UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIELA CASTILLO ANGULO
1644 Perserverence Hill Circle
Kennesaw, GA 30152

FELIPE RIVERA HERRERA
1644 Perserverence Hill Circle
Kennesaw, GA 30152

Plaintiffs,

v.

Civ. No. 1:16-cv-01784

JEH JOHNSON, Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

LEON RODRIGUEZ, Director
U.S. Citizenship and Immigration Services
Office of the Director MS 2000
20 Massachusetts Ave., N.W.
Washington, D.C. 20529

KATHY A. BARAN, Director
U.S. Citizenship and Immigration Services
California Service Center
P.O. Box 10129
Laguna Niguel, CA 92607

LORETTA E. LYNCH,
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF

Plaintiffs by their undersigned lawyer allege as follows:

I. Parties

1. Plaintiff Daniela Castillo Angulo ("Ms. Castillo") is a citizen of Venezuela. She is currently a resident of Kennesaw, Georgia. Her address is 1644 Perserverence Hill Circle, Kennesaw, GA 30152.

2. Plaintiff Felipe Rivera Herrera ("Mr. Rivera") is a U.S. citizen. He is currently a resident of Kennesaw, Georgia. His address is 1644 Perserverence Hill Circle, Kennesaw, Georgia 30152. He is married to Ms. Castillo and resides with her.

3. Defendant Jeh Johnson is the United States Secretary of Homeland Security, the head of the United States Department of Homeland Security, an agency of the United States. He is named in his official capacity. His address is: U.S. Department of Homeland Security, Washington, D.C. 20528.

4. Defendant Leon Rodriguez is the Director of the United States Citizenship and Immigration Services ("USCIS"), which is part of the Department of Homeland Security and is an agency of the United States. He is named in his official capacity. His address is: Office of the Director MS 2000, U.S. Citizenship and Immigration Services, 20 Massachusetts Ave., N.W., Washington, D.C. 20529.

5. Defendant Kathy A. Baran is the Director of the USCIS California Service Center, an agency of the United States. She is named in her official capacity. Her address is: USCIS California Service Center, P.O. Box 10129, Laguna Niguel, California 92607-1012.

6. Defendant Loretta E. Lynch is the Attorney General of the United States. She is named in her official capacity. Her address is: U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530.

II. Jurisdiction and Venue

7. This is an action to review administrative agency action of the USCIS. The action arises under the Immigration and Nationality Act of 1952, as amended (the "Act"), 8 U.S.C. § 1101 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq. Subject matter jurisdiction is based on 28 U.S.C. §§ 1331 and 1361 (mandamus). This Court may grant relief pursuant to the Act, the APA, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., 28 U.S.C. §§ 1361, and 28 U.S.C. § 1651 (the All Writs Act).

8. Defendants Jeh Johnson, Leon Rodriguez, and Kathy Baran had duties to act in conformity with the statute, the regulations, precedential decisional law, and the legislative history in adjudicating the Form I-612 persecution waiver application filed by Ms. Castillo.

9. Venue is proper in the United States District Court for the District of Columbia under 28 U.S.C. § 1391(e) because this is an action against officers and agencies of the United States in their official capacities, brought in the district where a substantial part of the events or omissions giving rise to the Plaintiffs' claim occurred. The Defendant Jeh Johnson is sued in his official capacity as Secretary of the Department of Homeland Security ("DHS"), a United States federal agency and resident in this district. The Defendant Leon Rodriguez is sued in his official capacity as Director of USCIS, a United States federal agency and resident in this district. The Defendant Kathy Baran is sued in her official capacity as Director of the USCIS California Service Center, a United States federal agency. Because national policy concerning adjudication

of applications for immigration benefits — including I-612 persecution waiver applications — is formulated by the DHS and implemented by the USCIS, venue is proper in this district.

III. Introduction and Legal Background

10. This section of the complaint gives an introduction of what happened and what is at stake, then a summary of the legal procedures involved.

11. The USCIS issued a denial on Ms. Castillo's application for a waiver of the two-year J-1 foreign residence requirement of 8 U.S.C. § 1182(e) ("the foreign residence requirement"). Ms. Castillo is a national of Venezuela. Ms. Castillo's spouse, Felipe Rivera, is a U.S. citizen. Venezuela is one of the most violent, dangerous, and unstable countries in the world.

12. There are seven separate and independent reasons why Ms. Castillo would indisputably face persecution for political reasons: (1) her father was kidnapped twice. At the time of the second kidnapping, Ms. Castillo had been involved in the student movement against the Chavez regime in January 2010. The kidnappers asked for the location of Ms. Castillo, but ultimately the father escaped after being shot in the foot. She fled to Mexico after the kidnapping; (2) she continues to support the opposition movement in Venezuela; (3) she has been publicly outspoken against the current Maduro regime on social media; (4) she has participated in anti-Chavez and anti-Maduro fundraising events in New Orleans and Miami; (5) she supported an individual who was protesting the Venezuelan government by going on a hunger strike in front of the United Nations building; (6) she is wishes to work with Amnesty International to report on human rights violations in Venezuela; and (7) she has close ties to the United States at a time when anti-American sentiment is strong and increasing in Venezuela.

13. Ms. Castillo would be singled out for persecution because of all of the reasons set forth above in paragraph 12. If a waiver is not granted, she would constantly face a substantial risk of persecution and even upon return to Venezuela. This risk is amplified by the facts that the applicant and her father have already been persecuted in the past.

14. In addition to the risk of persecution faced by Ms. Castillo, her husband would also suffer many hardships if his wife is compelled to return to Venezuela. Evidence of hardship to Ms. Castillo's husband must be considered by the USCIS under 8 U.S.C. § 1182(e), which requires the grant of a J-1 persecution waiver to be found by the government to be in the public interest. It is not in the U.S. public interest to subject a U.S. citizen to the kinds of hardships set forth in the waiver application.

15. The chief claim of this action is that the UCIS must have abused its discretion, because it could not have come to its negative conclusion through a correct process of reasoned decision-making.

16. Many foreigners come to the United States as "J-1" exchange visitors ("J-1s"). This is a kind of nonimmigrant (temporary) classification, as set forth in 8 U.S.C. § 1101(a)(15)(J).

17. Under 8 U.S.C. § 1182(e), there are three ways that a J-1 can become subject to the two-year foreign residence requirement: (1) the J-1 program is funded by the U.S. Government or the J-1's Government; (2) the J-1 is engaged in training that is on the "Skills List" for the home country; or (3) the J-1 is coming to the United States for graduate medical education. The foreign residence requirement prohibits a J-1 from doing certain things, such as

applying for permanent resident status (green card), until she has either fulfilled the requirement by spending two years in his home country, or until she has obtained a waiver of the requirement.

18. Ms. Castillo can only fulfill the requirement in Venezuela. In particular, 8 U.S.C. § 1182(e) provides that a J-1 subject to the requirement may fulfill it only in his country of "nationality or last residence," and "last residence" has consistently been interpreted by both the USCIS and the State Department to mean a country where the person had the equivalent of permanent resident status as of the time of first admission to the United States in J-1 status.

19. As described with more specificity below, Ms. Castillo became subject to the foreign residence requirement because she came to the United States in J-1 status to engage in education in a field of specialized knowledge or skill (business) that was on the exchange visitor skills list for Venezuela.

20. Under 8 U.S.C. § 1182(e), there are four ways that a J-1 can pursue a waiver of the foreign residence requirement (these are specified below). The instant action concerns Ms. Castillo's application for a waiver based on a well-founded fear of persecution upon return to Venezuela. This kind of waiver application commences with the filing of a DS-3035 data sheet form with the State Department. This is followed by the main application, which is submitted on Form I-612, with accompanying evidence, to the USCIS California Service Center.

21. Unlike virtually all other waiver application types in U.S. immigration law, this kind of waiver application is not adjudicated solely by the USCIS. Instead, the waiver can be granted only if the State Department issues a favorable recommendation. In this case, the USCIS denied the case before seeking the recommendation of the State Department. As such, it is unknown what the stance of the State Department is on this application because the USCIS never

sought its opinion. However, undersigned counsel knows that the State Department routinely issues a Favorable Recommendation on cases like this.

IV. Factual Allegations

22. Ms. Castillo first entered the United States on her J-1 visa on August 22, 2013, as a nonimmigrant exchange visitor under 8 U.S.C. § 1101(a)(15)(J) to undertake an educational program in business at Northeastern University in Boston, Massachusetts.

23. Ms. Castillo was in valid J-1 status from August 22, 2013 to May 25, 2016. Her J-1 status expired on May 25, 2016.

24. Ms. Castillo married Mr. Rivera on September 22, 2015.

25. Ms. Castillo will indisputably face persecution upon return to Venezuela for the reasons set forth in paragraph 12. In addition, the denial of the waiver application will harm her U.S. citizen husband, Felipe Rivera, as well as many U.S. citizens and is otherwise harmful to the U.S. public interest.

V. J-1 Waiver History (Persecution Waiver)

26. All applicants for a J-1 exceptional persecution waiver must fill out an electronic Form DS-3035 on the State Department's website.

27. After completing the electronic Form DS-3035, the State Department's website generates (1) a "Waiver Review Division Case Number," (2) a "Waiver Review Division Barcode Page," (3) a "Third Party Barcode Page," (4) an electronic DS-3035 in "PDF" format with the applicant's answers, (5) Supplementary Applicant Information Pages (if necessary), and (6) a "Packet Assembly Checklist" and "Instruction Sheet."

28. All applicants for a J-1 waiver must receive a Waiver Review Division ("WRD") Case Number from the State Department, which arrives when the DS-3035 is first submitted online.

29. All applicants for a J-1 waiver must pay a $120.00 filing fee to the State Department for the DS-3035. After filing the DS-3035 online, the applicant must send a hard copy of the form, plus fee, to a State Department lockbox in St. Louis, Missouri.

30. For persecution waiver applications, the main waiver application is filed with the USCIS California Service Center. The application is filed on Form I-612 with accompanying evidence.

31. All applicants for a J-1 persecution waiver must also pay a filing fee to the USCIS. For Ms. Castillo, this fee was $585.00.

32. On November 19, 2015, Ms. Castillo, though counsel, filled out Form DS-3035 on the State Department's website to initiate the application process for a J-1 waiver.

33. The State Department assigned to Ms. Castillo's case WRD Case Number 911087.

34. The State Department generated a "Waiver Review Division Barcode Page" and a "Third Party Barcode Page" for submission with Ms. Castillo's waiver application. Ms. Castillo, through counsel, paid $120.00 to the State Department via cashier's check dated November 18, 2015. The State Department Waiver Review Division received Ms. Castillo's signed DS-3035 on December 3, 2015.

35. On December 3, 2015, Ms. Castillo, through counsel, filed her Form I-612 persecution waiver application with the USCIS California Service Center. The applicant was assigned USCIS Case Number WAC-16-044-50769.

36. Ms. Castillo's I-612 materials included the WRD Case Number as well as her Form DS-3035 and the barcode sheet generated by the State Department.

37. Ms. Castillo is statutorily eligible to seek a persecution waiver because she has a well-founded fear of facing persecution on account of political opinion upon return to her home country of Venezuela.

38. Ms. Castillo's persecution waiver application complied with all statutory and regulatory requirements specified by the defendants.

39. Ms. Castillo's case was issued a hostile Request for Evidence ("RFE") on April 29, 2016. The RFE clearly showed an improper predisposition to deny the case. It asked a number of questions, some of which were irrelevant and/or objectionable. Other questions tended to indicate that large portions of the waiver application were wholly ignored.

40. RFEs should only be issued when the evidence raises underlying questions regarding eligibility or does not fully establish eligibility. See February 16, 2005 William R. Yates Interoffice Memorandum, Requests for Evidence (RFE) and Notices of Intent to Deny (NOID).[1] The RFE in the Castillo case violated the 2005 Yates memo because it does not clarify how the evidence submitted in the original filing did not fully establish eligibility. Indeed the application was approvable as filed. Additionally, the applicant met her burden of proof and thus

[1] This is current USCIS policy on the issuance of RFEs and Notices of Intent to Deny ("NOIDs").

made a prima facie case for approval. See USCIS Adjudicator's Field Manual ("AFM") § 11.1(c). The standard of proof applied in an I-612 persecution waiver application is that the applicant must establish by a "preponderance of the evidence" that there exists a reasonable likelihood of persecution.[2] *Id*.

41. The AFM goes on to say:

> Thus, even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

See USCIS AFM § 11.1(c). The adjudicator did not articulate material doubt in the RFE, as he/she was required to do under AFM § 11.1(c). As such, the RFE violates the AFM.

42. Undersigned counsel's firm filed approximately 60 Form I-612 hardship and persecution waiver applications between the beginning of 2014 and April 29, 2016, and none of the cases received hostile RFEs that were this legally objectionable. Indeed, every such case resulted in the grant of the waiver. As such, the issuance of an RFE in a strong case like this is a dramatic change in the adjudication of J-1 persecution waiver applications filed for Venezuelans. Courts have held that an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed. See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970). The issuance of this RFE in a perfectly sound

[2] The interplay of the general preponderance standard with the reasonable likelihood standard is more fully explained below in ¶ 85.

Venezuelan persecution case without explaining the change in policy and standards violates federal decisional law that mandates such explanations.[3]

43. The RFE stated:

> This office is unable to complete the processing of your Application for Waiver of the Foreign Residence Requirement, (Form I-612) without additional information. Please submit the information requested below.

44. This is false. The application was approvable as filed and the RFE did not explain what was lacking in the original filing, in violation of the USCIS RFE policy set forth above.

45. The RFE continued:

> Provide a statement regarding your current status in the United States if you have completed your exchange program. Based on statements in the file, you completed your program May 2015. Submit transcripts from Northeastern University, Boston MA, indicating the date you completed degree requirements.

46. The applicant's full immigration history was documented in the waiver application in Exhibits 4-7. This question shows that the adjudicator did not review the most fundamental documents in the entire case, which is another violation of the 2005 Yates memo. Exhibit 4 clearly shows that the applicant was granted J-1 status through May 25, 2016. It is clear that the applicant was granted one year of J-1 academic training status following the completion of her studies. That period of time runs from May 26, 2015 to May 25, 2016.

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[3] The RFE in the Castillo case was the first of a spate of 6 RFEs issued by the USCIS in rock-solid persecution and hardship waiver cases. This included what appears to be retaliation by the USCIS for an aggressive RFE response where it took two of undersigned counsel's cases out of order and issued two hostile RFEs on the same day. On August 16, 2016, undersigned counsel filed a complaint with the DHS Inspector General's Office concerning this serious misconduct. This complaint requests the DHS Inspector General to open an investigation into all six cases. Undersigned counsel forwarded the IG complaint to DHS General Counsel on September 2, 2016, after another RFE was issued on August 31, 2016.

Exhibits 4-7 clearly and distinctly present the applicant's full U.S. immigration history. Furthermore, the applicant's immigration history and current status are only relevant to the question of whether she is subject to the two-year foreign residence requirement. An applicant subject to the two-year foreign residence requirement could be out of status for years and still be eligible for this kind of waiver.

47. The RFE continued:

> Submit evidence of any address changes you have filed with USCIS or through your educational program.

48. The applicant, through counsel, responded as follows:

> The applicant, through counsel, objects to this inquiry based on relevance. An I-612 persecution waiver application concerns whether the applicant has demonstrated that he/she has a well-founded fear of persecution based on one of the enumerated grounds in the statute. See INA § 212(e). The reasons why the applicant faces a risk of persecution upon return to Venezuela on account of political opinion are listed on pages 1-2 of the lawyer letter. The evidence of this was presented in Exhibits 2-3 and 13-27. Based on a review of the entire RFE, it is clear that the majority of this evidence was improperly ignored or disregarded. The governing law for this kind of case was set forth on pages 2-6 of the lawyer letter that accompanied this case. The Service may only assess whether the applicant has met her burden of proving that she has a well-founded fear of facing persecution on account of political opinion upon return to Venezuela. Of course, the applicant overwhelmingly met her burden of proof on this point in the initial application.
>
> The request for the submission of evidence as to any address changes filed with USCIS or through the educational program is not reasonably calculated to elicit relevant information concerning the persecution claims in this case. Consideration of any evidence generated in response to this request would be improper and legally erroneous. This line of inquiry has no basis in the statute, regulations, and administrative and federal decisional law in this

> kind of case. It would be an abuse of discretion to consider evidence submitted in response to this inquiry.

49. The applicant's response speaks for itself, although the nature of the underlying question shows an improper predisposition to deny the case because it is designed to uncover some kind of wrongdoing, which if found, would be completely irrelevant to the underlying I-612 persecution waiver application.

50. The RFE continued:

> Provide a statement explaining why you are unable to return to Mexico, the country of your last foreign residence.

51. The applicant, through counsel, responded as follows:

> The applicant, through counsel, objects to this inquiry based on relevance. The applicant cannot fulfill her two-year foreign residence requirement in Mexico. *See* INA § 212(e). This question seems to be getting at the asylum concepts of "safe third country" agreements or firm resettlement, which are completely irrelevant to I-612 persecution waiver analysis. There is no basis in any law for this question of the RFE. An I-612 persecution waiver application concerns persecution to the applicant on account of race, religion, and/or political persecution. *See* INA § 212(e). The sole ground of persecution argued in this case is persecution on account of political opinion. As discussed in the December 3, 2015 lawyer letter, the applicant indisputably faces a severe risk of persecution on account of her political opinions for seven separate and independent reasons.
>
> The governing law in this kind of case was set forth in pages 2-6 of the lawyer letter. The Service may only assess whether the applicant may face persecution upon return to Venezuela on the basis of race, religion, and/or political opinion. The consideration of whether the applicant is unable to return to Mexico is not reasonably calculated to elicit relevant information concerning the persecution claims in this case. Consideration of any evidence generated in response to this inquiry would be improper and legally erroneous. This line of inquiry has no basis in the statute, regulations, and administrative and federal decisional law in this

> area. It would be an abuse of discretion to consider evidence submitted in response to this inquiry, and consideration of this inquiry raises constitutional concerns.

52. The applicant's response speaks for itself, but the initial question tends to show a predisposition to deny the case by the adjudicator. Specifically, this kind of irrelevant legal question, in the midst of other erroneous, irrelevant, and unlawful questions, indicates that the adjudicator is straining to find a way to deny the case.

53. The RFE continued:

> If previously married, submit a photocopy of the divorce decree (or death decree, if applicable) issued by civil authorities that terminated all your prior marriages and all the prior marriages of your current spouse.

54. The applicant, through counsel, responded as follows:

> The marital status of the applicant is not strictly relevant to whether she has met her burden of proving that she has a well-founded fear of facing persecution upon return to Venezuela. It is nonetheless relevant because the grant of the waiver must be found by the government to be in the public interest. *See* INA § 212(e). Hardship to the applicant's U.S. citizen husband clearly implicates the public interest of the United States, which must be proved in every J-1 persecution waiver case. *See id*.

55. The RFE continued:

> Note: An applicant must establish that exceptional hardship would be imposed on a U.S. citizen or lawful permanent resident spouse or child by the foreign residence requirement in both circumstances and not merely in one or the other. Hardship is divided into two segments. Consideration must be given to the effects if the qualifying family member(s) was to accompany the applicant abroad for the stipulated two-year term, Consideration must separately be given to the effects of the requirement should the qualifying family member(s) choose to remain in the United States while the applicant is abroad. Hardship to the applicant is not a consideration in this matter.

56. The applicant, through counsel, responded as follows:

> This is a standard, boilerplate statement of the established doctrine in I-612 hardship waiver applications. It is completely irrelevant to this application because it is a persecution waiver application. Elements of hardship to the U.S. citizen husband have been proved because the grant of the waiver must be found by the government to be in the public interest of the United States. *See* INA § 212(e). But the applicant is entitled to, and arguing for, a waiver of her J-1 foreign residence requirement on the basis of her personal risk of persecution, not due to the hardships that would be suffered by her husband.
>
> Not withstanding the fact that this is a properly filed I-612 persecution waiver application, the final sentence of the quoted material is incorrect with respect to I-612 hardship waiver applications. It is true that, strictly speaking, hardship to the applicant herself is not directly relevant in a Form I-612 case. However, it is also indisputable that death or serious physical injury to a wife will cause long-term serious hardships to her husband. In other words, serious harm to a J-1 exchange visitor absolutely is relevant, to the extent that it causes hardship to the qualifying relative.
>
> The applicant and her husband systematically proved that the applicant's husband and others would face an exceptional combination of hardships under all of the travel alternatives in the waiver application that was filed on December 3, 2015. The case was approvable as filed.
>
> It is indisputable that very serious harm to the applicant, and even just the grave risk of very serious harm, would be deeply disturbing to her husband, Felipe Rivera. This was thoroughly demonstrated in the original waiver application. *See* Exhibits 1-3, and 17-18.

57. The RFE then proceeded to make inquiries on hardship grounds asserted in the persecution waiver application. As discussed above, evidence of hardship to a qualifying relative is not necessary in an I-612 persecution waiver application. It is not necessary to establish exceptional hardship to a qualifying relative or relatives to prevail in an I-612 persecution waiver

application. Nonetheless it is relevant in this case to the extent that it implicates the U.S. public interest. See 8 U.S.C. § 1182(e). As such, evidence submitted concerning the hardships that would be faced by Felipe Rivera if the two-year foreign residence requirement is imposed on his wife is indeed relevant to the extent that it implicates the U.S. public interest. The RFE and the denial completely ignored the public interest, which the USCIS is required to consider in this kind of case.

58. The RFE continued:

> Submit current documentary evidence to show that conditions in the country of your nationality or last foreign residence have worsened since your departure to enter the United States as an exchange visitor or student.

59. The applicant, through counsel, responded as follows:

> This inquiry indicates a profound misunderstanding of I-612 persecution waiver law. It also indicates that the adjudicator improperly ignored and/or disregarded almost the entire waiver application, which included an abundance of current and competent evidence that the applicant has a well-founded fear of facing persecution upon return to Venezuela on the basis of political opinion.
>
> The applicant, through counsel, objects to this inquiry because the applicant is not required to show that the conditions in her home country have worsened since her departure. *See* INA § 212(e). The applicant only needs to show that she has a well-founded fear of facing persecution under one of the enumerated grounds in the statute. The applicant overwhelmingly did so in the initial waiver application. . . .
>
> * * * *
>
> It is apparent that the adjudicator who issued this RFE wholly ignored or improperly disregarded all of the above evidence. This violates the 2005 Yates memorandum in that the adjudicator did not clarify how the evidence submitted does not fully establish

> eligibility. Indeed, the RFE does not even acknowledge such evidence was submitted. Further, the adjudicator did not deal with the fact that the evidence submitted clearly met the applicant's burden and standard of proof. The adjudicator did not articulate material doubt in this RFE, as he/she is required to do under AFM § 11.1(c).

60. The RFE continued:

> Provide a detailed statement (signed and dated) explaining why you would be subject to persecution on account of race, religion, or political opinion upon returning to the country of your nationality or last foreign residence because of the two-year foreign residence requirement.

61. The applicant, through counsel, responded as follows:

> The applicant submitted a detailed 15-page affidavit addressing the risks of persecution with the original waiver application. *See* Exhibit 2. It appears that this affidavit was completely ignored by the adjudicator. This violates the 2005 Yates memorandum in that the adjudicator did not clarify how the affidavit submitted does not fully establish eligibility. Indeed, the RFE does not even acknowledge the affidavit was submitted. Further, the adjudicator did not deal with the fact that the evidence submitted clearly met the applicant's burden and standard of proof. The adjudicator did not articulate material doubt in this RFE, as he/she is required to do under AFM § 11.1(c).

62. Notwithstanding the submission of a 15-page detailed affidavit addressing the risks of persecution, the applicant and her husband submitted a joint statement in response to the RFE. This supplemental statement was also generally ignored in the denial letter.

63. The RFE continued:

> Have you ever applied for political asylum on Form I-589, Request for Asylum in the United States? If yes, provide photocopies of the disposition of the case.

64. The applicant, through counsel, responded as follows:

> The applicant, through counsel, objects to this inquiry based on relevance. An I-612 persecution waiver application concerns persecution to the applicant on account of race, religion, and/or political persecution. *See* INA § 212(e). The sole ground of persecution argued in this case is persecution on account of political opinion. As discussed in the December 3, 2015 lawyer letter and the response to the third question in the RFE, the applicant indisputably faces a severe risk of persecution on account of her political opinion for seven separate and independent reasons. The governing law in this kind of case was set forth in pages 2-6 of the lawyer letter. The Service may only assess whether the applicant may face persecution upon return to Venezuela on the basis of race, religion, and/or political opinion. The consideration of whether the applicant has ever applied for asylum is not reasonably calculated to elicit relevant information concerning the persecution claims in this case, and it is wholly irrelevant. Consideration of any evidence generated in response to this inquiry would be improper and legally erroneous. This line of inquiry has no basis in the statute, regulations, administrative, and federal decisional law in this area. It would be an abuse of discretion to consider evidence submitted in response to this inquiry, and consideration of this inquiry raises constitutional concerns.

65. The RFE continued:

> Please provide a detailed listing of all addresses you have lived at since January 1, 2011. Include begin and end dates, complete street address and country name. Include the names of people who shared the same residence.

66. Aside from whether the applicant resided in Venezuela during the relevant times, this question is irrelevant to the persecution claim. Nonetheless, the applicant responded to the question by providing all addresses and dates for the United States. She rightfully declined to provide the names of the individuals who shared the same address during the relevant time periods. The question was inappropriate in that it asked the applicant to divulge confidential and private information that was irrelevant to the persecution claim.

67. The RFE continued:

> **Note:** On form I-612, Part 3, Box 2 is checked indicating that you are applying for a waiver of the foreign residence requirement and that you cannot return to the country of your nationality or last foreign residence because you would be subject to persecution on account of race, religion, or political opinion. However, the evidence you submitted appears to be based equally on hardship to your US citizen spouse and persecution.

68. The applicant, through counsel, responded as follows:

> The applicant clearly indicated that this is an I-612 persecution waiver application. The correct box was checked on the form I-612. The lawyer letter clearly indicated that this was a persecution waiver application. Even a cursory reading of the applicant's affidavit clearly shows that this is a persecution waiver application. The vast majority of the exhibits submitted with the waiver application are clearly related to the applicant's risk of persecution upon return to Venezuela.
>
> The last statement of the quoted passage is false. Hardship to the applicant's U.S. citizen husband is presented in support of the persecution waiver application because the government must find that the grant of the waiver application be in the public interest of the United States. *See* INA § 212(e). The hardship that the applicant's U.S. citizen husband would face if the applicant was compelled to fulfill her two-year foreign residence requirement is relevant to the application in the context of the U.S. public interest. In other words, harm to a U.S. citizen is equivalent to harm to the U.S. public interest.

69. The RFE continued:

> DOS Waiver Review Division advises that you should not intertwine persecution claims with claims of exceptional hardship. Although you may qualify for more than one waiver basis, the Department recommends that you file each waiver basis separately. In response to this notice, please confirm the waiver basis below that you wish to proceed with.

70. The applicant, through counsel, responded as follows:

> As set forth in the response to the previous statement, hardship to the U.S. citizen spouse in this application is relevant to the extent it implicates the U.S. public interest. *See* INA § 212(e). Applications filed by this firm have consistently made this argument where a U.S. citizen or permanent resident spouse and/or children were present in I-612 persecution waiver application. The State Department Waiver Review Division has issued a favorable recommendation in every persecution waiver application that has been filed by this law firm.
>
> The adjudicator clearly misunderstands the position of the State Department's Waiver Review Division on this issue. Although the Immigration Service has historically not cared, the Waiver Review Division has always insisted that a persecution waiver application and an exceptional hardship waiver application should not be combined in one application package. The instant application is completely consistent with that policy. It is a J-1 persecution waiver application. It is not a J-1 hardship waiver application. Facts about hardship to the applicant's husband go to the issue of the U.S. public interest, which must be proved in every J-1 persecution waiver case. They are not an argument directly bearing on the applicant's eligibility for a waiver.

71. The sum total of the entire RFE indicates that the adjudicator had a predisposition to deny the case. The many inappropriate, irrelevant, and legally objectionable questions show that the adjudicator was straining to find a way to deny the waiver application. The many irrelevant and objectionable questions also indicate a profound misunderstanding of the law in this area.

72. As shown above, the applicant, through counsel, systematically rebutted every aspect of the improper RFE. Remarkably, the August 23, 2016 denial disregarded all questions asked in that RFE and simply resorted to new theories to deny the case. The only exception was the applicant's declination to divulge the confidential and private information regarding who she

lived with at various addresses. As shown above, that question was improper and irrelevant. As will be shown below, the adjudicator could have sought clarification on alleged inconsistencies referenced in the denial in the RFE. Aside from the inappropriate question about who the applicant lived with over the course of time, the rest of the factual basis of the denial was never raised in the RFE. That shows that the adjudicator had a predisposition to deny the waiver application.

73. The applicant's RFE response was received by the government on May 19, 2016.

74. After sitting on the RFE response for over three months, the USCIS ultimately issued a denial of the waiver application on August 23, 2016. The denial letter is riddled with factual inaccuracies. The denial letter has zero legal analysis. The denial cites to an erroneous legal standard that is not binding, although the adjudicator failed to apply that rule to the facts submitted in the application. The denial is further confirmation that the adjudicator started to review this case with an improper predisposition to deny the waiver application. This is made clear by the adjudicator further straining to construe facts in the light most unfavorable to the applicant. The adjudicator also violated the legal standard set forth in AFM § 11.1(c), as well as the proper evidenentiary standard for this kind of case: the well-founded fear standard.

75. The denial states:

> In determining whether or not hardship would be exceptional as contemplated by the statute, consideration must still be given to the House of Representatives Report Number 721, dated July 17, 1961, entitled "Immigration Aspects of the International Educational Exchange Program." Subcommittee number one of the Committee on the Judiciary, on page 121 of their report, reiterates and stresses the fundamental significance of a most diligent and stringent enforcement of the foreign residence requirement. The report states:

> It is believed to be detrimental to the purpose of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers, including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from this country would cause personal hardship.

76. This is worthless authority. This is boilerplate denial language used in hardship waiver denials. It was the foundation of hardship denials, which typically cite no legal authority except the statute and this old report. This statement is completely irrelevant to the instant persecution waiver application. Marriage or the presence of a qualifying relative is not a requirement for a persecution waiver application. This legislative history is from before persecution waiver applications were permitted in 8 U.S.C. § 1182(e). Specifically, Congress expanded the grounds for waivers to include persecution and no objection by the home country in 1970. 8 U.S.C. § 1182(e), as amended by Act of Apr. 7, 1970, § 2, Pub. L. no. 91-225, 84 Stat. 116.

77. It appears that the adjudicator haphazardly cited to inapplicable legislative history in an effort to deny the instant persecution waiver application by presenting the sham appearance of ostensible legal authority. That shows a predisposition to deny the instant persecution waiver application. Such erroneous citations to inapplicable legislative history is clear evidence that the adjudicator abused his or her discretion in denying the instant case.

78. The denial continues:

> As previously stated, the applicant entered the U.S. as an exchange visitor on August 22, 2013. This entry is depicted on the submitted Form IAP-66 or DS-20I9. The applicant signed the form on July 29, 2013 certifying that he/she read all instructions, particularly the

> two-year country physical presence requirement at the completion of his/her exchange program. Consequently, the applicant was aware that at the end of his/her academic program he/she would be expected to fulfill that two-year residence requirement. The applicant's program ended on May 25, 2016.

79. The applicant's knowledge of the J-1 foreign residence requirement has no relation to the fact that she is entitled under the statute to a waiver, because she has a well-founded fear of facing persecution upon return to Venezuela. The applicant does not claim that she was unaware of the foreign residence requirement.

80. The above quoted paragraph shows that the adjudicator is attempting to use 8 U.S.C. § 1182(e) as a punitive provision of the law. That is another example of the adjudicator's predisposition to deny the claim. The statute is not designed to punish foreigners. It is certainly not designed to punish American citizens. It is designed to foster high-minded foreign policy goals of mutual understanding among peoples of the world, and derivative goals of foreign development, but only where doing so would not subject the foreign national to a well-founded fear of persecution upon return to the country of nationality or last residence on the basis of race, religion, and/or political opinion.

81. The denial continues:

> The initial evidence includes multiple statements about hardship to the applicant's USC spouse, however, Form 1-612, Part 3, Box 2 is checked for persecution. An RFE was sent for additional information including clarification of basis for waiver. In response to the RFE, the applicant's attorney confirmed that persecution is the correct waiver basis and that the applicant is not claiming exceptional hardship on a USC spouse.
> In a post-RFE response, the applicant states: "My waiver submission was based on the fear of persecution I face on my return to Venezuela."

82. It was clear from the beginning that this was a persecution waiver application and not a hardship waiver application. The forms (G-28 and I-612), both affidavits, and the Table of Exhibits all make clear that this is a persecution waiver case. There are repeated references to fear and incidence of persecution in Venezuela, in the affidavits and the Table of Exhibits, as well as accompanying support materials. One would have to ignore the entire waiver application, including the Form I-612, to have any doubt that this was an I-612 persecution waiver application. Hardship arguments concerning the applicant's U.S. citizen husband were also made because the grant of a persecution waiver must be found by the government to be in the public interest.

83. The denial continues:

> USCIS notes that fear of persecution is the standard for asylum, however, the standard for I-612 waivers is "would be" persecuted.

84. This statement does not make sense. It admits the standard for this case is the "well-founded fear" standard of asylum, but then appears to attempt to qualify that the standard for I-612 waivers is somehow different. It appears that the adjudicator is attempting to improperly enhance the legal standard for this kind of case.

85. The correct legal standard for I-612 persecution waiver cases was set forth in pages 2-6 of the lawyer letter accompanying the waiver application. In summary, it is the same as the well-founded fear standard for asylum cases. In particular, the lawyer letter states:

> In particular, in Cardoza-Fonseca the U.S. Supreme Court declared:
>
> **One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place**. As one leading authority has pointed

> out: "Let us . . . presume that it is known that in the applicant's country of origin **every tenth adult male person is either put to death or sent to some remote labor camp**. . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return.'" 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966). 480 U.S. at 431 (emphasis added).
>
> In that famous footnote, the U.S. Supreme Court ruled that one can deserve protection due to a risk of persecution even if the probability of harm can be shown to be only 10 percent. That footnote occurs in the midst of the all-time leading decision on the burden and standard of proof for persecution.

Furthermore, the lawyer letter accompanying the application explains in detail that an I-612 persecution waiver applicant need only show a "reasonable likelihood" of future persecution, which can be as little as a 10% probability. The interaction of the general "preponderance of the evidence" standard for immigration adjudications and the "reasonable likelihood" standard for persecution cases can be articulated as follows: The applicant must establish by a preponderance of the evidence that there exists a reasonable likelihood of persecution.

86. One federal district court has specifically ruled that the legal standard for proof of persecution under 8 U.S.C. § 1182(e) is a "well-founded fear" standard rather than the more restrictive "clear probability" standard. Almirol v. INS, 550 F. Supp. 253 (N.D. Cal. 1982). Interestingly, this was decided prior to the famous Supreme Court decision in Cardoza-Fonseca.

86. In addition, Ms. Castillo's affidavit (and other supporting evidence) explained that she has already been persecuted. Such past persecution is evidence that persecution is likely in the future, and it reduces the applicant's current burden of proof. See Matter of Chen, 20 I. & N. Dec. 16 (BIA 1989).

87. As such, the applicant's burden of proof is a well-founded fear standard and less than 10% given the fact that past persecution is present. The applicant has clearly met this burden in the instant case.

88. In the alternative that this Court disagrees that the proper standard is the well-founded fear standard, the applicant argues that the standard is the preponderance of the evidence standard. The legislative history of the 1970 amendment to 8 U.S.C. § 1182(e) that added the persecution waiver as an additional basis for a J-1 waiver states (in pertinent part):

> The amendment of section 212(e) would retain the provision for waiver of the foreign residence requirement in cases of hardship to the alien's U.S. citizen or permanent resident spouse or child and the provision for waiver based on the request of an interested government agency and would add two other provisions for waivers. One provides for a waiver if the alien cannot return to his home country because he would be subject to persecution. This waiver on account of likely persecution is consistent with the authority of the Attorney General to withhold deportation under section 243(h) of the act. . . .

H.R. REP. NO. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2756.

89. The Refugee Act of 1980 changed the previous requirement that applicants "would be subject to persecution" to a requirement that their "lives or freedom would be threatened." Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (1980). Prior to the change, courts construed the statute as requiring applicants to show a "clear probability" that the applicant would be persecuted. See e.g. Matter of Williams, 16 I. & N. Dec. 697 (BIA 1979). After the 1980 amendment, the standard was construed to require a preponderance of the evidence. See Matter of Acosta, 19 I. & N. Dec. 211, 215 (internal citation in AAO decision relied on by Defendants in the denial letter). The basis for the distinction between preponderance and the

well-founded fear standards is that restriction on removal is mandatory once eligibility is established, whereas asylum is discretionary in nature. See INS v. Cardoza-Fonseca, 480 U.S. 421, 443-44 (1987); Matter of Mogharrabi, 19 I. & N. Dec. 439, 441 (BIA 1987).

90. In the I-612 context, the applicant argues that the more appropriate standard is the well-founded fear standard because the grant of the waiver only removes the legal disabilities associated with the two-year foreign residence requirement, such as an application for permanent resident status. See 8 U.S.C. § 1182(e) and Complaint ¶ 17. The grant of a persecution waiver application does not confer any kind of status nor permit one to apply for employment authorization like restriction on removal does. See 8 U.S.C. § 1231(b)(3) and 1182(e). Further, as discussed above, 8 U.S.C. § 1182(e) is not a punitive provision of the law.

91. The applicant has overwhelmingly proven her burden by either the well-founded fear standard or the preponderance of the evidence standard.

92. The denial continues:

> AAO dismissed a case with similarities on May 21 , 2008. The AAO dismissal references Matter of Acosta, 19 I & N, Dec. 21[1] (BIA 1985). According to the AAO dismissal: "*Unlike applicants for refugee or asylee status, who may establish a well-founded fear of persecution on account of five separate grounds including race, religion, nationality, membership in a particular social group, or political opinion, an applicant for a waiver under section 212(e) of the Act must establish that he or she would be persecuted on account of one of three grounds, race, religion or political opinion . . . The burden of proving eligibility for a waiver under section 212(e) of the Act rests with the applicant. See section 291 of the Act, 8 U.S.C. [§] 1361.*"

93. As set forth above, the enhanced standard applied in the USCIS Administrative Appeals Office ("AAO") decision cited here is legally erroneous. Note that there is no legal

analysis present in this quoted language. It appears that the AAO is attempting to enhance the legal standard from that of asylum, although it does not provide any rational basis for doing so. Further, as shown in Acosta, the standard cannot be higher than the preponderance standard. Acosta, 19 I. & N. Dec. at 215.

94. The denial continues:

> The applicant states that she has been persecuted, however the evidence submitted is based on statements from the applicant and her family members. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof.

95. This statement is reversible legal error and clearly shows that the adjudicator abused his or her discretion. In Matter of [name redacted] (AAO Aug. 15, 2007), the USCIS's AAO ruled that: "Affidavits alone may serve as sufficient evidence to show a fact by a preponderance of the evidence when they are detailed and consistent." In Mogharrabi, 19 I. & N. Dec. at 445, the Board of Immigration Appeals ("BIA") similarly stated: "The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear [of persecution]."

96. Furthermore, the quoted statement above is a violation of USCIS adjudications policy set forth in AFM § 11.1(c) because the adjudicator does not articulate material doubt that the applicant met her burden of proof. It is an abuse of discretion for the adjudicator to simply state that "Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof," in view of Service policy and decisional law cited above. Furthermore, this flagrant error of law shows that the adjudicator has a predisposition to

deny the case.

97. The above quoted statement that "The applicant states that she has been persecuted, however the evidence submitted is based on statements from the applicant and her family members," is patently false. In addition to evidence from family members who knew firsthand about the applicant's persecution in Venezuela, there were signed letters from other credible sources personally familiar with the applicant's activism in Venezuela and her subsequent persecution, providing additional corroboration of facts. For example, Jaime Merrick, Guillermo Quiroga Saez, Raquel Yadaxani Sanchez Carrero, Virginia Segovia de Bolivar, Argenis Asuncion Flores Flores, Marina Del Carmen Guerrero Ramirez, and Elba T. Avendano Arias all wrote informative letters. As such, the falsity of the adjudicator's statement shows a predisposition to deny the case. It also is an admission that the adjudicator improperly ignored all of this competent evidence, which is also an abuse of discretion.

98. The denial continues:

> The evidence submitted includes numerous articles about student protesters, country conditions in Venezuela and letters of support from friends of the applicant. The articles are not specific to the applicant and or the events the applicant participated in. Statements provided contain conflicting information and lack detail, such as date of event. Therefore, the statements are less credible.

99. This aspect of the denial is also patently false. The letters cited above are indeed specific to the applicant. The country conditions in Venezuela reflect a general climate of hostility toward those opposed to the current regime, and the applicant has publicly continued her activism while here in the United States, for which evidence was also presented, such as photos,

media posts, and support letters. This falsity is another example of a predisposition to deny the case.

100. The denial continues:

> The applicant states that she was persecuted in 2010. The applicant returned to her home country three times after the stated persecution and the visits were lengthy. The applicant applied for and was granted a J-1 visa after the stated persecution. The applicant's parents have remained living in Venezuela since their adult children left Venezuela to live in the U.S. The applicant's parents have Venezuelan passports, have secured travel visas and have traveled freely to and from the U.S. since 2009.

101. The applicant's visits were short and purposeful: for a grandparent's funeral and for her mother's surgery, and she took special precautions both times to stay safe. A third trip was for urgent dental surgery and she stayed in a hotel, for security reasons. She did not visit for pleasure, and she was afraid each time, with each visit being much shorter than the two-year residency she now faces. It is improper to infer that the applicant's parents have not suffered persecution in Venezuela, or do not fear for relatives' lives, simply because they still reside there. Their reasons for staying are their own. Their daughter's fears of returning for two years are, likewise, her own. They are based on her personal experience as well as what she learns from relatives, friends, and associates in Venezuela and through the media. As such, the adverse inference by the adjudicator shows an improper predisposition towards the application and comprises an abuse of discretion.

102. The denial continues:

> The applicant has relatives living in Florida. In 2009, the applicant applied for an F-1 visa. In June 2009, the program was cancelled due to non-attendance. Later the same year, the applicant, her parents and her brother traveled to Florida on a visitor visa. The

family arrived in the U.S. on December 23, 2009 and returned to Venezuela on January 4, 2010.

In January 2010, the same month the applicant and her family returned from the U.S., the applicant states that while driving, she was intercepted by a group of four men as she left campus. The applicant states "I was intercepted by a group of men on motorcycles who forced me to stop by knocking on my car windows and getting in my way with their motor bikes." The applicant states that the men told her to get out of her car and then one of the men pointed a gun at her forehead. The applicant says the men wanted to know who her family was. The applicant says the men also asked if she knew what would be the next action of the students in the streets. The applicant states that no words came out of her mouth during the incident. In a conflicting statement, the applicant was forced to provide detailed, verbal information. The applicant states that the men beat her and shouted at her that they would take her with them. She states that in a moment, while the men were distracted, she ran and crossed the highway. She says the men shot at her but luckily none of the bullets hit her. She says she hid in some bushes and the men escaped with her car. The applicant does not provide specific details such as the date of the incident. The applicant does not provide evidence that she sought medical treatment for the physical beating or photos of any injuries. The applicant does not provide evidence that she contacted school or police officials or her auto insurance company in January, 2010. The applicant states that she had auto insurance but that she didn't report the incident to her insurance.

The applicant's father provides a statement about the same incident. In the father's description of the event, the applicant received a verbal threat before her car was taken. The father's statement does not include information about a physical beating or information about a gun. The father says the family received anonymous calls suggesting "we should pay to recover the vehicle."

The events described above appear to be more closely related to a carjacking, a crime to obtain money or assets vs. an attempt to persecute the applicant based on political opinion. Venezuela has a high rate of violent crime including kidnapping for ransom and carjacking.

103. The above comprises a disingenuous reading of the applicant's affidavit and the consideration of related corroborating evidence. Specifically, this is a significant misreading of the applicant's affidavit, with regard her to being silent versus speaking during the attack. She did not speak. The applicant's affidavit at ¶ 13 states (emphasis added):

> They tried to force me to tell them who my family was and if I knew what would be the next action of the students in the streets. I remained paralyzed and nervous, and no words were coming out of my mouth. Thus, one of them beat me, shouting that they would take me with them.

104. Also with regard to the January 2010 attack on the applicant, her father's letter in Exhibit 17, Item 3, notes the following (emphasis added):

> It started a series of threatening anonymous calls, both for Daniela and for me in my personal mobile, stating clearly that she was a military target just for being part of the student movement and for disagreeing with the government measures. They stated that we should pay to recover the vehicle, and that they had all the information about our activities and our locations of work and residence.

105. The applicant clearly explains in her affidavit at ¶ 15 why no report of the attack was made to the police (which could also be used in filing an insurance claim) as follows:

> I had the chance to report my stolen car to a police delegation to mark it as stolen at the Transportation and Transit Ministry, in case my insurance would cover the loss. Nevertheless, the police delegation told me this was a case that should be escalated to the Scientific Police Corps, but since the colectivos were lauded by the government, making such accusation 'wouldn't be recommended' as it would 'add me more trouble.' The reason is because in Venezuela the same police don't have the power to go against these individuals, and thus they cannot guarantee protection of the citizens. Many times they just turn a blind eye in the face of these kinds of accusations. I had to leave with the clear message that I should take my own 'precautions' in order to guarantee my safety.

106. It appears that the adjudicator is attempting to penalize the applicant for her not having filed a report in 2010, when the filing of such a report could have endangered her life. A letter from Venezuelan attorney Jaime Merrick in Exhibit 18, Item 14, states (in pertinent part):

> [M]aking a police report is not viable because the institutions of the State are led by the same civil servants that are openly pro the "revolution" besides, the Venezuelan judicial system is characterized by general impunity and injustice.

107. It should be noted that the government did not seek a specific date or any clarifications in the RFE. Astonishingly, the adjudicator is viewing the facts of this case in the light most unfavorable to the application, while at the same time, deliberately misreading and misrepresenting the facts of the case in the denial decision. That is a clear abuse of discretion.

108. The denial continues:

> The applicant describes a second incident as persecution. The applicant says that in one "visit" to the place where she was residing, she heard motorcycles outside of her apartment. The motorcycles were coming toward the building and she heard men shout "the students are threats to the fatherland!" The applicant states that this was a sign that the she was being followed.
>
> The applicant says that she hid in the building and waited until very late to come out and was escorted out of the building The applicant doesn't provide specifics such as the date of the event, the name of the person who escorted her out of the building, etc. The applicant doesn't provide additional evidence to establish that she was being followed or that a remark was made directly to her vs. being made to others in the building or outside the building.

109. This is another disingenuous misreading that shows the adjudicator is straining to construe the facts of the case in the light most unfavorable to the applicant. Specifically, the applicant stated in her affidavit at ¶ 17:

> Precisely at that time, I heard them coming outside of my apartment, surrounding the area with their motorcycles, making tremendous noise and shouting "the students are threats to the fatherland!"—as they used to say as part of their intimidations.

When referring to the apartment, she was not referring to the building. They were just below her window and next to it. She then says they "surrounded the area (her apartment) with their motorcycles," to illustrate that they were not outside randomly shouting, but that the shouting was directed at her. If the adjudicator needed more specificity concerning this event, he or she could have asked for it in the RFE. Instead, the adjudicator has disingenuously construed the facts in the light most unfavorable to the applicant. That is an abuse of discretion.

110. The denial continues:

> The applicant states that her father was kidnapped in 2008 and was able to escape by giving money to the individuals. The applicant says that her father was "expressed kidnapped" the same year that she was attacked (2010). In another statement, the applicant's father was kidnapped the same month as the attack. In a third statement, the applicant's father was kidnapped a few days after the applicant was attacked. The applicant states that when her father was kidnapped, the "the kidnappers again inquired about me." There's no explanation of a previous inquiry about the applicant. The applicant submitted statements but no, supporting documentary evidence of kidnapping in 2008, 2010 or carjacking/violence based on political opinion in 2010.

111. This is another disingenuous misreading of the affidavit. Her father was kidnapped in 2010. It is improper to imply that by giving the year only, instead of the month,

week, and date somehow represents an inconsistency is wrong. Furthermore, the applicant wrote in her affidavit at ¶ 16:

> Following this frightful encounter with the colectivos, I anticipated persecution by the group, as it was driven by violence against those who were part of the pacific protests. I became a ready target for them since they could easily track me. My family and I received calls from anonymous people stating: 'You would rather leave or we will find you' and 'We know when you are arriving to UCAB and when you leave' and 'If you are part of the Student Movement you are a fatherland enemy' and 'Daniela, you are a far-right collaborator and we are going to chase you down.'

Her father's letter states in Exhibit 17, Item 3:

> The 2010 attack "started a series of threatening anonymous calls, both for Daniela and for me in my personal mobile, stating clearly that she was a military target just for being part of the student movement and for disagreeing with the government measures. They stated that we should pay to recover the vehicle, and that they had all the information about our activities and our locations of work and residence."

112. There is nothing inconsistent about the testimonial evidence set forth above. If the adjudicator had problems understanding what took place in this testimony, he or she could have sought clarification in the RFE.

113. The adjudicator questioned the consistency of testimony related to a kidnapping of the applicant's father in 2010. During this kidnapping the applicant's father was kidnapped at 8:30 in the evening and was released the next morning and was also shot in the foot and taken to an emergency room. The adjudicator questions this testimony because the applicant did not provide the date of the event, evidence of the physical injury, and other corroborating evidence of the event.

114. The RFE never requested medical documentation of the father's injury. A very detailed account of this incident is not necessary because it is tangential to the persecution personally experienced by the applicant.

115. The denial continues:

> The applicant's brother lives in the U.S. and states that he and his U.S. citizen wife want to return to Venezuela to visit his parents, however, they haven't because the visa petition process is difficult. The applicant provided conflicting family statements suggesting that the brother fled Venezuela because of persecution. If the brother would be persecuted in Venezuela, it is questionable as to why he would return there with his wife.

116. This is another example of the adjudicator disingenuously misconstruing the evidence submitted in this case in an effort to deny it. Here is a fuller account of what the applicant's brother wrote regarding fear of persecution in Venezuela (emphasis added) (Exhibit 17, Item 2):

> As the lingering fear of another attack by these groups was permanent I decided as well to leave Venezuela. Even though I wasn't in the eye of the hurricane like my sister, just for the fact of being related to her put me also in danger. It was then when my family separated and we have been fragmented since. . . . If she goes back it would very difficult for me and my wife to travel to Venezuela to see her again, not only for the fact that coming from the U.S. we would have to go through a very difficult process, but also both for the risk that it represents to be close to her in that country.

117. The denial continues:

> The applicant submitted a letter from an attorney friend in Venezuela. The attorney states that the applicant joined a protest in Mexico in 2010. The attorney friend describes his own involvement in protest activity in Venezuela. Based on the statement, the attorney openly protested the government over several years in Venezuela. The attorney remains living and

> working in Venezuela, with no indication of harm or persecution based on his political beliefs.

118. This is another example of the adjudicator construing the facts in the light most unfavorable to the applicant. The letter from Jaime Merrick speaks of concern for the applicant's safety and the persecution that could await her in Venezuela. Although he writes about his phone being "intervened," how much persecution this individual attorney has suffered is not germane to the applicant's persecution waiver application. Why he stays in Venezuela is not germane. The fact he is "on the ground" and aware of current conditions is germane. Furthermore, there were letters from two other attorney/activists, one of whom was granted political asylum in the United States. It is clear that this one letter writer (attorney) was singled out for inclusion in the spurious reasons for denial because the adjudicator was straining to find a way to deny the case.

119. The denial continues:

> The applicant provided a statement from a psychologist in Venezuela dated September 15, 2015. According to a translated psychologist statement, the applicant has maintained therapy sessions for five years via skype. The applicant does not provide detailed evidence such as specific dates of therapy, number of therapy sessions, invoices or explanation of benefit records.

120. This report is detailed and consistent with the rest of the evidence submitted in this case. The psychologist provided a signed report, including a detailed case history summary and conclusion. 8 C.F.R. § 212.7(c)(8) describes the evidentiary requirements for persecution waiver applications. All that is required is ". . . a statement, dated and signed by the applicant, setting forth in detail why the applicant believes he or she would be subject to persecution." Further, this statement from the psychologist meets the regulatory evidentiary requirements for hardship waivers. See 8 C.F.R. § 212.7(c)(7). That is true because the statement was written in

terms understandable to a layman with the nature and effect of the illness and prognosis described. This unrequired evidence simply bolsters the applicant's claim.

121. The denial continues:

> The applicant states that she has participated in the Student Movement protests against the government and provides photos as evidence. The photos are undated and the applicant is smiling and posing for photos. In three of the photos she's wearing the same black tank top. In another photo a white t-shirt is worn over what appears to be a black tank top. The photos are not similar to the news article photos of student protests. In news articles photos of student protests, the students appear angry and/or shouting.

122. This is an inaccurate and disingenuous summary of the evidence in the case. The photos referenced are not from the time the applicant was participating in the student movement in Venezuela. These are from section IX-B 4 (Exhibit 20) entitled Movement of Venezuelans in Exile, which is dated September 19, 2015. Those photos are from when she was at an event in Miami, protesting for the freedom of Leopoldo Lopez. Furthermore, ample testimonial evidence and news articles demonstrate the violence involved in student protests by armed groups such as Colectivos and the Bolivarian National Guard. This evidence was ignored. Additionally, there are no frontal photos of the applicant engaged in protests where violence was present because it is difficult to take photos when one is being physically attacked while tear gas is in the air. Documentary evidence of that difficulty was present in the article "In the Fight for Freedom of Speech-Testimonials from the Venezuelan Student Movement." See Exhibit 20. In any event, if the adjudicator was confused, he or she could have sought clarification of this in the RFE.

123. The denial continues:

> The applicant's mother worked as a public servant from 2001 to September 2013. The applicant's mother states that she was forced

> to retire September 2013, based on political beliefs and due to a document she signed in 2004. Evidence in the file indicates the applicant's mother had a medical condition and required gallbladder surgery in May 2013.
>
> The applicant's mother was not able to return to work in May 2013. It is unclear if the applicant's mother returned to work after her medical leave in May and before her [her] retirement in September 2013. The applicant's mother was age 55 at retirement. Age 55 is the age of retirement with pension for women in Venezuela. The applicant submitted insufficient evidence to establish that her mother was forced to retired based on political beliefs.

124. This is a false adverse inference. According to the applicant, under Venezuelan law, a female can retire at 55 years of age provided she has completed at least 25 years of service. According to Yanet Angulo's (applicant's mother) letter, at the time of her forced retirement, she had only 12 years of service. Additionally, there was documentary evidence citing that the forced retirement was "especial" (forced) based on restructuring of the agency. That combined with Ms. Angulo's detailed and consistent testimony, the applicant proved by the preponderance of the evidence that her mother was forced to retire due to her political opinion.

125. The denial continues:

> The applicant's last foreign residence appears to be Mexico. The applicant appears to have lived in Mexico from 2010 to 2013 with three visits to Venezuela in between. The applicant applied for the J-1 visa while living in Mexico but says she has no ties to Mexico after leaving school in 2013: *"Mexico was a country where I studied during the first two years of my undergraduate classes with a student visa. However, I don't have any ties with this country, and I am not related to Mexico whatsoever."*
>
> The applicant departed the U.S. for Mexico April 2014 and returned from Mexico to the U.S. June 2014. It is unclear if the applicant lived in Mexico for two months or if the applicant stopped in Mexico on the way to another country for two months.

> The applicant was asked to provide a detailed address history, however, this time period is omitted from the address history and conflicting information is provided.
>
> The applicant submitted a resume copy with her application. According to the resume, the applicant earned a degree from Mexico in May 2015. Based on the above information, the applicant appears to have ties with Mexico from 2010 to May 2015. This conflicts with statements provided by the applicant.

126. Whether the applicant resided in or has ties with Mexico is completely irrelevant to the persecution waiver application. This question seems to be getting at the asylum concepts of "safe third country" agreements or firm resettlement, which are completely irrelevant to I-612 persecution waiver analysis. Further, there is no inconsistency here. The applicant was present in Mexico at various times between 2010 and 2014 because she was a student at a university in Mexico. Her educational program required two years of study in Mexico and two years of study in the United States. The applicant earned the degree referenced in her resume, although it has not been conferred in Mexico because she has not returned there since earning the degree. The adjudicator never sought clarification on any of these issues in the RFE. In any event, whether the applicant has ties to Mexico is irrelevant to the persecution waiver application.

127. The denial continues:

> The applicant's brother arrived as an F-1 student in March 2011. The brother's visa was approved on February 4, 2011. The applicant's brother had previously traveled to the U.S. on a tourist visa. The brother appears to have traveled freely and received approval for a student visa without incident.
>
> There's some indication that the applicant's brother was single prior to arriving in the U.S., however, this conflicts with the adjustment of status information; after arriving in the U.S. as an F-I student, the applicant transferred schools and adjusted as IR6. The IR6 status indicates marriage at least two years prior to time of

> adjustment. The brother's U.S. citizen spouse is also the same person who arranged the initial meeting between the applicant and the applicant's U.S. citizen spouse.

128. This is all irrelevant to the persecution claim, although it seems that the adjudicator is attempting to draw some kind of adverse inference from this irrelevant information.

129. The denial continues:

> The applicant states that she met her U.S. citizen spouse during a visit to Georgia December 2014. The applicant met the U.S. spouse six months prior to the end of her J-I program and married him two months prior to filing for the I-612 waiver. A photo provided by the applicant has the following caption: "The applicant.. with her U.S. citizen husband...at the Miami Dade Courthouse on the day of their engagement." The couple married at the courthouse on September 22, 2015.

130. This is all irrelevant to the persecution claim, although it appears the adjudicator is attempting to draw some kind of adverse inference. Even if the applicant was not married she would still have a viable persecution claim. In any event, the marriage is valid under Florida law.

131. The denial continues:

> There's conflicting residence information in the file. Based on information provided, the applicant and her U.S. citizen spouse lived in different states until just prior to the marriage. The applicant states that she lived in New York, Massachusetts, Russia and Florida during the J-1 program. Time spent in Mexico is not included.

132. This is false. There's nothing conflicting about anything here. It is not uncommon for couples to work in different states and to have residences in different states for professional reasons. To impugn wrongdoing for these circumstances is improper and indicates a

predisposition to deny the case. Furthermore, the validity of the couple's marriage is irrelevant to the persecution waiver claim.

133. The denial continues:

> The U.S. citizen spouse is licensed to sell insurance in Georgia. The applicant and U.S. citizen spouse met in Georgia. The applicant and her spouse state that they live together in Florida but it is unclear when the U.S. citizen spouse moved to Florida and if he is licensed to sell insurance in Florida.

134. This is entirely irrelevant to the persecution waiver claims.

135. The denial continues:

> Country Conditions: Department of State issued a travel warning for Venezuela on July 7, 2016. The travel warning is based on the high violent crime rate in Venezuela. Thousands of U.S. citizens safely visit Venezuela each year and are not specifically targeted; however, violent crime is pervasive including murder armed robbery, kidnapping and carjacking.

136. The applicant faces heightened risk of harm because of her public involvement with anti-regime activities and freedom movements, both in Venezuela and in the United States; her husband, who has dual U.S. and Colombian citizenship, faces special risks for harm, as described in the affidavits and various support documents.

137. Given the foregoing, the entire denial is facially invalid because it does not show that the USCIS adhered to its own regulations and subregulatory guidance (USCIS AFM and the 2005 Yates Memo), in addition to other law that applies to this case, such as 8 U.S.C. § 1182(e), the legislative history, the U.S. Constitution, and treaty law.

138. It is possible to file a permissive and not mandatory appeal to the USCIS AAO. The permissive nature of this appellate right is set forth in 8 C.F.R. § 103.3. Courts may not

"require litigants to exhaust optional appeals as well." Darby v. Cisneros, 509 U.S. 137, 147 (1993). See also Career Educ., Inc. v. Department of Educ., 6 F.3d 817, 820 (D.C. Cir. 1993). Furthermore, the Department of Justice has already acquiesced to the proposition that one is not required to file an appeal with the AAO prior to commencing suit in federal district court. See RCM Techs., Inc. v. United States Dep't of Homeland Sec., 614 F.Supp. 2d 39-44-45 (D.D.C. 2009).

139. The August 23, 2016 USCIS denial is irrational and contrary to the statutory standards of the APA and the Immigration and Nationality Act, the Department of Homeland Security Regulations, the intent of Congress in enacting the J-1 persecution waiver, and to due process of law — in that it fails to state any legitimate basis for the denial and that it deliberately ignored competent evidence.

140. Ms. Castillo's waiver application is meritorious and should be approved.

VI. Irreparable Injury

141. Absent approval of Ms. Castillo's waiver application, plaintiffs will suffer irreparable injury, life-or-death consequences, and many severe and exceptional hardships.

142. Ms. Castillo faces an exceptional risk of physical harm and even death upon return to Venezuela based on the facts set forth in the waiver application and RFE response.

143. Ms. Castillo and her husband are presently facing serious financial and psychological hardships in the wake of the improper denial. Ms. Castillo presently is not authorized to work in the United States. She is also presently out of status. Her inability to work has had and will have a profound impact on her ability to advance her career. This impact is permanent and irreparable.

COUNT ONE: ABUSE OF DISCRETION
AND VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

144. Paragraphs 1 through 143 above are repeated and realleged as though fully set forth herein.

145. The defendants's denial of Ms. Castillo's I-612 waiver application is contrary to the statutory standards, the regulations, the legislative history, and the intent of Congress, and it is therefore arbitrary and capricious, because the defendants failed to consider all the evidence in the record before rendering a decision, ignored substantial evidence in the record without any rational basis, and/or failed to state a valid reason for the denial.

146. The defendants acted outside the scope of discretion granted by Congress.

147. The defendants's denial of the application therefore violates the Administrative Procedure Act, 5 U.S.C. §§ 555(b), 702, and 706(1), and otherwise constitutes abuse of discretion.

COUNT TWO: DUE PROCESS VIOLATION (RIGHT TO LIFE)

148. Paragraphs 1 through 147 above are repeated and realleged as though fully set forth herein.

149. The plaintiffs have a fundamental right to life.

150. The defendants's denial of Ms. Castillo's waiver application threatens her life because if she is forced to return to Venezuela, she and/or her family may be killed or severely injured by her risk of persecution and the ongoing violence in that country.

151. The defendants's denial of Ms. Castillo's waiver application violates her family's right to due process of law under the Fifth Amendment to the United States Constitution.

COUNT THREE: DUE PROCESS VIOLATION (PROPERTY INTEREST)

152. Paragraphs 1 through 151 above are repeated and realleged as though fully set forth herein.

153. Ms. Castillo has a property interest in the application fee that she paid to the Department of Homeland Security.

154. The defendants's denial of Ms. Castillo's waiver application without any rational basis violates the plaintiffs's right to due process of law under the Fifth Amendment to the United States Constitution.

COUNT FOUR: FAILURE TO PROVIDE REASONED ANALYSIS DESCRIBING A MARKED CHANGE IN POLICY IN THE ADJUDICATION OF I-612 PERSECUTION WAIVER CASES

155. Paragraphs 1 through 154 above are repeated and realleged as though fully set forth herein.

156. Courts have held that an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed. See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

157. Aside from the instant aberration, out of all previously filed I-612 persecution waiver cases filed by this law firm that have received a decision (47 cases), not one case received a denial between approximately 1998 and 2016. Indeed, a quite similar Venezuelan persecution waiver application was granted just a few days after the RFE was issued in the instant case.

158. The defendants's denial of Ms. Castillo's waiver application without explaining the change in policy and standards violates federal decisional law that mandates such explanations.

COUNT FIVE: VIOLATION OF TREATY

159. Paragraphs 1 through 158 above are repeated and realleged as though fully set forth herein.

160. Ratified treaties constitute the supreme law of the land under Article VI of the United States Constitution. Ever since 1804 the U.S. Supreme Court has ruled that statutes must be interpreted in consistency with U.S. international law obligations. Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

161. President Jimmy Carter signed the International Covenant on Civil and Political Rights ("I.C.C.P.R.") on October 5, 1977. On June 8, 1992, the I.C.C.P.R. was ratified by the U.S. Senate pursuant to Article II, Section 2 of the U.S. Constitution. The United States is therefore a party to the I.C.C.P.R.

162. The defendants have a duty to adhere to the I.C.C.P.R. when adjudicating waiver applications.

163. The defendants's action in denying Ms. Castillo's I-612 waiver application without any rational basis violates the United States's obligations under various articles of the I.C.C.P.R. In particular, it violates Articles 1, 12, 17, 18, and 23, in addition to possible violations of other articles.

COUNT SIX: DECLARATORY JUDGMENT

164. Paragraphs 1 through 163 above are repeated and realleged as though fully set forth herein.

165. This Court has authority to issue a declaratory judgment regarding the rights, privileges, and duties of the parties under 28 U.S.C. § 2201.

166. This Court should issue a declaratory judgment establishing that Ms. Castillo is eligible for a J-1 waiver and that due to the risks of persecution set forth in her persecution waiver she is therefore entitled to a waiver.

167. This Court should declare that the defendants's adjudication of this waiver application without properly reviewing all of the evidence and without stating a valid reason for the denial is contrary to the statutory standards, regulations, legislative history, congressional intent, and due process of law.

168. This Court should declare that the correct legal standard for the adjudication of I-612 persecution waiver applications is the well-founded fear standard, as set forth in the lawyer letter accompanying the waiver application, as another federal district court did in Almirol v. INS, 550 F.Supp. 253 (N.D. Ca. 1982).

169. In the alternative that this Court disagrees that the proper standard is the well-founded fear standard, it should declare that the standard is the preponderance of the evidence standard based on the analysis set forth above in ¶¶ 88-90.

170. This Court should declare that Ms. Castillo met either legal standard for I-612 persecution waivers and is therefore entitled to the waiver.

171. This Court should declare that the denial of Ms. Castillo's waiver application violates her family's right to due process of law under the Fifth Amendment to the United States Constitution.

172. This Court should declare that Ms. Castillo has a property interest in the application fee that she paid to the Department of Homeland Security.

173. This Court should declare that the defendants's denial of Ms. Castillo's waiver application without any rational basis violates the plaintiffs's right to due process of law under the Fifth Amendment to the United States Constitution.

174. This Court should declare that the USCIS has a duty to explain its abrupt change in policy and standards with respect to the adjudication of J-1 persecution waiver applications.

175. This Court should declare that the defendants have a duty to adhere to the I.C.C.P.R. when adjudicating waiver applications.

176. This Court should declare that the defendants's denial of the I-612 persecution waiver application violates various articles of the I.C.C.P.R.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray for the following relief:

A. Declare the defendants' adjudication of Ms. Castillo's I-612 waiver application to be in violation of the statute, regulations, legislative intent, agency procedures, treaty law, and the Constitution;

B. Declare that Ms. Castillo is statutorily eligible for a waiver under 8 U.S.C. § 1182(e);

C. Declare that the defendants's denial of Ms. Castillo's waiver application was unlawful, arbitrary and capricious, contrary to the statute, regulations, legislative history, congressional intent, and in violation of the Constitution, and the I.C.C.P.R.;

D. Declare that Ms. Castillo's waiver application is meritorious and should be approved;

E. Order the defendants to reverse the denial of the waiver application, issue a favorable recommendation on the application by generating an I-613, and forward the case to the State Department Waiver Review Division to seek its recommendation on the waiver application;

F. Grant an award of attorneys's fees and costs; and

G. Grant such other relief as the Court may deem just and proper.

Dated: September 28, 2016

/s/ Brian C. Schmitt
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