ms. Santos has fled the country, the FARC continue to look for her today and have repeatedly contacted Ms. Santos' mother's doctor to inquire if Ms. Santos has visited her mother.

The FARC has the capability and inclination to punish Ms. Santos because, on several occasions, the threats ripened in brutal, violent and even deadly encounters involving Ms. Santos and those close to her. Two individuals were killed for attempting to protect or warn Ms. Santos about the FARC, and Ms. Santos herself was violently beaten and threatened on two occasions, and even kidnapped on one occasion.

Therefore, Ms. Santos has established a sufficient connection between her past persecution and her political opinion consistent with the requirements of Rodriguez. Mr.

Finkelman and the IJ found that while Ms. Santos was persecuted in the past, her persecution was not due to her political opinion but rather to her charitable work for the poor. This is an incorrect finding, because Ms. Santos' charitable work was only tangentially related, if at all, to her persecution by the FARC. As an open advocate against the FARC, and open supporter of political candidates who opposed the FARC, Ms. Santos was targeted for her political activism in these areas. The FARC does not target people solely for their charitable work. Therefore, the BIA should reverse the IJ's holding that the events described by Ms. Santos do not amount to persecution in the past as defined in the statute and regulations.

3. Ms. Santos has established, by persuasive testimony with reference to specific and sufficient facts, that she is unable, or at least unwilling to return to, or avail herself of the protection of, Colombia owing to her repeated and brutal incidences of persecution at the hands of the FARC.

Ms. Santos has attempted to return to Colombia on several occasions. She has even attempted to change her appearance and relocate within the country. Despite all of these measures, she has not been able to escape the threats or violence directed towards her by the FARC. On August 1, 2007, she even alerted the police about the threats. The government will contend she should have alerted the police earlier, but Ms. Santos felt she could not do so because it would lead to further retaliation. The Country Conditions Report submitted by the government shows that members of the government of Colombia have collaborated with members of illegal groups and therefore Ms. Santos' fear of further persecution was valid. If Ms. Santos were returned to Colombia, she would suffer additional threats, violence and potentially even death, consistent with her past experiences.

The IJ was incorrect in her finding that the persecution suffered by Ms. Santos does not amount to persecution in the past as defined by the applicable statutes and regulations and therefore the BIA should reverse the IJ's holding.

4. The BIA should not exercise its discretion to deny Ms. Santos' application because of changed circumstances in Colombia because the circumstances have not improved significantly.

The Colombia Country Conditions report shows that political and unlawful killings committed by all actors during the first six months of 2007 increased from 77 in the prior year's period to 238 in 2007. The state contends that the conditions have improved, and while kidnapping is indeed down, there is still ample evidence of violence by all the actors, including the FARC, as well as corruption in the ranks of the government assisting or turning a blind eye to the FARC's activities.

Therefore, contrary to the government's arguments, the conditions have not improved in Colombia and the IJ's decision finding no past persecution should be overturned. The burden is on the Immigration Service to establish this argument by a preponderance of the evidence, and the Immigration Service has failed to do so.

5. The BIA should not exercise its discretion to deny Ms. Santos' application because she could not avoid future persecution by relocating to another part of Colombia.

The Immigration Service has the burden of proving, by a preponderance of the evidence, that Ms. Santos could avoid persecution by relocating to another location in Colombia. The Immigration Service has not even attempted to meet this burden, as it offered no evidence that Ms. Santos could have relocated and avoided persecution.

Even if it had offered evidence, however, Ms. Santos has attempted to relocate from her home in Bogota to her parents' farm outside of Bogota and to her activities in Masquera. Each time, the FARC has found her and threatened or beaten her or those close to her. The facts in Ms. Santos' case are different from those in Mazariegos because Ms. Santos does not have a "low level" role due to her extensive political connections and the organizations she has founded and taken a prominent role in. Additionally, Ms. Santos attempted to relocate, but to no avail.

Therefore, the IJ and the BIA should not exercise its discretion in denying the application on the grounds that Ms. Santos has not established she could avoid persecution by relocating within Colombia.

6. Even if Ms. Santos has not established past persecution, she has established a well-founded fear of future persecution on account of her political opinion because her fear is both subjectively genuine and objectively reasonable given her past experiences with the FARC.

In Rodriguez, the court found that the subjective component of a well-founded fear of future persecution is generally satisfied by the applicant's credible testimony that she genuinely fears persecution. The objective component is established by showing only that persecution is a reasonable possibility.

As has already been discussed, Ms. Santos' testimony has been found to be credible. She has clearly established past persecution at the hands of the FARC due to her political opinion, and has shown that that there is a reasonable possibility that if she was returned to Colombia, she would continue to suffer future persecution since every time she has left Colombia in the past and returned, she has suffered future persecution.

However, the IJ held that since Ms. Santos left Colombia on numerous occasions after facing persecution and decided to return to Colombia on each occasion, her testimony as to her fear of future persecution was undermined. This holding is not justified because Ms. Santos left Colombia on each occasion to escape the severe persecution, and only returned because of her steadfast desire to improve the political situation in her country. The fact is that each time she returned, the persecution got worse until she was finally kidnapped by the FARC, brutally beaten with rifle butts and forced into a van to be taken to the mountains and executed. Had she not been saved by Colombian military forces, she would have surely been killed. Such event was the last straw, and Ms. Santos decided that she had to flee Colombia and could never return.

Therefore, the fact that Ms. Santos left Colombia and returned on several occasions does not diminish her testimony that she has a well-founded fear of future persecution. Quite the contrary, each time Ms. Santos returned, the persecution worsened and her fear was increased until she could no longer bear it.

Therefore, the IJ erred in its holding on this matter and its decision should be reversed.

III. Conclusion

For all of the reasons stated above, the IJ erred in its decision to deny Ms. Santos' application for asylum and the decision should be reversed.

Answer 2 to Performance Test B

Memorandum of Points and Authorities in Support of Asylum for Maria Santos

Statement of Facts

Maria Santos is a Colombian national who has fled her home country to the United States after years of persecution by the Revolutionary Armed Forces of Colombia, or FARC. While Ms. Santos originally entered the United States as a visitor, she filed an application for asylum because of her fear of returning to Colombia. Ms. Santos had a long history of political activism in Colombia. She was married to a Colombian diplomat, the ambassador to Peru, and acquainted with political leaders. She was a member of the Colombian Liberal Party and the New Democratic Force, which advanced democracy in Colombia. When Ms. Santos began taking on more independent political leadership, by engaging in activities that included both substantial philanthropy and the organization of political meeting and campaigns, she began to be the target of FARC. Over the two years prior to her final exit from Colombia, Ms. Santos has received numerous threats by mail and phone that instructed her to end her political activities. When she did not, the attacks against her escalated from threats into physical altercations. She was once forced from her car and beaten by FARC members, who explicitly told her that they were attacking her for her work for the Colombian government. In attempting to continue to make good on their threats, FARC followed her after she moved from the capital to her parent's farm, where they tortured and killed her parent's groundskeeper in front of his son when he would not reveal her location. When they next did find her, Ms. Santos was kidnapped, beaten, and rescued by chance when the kidnappers engaged in an altercation with the Colombian army. After repeated attempts to return to Colombia when she was forced to leave to save herself, Ms. Santos finally realized that she cannot safely return to Colombia, and applied for asylum.

Standard of Review

The Board of Immigration Appeals should review the determination by the IJ *de novo*, upholding the conclusions of the IJ only where they are supported by substantial evidence. While this test is deferential, the denial of asylum can be reversed where the evidence is so powerful that a reasonable fact-finder would have to conclude that the applicant is in fear of persecution. *Mazariegos.* Ms. Santos is also entitled to a presumption of credibility in this appeal. Where no adverse determination of credibility is made, the applicant is entitled to a presumption of credibility on appeal. 8 U.S.C. §1158(b)(1)(B)(iii). Not only did the IJ fail to find that Ms. Santos was credible, but she explicitly found that the testimony given by Ms. Santos was "credible and consistent with her application." Based on this determination, the BIA should presume that Ms. Santos's testimony is credible.

Argument

The opinion of the IJ should be reversed by the BIA because the conclusions leading to denial are not supported by substantial evidence. Even a deferential examination of the conclusions of the IJ will show that Ms. Santos is eligible for asylum under the requirements of 8 C.F.R. § 208.13, based on the facts that she presented. To be eligible for the asylum, an applicant must either have suffered past persecution or have a well-founded fear of future persecution. Ms. Santos will be able to prove both that she was persecuted in the past and that she has a fear of returning to Colombia based on the likelihood of future persecution.

<u>Ms. Santos has demonstrated that she was persecuted by FARC because of her political activities in Mosquera, Columbia.</u>

Facts determined by the IJ show that Ms. Santos did suffer persecution. To show past persecution, an applicant for asylum must establish that she has suffered persecution, that the persecution was on account of one of five enumerated categories, and that she is unable or unwilling to return to the country because of the past persecution.

Ms. Santos gave sufficient evidence to the IJ to meet all of these elements, and the decision of the IJ denying her asylum should be overturned.

The IJ erred in determining that Ms. Santos's injuries do not amount to past persecution.

The IJ opinion claimed that Ms. Santos's significant and demonstrated injuries, including repeated death threats and multiple beatings, as well as the torture and murder of a friend who would not reveal her location, did not amount to persecution as defined by the statute and regulations. However, neither the applicable statute nor the regulations define the conduct that will amount to persecution. Case law shows that a series of threatening phone calls or a single beating were worthy of consideration for past persecution, which may have been found had the applicants in those cases been able to show that those harms were based on one of the enumerated categories necessary for asylum. Here, Ms. Santos can show a significantly more substantial amount of persecution. The threats of retaliation for the political activities she conducted in Mosquera, Colombia began in 2005, and resumed each time she returned to Colombia, continuing until she left for the final time at the end of August, 2009. She was dragged from her car and beaten in 2005, and in 2006 kidnapped, beaten, and threatened with death before her rescue. Ms. Santos gave evidence of these horrific experiences by supplying the court with her emergency room bills. These experiences, in total, should be more than sufficient to show that Ms. Santos was a victim of persecution before she left Colombia.

The IJ's determination that Ms. Santos was not persecuted based on an enumerated category is not supported by substantial evidence.

The IJ erred in rejecting Ms. Santos's showing of past persecution on the grounds that it did not meet one of the five enumerated categories under the regulations. Section 208.13 requires that asylum applicants show that their past persecution was on the basis of race, religion, nationality, membership in a particular social group, or political

opinion. Ms. Santos's credible testimony makes clear that this persecution was due to her political activities in the town of Mosquera. Her persecution is at the hands of the FARC, a group known to the United States as being in conflict with the government of Colombia. *See* Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices - 2007* (hereinafter *Report*). At that time, political killings committed by guerillas, "notably the FARC," were on the rise, with at least 238 political and unlawful killings in the first six months of 2007 alone. Ms. Santos was a target of the FARC because she was urging teenagers to support the democratic government rather than the FARC, holding political affairs discussions with citizens, and campaigning to reelect a politician opposed to the FARC. It was after Ms. Santos's political actions began that FARC began to threaten her, urging her to end all her political activities. In *Rodriguez*, the court required a showing of four factors to prove that the persecution is connected to a protected activity. First, Ms. Santos must show that she possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment. Ms. Santos showed this by discussing her political activities, including urging teens not to join FARC. Second, she must show that the persecutor is aware, or could become aware, that she has this belief or characteristic. The repeated pattern of threats and injuries, as well as FARC's determination to seek Ms. Santos out as an individual, show that they are aware of her beliefs that are contrary to their own. Next, she must show that her persecutor had the capability of punishing her. As her kidnapping in 2006 shows, FARC is able to find her whereabouts, even when she attempts to use disguises, and they are willing to beat, kidnap, and likely kill her to punish her for her views. Without the timely intervention of the Colombian army, Ms. Santos would likely already be dead. Her past experiences also show the fourth factor, that her persecutor is inclined to punish her for her views. Clearly, the FARC is willing to go to any length to stop Ms. Santos from acting on her political beliefs. There is no evidence in the record that FARC's objections to Ms. Santos's activities were based on her charitable work. While this was suggested as a possible motive for her persecution by the cross-examination at her immigration hearing, no evidence with introduced to support the contention.

Ms. Santos did not confirm this suggestion when she was asked, there is little reason to suspect that guerilla fighters like the members of FARC are embarrassed by the need for charitable work. Though FARC has attacked human rights activists, the *Report* details no known abuse of those providing charitable assistance to the people of Colombia by FARC members. On the other hand, FARC members are known to have killed "journalists, religious leaders, candidates for public office, local elected officials and politicians, alleged paramilitary collaborators, and members of governmental security forces." *Report*. All the evidence points to persecution at the hands of a quasi-political paramilitary group who was angered by Ms. Santos's political, rather than charitable, activities. Since there is no evidence to support the determination of the IJ, this BIA should overturn the conclusion of the IJ that Ms. Santos has not suffered past persecution due to a qualifying category.

Ms. Santos is entitled to a presumption of a well-founded fear of future persecution because she has shown past persecution.

Ms. Santos has shown that she was a victim of political persecution in Colombia, and she has stated that she does not want to return to the country because of this persecution. Where an applicant has established past persecution, they "shall also be presumed to have a well-founded fear of persecution." 8 C.F.R. § 208.13(b)(1). This presumption means that Ms. Santos does not bear the burden of establishing that the fear is well-founded, but may simply claim that she is afraid to return to have her application approved. While it is possible to rebut this presumption, this can only happen where there has been a fundamental change of circumstances or the applicant can reasonably live in another part of her home country. In this case, no fundamental changes have occurred. While the *Report* shows that some parts of the conflict in Colombia are diminishing, such as a decrease in kidnappings between 2006 and 2007, there is no evidence of a fundamental change. Even in 2007, there were 289 kidnappings from January to August, showing that the danger is far from over, even if it a substantial decrease from prior years. Ms. Santos is also aware that she is personally still a target of FARC, because they have continued to attempt to track her

whereabouts, even monitoring the visitors to her mother's hospital room to see if she was in the country. While her family may be safe from persecution at the hands of FARC, a factor that the 15th Circuit found relevant in *Rodriguez*, there is proof that Ms. Santos herself is still in danger, which should overcome any implication based on her family's safety. Since there is no proof that there has been a *fundamental* change in the circumstances in Colombia, but at best a slightly lessened danger, the presumption of fear should not be rebutted on these grounds. Neither can Ms. Santos reasonably be expected to return to a different part of Colombia safely. FARC is not a primarily local organization. They have also shown a willingness to follow Ms. Santos as she moved from an apartment in urban Bogota to her parent's rural farm, and continued to try to find her whereabouts. The burden is not on Ms. Santos to show that they would continue to seek her out regardless of her location in the country, yet the evidence strongly suggests that that is the case. Because the presumption of fear has not been rebutted, and because Ms. Santos has proven past persecution because of political activities, she has met the test for asylum on the basis of past persecution under 8 C.F.R. § 208.13(b)(1). The BIA should accordingly overturn the IJ's decision and grant Ms. Santos asylum.

Ms. Santos has also demonstrated a fear of future persecution at the hands of the FARC if she were to return to Colombia.

Even if the BIA fails to find that Ms. Santos was persecuted in the past, she has established a fear of future persecution. A well-founded fear of future persecution can be the basis for asylum where the applicant proves that she has a well-founded fear of persecution on account of the five enumerated factors, there is a reasonable possibility that she will suffer such persecution, and she is unwilling to return to the country.

Ms. Santos has a significant fear of future persecution based on her political views and activities against the FARC movement.

As discussed above, Ms. Santos fears persecution not for her charitable activities or the general danger of living in Colombia, but because she is a specific, visible target based on her political opposition to the FARC. The *Rodriguez* court determined that a showing of fear of future persecution must be subjectively genuine and objectively reasonable. The IJ erred in finding that Ms. Santos did not show a subjective fear because the court should have been satisfied with "the applicant's credible testimony that he or she genuinely fears persecution." *Rodriguez*. Since the IJ not find that Ms. Santos's testimony was generally credible, she was not required to show additional evidence to prove her subjective fear. Instead, the IJ found that her repeated departures from and returns to Colombia showed that Ms. Santos was not objectively fearful. On the contrary, these show that Ms. Santos waited until she was so afraid for safety that she could not return to Colombia before she applied for asylum in the United States. Ms. Santos continued to make every effort to live in her home country, but the threats against her continued after each trip. It was only after repeated, increasing threats on her life, and the lives of those around her, that Ms. Santos finally left the country.

Ms. Santos has easily met the low bar of showing that there is a reasonable possibility that she will be persecuted upon her return to Colombia.

The regulations also require that Ms. Santos show that there is a reasonable possibility that she will suffer persecution if she returns to Colombia. Here, as was made clear in *Rodriguez*, Ms. Santos does not have to show that there will definitely be persecution, or even that persecution is "more likely than not." The court then suggested that "even a one in ten chance of persecution may establish a well-founded fear." Here, Ms. Santos has shown that there is a reasonable, and in fact likely, possibility that she will be harmed. FARC members are still attempting to track her down. At her last face-to-face encounter with them, she was beaten, kidnapped, and told she would be killed before she was rescued by chance by the Colombian army. These threats and continued efforts to find her show that it is at the very least reasonably likely that she will be harmed if she were to return.

Ms. Santos is prevented from returning home by her fear, and only her fear, of reasonable persecution.

Ms. Santos has made clear that she would like to return to Colombia to be with her family, particularly her mother, who has recently been seriously ill. Ms. Santos proved her determination to return to Colombia by continuing to return after she was forced out of the country by her fear, even when her family urged her to stay out of the country to protect her safety. Ms. Santos even returned to the country after she was kidnapped and a family friend was tortured and killed for failing to disclose her location. While the prosecution argues that this is an indication that Ms. Santos does not actually fear for her life, this is in fact proof that if she were not so afraid, she would have no reason to attempt to stay in the United States. Her home, family, and country are suffering, and it is her wish to return to them. However, the repeated attacks to herself and those around her have finally broken her to the point where she feels she must stay away from her home. The BIA should recognize this fear and grant her asylum accordingly.

Ms. Santos cannot relocate within Colombia because FARC members have attempted to follow her around the country.

Finally, the asylum regulations prove that an applicant cannot show a fear of persecution where it would be reasonable for her to move to another part of her country of origin. To determine whether Ms. Santos can reasonably relocate within Colombia, the regulations advise a judge to consider whether she would face serious harm in a place of suggested relocation, whether there is any ongoing civil strife within the country, as well as social and cultural constraints such as familial ties. Ms. Santos has demonstrated all of these. As discussed above, FARC members have persistently tracked Ms. Santos as she moved to various places around Bogota. FARC is a national, rather than local guerrilla movement who is still a powerful force within the country, and there is no reason to suspect that they would be less likely to harm her if she moved to another part of Colombia. There is continuing civil strife in the country. While the *Report* indicates that the problems in Colombia are decreasing, it outlines an

increasing number of killings, still significant number of kidnappings, abuses of force in internal conflicts, and continued exceptions to free movement throughout the country. Finally, Ms. Santos has familial ties in the area around Bogota that she does not have in other parts of the country. There is no logical place within Colombia for Ms. Santos to go and live in peace and safety.