The following are excerpts from the forthcoming Center for New Americans Eighth Circuit Immigration Law Outline, an online resource. This research tool is only a starting point. Practitioners must always conduct their own independent research and verify that cited decisions are accurate and still good law. Special thanks to our student director Anna Finstrom (‘15) for her leadership building the outline for the Center, and also to student director Shuangqi (Joy) Wang (‘15).

1) ASYLUM, WITHHOLDING, AND CAT RELIEF
   a) FUNDAMENTALS OF ASYLUM AND WITHHOLDING OF REMOVAL
      i) BURDENS OF PROOF [8 USC 1158(a)(1)(B)] [8 CFR 208.13(A)]
         o Feleke v. I.N.S., 118 F.3d 594 (8th Cir. 1997) Asylum applicant bears burden of demonstrating statutory eligibility for asylum: that applicant has a well-founded fear of persecution on account of a protected ground. Petitioner, Ethiopian national, sought and was denied asylum based on political opinion claim. While political unrest is apparent, petitioner’s evidence was not sufficiently targeted at the statutory requirements. While several hundred international activists in opposition to the government were convened in Ethiopia, only seven were arrested and only one remains detained. Petitioner failed to demonstrate particular similarity with those actually persecuted, and also failed to demonstrate a pattern or practice of persecution of those in a generally similar situation.
         o Kratchmarov v. Heston, 172 F.3d 551 (8th Cir. 1999) Where a petitioner has established past persecution, a presumption is formed in favor of a well-founded fear of future persecution and the burden shifts to the government to disprove that presumption. Petitioner seeks asylum based on his fear that the Bulgarian government would persecute him if he was forced to return because of his political opinions and his status as a former police officer who refused to follow certain orders. Petitioner establishes past persecution, and the government sought to rebut the presumption of well-founded fear of future persecution. CA8 affirms the reasonableness of the Board’s finding that the Bulgarian government could be pursuing him only to collect reimbursement for a portion of the cost of his police training based on his early departure from the service, and its reliance on State Department reports showing that Bulgaria is now safe for past or present political dissidents.

   ii) STANDARDS OF REVIEW [8 USC 1252(B)(4)]
       o Agha v. Holder, 743 F.3d 609, 614 (8th Cir. 2014) CA8 reviews legal determinations de novo, and factual findings for substantial evidence. See also Nadeem v. Holder, 599 F.3d 869, 872 (8th Cir.2010), Iyamba v. I.N.S., 244 F.3d 606, 607–08 (8th Cir.2001).
       o Kratchmarov v. Heston, 172 F.3d 551, 554 (8th Cir. 1999) CA8 reviews the BIA's factual findings underlying its refusal to grant asylum, under the substantial evidence standard. Reversal of the BIA's decision is warranted only if the petitioner shows that the evidence was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution. Under this standard, this court must determine whether, based on the record considered as a whole, the BIA’s decision was supported by reasonable, substantial, and probative evidence. Also see Hajiani-Nirooumand v. INS, 26 F.3d 832, 838 (8th Cir.1994).
Nyonzele v. INS, 83 F.3d 975 (8th Cir. 1996)  The Board's decision that an alien is not eligible for asylum must be upheld if supported by reasonable, substantial and probative evidence on the record considered as a whole. Here, CA8 upheld the Board’s decision that secondhand information about the alleged murder of Petitioner’s father by the Zairian government on account of his political activism does not substantiate Petitioner’s fear that his government will persecute him assuming an intent to avenge his father’s death.

Krasnopivtsev v. Ashcroft, 382 F.3d 832, 837 (8th Cir.2004) Where the BIA has adopted the Immigration Court's opinion and added reasoning and analysis of its own, CA8 reviews both decisions.

(1) CREDIBILITY DETERMINATIONS BY THE IMMIGRATION JUDGE (IN ASYLUM/WITHHOLDING) [8 U.S.C. 1158(b)(B)(iii)]

Zhang v. Holder, 737 F.3d 501, 505 (8th Cir. 2013)  An IJ's adverse credibility finding must be supported by the record and relevant evidence. Chinese petitioner recounted being given a photograph of her aborted fetus when she asked a nurse for documentation of the forced procedure. IJ dismissed her testimony stating that it was implausible that the victim of a forced abortion would request a photograph of her aborted fetus. CA8 invalidated IJ’s adverse credibility findings where they were unsupported by the record and ignored relevant evidence (she did not ask for a photograph of her aborted fetus, but for documentation of the procedure), and contained impermissible speculation.

R.K.N. v. Holder, 701 F.3d 535, (8th Cir. 2012) Kenyan citizen applied for asylum, withholding, relief under CAT based on HIV positive status and membership in the Mungiki group “which opposes the Kenyan government, fights corruption, and advocates a return to traditional values.” IJ denied application based on adverse credibility finding. BIA dismissed appeal but reopened sua sponte and remanded to different IJ. IJ excluded certain medical records and denied applications again based on adverse credibility. The Court held that exclusion of medical records, even if improper, would not have changed the outcome and therefore petitioner’s due process rights were not violated. IJ applied post-REAL ID Act standard on credibility to pre-REAL ID application but the court concluded that adverse credibility findings for pre-REAL ID claims do not require inconsistencies that go to the heart of the asylum claim so long as the adverse finding is supported by “specific cogent reasons” to disbelieve the claim. “Here, the IJ based its finding on several specific inconsistencies in the evidence about when R.K.M. traveled to Kenya for his father's funeral and was allegedly beaten for being HIV positive. R.K.M. testified the trip was in July 2001 but his brother's affidavit said it was in September 2001. R.K.M. was initially unable to provide the date of his father's death. Once the date was established, R.K.M. was unable to confirm whether his father was alive when he traveled to Kenya. These inconsistencies are specific, cogent reasons for the IJ's adverse credibility finding.” Remand to apply proper standard was not required where ij’s fact finding was sufficient under correct standard.

(1) INTERPRETING THE DEFINITION OF REFUGEE [8 USC 1158(b)(1)(A); 8 USC 1101(a)(42)(A)]

(a) IN GENERAL – WHAT CONSTITUTES PERSECUTION?

Ngure v. Ashcroft, 367 F.3d 975, 990 (8th Cir. 2004) “The general definition of ‘persecution,’ for purposes of an asylum claim, as the infliction or threat of death, torture, or injury to one's person or freedom, on account of race, religion, nationality, membership in a particular social group, or political opinion, must be refined further in the context of a particular alien's situation.”

Garcia-Colindres v. Holder, 700 F.3d 1153 (8th Cir. 2012) Persecution is an extreme concept. Guatemalan citizen applied for asylum and withholding. Petitioner’s home was ransacked in 1993 by 30-40 members of Guatemala’s National Civilian Police (PNC) who believed son was hiding weapons for a guerrilla group. The son was not home at the time. Petitioner was taken into custody, beaten and burned with a cigarette for 8 hours. PNC said they would kill petitioner
and hold his family responsible if son did not reappear. Petitioner did not return home. PNC searched his home several more times and Petitioner eventually hid his family and fled to the U.S. In 1995, petitioner’s other son was found with acid burns covering his face and body—a method of torture characteristic of PNC. Most of petitioner’s family came to the U.S. but the eldest daughter remained and helped the family with their asylum application. She reported to her family and a police investigator that she was being followed by armed men, but in 2007 was found dead after being shot 9 times. IJ denied applications finding no past persecution and no well-founded fear of future persecution due to changed country conditions. Court held that harm inflicted against Petitioner in 1993 did not rise to level of past persecution, even considered cumulatively, because it involved brief detention, minor beatings, and the threat of future violence, and as such was not sufficiently “extreme”. There was insufficient evidence to show that the killings of petitioner’s two children were by the government or persons the government was unable or unwilling to control.

But, see Bellido v. Ashcroft, 367 F.3d 840, 843 (8th Cir. 2004): “‘Persecution’ is not a defined term. Rather, it is a fluid concept that does not necessarily require the applicant to prove that his life or freedom has been or will be directly jeopardized.”

(2) NON-STATE PERSECUTION – ABILITY / WILLINGNESS TO CONTROL

Valioukevitch v. INS, 251 F.3d 747, 749 (8th Cir. 2001) The definition of persecution requires harm to be inflicted either by the government or by persons or an organization that the government is unable or unwilling to control. Citizen of Belarus petitions for review of BIA decision denying his asylum application based on his claim of religious persecution. Petitioner asserts that he was abused and harassed by private individuals on account of his Baptist faith and practice of proselytizing, but there is no evidence that the perpetrators were agents of the government or that their conduct was sanctioned by or overpowering of government forces. In fact, some of the perpetrators were expelled from the school where the abuse took place.

Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005) An applicant seeking to establish persecution based on violent conduct of a private actor must show more than that the government had difficulty controlling private behavior or made an unsuccessful investigation, rather the applicant must show the government “condoned … or at least demonstrated a complete helplessness to protect the victims.” Here, Salvadoran Petitioner was the victim of ongoing unwanted advances by a gang member who wanted her to be his girlfriend. When Petitioner refused, he attacked her and her family with gunfire, murdering her grandmother and paralyzing her niece. Police responded as promptly as possible to the shooting incident, but were not contacted for any assistance with stalking or harassment before or after the incident. The fact that police were unable to find and apprehend the perpetrator did not indicate government inability or unwillingness to control violent crime. Similarly, the fact that gang violence is rampant in El Salvador was irrelevant to petitioner’s fear of an individual gang member based on an isolated violent act. Also see Gutierrez-Vidal v. Holder, 709 F.3d 728 (8th Cir. 2013) and Khilan v. Holder, 557 F.3d 583 (8th Cir.2009).

Ngengwe v. Mukasey, 543 F.3d 1029, 1036 (8th Cir. 2008) An applicant may be able to show a well-founded fear of persecution on cumulative grounds. Petitioner sought asylum as a Cameroonian widow. CA8 found that the BIA’s denial of Petitioner’s asylum application and failure to find past persecution was not supported by substantial evidence and remanded, holding that the cumulative grounds—a choice between forced marriage, death, or paying an unaffordable bride’s price; her property having been confiscated by her in-laws; and physical harm and threats by her in-laws—constituted persecution.

Prosecution or contact with law enforcement based on a fairly administered law does not constitute persecution, for example where Iranian engineer is charged, convicted and sentenced to jail time in absentia for abandonment of service in government-sponsored employment (Behzadpour v. United States, 946 F.2d 1351, 1353 (8th Cir. 1991)); where a protestor is arrested, detained, “roughed up” and interrogated for his participation in a demonstration that became riotous (Ngure v. Ashcroft, 367 F.3d 975, 979 (8th Cir. 2004)); or for draft evasion (Ladyha v. Holder, 588 F.3d 574, 578 (8th Cir. 2009)).
3) PROCEDURAL ISSUES & CONSTITUTIONAL CLAIMS

3.1 Due Process Claims

- Wanyama v. Holder, 698 F.3d 1032 (8th Cir. 2012) (Riley, Arnold, GRUENDER). Kenyan citizen applied for asylum, withholding, and relief under CAT on account of an article he wrote in 2004 critical of the president. IJ closed proceedings in April 2008 but reopened the case in December 2009 to allow for new evidence of changed country conditions. The IJ concluded that the petitioner did not establish an objectively reasonable fear of future persecution. Petitioner challenged the denials and claimed that his due process rights were violated. The court held that the harm petitioner’s family members experienced in losing a job and being questioned about him did not amount to persecution. With respect to due process, the Court held that because there is no constitutionally protected liberty or property interest in asylum, there is no constitutional right to due process in asylum proceedings (Wanyama had waived his withholding and CAT claims). Court noted that to the extent that the court had reached due process claims in asylum cases without finding a protected interest in other cases, the court was not bound by stare decisis as the court had not squarely addressed this issue in those cases. This case highlights the importance of explicitly raising and exhausting parallel claims to withholding, which, because it is a mandatory form of relief, can support a due process claim. Relatedly, it is generally preferable to claim regulatory or statutory violations first, and not just a constitutional violation, whenever IJ or BIA errors can also be cast this way.