U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
National Records Center
P.O. Box 648010
Lee's Summit, MO 64064-8010

U.S. Citizenship and Immigration Services

January 29, 2021

COW2019501574

Austin Evers 1030
15th St NW Ste
B255
Washington, DC 20005

Dear Austin Evers:

This is in response to your Freedom of Information Act/Privacy Act (FOIA/PA) request received in this office on November 13, 2019. You specifically requested any final policies, procedures, protocols, instructions or guidance regarding the transfer of responsibility for credible fear interview from asylum officers within USCIS to law enforcement agents within CBP.

Enclosed is the seventh production of responsive records, which consists of 1098 pages that are responsive to your request. There are 1028 pages released in their entirety and 70 pages released in part. We have reviewed and have determined to release all information except those portions that are exempt pursuant to 5 U.S.C. § 552 (b)(5), (b)(6), and (b)(7)(e) of the FOIA.

The following exemptions are applicable:

Exemption (b)(5) provides protection for inter-agency or intra-agency memorandums or letters, which would not be available by law to a party other than an agency in litigation with the agency. The types of documents and/or information that we have withheld under this exemption may consist of documents containing pre-decisional information, documents or other memoranda prepared in contemplation of litigation, or confidential communications between attorney and client.

Exemption (b)(6) permits the government to withhold all information about individuals in personnel, medical and similar files where the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. The types of documents and/or information that we have withheld may consist of birth certificates, naturalization certificates, drivers' licenses, social security numbers, home addresses, dates of birth, or various other documents and/or information belonging to a third party that are considered personal.

Exemption (b)(7)(E) of the FOIA provides protection for records or information for law enforcement purposes which would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. The types of documents and/or information we have withheld could consist of law enforcement systems checks, manuals, checkpoint locations, surveillance techniques, and various other documents.

As a result of discussion between agency personnel and a member of our staff, as a matter of administrative discretion, we are releasing computer codes found on system screen prints previously withheld under exemption b(2). There may be additional documents that contain discretionary releases of exempt information. If made, these releases are specifically identified in the responsive record. These discretionary releases do not waive our ability to invoke applicable FOIA exemptions for similar or related information in the future.

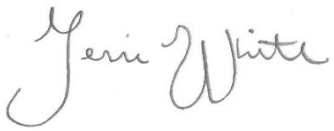
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The enclosed record consists of the best reproducible copies available. Certain pages contain marks that appear to be blacked-out information. The black marks were made prior to our receipt of the file and are not information we have withheld under the provisions of the FOIA or PA.

The National Records Center does not process petitions, applications or any other type of benefit under the Immigration and Nationality Act. If you have questions or wish to submit documentation relating to a matter pending with the bureau, you must address these issues with your nearest District Office.

All FOIA/PA related requests, including address changes, must be submitted in writing and be signed by the requester. Questions concerning this FOIA/PA request may be mailed to the FOIA/PA Officer at the PO Box listed at the top of the letterhead or emailed to FOIAPAQuestions@uscis.dhs.gov. Please include the control number listed above on all correspondence with this office. You can now submit a new FOIA request online using our new Freedom of Information Act Records System (FIRST). If you wish to submit a new FOIA/PA request, please visit www.uscis.gov/FOIA for instructions and requirements.

Sincerely,



Terri White
Acting Director, FOIA Operations

Enclosure(s)

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

INTERVIEWING – INTRODUCTION TO THE NON-ADVERSARIAL INTERVIEW

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

INTERVIEWING – INTRODUCTION TO THE NON-ADVERSARIAL INTERVIEW

Training Module

MODULE DESCRIPTION

This module describes the main components of an interview for all RAIO adjudications.

TERMINAL PERFORMANCE OBJECTIVE(S)

During an interview, you (the Officer) will be able to elicit in a non-adversarial manner all relevant information to properly adjudicate a claim or request.

ENABLING PERFORMANCE OBJECTIVES

1. Distinguish adversarial from non-adversarial interview methods.
2. Conduct an interview in a professional manner.
3. Identify the components of an interview for RAIO adjudications.
4. Explain the purpose of the interview for RAIO adjudications.
5. Explain the responsibilities and roles of all parties involved in the interview.
6. Demonstrate the "Introduction" component of an interview during the mock interview scenario.
7. Explain confidentiality provisions that apply to the interview and adjudication.
8. Administer oath to interviewees and interpreters during the mock interview.
9. Advise the interviewee of post-interview procedures and what to expect next in the process.

INSTRUCTIONAL METHODS

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- Interactive presentation
- Practical exercises

METHOD(S) OF EVALUATION

- Multiple Choice Exam
- Mock Interview Exam

REQUIRED READING

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. Memorandum from Bo Cooper, INS Office of the General Counsel, to Jeffrey Weiss, Director, Office of International Affairs, Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information, HQCOU 120/12.8 (Jun. 21, 2001).

2. Fisher, Ronald P. and Geiselman, R. Edward. "The Cognitive Interview method of conducting police interviews: Eliciting extensive information and promoting Therapeutic Jurisprudence," International Journal of Law and Psychiatry 33, 2010, pp. 321–328.

3. Memorandum from Joseph E. Langlois, Director, Asylum Division, to Asylum Office Directors and Deputy Directors, Fact Sheet on Confidentiality, HQASM 120/12.8 (Jun. 15, 2005).

4. Memon, Amina; Meissner, Christian A.; and Fraser, Joanne. "The Cognitive Interview: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years," Psychology, Public Policy and the Law 16, no. 4, 2010, pp. 340–372.

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

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CRITICAL TASKS

Task/ Skill #	Task Description
ITK1	Knowledge of policies, procedures and guidelines for conducting non-adversarial interviews (e.g., confidentiality, conditions) (4)
ITK3	Knowledge of the roles and responsibilities of parties involved in the interview process (4)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
ITK9	Knowledge of procedures and guidelines for administering oaths (4)
ITS6	Skill in conducting non-adversarial interviews (4)
ITS8	Skill in confronting applicant with credibility issues (4)
IR1	Skill in interacting with others in a professional manner (e.g., respectful, courteous) (4)
IR4	Skill in building rapport with others (4)
SCM1	Skill in maintaining a professional demeanor in stressful situations (e.g., potentially dangerous encounters, emergency situations, threats to personal safety) (4)
SCM3	Skill in identifying potential sources of conflict (4)
SCM4	Skill in managing situations involving conflict (4)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
06/06/2013	Throughout document	Corrected minor typos, formatting, cites identified by OCC-TKMD.	MMorales, RAIO Training
10/01/2013	Throughout document	Corrected bad links due to move of RDOT Curriculum Library	LG, RAIO Training
01/10/2015	Throughout document	Fixed links	RAIO Training
11/25/2015	Throughout document	Corrected links;	
03/24/2017	Throughout document	Updated link to I-590 SOP in RAD supplement; made minor revisions suggested by divisions; updated table of contents.	RAIO Training

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

Officers in the RAIO Directorate conduct interviews primarily to determine eligibility for immigration benefits or requests; to corroborate information provided by applicants, petitioners, and beneficiaries; and/or to establish whether a person understands the consequences of his or her actions.

The modules of the RAIO Directorate – Officer Training Course and the division-specific training courses constitute primary field guidance for all officers who conduct interviews for the RAIO Directorate. The USCIS Adjudicator's Field Manual (AFM) also provides guidance for officers when conducting interviews, particularly for officers in the International Operations Division. There may be some instances where the guidance in the AFM conflicts with guidance provided by the RAIO Directorate. If this is the case, you should follow the RAIO guidance. Further guidance regarding interviews for specific applications will be discussed during division-specific trainings.

In this module, the term "interviewee" is used to refer to an individual who is interviewed by an officer in the RAIO Directorate for an official purpose.

1 INTRODUCTION

This is the first in a series of interviewing modules that discuss various topics including how to elicit testimony, the proper procedures for taking notes, and considerations when conducting an interview through an interpreter. This module outlines the basic principles and components of conducting a non-adversarial interview. Please refer to the other interviewing modules for additional guidance on conducting RAIO interviews.

- Interviewing – Eliciting Testimony

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- Interviewing – Note-Taking
- Interviewing – Working with an Interpreter
- Interviewing – Interviewing Survivors of Torture

The following is a non-exhaustive list of immigration benefits, petitions, protection determinations, and other immigration-related requests you may encounter as an officer in the RAIO directorate:

- G-646 Sworn Statement of Refugee Applying for Admission into the United States
- I-130 Petition for Alien Relative
- I-131 Application for Travel Document
- I-407 Abandonment of Permanent Resident Status
- I-589 Application for Asylum and Withholding of Removal
- I-590 Registration for Classification as Refugee
- I-600 Petition to Classify Orphan as Immediate Relative
- I-604 Determination on Child for Adoption
- I-730 Refugee/Asylee Relative Petition
- I-881 Application for Suspension of Deportation or Special Rule Cancellation of Removal (NACARA)
- N-400 Application for Naturalization (Military Naturalizations)
- Boarding letters
- Credible fear determination
- Reasonable fear determination

2 AUTHORITY

The following provides the authority on interviewing for all officers who conduct interviews for the RAIO Directorate.

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- 8 C.F.R. § 103.2(b)(9) gives the authority to USCIS to require that an applicant, petitioner, sponsor, beneficiary, or other individual appear for an interview.

- 8 C.F.R. § 208.9(b) requires that Asylum Officers conduct interviews in a non-adversarial manner. Although this regulation applies only to Asylum Officers, as a matter of policy, officers in the RAIO Directorate must conduct all interviews in a non-adversarial manner.

- 8 C.F.R. § 207.2(b) requires that each applicant 14 years and older appear in person before an Immigration Officer for an inquiry under oath to determine his or her eligibility for admission as a refugee.

- INA § 287(b) gives the authority to USCIS officers to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States.

3 PURPOSE OF THE INTERVIEW

The main purpose of the interview is to elicit and provide information related to eligibility for an immigration benefit or for some other official purpose. The interview also provides an opportunity for the interviewee to ask questions that he or she may have and to present relevant information [ASM Supplement – Purpose of the Interview].

3.1 Elicit Information

The main reasons that you will elicit information during an interview are to:

- Verify the identity of those present at the interview.

- Determine whether to proceed with the interview (which may depend on jurisdiction, the availability of an interpreter, the presence of an attorney of record, or other factors).

- Determine eligibility for a benefit being sought (if the interview relates to an application for a benefit).

- Determine whether the interviewee is subject to any bars or grounds of inadmissibility.

- Evaluate the credibility of the interviewee.

- Identify whether fraud may be involved.

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Eliciting testimony involves more than simply asking questions and receiving responses. You will likely need to actively draw out information from the interviewee that has a bearing on the purpose of the interview, such as an interviewee's eligibility for a benefit.[1]

3.2 Provide Information

In addition to obtaining information during the interview, you also provide information to the interviewee and to others who may be present, such as derivative family members, interpreters, and in some circumstances, witnesses or the interviewee's representative. The information you provide includes:

- The purpose of the interview and the interview process
- The roles and responsibilities of all persons involved in the interview
- What the interviewee can expect to happen after the interview

If the interviewee has questions, you will also provide information in response to those questions.

4 IMPORTANCE OF THE INTERVIEW

The importance of the interview cannot be overstated.

- The interview is an important part of your adjudication or determination and is one of the main tools you use to gather the information necessary to make a correct decision.
- The interview may be the only opportunity for you to elicit and clarify information upon which to base a decision.
- The decision you make, based on the information you gather at the interview, may have serious consequences.
  - Your decision may affect whether the interviewee is reunited with close family members.
  - In the protection context, an interviewee wrongly found ineligible for the benefit sought may eventually be returned to the country from which he or she fled and may thereby face persecution or even death.
  - Your decision regarding the grant of an immigration benefit could have implications for U.S. national security.

[1] For additional information, see RAIO Training module, Eliciting Testimony.

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- Interviewees may shape their opinion of the U.S. Government based on their interactions with you. While you may not remember every person you interview, this interview may be a pivotal point in an interviewee's life, and he or she will likely remember you and his or her impression of you and the U.S. Government for years to come.

Because of the importance of the interview, you must conduct yourself in a professional manner at all times, treating the interviewee with respect and courtesy. You must constantly strive to conduct organized, focused, and well-planned interviews.

5 THE PARTICIPANTS AND THEIR ROLES

A number of individuals may be present at an interview, each with a different role. The roles of the possible participants, outlined below, are discussed throughout this module.

5.1 The Officer

You are a representative of the U.S. Government and as such, you must project a competent, professional, and courteous image, and uphold the integrity of the U.S. immigration system. With this in mind, you are to conduct non-adversarial interviews in the manner described throughout this module.

Officers within RAIO include:

- Refugee Affairs Division (RAD): Refugee Officers, Supervisory Refugee Officers, Fraud Detection and National Security (FDNS) Officers, and officers from other USCIS components who are detailed to RAD to conduct refugee interviews. (Note: guidance in this module also applies to non-officers, such as Office of Chief Counsel [OCC] attorneys, who are detailed to RAD to conduct refugee interviews)

- Asylum Division: Asylum Officers (including Senior Asylum Officers and Training Officers), Supervisory Asylum Officers (including Asylum Office Directors, Deputy Directors), and FDNS Officers

- International Operations Division: Adjudications Officers, Overseas Adjudications Officers, Overseas Adjudications Specialists, and Supervisory Adjudications Officers (including Field Office Directors, District Directors, Deputy District Directors, and Branch Chiefs), and FDNS Officers

In most cases, when conducting interviews, you are both the fact-finder and the decision-maker. You control the direction, pace, and tone of the interview and have a duty to elicit all relevant testimony.

5.2 The Interviewee

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The interviewee may be the principal applicant, a derivative family member, or witness in the case. The interviewee's role is to provide testimony and, when appropriate, other evidence.[2]

5.3 The Interpreter

The interpreter's role is to accurately interpret between the language of the interviewee and the language of the officer (English). The interpreter is not a witness and should not offer testimony, nor should the interpreter attempt to clarify the officer's or interviewee's statements or questions.[3]

5.4 The Representative

An applicant or petitioner may be represented by an attorney in the United States, an attorney outside the United States (in matters occurring outside the geographical confines of the United States), or an accredited representative of a recognized organization.[4] In addition, whenever an examination is required, the person involved has the right to be represented by an attorney or representative.[5] This does not provide any applicant for admission the right to representation, in either primary or secondary inspection or in an interview regarding a request for classification as a refugee, unless the applicant is the focus of a criminal investigation and has been taken into custody.[6]

The representative must file a properly completed Form G-28 Notice of Entry of Appearance as Attorney or Accredited Representative or Form G-28I Notice of Entry of Appearance as Attorney In Matters Outside the Geographical Confines of the United States, which must be signed by the applicant or petitioner.

Because of the non-adversarial nature of the process, described below, the role of the representative during the interview is minimal. You control the interview and will ask most of the questions. You may allow the representative to comment or ask questions during the course of the interview to clarify specific points. After your last question, you should give the attorney an opportunity to offer a closing statement. You have the discretion to limit the length of the closing statement, or in rare circumstances, require that a statement be submitted in writing instead.[7]

5.5 Other Participants

[2] 8 C.F.R. § 208.9(b).

[3] For additional information, see RAIO Training module, Interviewing — Working with an Interpreter.

[4] 8 C.F.R. § 103.2(a)(3).

[5] 8 C.F.R. § 292.5(b).

[6] Memorandum from Grover Joseph Rees III, INS Office of the General Counsel, to Jan C. Ting, Office of International Affairs, Representation of an Applicant for Admission to the United States as a Refugee During an Eligibility Hearing (Nov. 9, 1992).

[7] 8 C.F.R. § 208.9(d).

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In some interviews the applicant has another person present. In the case of children, this may be a "trusted adult" who participates in order to help the child feel at ease.[8] In interviews of children or individuals with disabilities who may be unable to state their claim, a "trusted individual" may assist by testifying about the applicant's circumstances.

6 THE NON-ADVERSARIAL NATURE OF THE INTERVIEW

It is well established that a non-adversarial approach in which the interviewer builds rapport is the most effective interview style for eliciting credible information.[9]

A non-adversarial proceeding is one in which the parties are not opposing each other. It differs from an adversarial proceeding, such as civil and criminal court proceedings, in which parties oppose each other by advocating their mutually exclusive positions before a neutral arbiter until one side prevails and the other side loses. A removal proceeding before an immigration judge is generally an adversarial proceeding because the Immigration and Customs Enforcement (ICE) attorney represents DHS in removal proceedings.[10]

In conducting an interview for an immigration benefit as well as other RAIO interviews, you are usually the only person who questions the interviewee. With a request for a benefit, the primary intent of USCIS is to determine whether the principal interviewee qualifies for a benefit. It is not the role of the interviewer to oppose the principal interviewee's request or application. Because the process is non-adversarial, it is inappropriate for you to interrogate or argue with any interviewee. You are a neutral decision-maker, not an advocate for either side. In this role you must effectively elicit information from the interviewee in a non-adversarial manner, to determine whether he or she qualifies for the benefit.

Additionally, RAIO interprets the term "non-adversarial interview" to encompass not only the manner of questioning as described above, but also the tone and atmosphere in which you must conduct interviews. It is your job to maintain a neutral and professional demeanor even when confronted with interpretation problems, a difficult or challenging interviewee or representative, or an interviewee whom you suspect is being evasive or untruthful. Your personal feelings about the participants in the interview should not affect the quality of your interview or your decision.

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[8] Memorandum from Jeff Weiss, INS Office of International Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees), Guidelines for Children's Asylum Claims, 120/11.6 (Dec. 10, 1998); for additional information, see RAIO Training module, Children's Claims.

[9] Amina Memon, et al., "The Cognitive Interview: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years," Psychology, Public Policy and the Law 16, no. 4, 2010, pp. 340–372; Ronald P. Fisher and R. Edward Geiselman, "The Cognitive Interview method of conducting police interviews: Eliciting extensive information and promoting Therapeutic Jurisprudence," International Journal of Law and Psychiatry 33, 2010, pp. 321–328.

[10] USCIS, Adjudicator's Field Manual (AFM), Appendix 15-2 Non-Adversarial Interview Techniques.

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The non-adversarial nature of the interview allows the applicant to present a claim in an unrestricted manner, within the inherent constraints of an interview before a government official. An interview before a government official may be intimidating to an applicant for various reasons, including, but not limited to, the following:

1. Prior negative experiences with authority figures
2. Trauma from sudden flight from the country of origin, or other causes
3. Perceived or real differences between the applicant's culture and the culture of the government official conducting the interview
4. Fear of sharing information of a highly personal or sensitive nature

7 THE COMPONENTS OF AN INTERVIEW

Although you will develop your own interview style, the following components are required components of every officer's interviews:

- Pre-Interview Preparation
- Introduction
- Oath
- Verification of Basic Biographical Information
- Testimony
- Closing Statement/Comment/Questions by Interviewee and/or Representative
- Conclusion

7.1 Pre-Interview Preparation

Preparing for the interview helps you identify the issues to focus on and to formulate meaningful questions to ask during the interview to gather the facts needed to support your decision. Before each interview you must analyze the case and assess the evidence in the record by reviewing the file, performing security checks, and, in many instances, reviewing relevant country of origin information.

As you review the file, you should read the application and any accompanying statements and supporting documents. You should also cross-check names and aliases of the principal interviewees and dependents against other documents in the file and available databases. In addition, you must be alert to indications that you will need to follow special procedural guidance or modify your questioning techniques; for example, when interviewing children, possible trafficking victims, or individuals who may pose a threat to national security [ASM Supplement – Pre-Interview Preparation].

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This preparation helps you to establish the chronology of events of a case, determine lines of questioning, and, where relevant, identify gaps, inconsistencies, or potential bars you will need to address during the interview[11] [IO Supplement – Pre-Interview Preparation].

As noted below in Interviewing Tips, an outline or checklist of the main points you want to address in the interview may be helpful. You may create such a checklist yourself for each case or use common checklists created by each division. Before a refugee or asylum interview, you could write a chronology of events leading to the interviewee's departure from his or her country and refer to it during the interview. If using an outline, checklist, or chronology, be sure that it does not distract you from asking necessary follow-up questions during the interview or from actively listening to and evaluating the interviewee's responses or questions.

It is essential that the interviewee appreciate the importance and seriousness of the proceedings. Therefore, the setting in which the interview takes place must be orderly and official in appearance.[12]

> Before beginning an interview, you should take particular care to remove from the interview area all files and documentation relating to other interviewees. This ensures confidentiality and prevents documents from being placed in the wrong file.

7.2 Introduction to the Interview

The introduction to the interview includes greeting the parties and explaining what will happen during the interview. You will develop your own style for handling the introduction. Your manner during the introduction sets the tone for the interview. The introduction is your best opportunity to establish rapport[13] with the interviewee. Your introduction should help put the interviewee at ease, thus facilitating the flow of information and allowing you to elicit the information that you need throughout the interview. Whatever approach you choose, you must conduct the entire interview in a non-adversarial manner.

Greet the Parties

You should greet the interviewee and any other participants present at the interview and establish the identities of all parties. You should introduce yourself and any other

[11] See also European Asylum Curriculum (EAC) #6 – Interview Techniques, Sub-module 1: Conducting the Interview, Unit 1.1 Preparation of the Case, "Case preparation."

[12] USCIS, Adjudicator's Field Manual (AFM), Chapter 15.2 Interview Environment.

[13] For additional information on establishing rapport, see RAIO Training module, Interviewing - Eliciting Testimony.

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participants who may not know each other. Before escorting the interviewee to your interview space, verify the identity of the interviewee and any dependents, as well as that of the interpreter when appropriate. In situations where the interviewee is escorted by another person to your interview space, do this as soon as the interviewee arrives.

Determine Who Will Be Present During the Interview

You have the discretion to decide who will be present at the interview.

- Dependents

Dependents may remain with the principal interviewee during the interview at your discretion. In certain types of cases, dependents must be interviewed individually. In these situations, you should interview the dependents separately, apart from the principal interviewee and other dependents. When it is not required that dependents be interviewed separately or offer testimony, you should defer to the principal interviewee's preference as to whether their dependents remain present during the interview. However, in protection interviews it is generally better to interview the principal applicant without dependents present, as noted below.

In interviews where the principal applicant is unable to testify due to disability or incapacity, it is permissible for a third party to testify on his or her behalf.[14]

- Sensitive Topics

As noted above, you should defer to the interviewee's preference when determining whether dependents will remain in the interview. However, after the interview has begun, an interviewee may be reluctant to request that dependents leave the room. You should therefore be alert for signs that an interviewee may be uncomfortable discussing certain issues with others present. In some cases (e.g., involving domestic violence or sexual abuse), you may ask to speak with the interviewee alone first to determine whether the interviewee would prefer to be interviewed without the dependents present.

In protection interviews it is best to make it your practice to interview the principal applicant without dependents present. Even if topics under discussion do not appear to be sensitive, it is usually troubling for children to see their parent display her or his vulnerabilities and an inability to protect them. Furthermore, many men feel reluctant to express personal fears in front of their families, and if their dependents remain in the interview, you may not adequately elicit all of the applicant's concerns.

Some interviewees may request that a relative or friend be present at the interview for moral support. You may allow such individuals to remain. In particular, children may have a "trusted adult" present during the interview. However, you must also explain to any accompanying individual that he or she is not the interviewee's representative, and

[14] For additional information on specific procedures, refer to Division procedure manuals.

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that he or she must not become involved in the interview process. You should also watch for any red flags which may suggest problems or irregularities with the relationship between the "trusted adult" and the child, and should consult your supervisor if you suspect any wrongdoing on the part of the "trusted adult" or other accompanying adult. See also "Trafficking or Other Forms of Coercion," below.

- Validity of Family Relationships

In some interviews, you will have to determine whether the relationship between the primary applicant and a relative listed on the application form is genuine.

Example

> In the adjudication of a Form I-590, Registration for Classification as Refugee, where the primary applicant has listed seven minor dependent children, you may interview some of the children separately to ensure that they are in fact part of the same family unit. If you believe that some or all of the relationships are not as claimed on the I-590, it is best to interview each child separately, so that blame for a denial does not fall on one or two children, who may be harmed as a result.

- Trafficking or Other Forms of Coercion

You may become concerned that the interviewee is in a vulnerable situation in relation to another party present at the interview. These are sensitive situations, and you must proceed with caution. While you may attempt to interview an interviewee apart from a suspected trafficker who may represent himself or herself as a party to the interview (such as a guardian, companion, or interpreter), you must also ensure that you are not violating the interviewee's right to representation or exposing the interviewee to possible reprisal from the trafficker. In such situations you should seek supervisory guidance before separating an interviewee from another party to the interview.[15]

- National Security Risks

If you discover during your interview preparation or during the interview that the interviewee may have provided support to a terrorist group or may have been involved in a terrorist activity or in another act that could negatively impact public safety or national security, contact your supervisor.[16]

Explain the Purpose of the Interview

You must explain that the purpose of the interview is to:

[15] For additional information, see RAIO Training module, Detecting Possible Victims of Trafficking.

[16] For additional information, see the specific procedures for your division and RAIO Training module, National Security: Terrorism Related Inadmissibility Grounds.

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- Give the interviewee an opportunity to explain why he or she submitted the application or requested the benefit.
- Allow the interviewee to present evidence of eligibility.
- Allow you to gather necessary information from the interviewee and any witnesses.
- Provide information to the interviewee concerning the application process.

Explain Confidentiality

All asylum and refugee interviews are confidential.[17] Asylum confidentiality standards are formalized in the regulations. In the asylum context, absent the applicant's consent, you are generally prohibited from disclosing information contained in or pertaining to any asylum application to individuals other than the applicant. This includes acknowledging the existence of an asylum application. This restriction on disclosure does not apply to releasing information to the applicant's representative. The regulation also has exceptions on the prohibition on disclosure for certain U.S. Government officials and certain U.S. courts with a need to know the information.[18] Confidentiality provisions for asylum applicants contained in 8 C.F.R. § 208.6 also apply to the beneficiaries of I-730 petitions, whether they are following-to-join asylees or refugees. They also generally govern the disclosure of information related to credible fear and reasonable fear determinations, as well as to applications for withholding or deferral of removal under Article 3 of the Convention Against Torture, which are encompassed within the asylum application.[19]

As a matter of policy, adjudications in the refugee context follow the same confidentiality guidelines as asylum, with one limited exception:

- When a credibility issue arises based on conflicting testimony by family members who are part of the same case or a cross-referenced case, information provided by one family member should be shared with another family member to give the applicant(s) an opportunity to explain the discrepancies.

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[17] Immigration and Nationality Act (INA) § 245A(c)(5); Memorandum from Barbara L. Strack, Chief, Refugee Affairs Division and Joanna Ruppel, Chief, International Operations Division, USCIS, to Refugee Affairs Division, Information Consent Form for Use in Refugee Interviews, 120/6 (Jun. 17, 2009).

[18] The Secretary may disclose asylum related information Only your supervisor or upper management may decide whether an exception on the prohibition on disclosure exists. For additional information, refer to the Identity and Security Check Procedures Manual (ISCPM).

[19] See Asylum Confidentiality Memos: Memorandum from Joseph E. Langlois, Director, Asylum Division, to Asylum Office Directors and Deputy Directors, Fact Sheet on Confidentiality, HQASM 120/12.8 (Jun. 15, 2005); and Memorandum from Bo Cooper, INS Office of the General Counsel, to Jeffrey Weiss, Director, Office of International Affairs, Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information, HQCOU 120/12.8 (Jun. 21, 2001).

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You are required to safeguard information and may not disclose it unless one of the exceptions to the disclosure restrictions applies. You must know if any prohibitions on disclosure exist for the benefit being adjudicated, and inform interviewees of the applicable confidentiality provisions.

Interviewees may be hesitant to disclose information if they believe it is not confidential because:

- Descriptions of past events may be highly personal.
- Interviewees may fear harm to themselves or others as a result of disclosing certain information.
- Interviewees may fear for the lives and safety of family members and friends.

Remember that many interviewees are from countries where the government does not value or protect the privacy of its citizens. Therefore, it may be difficult for some interviewees to understand the term "confidentiality." In the overseas refugee context, officers are provided specific language to assist the applicant in understanding confidentiality and what it means to waive confidentiality or otherwise disclose information under certain circumstances.[20]

Explain Other Aspects of the Interview Process

You can help alleviate some of the interviewee's nervousness by explaining the process of the interview so that the interviewee will know what to expect. The interviewee should be informed that:

- It is important that you and the interviewee understand each other.
- The interviewee must answer your questions truthfully and to the best of his or her knowledge.
- The interviewee must tell you if he or she does not know the answer to a question, rather than guess at or supply an answer he or she thinks you want to hear.
- It is crucial that the interviewee understand each question and if he or she does not understand a question, he or she must let you know so that you may clarify it. (Due to cultural barriers or fear of authority figures, many interviewees will not ask for clarification when they do not understand your question.)
- He or she should not ask the interpreter for help or clarification, because the interpreter's role is only to interpret what each party says.

[20] See Memorandum from Barbara L. Strack, Chief, Refugee Affairs Division and Joanna Ruppel, Chief, International Operations Division, USCIS, to Refugee Affairs Division, Information Consent Form for Use in Refugee Interviews, 120/6 (Jun. 17, 2009).

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- You will take notes during the interview to remember what was said during the interview.
- The interviewee may ask questions at any time during the interview.
- All the information in the notes is also confidential and will not be shared with unauthorized individuals.
- You will allow the interviewee time at the end of the interview to make any additional statements, including information that you did not ask about that he or she thinks is important and would like to add.
- You will carefully consider the information the interviewee provides to determine eligibility for the benefit.
- At the end of the interview, you will tell the interviewee how he or she will be notified of the decision on the case.

Advise the Interpreter

The interpreter's role is to interpret as accurately as possible what the officer and interviewee say during the interview. You must advise the interpreter that he or she is a conduit of communication and must not add nor detract from your statements or the interviewee's statements. Officers in the RAIO Directorate should follow their division-specific guidance when advising interpreters about confidentiality requirements and their oath to interpret truthfully and accurately.[21] [RAD Supplement – Interpreters for Refugee Interviews]

If a Representative Is Present at the Interview

If a representative is present, you must:

- Review form G-28 Notice of Entry of Appearance as Attorney or Accredited Representative or form G-28I Notice of Entry of Appearance as Attorney In Matters Outside the Geographical Confines of the United States to verify that it has been properly executed;[22] or
- If the representative and/or the interviewee have not signed the form, ask them to do so at the interview; or
- If no form is in the file, ask the representative to submit one before beginning the interview.

[21] For additional information, see RAIO Training module, Interviewing – Working with an Interpreter.

[22] 8 C.F.R. § 292.4.

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You also must verify that the representative at the interview is the same person who signed the G-28 or G-28I. If the representative present is not the representative listed on the G-28, follow the guidance below.

- If the representative appearing at the interview is from the same office as the representative who submitted the G-28, he or she must sign the form and correct any information on it, as appropriate.

- If the representative appearing at the interview is not from the same office as the representative who submitted the G-28, he or she must submit a new G-28.

You must clarify with the interviewee whether the new representative is representing him or her for purposes of the interview only or is replacing the original representative, in which case you should annotate the original G-28 to reflect the change in representation.

If the representative has submitted a G-28 or G-28I but is not present, you must inform the interviewee that he or she has a right to have a representative present at the interview. If the interviewee wishes to proceed without the representative, the interviewee must sign a waiver form before the interview can be conducted. If the interviewee does not wish to proceed without the representative, you must reschedule the interview.

Cooperative Relationship Between the Representative and the Officer

You and the representative are not adversaries. Therefore, some actions that may be appropriate for attorneys in an adversarial setting may not be appropriate in the non-adversarial interview, where you and the representative share a cooperative role in developing and clarifying the merits of the interviewee's claim.

In certain instances it may be appropriate for the representative to comment during the course of the interview to clarify issues. Such comments may be helpful and should not be discouraged. However, you must retain control of the interview. If the representative repeatedly interrupts or otherwise disrupts the interview, ask the representative to refrain from interrupting and explain that he or she will have an opportunity at the end of the interview to ask questions and make comments.

If you encounter a representative who is unaware of the non-adversarial nature of the interview, you may need to advise the attorney of his or her role in this proceeding. In doing so, you must always conduct yourself professionally.

You must inform the representative that he or she will be allowed to make a closing statement, comment on the evidence presented, and ask the interviewee additional questions. You have the discretion, however, to limit the length of the statement or request that it be submitted in writing, in lieu of an oral statement at the end of the

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interview.[23] You also have the discretion to have the attorney suggest questions for you to ask rather than allowing the attorney to question the interviewee directly.

7.3 Oath

Interviewees and witnesses must be placed under oath before testifying. You must place all interviewees under oath before asking any questions related to the claim or application. You, the interviewee, and the interpreter should stand during the administration of the oath unless physically unable to do so.

The oath should be administered in a way that impresses upon the interviewee the importance of the occasion and the testimony he or she is about to give. A suggested explanation of the oath follows:

> "I am now going to place you under oath. This means that I am going to ask you to vow or promise to tell the truth. Once you are placed under oath, I will expect that what you tell me will be the truth to the best of your knowledge."

The Refugee Affairs Division has developed specific language for the oath [RAD Supplement – Oaths].

The fact that the interview is being conducted under oath or affirmation should be recorded in the interview notes. If a verbatim question-and-answer statement is taken, the exact wording of the oath or affirmation should be included in the statement [ASM Supplement – Oath].

If an interpreter is present, you must administer a separate oath to the interpreter.

7.4 Verification of Basic Biographic Information

You must verify with the interviewee all of the biographical information on the application form. Techniques for gathering this information are elaborated in RAIO Training module, Interviewing – Eliciting Testimony.

Review the Form

You must verify and, if necessary, update or correct information on the form. Someone other than the interviewee may have completed the form, or information about the interviewee may have changed since the form was filed. As a result, some of the information on the form may not be correct [RAD Supplement – Review the Application Form]. Please keep in mind that the interviewee may not be aware of all of the information that has been submitted on his or her behalf. Any corrections must be made in red ink and numbered. At the end of the interview, the interviewee must provide a signature to confirm all changes made to the form.

[23] 8 C.F.R. §208.9(d).

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You must be certain that the form contains the interviewee's full and correct name, plus any aliases (RAD, see Standard Operating Procedure for Form I-590). Aliases are any other names the interviewee has used, including maiden names, nicknames, hyphenated names, abbreviated names, baptismal names, and alternate order of first and last names. You must also note any variation in birth date that the interviewee has used. Different calendars and cultural practices can lead to confusion about dates of birth. You must confirm all dates in addition to places of birth, address, and entry information, and you must confirm that all other biographical information on the form is current and correct.

You must also compare information on the form with other documentation in the file and documents presented by the interviewee at the interview, such as birth certificates, marriage and divorce certificates, death certificates, school records, baptismal certificates, and passports. If the interviewee has dependents, verify that the biographical information for each is also correct.

Review Documents

The interviewee may submit documents with his or her application or petition and may bring additional documents to the interview.

Although interviewees are not always required to submit identity documents, you must ask the interviewee and dependents if they have such documents. Examples include identity documents from the interviewee's country, the United Nations High Commissioner for Refugees (UNHCR), the United States, or other governmental sources.

If the interviewee does not have identity documents, and he or she is from a population that ordinarily possesses identity documents, you should ask the interviewee to explain why he or she does not have these documents.

If the interviewee submits an original document with copies of the document, you should retain the copies for the file, write or stamp on the copies "original seen and returned," and sign and date each copy below this statement.[24]

Similarly, if the interviewee presents an original document for which there are copies in the file, you should write or stamp on the file copies that the "original was seen and returned" and sign and date the file copies. If the interviewee has only photocopies of a document, you should write on the copies retained for the file "from photocopy," and sign and date each one. You should also inquire as to why the applicant does not possess the original document.

Guidance on how to proceed if you encounter a document that appears to be fraudulent is provided in RAIO Training module, Fraud.

[24] For additional information, see RAIO Training modules, Evidence and Fraud.

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Correct the Form

Any corrections to the form must be made in red ink on the record copy of the form, crossing out the original information so that it is still legible. This includes corrections to a personal statement attached to the Form I-589 in asylum processing and the Resettlement Support Center (RSC) case history attached to the Form I-590 in overseas refugee processing.

At the beginning of the interview, you should ask the interviewee and the interviewee's representative, if any, if they would like to make any corrections on the personal statement or RSC Case History.

The corrections must be numbered so that they can be explained to the interviewee before he or she signs the form at the end of the interview to verify that the application form is accurate. If the interviewee does not alert you to any corrections before the interview begins, and his or her testimony is inconsistent with information on the form, you must address material credibility concerns with the interviewee. However, it is important to remember that the applicant may not have prepared this form and may not be fully aware of its contents.[25]

7.5 Testimony

Because this is a non-adversarial proceeding and you are the fact-finder in the case, you are responsible for eliciting all relevant information from the interviewee.[26] Although you must cover all of the information requested in the application form, you should not simply ask the interviewee the same questions as those on the form. Instead, you should use a variety of techniques that provide the interviewee an opportunity to speak in his or her own words.[27]

Allow Applicant to Clarify Inconsistencies

If any of the information in the form conflicts with the interviewee's interview testimony, or if you notice inconsistencies within the interviewee's interview testimony, you must give him or her an opportunity to explain the discrepancies. You must correct the application form when necessary, advising the interviewee of the corrections.

You must pursue all relevant lines of questioning, until you are certain that you have sufficient pertinent information to make a determination on the interviewee's claim. You must also allow the interviewee to ask questions as appropriate and to submit additional documents at the interview in support of his or her claim.

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[25] For additional information, see RAIO Training modules, Credibility and Evidence.

[26] 8 C.F.R. § 208.9(b); UNHCR Handbook, para. 196.

[27] For additional information on methods and issues related to eliciting testimony, see RAIO Training module Interviewing – Eliciting Testimony.

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You must learn to distinguish between the likelihood that the interviewee is confused and the possibility that his or her non-responsiveness is an attempt to receive a benefit by fraud. If the interviewee does not appear to understand your question, you should ascertain whether there is a problem with the interpretation or with your phrasing of the question. However, if the interviewee appears to understand your question and is being evasive or non-responsive, or presents inconsistent or implausible testimony, you must confront the interviewee and give him or her an opportunity to explain. Proper confrontation of an interviewee is not hostile or challenging. By confronting an interviewee, you merely make the interviewee aware of your concerns, and provide the opportunity to address them.[28]

7.6 Closing Statement/Comment/Questions by Interviewee and/or Representative

As noted above, at the end of the interview, you should allow the interviewee and, if present, the representative, to make final comments or ask questions after you have finished asking your questions.

Signatures on Form

You and the interviewee must sign the record copy of the form. You must note the corrections made to the form, explain them to the interviewee, and inform the interviewee that, by signing the application, he or she is affirming that all the information in the form is true and correct as of the date of the interview.

Requests to Submit Additional Documents

In certain cases, you may request that the interviewee submit additional documentation as evidence in support of his or her claim.[29]

Explanation of the Next Steps in the Process

In most cases, you will not inform the interviewee of the decision at the end of the interview. Instead, you will advise the interviewee as to how he or she will receive the decision. These procedures vary, depending on the form type and interview location.

Exit Procedures

At every interview location, you must follow local exit procedures at the conclusion of the interview. Before beginning your first interview, you should be familiar with the local procedures. For example, in most locations a waiting area is set apart from the interview spaces and other offices. You may be required to escort the interviewee back to the waiting area rather than allow the interviewee to find his or her own way back

[28] For additional information, see RAIO Training modules, Credibility and Evidence.

[29] For additional information, see RAIO Training module, Evidence.

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unescorted. In other locations it may be standard procedure to allow the interpreter, when present, to escort the interviewee back to the waiting area.

8 Outside Factors that Can Affect the Interview

Multiple factors may interfere with your ability to conduct the interview or may affect the interviewee's ability to testify.

8.1 Stress

An immigration interview, no matter what type, can be a stressful situation for all of the individuals involved. People respond to stress in different ways and develop personal mechanisms for handling stress. These factors can affect both you and the interviewee during an interview.

You, as the interviewing officer, may have days when you are distracted by personal issues or other professional issues. You must recognize your own distractions and minimize their effect on the interview.

The interviewee may find the interview stressful for a number of reasons. He or she may be:

- Anxious because his or her future may depend on the outcome
- Anxious about the unknown (not knowing what will happen during the interview)
- Concerned that he or she will not be able to answer the questions asked
- Fearful of dealing with a government official or being in an unfamiliar environment
- Concerned about communicating through an interpreter
- Worried about forgetting important information
- Concerned that his or her application or request may be denied
- Apprehensive about retelling painful or humiliating experiences
- Suffering from a physical ailment such as dementia, or a trauma-related condition such as Post-Traumatic Stress Disorder (PTSD)[30]

All of these factors have the potential to increase the interviewee's level of stress or otherwise impede the smooth flow of the interview.

[30] For additional information, see RAIO Training module, Interviewing Survivors of Torture and Other Severe Trauma.

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The interpreter, representative, witness, or other participants in the interview may have their own concerns, such as their ability to interpret correctly, or to represent or testify on behalf of the interviewee in such a way as to assist the interviewee most effectively. In some cases, those accompanying the interviewee may have an ulterior motive to commit fraud on behalf of the interviewee.

You are responsible for monitoring your stress level as well as identifying and mitigating the stressors that may affect all other participants at the interview.

8.2 Time Constraints

As the interviewing officer, you are obligated to collect as much relevant information as possible within the time period allocated by your division or local office to conduct an interview. The tasks and time involved in completing a particular interview may increase when:

- A complicated story takes additional time to fully elicit
- A potential bar or ground of inadmissibility needs to be explored
- Several dependents on the case require interview and processing, and/or
- A dependent must be added or deleted

To accomplish all of the required tasks successfully, you must work expeditiously within predetermined time constraints. Always be mindful of the need to gather enough information to make a legally sufficient adjudication.

8.3 Your Personal Experiences

During the interview, you should not allow your personal life experiences and biases to influence you either in favor of or against the interviewee. You should never approach the interview with a preconceived notion of the outcome.

9 Interviewing Best Practices

The following tips may help you to maintain control and elicit all necessary information at the interview.[31]

9.1 Be Organized

[31] For additional information, see RAIO Training Modules, Cross-cultural Communication and Interviewing – Working with an Interpreter.

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As you prepare for the interview, create an organized environment that will help you capture all of the information you need. You and the interviewee must remember a significant amount of information; the fewer distractions, the easier it will be.

Your desk should be clean and free of clutter, including papers from other files, with only those items that are necessary for processing the case visible to the applicant. Have all supplies and necessary papers (notepad, checklists/outlines) within easy access during the interview. This will remove unnecessary distractions and allow you and the interviewee to concentrate on the interview. It is also helpful to have a box of tissues nearby in case the interviewee becomes emotional during the interview.

Use an Outline or Checklist

Before you begin conducting interviews, ask your supervisor if he or she recommends an outline or checklist that other officers have used. Another option is to prepare your own outline or checklist based on Standard Operating Procedures (SOP) for different form types. For example, for protection interviews, your outline or checklist might include background, past harm, possession of a protected characteristic, awareness, capability, inclination, military service, firm resettlement, and whether mandatory bars or grounds of inadmissibility apply. Using an outline or checklist may prevent omissions of important lines of questioning. Even experienced officers sometimes forget to ask certain questions. You should review the outline or checklist before the interview and look at it again before ending the interview to ensure that everything has been covered.

> Outlines or checklists are merely the starting point for the information you must elicit during the interview. They should not be used as a substitute for all necessary lines of questioning and follow-up questions during your adjudication. Do not let an outline or checklist distract you from asking necessary follow-up questions during the interview or from actively listening to and evaluating the interviewee's responses or questions.

Develop Time Management Skills

Before adjudicating a new form type, you should learn about the adjudication, both from procedures manuals and from experienced colleagues who are able to adjudicate the same form efficiently. You can learn methods that streamline the process without negatively affecting the quality of the adjudication. Your colleagues can help you to develop interviewing skills that will allow you to quickly and efficiently gather all relevant information needed for a legally sufficient adjudication.

Record Questions as They Arise as a Reminder to Ask Them Later in Interview

During the interview, jot down questions that arise but are not appropriate to ask at that moment, as a reminder to ask those questions when it is appropriate. This allows you to

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focus on what the interviewee is saying, rather than on the question you plan to ask later. Use a notepad or piece of paper at the side of the desk, or create a place on your computer document to jot down any specific questions or lines of questioning that come to mind that you want to ask later. Refer to these notes later in the interview to be reminded of the additional questions that you need to ask.[32]

Have a Map or Atlas at Hand

The interviewee may be able to identify important locations on a map, such as where he or she lived, moved, or traveled. Keep in mind, however, that some interviewees may never have seen a map and may not know how to read one. In addition, some interviewees may never have traveled beyond their villages or towns. Their view of "distance" may be confined to the distance between their home and their field or the market. Furthermore, such interviewees may not measure distance in terms of miles or linear measurements, but rather according to another form of measurement, such as the length of time it takes to arrive at a destination, or landmarks along the way.

9.2 Interview, Don't Interrogate

Your questioning must be done in a professional, non-threatening, and non-accusatory manner.

Treat the Interviewee with Respect

As an officer in the RAIO Directorate, you should treat the interviewee with respect regardless of his or her eligibility for the benefit being sought. Similarly, you must treat the interviewee with respect even if he or she is not forthcoming with information during the interview, or does not seem to understand the process. You cannot know all of the factors that motivated the interviewee to apply for the benefit he or she is seeking, or what events have transpired in the interviewee's life before this moment. For these reasons, you should treat every interviewee with respect and consideration.

You must not show impatience or incredulity, even though you may have heard similar stories from many interviewees or you find the interviewee's testimony implausible.

Even the most self-possessed officer may feel annoyed if it appears that an interviewee is not being truthful during an interview, but you must refrain from expressing emotions such as annoyance either verbally or non-verbally.

Maintain a Neutral Tone throughout the Interview

It is important that you always maintain a neutral tone, even when frustrated. You occasionally may be frustrated with interviewees who are long-winded, discuss issues

[32] For additional information, see RAIO Training module, Interviewing - Note Taking.

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irrelevant to the claim, are confused by your questions, or appear to be fabricating a claim.

Be Non-Judgmental and Non-Moralistic

Some information you gather during an interview may shed a negative light on the interviewee. How an interviewee reacts to or handles a particular situation may differ from how you think the situation should have been handled. The interviewee may have left family members behind in difficult or dangerous circumstances, or the interviewee may belong to an organization for which you have little respect.

Although you may feel offended by some interviewees' actions, you must put personal feelings aside and avoid passing moral judgments on interviewees in order to make neutral, legally sound decisions.

Create a Comfortable Atmosphere

Create an atmosphere in which the interviewee can freely express his or her claim. You should attempt to put the interviewee at ease at the beginning of the interview and continue to do so throughout the interview. Physical discomfort may also impede communication. If the interviewee has been testifying for an extended period of time, it may be appropriate to suggest that you take a break to use the restroom or get a drink of water.

Treat Each Interviewee as an Individual

Although many claims may be similar, each claim must be evaluated on its own merits, and each interviewee must be treated as an individual. You must approach each interviewee without any predisposition to grant or deny the benefit sought.

Be Mindful of Potential Biases

Everyone develops individual preferences, biases, and prejudices based on personal life experiences. This influences how you view others and how you perceive circumstances, either negatively or positively. You must make continual efforts to become aware of instances in which this can influence your approach to interviews, either positively or negatively, such that it becomes "personal baggage."

The following types of biases encountered in other interview settings, such as job applicant interviews, may also apply in a RAIO interview setting.

- Halo effect: The interviewee's strength in one area causes you to view the other areas positively without fully considering or exploring them.
- First impression: The interviewee is judged before having a fair chance to respond to your questions.

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- Stereotype: Because you perceive the interviewee as fitting into a certain category, you believe that he or she is not qualified for the benefit.
- Similarity: Your decision on eligibility is muddied after confusing the interviewee's personal similarity to yourself with his or her qualifications for the benefit.
- Contrast: Your judgment in the interviewee's case is based on how well others answered questions in previous interviews.
- Excessive harshness: You focus unfairly only on the negative factors in the interviewee's case, disregarding all strengths in his or her claim.

Being aware will allow you to recognize how your biases may interfere with the interview process. You must make an effort to prevent "personal baggage" from negatively affecting your ability to interview in a non-adversarial and neutral manner.

Have Patience

Remember that although the interview process may become routine for you, it is not routine for the interviewee and may not be routine for others present. You should take time to explain the process and allow time for the interviewee to gather his or her thoughts.

Ensure That All Parties to the Interview Remain Non-Adversarial

If, during the course of the interview, the interviewee or any other party to the interview becomes agitated, shouts, or otherwise loses composure, you must re-establish order. Calmly and in a moderate tone of voice remind the parties that this is a non-adversarial interview, and that this applies to all parties. If this does not defuse the situation, you should not continue the interview until the problem can be resolved. You may need to ask a colleague or supervisor to intercede. Under no circumstances should you respond in kind to anger or frustration from the interviewee, representative, interpreter, or other participant at the interview, as this will only exacerbate the problem.

Do Not Intimidate, Harass, or Embarrass the Interviewee

Your tone of voice and facial expressions must remain neutral throughout the interview process. You must not argue against the interviewee's statements, raise your voice, use rapid-fire questioning, roll your eyes, or use a hostile, deprecating, or incredulous tone with any interviewee.

You may be tempted to do all of these with some interviewees if you notice serious credibility problems during an interview. If the interviewee does not appear to understand your question, you should ascertain whether there is a problem with the interpretation or with the way in which you articulated the question. However, if the interviewee appears to understand your question and is evasive or non-responsive, or presents inconsistent or implausible testimony, you must probe the interviewee's credibility by confronting him

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or her with the specific credibility problem and by giving him or her an opportunity to explain.

Confronting an interviewee does not require you to challenge or become hostile toward the interviewee. Rather, confronting an interviewee merely makes him or her aware of your specific concerns and gives the interviewee the opportunity to address the concerns.[33]

The non-adversarial nature of the interview allows the interviewee to present a claim in as unrestricted a manner as possible, within the inherent constraints of an interview before a government official. An interview with a government official may be intimidating to an interviewee. Interviewees may feel vulnerable and threatened during an interview with you, as a representative of the U.S. Government, because of:

- Negative experiences with authority figures
- Differences between the interviewee's culture and yours
- Fear of exposing highly personal or sensitive information
- Trauma due to a variety of reasons, including sudden flight from the country of persecution
- Fear of an agent or trafficker who smuggled the interviewee, if the interviewee was trafficked

9.3 Maintain Control of the Interview

During the entire interview, you must not only remain alert to information from the interviewee, but must also be aware of more general factors affecting the flow of communication.

Promote Effective Exchange of Information

To the extent that it is possible, try to eliminate factors that limit or prevent an effective exchange of information during the interview. If the interviewee appears to be uncomfortable disclosing part of the claim in front of family members, you may ask family members to wait in the waiting room. If the interpreter is having difficulty interpreting a question, think of a different way to ask the question or obtain the information. Always be on the lookout for anything you can do that can facilitate the flow of information.

Keep the Interview Focused

[33] For additional information, see RAIO Training module, Evaluating Evidence.

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In order to conduct efficient interviews, you should limit questions to topics that are relevant to the purpose of the interview.

9.4 Practices to Avoid

- Do not over-empathize with the interviewee.
- Do not ask questions that are not relevant to the adjudication in question.
- Do not eat, drink, answer the phone, or engage in other personal behavior during the interview.

10 CONCLUSION

You play multiple roles in the adjudication process. As both the fact finder and neutral decision-maker, you must elicit testimony from the applicant, maintain a neutral tone throughout the process, and create an atmosphere in which the interviewee can freely express his or her claim. The interview is your opportunity to probe into all material elements of the interviewee's claim to determine eligibility for the benefit sought. You must develop strong interviewing skills that allow you to elicit expeditiously and efficiently all necessary testimony to make a decision.

Although you will develop your own style over time, for each interview you must:

- Thoroughly prepare, including file review, country of origin research, security checks, and electronic data base searches, before inviting the interviewee into your office
- Greet the parties and establish rapport
- Explain the interview process
- Place parties under oath, as necessary
- Verify identity, address, contact, and all biographical information on the forms
- Correct errors or update information that may have changed since the form was completed
- Elicit testimony regarding the claim and ask all relevant follow-up questions
- Confront the interviewee with material credibility issues and allow him or her an opportunity to explain
- Allow the interviewee and representative to make final comments and ask questions to provide information not already covered during interview

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- Sign the application form and obtain all necessary signatures
- Advise the interviewee of the decision notification process

11 SUMMARY

11.1 Authority

The following authorizes USCIS officers to conduct interviews:

- 8 C.F.R. § 103.2(b)(9) gives the authority to USCIS to require that an applicant, petitioner, sponsor, beneficiary, or other individual appear for an interview.
- 8 C.F.R. § 208.9(b) requires that Asylum Officers conduct interviews in a non-adversarial manner. Although this regulation applies only to Asylum Officers, as a matter of policy, officers in the RAIO Directorate must conduct interviews in a non-adversarial manner.
- 8 C.F.R. § 207.2(b) gives the authority to USCIS to require that each applicant 14 years and older appear in person before an Immigration Officer for an inquiry under oath to determine his or her eligibility for admission as a refugee.
- INA § 287(b) gives the authority to USCIS officers to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through or reside in the United States.

11.2 The Purpose of the Interview

11.2.1 To Gather Information

At an interview you elicit information to:

- Verify the identity of those present at the interview
- Determine whether to proceed with the interview, based on factors such as jurisdiction and availability of accurate interpretation
- Evaluate credibility and determine eligibility for the benefit being sought
- Determine whether the interviewee is subject to any bars or grounds of inadmissibility

11.2.2 To Provide Information

At an interview you provide information to the interviewee about:

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- The purpose of the interview and the interview process
- The roles and responsibilities of all persons involved in the interview
- What the interviewee can expect to happen during and after the interview

11.3 Importance of the Interview

- The interview, as the basis for your determination, may be the only opportunity for you to obtain accurate and complete information from the interviewee.
- The interview may be the only opportunity for you to elicit and clarify information upon which to base a decision.
- The decision you make, based on the information you gather at the interview, may have serious consequences.
- Interviewees may shape their opinion of the U.S. Government based on their interactions with you.

11.4 The Participants and Their Roles

The Officer

You are a representative of the U.S. Government and must project a competent, professional, and courteous image, and uphold the integrity of the U.S. immigration system.

The Interviewee

The interviewee may be a principal applicant, a derivative family member, or a witness in the case.

The Interpreter

The interpreter's role is to accurately interpret between the language of the interviewee and English.

The Representative

An applicant or petitioner may be represented by an attorney in the United States, an attorney outside the United States (in matters occurring outside the geographical confines of the United States), or an accredited representative of a recognized organization.

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Other Parties

Other parties may be present at the interview, depending on the circumstances. For example, some children or applicants with disabilities may need the assistance of a relative or guardian to present their claim.

11.5 The Components of an Interview

- Pre-Interview Preparation
- Introduction
- Oath
- Verification of Basic Biographical Information
- Testimony
- Closing Statement/Comments/Questions by Interviewee and/or Representative
- Conclusion

11.6 Interviewing Tips

- Be organized
  - Use an outline or checklist to ensure that all necessary information is covered.
  - Develop time-management skills.
  - Record questions as they arise as a reminder to ask them later in interview.
  - Have a map or atlas at hand.
- Interview, don't interrogate
  - Treat the interviewee with respect.
  - Maintain a neutral tone throughout the interview.
  - Be non-judgmental and non-moralistic.
  - Create a comfortable atmosphere.
  - Treat each interviewee as an individual.
  - Be mindful of potential biases.
  - Have patience.
  - Ensure that all parties to the interview remain non-adversarial.
  - Do not intimidate, harass, or embarrass the interviewee.
- Maintain control of the interview

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- Promote effective exchange of information.
- Keep the interview focused.
- Treat the applicant with respect.
- Maintain a neutral tone throughout the interview.
- Be non-judgmental and non-moralistic.
- Create an atmosphere in which the interviewee can freely express his or her claim.
- Treat each interviewee as an individual.
- Be mindful of potential biases.
- Have patience.

- Practices to avoid
  - Do not over-empathize with the interviewee.
  - Do not ask questions that are not relevant to the adjudication in question.
  - Do not eat, drink, answer the phone, or engage in other personal behavior during the interview.

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PRACTICAL EXERCISES

There are no Practical Exercises for this module.

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OTHER MATERIALS

There are no Other Materials for this module.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

None

ADDITIONAL RESOURCES

None

SUPPLEMENTS

RAD Supplement – Interpreters for Refugee Interviews

The Resettlement Support Centers (RSCs) provide interpreters for most USCIS Refugee Interviews and I-730 interviews. The RSC seeks to recruit dispassionate interpreters who have no interest in U.S. resettlement. The RSC provides an orientation for the interpreters used at USCIS interviews, including the requirement to interpret accurately and completely and maintain the confidential nature of the interview. The RSC makes every effort not to use interpreters from the same refugee camp population or urban refugee population as the population being interviewed; however, this may not be possible at times in particular locations or in certain circumstances. For example, an interpreter may be used from the refugee camp population or urban refugee population if the interview site is very remote and there are no interpreters available in the local population, or if the interviewee's language is not spoken widely outside the interviewee's ethnic group. For these same reasons, it may not be possible to find an interpreter in the local population who is not interested in resettlement to the United States, and at some interview locations, the interpreters themselves may be applicants to the United States Refugee Admissions Program (USRAP).

Interpreter's Oath

The interpreter must be placed under oath ("Do you solemnly swear or affirm that you will interpret all statements made during the interview completely and truthfully and that you will keep all information confidential?") If the same interpreter is used for more than one interview, the interpreter needs to be placed

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under oath only prior to the first interview. The interviewee should be told during the introduction or at the time of his or her oath that the interpreter has already taken an oath to interpret completely and keep all information confidential.

The interpreter should generally stand and raise his or her right hand when taking the oath. However, some interpreters may have objections to using the term "swear" or object to raising their right hands. The officer should adapt the oath to accommodate such objections, ensuring that the interpreter understands that he or she is promising, under the law, to interpret completely and truthfully and to keep the information in the interview confidential (e.g., using "affirm" rather than "solemnly swear" in the following: "Do you affirm that you will interpret all statements made during the interview completely and truthfully and that you will keep all information confidential?"). USCIS Refugee Affairs Division, Standard Operating Procedures: Introduction, Section 8 "Administer the Oath," 19 August 2009.

RAD Supplement – Oaths

The Refugee Affairs Division has instituted several requirements for administering the oath to an applicant, including standard language. Applicants must stand and raise their right hand for the administration of the oath. An exception may be made if the applicant is elderly or incapacitated. The officer administering the oath should also stand and raise his or her right hand. As some applicants may have religious objections to using the term "swear" or "so help me God," the required oath for applicants is:

> "Do you solemnly swear or affirm that the statements you are about to make will be the truth, the whole truth, and nothing but the truth?"

Some applicants may have objections to using the term "swear" or object to raising their right hands. The officer should adapt the oath to accommodate such objections, ensuring that the applicant understands that he or she is promising, under the law, to tell the truth. USCIS Refugee Affairs Division, Standard Operating Procedures: Introduction, Section 8 "Administer the Oath," 19 August 2009.

RAD Supplement – Review the Application Form

See Pilot Standard Operating Procedure for Form I-590: Registration for Classification as a Refugee (October 30, 2015).

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. Memorandum from Bo Cooper, INS Office of the General Counsel, to Jeffrey Weiss, Director, Office of International Affairs, Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information, HQCOU 120/12.8 (Jun. 21, 2001).

2. Memorandum from Joseph E. Langlois, Director, Asylum Division, to Asylum Office Directors and Deputy Directors, Fact Sheet on Confidentiality, HQASM 120/12.8 (Jun. 15, 2005).

ADDITIONAL RESOURCES

None

SUPPLEMENTS

ASM Supplement – Purpose of the Interview

In this lesson, students will learn about the purpose, components, and non-adversarial nature of the asylum interview, as well as the roles of the representative and the applicant. The lesson will also cover eliciting the basic biographical information on the I-589, such as date and place of birth and information pertaining to entry into the United States.

Definition

At asylum interviews (unlike defensive proceedings before an immigration judge, the Board of Immigration Appeals, or the Federal courts) there is no government official present arguing in opposition to the asylum applicant. Neither the Asylum Officer nor the representative cross-examines the applicant and witnesses (if any), as in defensive proceedings. The Asylum Officer is not an advocate for either side; rather, the Asylum Officer is a neutral decision-maker.

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ASM Supplement -Pre-Interview Preparation

- Review file and DHS computer systems to:
  - Determine who is included in the application
  - Determine which version of the I-589 the applicant submitted
  - Ascertain whether the file is complete

If the file is missing any documents, such as photographs or photocopies of documents, the Asylum Officer should request that the applicant provide the missing documents.

The Asylum Officer should also determine whether there is a "Notice of Entry of Appearance as Attorney or Representative" (Form G-28) in the file and whether it is properly completed.

If there is no G-28 in the file, but if it appears that the applicant is represented, the Asylum Officer should ask the representative and applicant to complete a G-28 during the interview.

- Determine whether there is any indication that the application is not within the jurisdiction of the Asylum Office.
- Determine when the applicant claims to have entered the United States and when he or she filed the asylum application.

The Asylum Officer should be prepared to inquire into whether the applicant's I-589 was filed in timely fashion, i.e., within one year of the last arrival into the United States, and whether an exception to that filing requirement may apply.

- Become familiar with the applicant's background and claim.

The Asylum Officer must read the information on the I-589 and review any supporting documents.

An applicant may have submitted extensive background information on country of origin information. It is not necessary to review all of the information prior to the interview, as this can be very time-consuming. However, the Asylum Officer must look through the information and read any information that specifically pertains to the applicant or his or her claim.

- Identify issues to cover during the interview.

A review of the file allows the Asylum Officer to identify lines of questioning and

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specific questions to ask during the interview.

- Determine whether the applicant may be in any "special status" (e.g., ABC, Mendez).

The procedures for handling certain cases, such as cases involving ABC class members, are different from other cases. Asylum Officers must be aware at the outset of the interview whether the case is governed by special procedures, in order to follow correct procedures.

- Review country of origin information

If the Asylum Officer is unfamiliar with country of origin information relevant to the applicant's claim, the Asylum Officer should quickly look up basic conditions in that country, referring to the electronic database Refworld, annual Department of State human rights reports, or information in the office library. A review of country of origin information can assist the Asylum Officer to focus on relevant elements of a claim and disregard that which is irrelevant.

- Review procedures, if necessary

The Asylum Officer may find it necessary to review specific procedures prior to interviewing some applicants (e.g., ABC cases, sensitive cases), if he or she is unfamiliar with the particular procedures involved in interviewing these applicants.

ASM Supplement – Oath

Applicants and any witnesses must be placed under oath prior to giving testimony. Some applicants may have religious objections to using the term "swear." Other applicants may object to the phrase "so help me God." The Asylum Officer must adapt the oath to accommodate the applicant, ensuring that the applicant understands that he or she is promising, under the law, to tell the truth.

The applicant must also sign a statement acknowledging that he or she swears or affirms to tell the truth and understands the penalties for misrepresentation. The applicant should not be made to sign the form without a brief explanation of the significance of the oath and the acknowledgement of the penalties for misrepresentation.

The interpreter must sign a statement (interpreter's oath), which puts the interpreter under oath. At the Asylum Officer's discretion, he or she may administer the oath to the interpreter in addition to having him or her sign the interpreter's oath.

The interpreter monitor must also be placed under oath. The oath given to the interpreter monitor should be translated for the applicant by the applicant's

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interpreter.

- Oaths if you suspect a national security risk

  If you have identified an individual who may be a national security risk, you must use Q&A format and take his or her testimony as a sworn statement [see RAIO Training module, Interviewing – Note Taking; AOBTC Lesson Plan, Mandatory Bars to Asylum and Discretion].

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

None

ADDITIONAL RESOURCES

None

SUPPLEMENTS

IO Supplement - Pre-Interview Preparation

The following are examples of tools used in the interview process:

- Revised NCTC Check Requirements for Visas 92/93
- Naturalization NQP5 Checklists

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

NOTE-TAKING

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

NOTE-TAKING

Training Module

MODULE DESCRIPTION:

This module outlines the importance of taking clear and comprehensive notes during the interview, the characteristics of proper notes, and procedures for proper note-taking.

TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing in the field, you will be able to create in your notes a clear record of all relevant information necessary to adjudicate the immigration benefit, petition, protection determination, or other immigration-related request.

ENABLING PERFORMANCE OBJECTIVES

1. Explain the importance and purpose of creating an accurate written record of an interview.
2. Write or type comprehensive and readable interview notes, following proper procedures for note-taking.
3. Explain which parties may have access to your interview notes.
4. Separate inappropriate inferences which should not be recorded from objective observations which may be documented.
5. Explain when you are required to switch your note-taking to a more detailed question-and-answer format of note-taking.
6. Explain the importance of using note-taking techniques that do not interfere with the interview.

INSTRUCTIONAL METHODS

- Interactive presentation
- Practical exercises

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METHOD(S) OF EVALUATION

- Written exam
- Practical application during mock interview exam

REQUIRED READING

1.

2.

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1.

2.

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

Task/ Skill #	Task Description
ITK7	Knowledge of strategies and techniques for note-taking (4)
ITS10	Skill in taking notes to capture information (4)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
12/12/2012	Entire Lesson Plan	Lesson Plan published	RAIO Training
06/06/2013	Throughout document	Corrected minor typos, formatting, cites identified by OCC-TKMD.	MMorales, RAIO Training
06/12/2015	3.1.2 – Sworn Statements and ASM supplement	Removed outdated procedural information	RAIO Training

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

Officers in the RAIO Directorate conduct interviews primarily to determine eligibility for immigration benefits or requests; to corroborate information provided by applicants, petitioners, and beneficiaries; and/or to establish whether a person understands the consequences of his or her actions.

The modules of the RAIO Directorate – Officer Training Course and the division-specific training courses constitute primary field guidance for all officers who conduct interviews for the RAIO Directorate. The USCIS Adjudicator's Field Manual (AFM) also provides guidance for officers when conducting interviews, particularly for officers in the International Operations Division. There may be some instances where the guidance in the AFM conflicts with guidance provided by the RAIO Directorate. If this is the case, you should follow the RAIO guidance. Further guidance regarding interviews for specific applications will be discussed during division-specific trainings.

In this module, the term "interviewee" is used to refer to an individual who is interviewed by an officer in the RAIO Directorate for an official purpose.

1 INTRODUCTION

This module is part of a series of interviewing modules that discuss various topics, including the basic principles and components of conducting a non-adversarial interview, the goals and techniques of eliciting information, and considerations when conducting an interview through an interpreter. This module provides guidance on creating a written record documenting the testimony and events that occur during an interview, and explains effective note-taking techniques. Please refer to the other interviewing modules for additional guidance on conducting RAIO interviews.

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- Interviewing – Introduction to the Non-Adversarial Interview
- Interviewing – Note-Taking
- Interviewing – Working with an Interpreter
- Interviewing – Interviewing Survivors of Torture

2 The Importance of Proper Note-Taking

2.1 Notes Serve as a Record

The two main purposes of taking notes during an interview are to:

- Support the decision regarding the interviewee's eligibility for the immigration benefit, petition, protection determination, or other immigration-related request
- Enable a reviewer to reconstruct what transpired during an interview

It is critical that you take clear and legible notes. Officers in the RAIO Directorate conduct several different types of interviews. In all interviews, notes must reflect what transpired during the interview and support the decision. In many instances, there may be a delay between the interview and when a final determination is made in a case. You may have to refer back to your interview notes to substantiate your analysis. In addition, your notes will be reviewed by others, such as supervisors and headquarters staff.

> The importance of taking accurate notes that provide a full picture of the interview cannot be overstated. In most cases, the subsequent reviewers were not present during the interview and must rely on your notes to adjudicate the case. It is important to remember that each part of your analysis must be supported by evidence in the record, and that your notes will form the primary record of the interview.

2.2 Access to an Officer's Notes

The following people may have access to an Officer's interview notes:

USCIS Field Office staff

Refugee, Asylum, and International Operations (RAIO) Directorate: Other Officers within the RAIO Directorate review interview notes when conducting re-interviews, reviewing Requests for Review, adjudicating the case at a later date, or conducting quality assurance (QA) review. Supervisors also review the interview notes when reviewing the decision. Other staff, including field management, Quality Assurance/

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Trainers (QA/Ts), Fraud Detection and National Security (FDNS) Officers, and locally engaged staff (LES), may also review the notes in certain cases.

Field Operations: USCIS domestic Field Operations staff will also access and review interviewing Officer notes during subsequent adjudications, including adjustment of status and naturalization.

USCIS Headquarters (HQ) staff

RAIO HQ staff, including Officers who conduct training and QA review, Division Managers, and the RAIO Research Unit review interview notes. On occasion, the Office of the Chief Counsel (OCC) reviews cases, including interview notes. In addition, the Administrative Appeals Office (AAO) reviews appeals of certain petitions and applications.

Interviewees and representatives

The Freedom of Information Act (FOIA) provides access to all federal agency records that are not protected from release by exemptions.[1] An applicant or his or her attorney of record may request a review or a copy of the record of proceedings. This includes any written record of an interview you conduct. Although generally interview notes are not provided in response to a FOIA request, notes have occasionally been provided.

(For additional information regarding your responsibilities under FOIA/Privacy Act, please see RAIO Training Module, Overview of Alien Registration Files (A-Files) and Handling Records.)

Department of State (DOS)

Department of State (DOS) staff may have access to electronic files. This includes access to interview assessments and interview notes. For example, DOS staff may access I-604 adoption investigation interview notes, I-130 interview notes, I-407 notes, or notes pertaining to a refugee interview in the Worldwide Refugee Admissions Processing System (WRAPS) database. At times, staff from the Bureau of Population, Refugees, and Migration (PRM) may review interview notes if there is a particularly sensitive issue to resolve in a refugee case.

Courts and lawyers

If an asylum applicant is placed in immigration proceedings, a number of people may have access to the interview notes. Immigration Judges, part of the Executive Office for Immigration Review (EOIR) conduct immigration court proceedings. In these proceedings, Immigration and Customs Enforcement (ICE) trial attorneys represent the Department of Homeland Security (DHS). The ICE trial attorney reviews the notes, and

[1] 5 U.S.C. § 552.

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if he or she introduces the interview notes as evidence, all parties to the proceeding, including the Immigration Judge, will have access to the interview notes.

The Board of Immigration Appeals (BIA) is EOIR's appellate component and has jurisdiction over appeals of decisions by Immigration Judges. As part of their review process, BIA Board Members and staff may review interview notes contained in the record.

If the BIA ruling is appealed, attorneys representing the government in the U.S. Courts of Appeals may have access to interview notes.

In the event that an interviewee is at some point in time identified as a possible human rights violator, your interview notes may be accessed by attorneys of the ICE Human Rights Law Division (HRLD) and ICE Human Rights Violators and War Crimes Center (HRVWCC). These units are charged with investigation, litigation, and removal of human rights violators.

In rare circumstances, courts hearing cases unrelated to immigration benefits may have access to the interviewing officer's notes.

Other U.S. Government officials

Certain Government officials and contractors may have a need to examine information in connection with an asylum and/or refugee application, as well as a need to review information pertaining to certain asylum, refugee, credible fear, and reasonable fear applications, and as such, may have access to your notes.[2]

For example, in certain situations, interview notes may be shared with law enforcement personnel, or with DHS employees outside of USCIS.

3 Characteristics of Proper Interview Notes

3.1 Format

There is no standardized format for interview notes. While all notes must conform to certain requirements, many different formats are used by officers. As you become more familiar with interviewing and taking notes, you will find the format that works best for you. There are three examples of interview notes taken in different formats in the Other Materials section of this module. For the Asylum Division, Format Example #1 is strongly suggested.

Regardless of how you format your interview notes, you must maintain an accurate written record of information elicited during the interview. Although you are not always

[2] 8 C.F.R.§ 208.6.

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required to keep a verbatim record of the interview, you must ensure that the notes are representative of the interviewee's testimony.

3.1.1 Modified Q&A Format

Refugee officers are required to take notes in modified Q&A format. Asylum officers and officers in International Operations are encouraged to use this format. Notes taken in modified Q&A format contain both the question asked by the officer and the interviewee's response. In modified Q&A format, it is not necessary to write down every word spoken. Rather, you should capture what was discussed during the interview to the fullest extent possible without interfering with the flow of the interview. If you are able to record a verbatim record, you may do so.

For instance, rather than writing, "Have you ever applied for a visa to the United States?" you can write, "Visa to U.S.?" If the applicant responds: "I applied for a visa in Bangkok in March 2004, but the Consular Officer denied me. I applied again in New Delhi in September 2006, and I was granted the visa," the written notes could state: "Applied, Bangkok, 3/04, denied. Applied, New Delhi, 9/06, granted."

At the end of the interview, you should review your notes and correct any typographical errors, grammatical mistakes, or spelling errors that distort the meaning of what was said at the interview. If typing your notes, be mindful that the autocorrect and spell-check functions on your word processing program may have altered words that you did not intend to change.

3.1.2 Sworn Statements

You are usually not required to take verbatim notes. However, there may be certain instances in interviews when it is essential to capture every word. In such instances, Officers in the Asylum and International Operations Divisions should take sworn statements, and Refugee Officers should take notes in greater detail in the modified Q&A format.[3] (Note: do not confuse a sworn statement as a note-taking format with the Form G-646 Sworn Statement of Refugee Applying for Entry into the United States, which is sometimes referred to by the same name.)

Sworn statements are taken in Q&A format. However, in contrast to the modified Q&A format, sworn statements reflect a verbatim record of the specific questions asked, and the interviewee's answers. At the end of the interview, you must review the sworn statement with the interviewee and representative, if applicable, and have the interviewee initial each page and sign the final page to attest that the sworn statement is true and correct.

Circumstances Requiring Sworn Statements or Increased Detail in Note-Taking

[3] In general, refugee officers do not use sworn statements. However, refugee officers are required to follow the I-730 SOP when conducting I-730 (V92/93) interviews, which requires the use of sworn statements in the circumstances outlined above. For more information, please refer to the Division-specific training on I-730 interviews.

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Even if your Division does not typically use sworn statements, each Division has specific guidance on the requirement for extra detail when recording notes under certain circumstances. In addition, you must switch to a more detailed format of note-taking if any of the following circumstances arise during the interview:

- The interviewee admits, or there are serious reasons to believe, that he or she is or has been associated with an organization included on either the Foreign Terrorist Organizations List or the Terrorist Exclusion List (available at http://www.state.gov/s/ct/), or that he or she is or has been a member of any other terrorist organization.

- The interviewee admits, or there are serious reasons to believe, that he or she is, or has been, involved in terrorist activities.

- The interviewee admits, or there are serious reasons to believe, that he or she assisted or otherwise participated in the persecution of others on account of one of the five protected grounds in the refugee definition.

- The interviewee admits, or there are serious reasons to believe, that he or she assisted or otherwise participated in the commission of torture.

- There are serious reasons for considering the interviewee a threat to U.S. national security.

- The interviewee admits, or there are serious reasons to believe, that he or she committed or was convicted of a serious crime outside the U.S. and the file does not contain a record of the conviction.

- The interviewee admits, or there are serious reasons to believe, that he or she committed human rights abuses.

- When the officer believes it is appropriate to take notes in a more detailed format in his or her discretion.

While there are Division-specific guidelines on ways in which to take notes, all of these circumstances have in common: serious reasons to believe, or an admission by the interviewee, that he or she has committed acts that may render the interviewee ineligible for the benefit sought because he or she:

- Is inadmissible to the United States
- Is subject to a mandatory bar
- May be subject to a discretionary denial

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Please see the supplements at the end of the module for Division-specific guidance regarding note-taking. [RAD Supplement – Increased Detail in Note-Taking, ASM Supplement – Sworn Statements, IO Supplement- Sworn Statements]

3.2 Requirements for Proper Note-Taking

3.2.1 Notes Must Be Legible

As noted above, a number of persons may read your interview notes during the life cycle of a case. Accordingly, interview notes taken by hand must be legible so that a reviewer can easily read and understand what was written. There is no requirement to use a specific penmanship style for interview notes; however, printed handwritten text tends to be more legible than cursive text.

Writing too small is a common mistake that officers make when taking interview notes by hand. Make sure that your writing is clear and large enough to read. Taking notes on lined paper may help you prevent your handwriting from becoming too small.

The consequences of developing a record that is not legible are significant. For example, in the asylum context, Immigration Judges or ICE trial attorneys may simply disregard an officer's notes, if illegible. In the refugee context, an officer adjudicating a Request for Review (RFR) who is unable to read the interviewing officer's notes will often send the case back for a reinterview because he or she is unable to concur that the decision is supported by the record. An officer reviewing material support exemptions may have to request a reinterview if he or she is unable to read the notes taken at the time of interview.

If you write your notes by hand, you must evaluate your handwriting and adapt your writing style so that your notes are legible to others. Remember, the purpose of taking interview notes is to create a record. Notes are often scanned into an electronic version and reprinted, which decreases the quality of the image. Therefore, notes that are barely legible may become even harder to read. Remember, if your notes are not legible, you have, in effect, failed to create that record.

Officers who have access to a government-issued computer and printer should follow their Division's guidance as to whether interview notes should be typed or handwritten.

3.2.2 Notes Must Accurately Reflect the Questions You Ask and the Interviewee's Response

A reviewer should be able to reconstruct what occurred during the interview by reading the interview notes. The interview notes must support the officer's decision.

You may conduct multiple interviews in a day, and the facts of one case can blur with the facts of another. Also, circumstances may delay the writing of an assessment or completion of a worksheet, or require another officer to complete a case. Thus, relying on

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your memory of what happened in a particular interview is inappropriate. It is imperative that notes be detailed and clear.

It is very difficult to place an interviewee's answers in context if the questions you ask are not also recorded. What at first glance appears to be a discrepancy in the applicant's testimony is often the result of an ambiguously worded question. Recording your questions in the interview notes is helpful in assessing the reliability of the applicant's testimony.

Accurate interview notes are crucial for analyzing the internal consistency of an interviewee's testimony, as well as other concerns about credibility that may arise during the interview. It is essential to document any credibility issues that arise during the interview in your notes. [See Section 4.1.1 below on referencing notes during the interview.]

If you repeat a question, but change the wording of the question to help the applicant understand, your notes should reflect the change in wording. This will both reflect accurately what occurred during the interview and show your efforts to be understood.

Example

Officer	Interviewee
Duties in the military?	Was a cook.
What did you do as cook?	Cooked for Officers
Did you do anything else other than cook for Officers during your day?	No
Can you tell me about what types of things you do when you cook for Officers?	Just cook.
Do you purchase the ingredients, or wash dishes, or serve the food?	Just cook.
I have asked you many questions about your five years of service in the Iraqi military. So far, you have told me the only thing you did during the five years was cook for	I cooked for Officers, nothing else.

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officers, without providing me with any detail. I would think that someone who served in the military for five years would be able to tell me more details about what he or she did during that time than just cook for Officers. Could you explain why you cannot provide more detail?	

Example

Officer	Interviewee
Duties in military?	Cook.
(Repeat Q) or (Repeat Q 3X)	same answers

The first example above accurately reflects the officer's effort to elicit detailed testimony regarding the interviewee's duties in the military and the interviewee's unwillingness or inability to provide sufficient detail. These notes, along with other examples from the interview, may help support a negative credibility determination based on lack of material detail.

The second example from the same interview would not support a negative credibility determination. It appears as if the officer asked, "What were your duties in the military?" three times, without varying the question. Example #2 does not show that attempts were made to rephrase questions, or elicit more detail regarding the subject.

3.2.3 Notes Must Not Include the Officer's Opinions, Suppositions, or Personal Inferences

Your opinions, suppositions, or personal inferences must not be included in the interview notes. This should not be confused with subjective statements that the interviewee may make, which should be included in the notes.

You must ensure that your notes are an accurate and objective written record of the interview. For example, an exclamation point placed next to a portion of the interviewee's testimony would be inappropriate, as it might suggest bias.

3.2.4 Notes Must Include What the Interviewee Did Not Say, When Appropriate

It is sometimes important to include information in your notes other than the applicant's testimony. This includes noting questions that the applicant does not answer, and certain non-verbal communication that occurs during the interview. This helps put the interview

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notes in context. Any important observations an officer makes that are relevant to the decision should be recorded in the notes. These may include indications that the applicant is silent or non-responsive to a question; or engages in any other non-verbal actions, such as crying, that could affect the interview in any way. It is important to be as objective as possible when writing such notes. The purpose of including this information is to create a complete picture of the interview and allow reviewers to reconstruct what occurred during the interview. The observations included in your notes during the interview are also evidence with regard to the interviewee's claim, application, or petition. You may need to record non-verbal communication in your notes in situations like the ones described here.

Example

Officer	Interviewee
When was your home attacked?	[Applicant is crying]

Example

Officer	Interviewee
What is your middle son's name?	(silence)
Can you tell me your second son's name?	(long pause) John.

It is best to put such information in parentheses or brackets to set it apart from the rest of the notes.

Example

Officer	Interviewee
How long did you know your wife before you proposed?	(30 second pause) (glanced towards wife) Wife: We knew each other for seven months

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	App: Umm—seven months
(Instructed wife not to respond on husband's behalf.)	
Who was the best man at your wedding?	(looks to wife) (silence)
Did you have a best man at your wedding?	Yes
What was his name?	(looks to wife) (silence)

Any interpreter comments or questions directed at an Officer should also be recorded in your notes.

Examples

Officer	Interviewee
	(Interpreter indicated that a particular word could have two possible meanings in his language and requested that the Officer clarify the applicant's testimony)

Officer	Interviewee
	(Interpreter asked applicant follow-up questions several times)
(Reminded interpreter of her role during the interview)	

Without this information in the record, it would be difficult for a reviewer to determine that there were problems with the interpretation.

3.2.5 Notes Must Identify the Speaker if More than One Person Is Providing Testimony

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You should record in your notes the names of everyone present at the interview and the reasons for their presence at the interview, if necessary. Witnesses may provide testimony on behalf of the interviewee. The officer may make a statement he or she wants recorded in the notes. The principal applicant's family members may be interviewed. In addition, if there is a representative, he or she may make a statement at the end of the interview, or may ask the interviewee additional questions. In these situations, you should clearly identify in the notes who is speaking, and note, when it is required, that an oath was administered prior to taking testimony [see section 3.2.8 below].

3.2.6 Notes Must Include Certain Identifying Information on Each Page

You must include certain identifying information on each page of the interview notes, regardless of whether your notes are typed or handwritten. There is always a risk that the interview notes may be placed out of order, or even become separated from the file. For these reasons, it is important to record a page number as well as identifying information, such as an A-number, on each page of your notes. Refer to Division-specific guidance for further information.

[RAD Supplement - Requirements for Each Page of Interview Notes; ASM Supplement – Include Identifying Information on Each Page].

3.2.7 Notes Must Not Include Abbreviations that a Reviewer Will Not Understand

If you use any abbreviations in your notes, they should be few in number and should be clear enough that anyone who reviews the interview notes will easily understand what they mean. Shorthand should never be used. To avoid confusion, you may include a key for common abbreviations in your interview notes.

3.2.8 Record Administration of Oath and Use of Interpreter

The fact that the interview is being conducted under oath must be recorded. If you are taking notes in a sworn statement, or are taking down verbatim a question-and-answer statement, the exact wording of the oath should be included in your notes. If you are taking notes in a less formal modified Q&A format, your interview notes should simply reflect that the interviewee was placed under oath. In overseas refugee processing, you are not required to note that the interview is being conducted under oath in the written record; instead, you must check the appropriate boxes on the front page of the Refugee Application Assessment to indicate that the oath was administered, and whether the interviewee understands the interpreter or officer. You are also required to fill in the interviewee's native language and the language in which the interview was conducted.[4]

In asylum processing, if you are fluent in a language other than English, you must obtain certification before you are permitted to conduct interviews in that language. In overseas refugee processing, you are not required to obtain language certification, but you are

[4] Refugee Application Assessment SOP; Refugee Application Assessment.

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generally discouraged from conducting interviews in languages other than English. If an interview is conducted without the use of an interpreter, you must make a clear notation of the language you and the interviewee spoke during the interview. Please see the RAIO Training Module, Interviewing – Working with an Interpreter for Division-specific guidance on conducting an interview in a language other than English. [ASM Supplement - Oath and Interpreter]

3.2.9 Notes Must Indicate Instances When the Officer Confronts Interviewee with Adverse Information

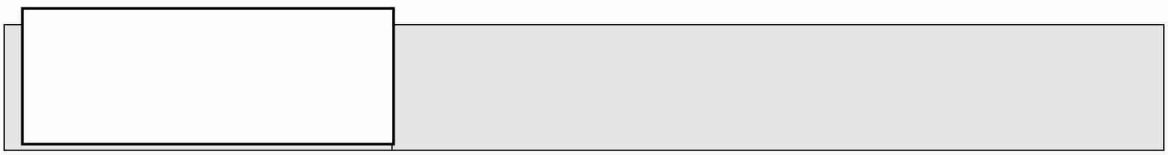
During the interview, the officer must provide the interviewee with an opportunity to explain any discrepancy or inconsistency that is relevant to the determination of eligibility. The interviewee may have a reasonable explanation for the discrepancy, or there may have been a misunderstanding between you and the interviewee. Therefore, it is critical that your interview notes clearly reflect your questions regarding the potentially adverse information, as well as the interviewee's responses. [RAD Supplement - Recording Credibility]

The example below involves an interview with a birth parent in an adoption case to determine whether the child meets the legal definition of an orphan:

Example

Officer	Interviewee
(b)(6)	

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(b)(6) 

3.2.10 Notes Must Substantiate the Analysis

Your interview notes substantiate your decision. You must record in your notes all of the information that you elicit during the interview regarding the interviewee's eligibility for a benefit, petition, or request. Your decision about the interviewee's eligibility must be supported by the record you create of the interview. As stated previously, the record includes your notes. Therefore, you must not include any information in the assessment or worksheet that is not reflected in your notes, or is not otherwise part of the record. [ASM Supplement – Important Information to Record]

3.2.11 Notes May Refer to Any Document Deficiencies in the File

Upon thorough review of the case file, you may identify missing documents or other such deficiencies and make reference to this in your notes. The interview notes should also reflect that you asked the interviewee for the missing documentation and that the interviewee was afforded a reasonable period of time to submit that documentation.[5]

For example, upon reviewing and preparing for an I-730 (V92/V93) interview, you may notice that the file does not contain any documentary evidence to support the identity of the beneficiary. Before the interview, you may make a notation in your notes and on the corresponding V92/V93 worksheet.[6] During the interview, the notation should remind you to ask about the deficiency. You must clearly distinguish your pre-interview notations from your discussion of the issue with the interviewee.

4 Effective Note-Taking Methods and Techniques

4.1 Develop Non-Intrusive Note-Taking Techniques

It is important to develop a note-taking technique that allows you to create an accurate record while maintaining rapport with the interviewee. Your technique should not distract the interviewee from providing responses to your questions.

If you focus more on note-taking than on the interviewee, it may appear as if you are not listening, which can be very disconcerting to the interviewee. Officers must develop

[5] USCIS, BASIC Participant Guide, Module 208A Part 1, "Interviewing Techniques," January 2010, EPO C, (7), pg. 10.

[6] Note for International Operations Officers: IO Officers should use the V92/V93 Interview Worksheets when conducting interviews of all I-730 beneficiaries. The worksheets are intended to guide these interviews. Please refer to the I-730 Standard Operating Procedure.

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skills to accurately take notes while maintaining a non-adversarial approach and rapport with the interviewee. Note-taking must never interfere with conducting the interview.

If an interpreter is used, you can use the time when the interpreter is speaking to write notes. When interviewing in English, it may be best to write your notes while the interviewee is responding to your questions so that you can write as much of what the interviewee says as possible and ensure that your notes are as accurate as possible. When writing notes in this manner, you will need to be careful to maintain rapport with the interviewee so that the interviewee can tell that you are paying attention to him or her.

Note-taking may be intimidating to the interviewee; he or she may wonder what you are going to do with your notes and if government officials from his or her country will have access to your notes. During your introduction, you should explain that you will be taking notes during the interview, as well as the purpose of taking notes and any applicable confidentiality provisions.

Whether handwriting or typing notes, you must become comfortable with taking notes in a manner that does not interrupt the flow of the interview. For example, if typing notes, the computer monitor should be positioned at an angle that will help maintain eye contact with the interviewee.

At the conclusion of the interview, typed notes should be saved immediately, printed, and placed in the file as soon as possible. As noted earlier, you should review your notes and correct any errors that might distort the meaning of what was said at the interview, taking into account that autocorrect and spell-check functions on your word processing program may have altered words.

Note: You may only use Government-issued computers (including laptops), VPN tokens, USB flash drives, and printers to type and print notes.[7]

4.1.1 Officers May Refer to the Notes at Any Time During the Interview

You may refer back to your notes during the course of the interview. For example, you might do this to clarify contradictory information provided during another part of the interview. This is a recommended practice. If you find that you cannot take notes fast enough, it may help if you read a section of the notes you have already taken, and confirm with the interviewee that what you wrote is correct. This will allow you extra time to catch up with your notes when the interpreter is repeating the information back to the interviewee in his or her language. This practice will also enable you to make sure that you have recorded the interviewee's testimony correctly. In addition, prior to concluding the interview, it is helpful to review your notes to ensure that you have captured all information necessary to complete your adjudication.

[7] DHS Sensitive Systems Policy Directive 4300A,Version 11.0, January 14, 2015, Section 4.8.3.b.

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5 CONCLUSION

Officers in the RAIO Directorate will conduct interviews for a variety of reasons. Creating a comprehensive and accurate written record of an interview is essential. You must be familiar with RAIO's requirements for notes, along with effective note-taking techniques. Finally, you must understand what information must be elicited and recorded in your interview notes, along with appropriate procedures for taking notes in a more detailed format, such as Q&A or a sworn statement.

You should apply the principles, techniques, and guidelines on note-taking set forth in this module to all interviews conducted within Refugee, Asylum and International Operations.

6 SUMMARY

6.1 The Importance of Proper Note-Taking

Notes Serve as a Record

- Your notes must support the decision regarding the interviewee's eligibility for the immigration benefit, petition, protection determination, or other immigration-related request.
- Your notes must enable the reviewer to reconstruct what transpired during an interview

Access to Your Notes

- Your notes could potentially be reviewed by many people, both within USCIS and the RAIO Directorate, and outside.

6.2 Characteristics of Proper Interview Notes

Format

- Modified Q&A

Refugee Officers are required to take notes in modified Q&A format. Asylum Officers and International Operations Officers are encouraged to take notes in modified Q&A format.

- Sworn Statements

Switch to a more detailed format of note-taking (see Division-specific materials) if any of the following circumstances arise during the interview:

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- The interviewee admits, or there are serious reasons to believe, that he or she is associated with a terrorist organization, or that he or she is or has been a member of any terrorist organization.
- The interviewee admits, or there are serious reasons to believe, that he or she is, or has been, involved in terrorist activities.
- The interviewee admits, or there are serious reasons to believe, that he or she assisted or otherwise participated in the persecution of others on account of one of the five protected grounds in the refugee definition.
- The interviewee admits, or there are serious reasons to believe, that he or she assisted or otherwise participated in the commission of torture.
- There are serious reasons for considering the interviewee a threat to U.S. national security.
- The interviewee admits, or there are serious reasons to believe, that he or she committed or was convicted of a serious crime outside the U.S., and the file does not contain a record of the conviction.
- The interviewee admits, or there are other serious reasons to believe, that he or she committed human rights abuses.
- When the Officer believes it is appropriate to take notes in a more detailed format, in his or her discretion.

Requirements for Proper Note-Taking

The interview record must:

- Be legible
- Accurately reflect the questions you ask and the interviewee's response
- Not include your opinions, suppositions, or personal inferences
- Include what the interviewee did not say, when appropriate
- Identify the speaker if more than one person is providing testimony
- Include certain identification information on each page
- Not include abbreviations that a reviewer will not understand
- Indicate that the oath was administered and whether an interpreter was used
- Indicate instances in which the interviewee is confronted with adverse information
- Substantiate your analysis
- Refer to any document deficiencies in the file, if material
- Adhere to any Division specific guidance on note-taking.

6.3 Effective Note-Taking Methods and Techniques

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Develop Non-intrusive Note-Taking Techniques

- When an interpreter is present, you can use the time when the interpreter is speaking to write your notes.
- Keep in mind that note-taking may be intimidating to the interviewee. Explain the purpose of note-taking and applicable rules of confidentiality to reassure the interviewee.
- Whether handwriting or typing notes during the interview, ensure that your manner of note-taking does not interfere with the flow of the interview.

Refer to your notes at any time during the interview

Refer back to your notes during the interview and at the conclusion of the interview to ensure completeness and accuracy.

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PRACTICAL EXERCISES

There are no Practical Exercises for this module.

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OTHER MATERIALS

The following sample interview excerpts are the same interview presented in different formats. These samples of note-taking formats are based on a refugee interview. RAIO interviews cover a variety of adjudications. These various interview types, as well as the issues presented within any given interview, will affect the level of detail, topics and extent of follow-up required.

FORMAT Example #1

This simple table format allows you to tab quickly (if typing) between your questions and the interviewee's responses. In addition, this format provides a clear delineation between what you say and what the interviewee says. Use of this format is strongly suggested for Asylum Officers.

> Note: These samples demonstrate the acceptable use of acronyms. The abbreviations (BM/Burma, MO/mother, and SI/sister) are from the Worldwide Refugee Admissions Processing System (WRAPS), and are familiar to RAD staff.

MY-000000
04/25/11
RO Smith
SOE, Christina

Officer	Interviewee
Why left BM?	I was about to be arrested by BM military.
Why?	They accused me of helping my MO escape from their hand.
How you know?	My auntie informed me, "The BM military were looking for you."
Where looked for you?	My house.
Auntie live there?	Yes.
Where were you?	I was at boarding hostel with my SI.
Why want to arrest MO?	BM military accused her of defying their order for refusing to send car for BM porter.
Did you help MO escape?	Only because she was sick, she had to be transferred to another hospital. I helped my MO transfer to another hospital. That's why they accused me of helping her escape from their hand.
Boarding hostel and your house in same town?	Yes. Falam.
I know you were not there, but what did auntie tell you about the soldiers' visit?	My auntie came to me and said "BM military came to our house looking for you b/c you helped your MO escape from their hand. They left message that if you come back you should report to the military."

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Did auntie agree to do anything?	No.
Did auntie tell them where you were?	No. She said I was traveling.
Did auntie say she would tell you to report yourself to the military?	Yes.
What you do?	I decided to run away.
When?	Same day auntie told me, March 15, 2007.
Activities between March 15 and April 17 when you crossed border?	I went to Kalaymyo where I was hiding for 2 wks. And about 2 wks in Rangoon.
Travel with anyone?	My MO and my SI.
MO and SI stay with you whole time?	Yes.
Time of day when auntie told you?	Evening.
Where?	At boarding hostel.
Time fled?	About 3 hours from the inform. I got from my auntie.
Why thought you would be arrested?	b/c they already see us as who is against their order.
Can you go back to BM?	No.
What would happen?	Military would arrest and imprison me.
Reason?	1st, since they are already see us as people against their order, they see us as enemy. 2nd, b/c we run away from BM.
Problem with running away from BM?	They think all of us who run away are enemy.
Why?	They are gov't. We run away from them. So they think we are against what they do.
Are you against gov't?	It's not that I'm against them.
Work in BM?	Just before I left I was a teacher at boarding school. And in Rangoon I was an assistant accountant.
Ever involved in any protests/political activities?	No.

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FORMAT Example #2

MY-000000
4/25/11
RO Smith
SOE, Christina

Why left Burma? I was about to be arrested by BM military.
Why? They accused me of helping my MO escape from their hands.
How do you know? My auntie informed me, "The BM military were looking for you."
Where looked for you? My house.
Auntie live there? Yes.
Where were you? I was at boarding hostel with my SI.
Why want to arrest MO? BM military accused her of defying their order for refusing to send car for BM porter.
Did you help MO escape? Only because she was sick, she had to be transferred to another hospital. I helped my MO transfer to another hospital. That's why they accused me of helping her escape from their hand.
Boarding Hostel and your home in same town? Yes, Falam.
I know you were not there, but what did auntie tell you about the soldiers' visit? My auntie came to me and said, "BM military came to our house looking for you b/c you helped your MO escape from their hand. They left message that if you come back you should report to the military."
Did auntie agree to do anything? No.
Did auntie tell them where you were? No. She said I was traveling.
Did auntie say she would tell you to report yourself to the military? Yes.
What you do? I decided to run away.
When? The same day.
Activities between March 15 and April 17 when you crossed border? I went to Kalaymo where I was hiding for 2 wks. And about 2 wks in Rangoon.
Travel with anyone? My MO and my SI.
MO and SI stay with you whole time? Yes.
Time of day when auntie told you? Evening.
Where? Boarding hostel.
Time fled? About 3 hours from the inform. I got from my auntie.
Why thought you would be arrested? b/c they already see us as who is against the government.
Can you go back to BM? No.
What would happen? Military would arrest and imprison me.
Reason? 1st, since they already see us as people against their order, they see us as enemy. 2nd, b/c we run away from BM.
Problem with running away from BM? They think all of us who run away are enemy.
Why? They are gov't. We run away from them. So they think we are against what they do.
Are you against gov't? It's not that I am against them.
Work in BM? Just before I left I was a teacher at boarding school. And in Rangoon I was an assistant accountant.

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Ever involved in any protests /political activities? No.

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FORMAT Example #3

MY-000000
4/25/11
RO Smith
SOE, Christina

Q. Why left Burma?
A. I was about to be arrested by BM military.
Q. Why?
A. They accused me of helping my MO escape from their hands.
Q. How do you know?
A. My auntie informed me, "The BM military were looking for you."
Q. Where looked for you?
A. My house.
Q. Auntie live there?
A. Yes.
Q. Where were you?
A. I was at boarding hostel with my SI.
Q. Why want to arrest MO?
A. BM military accused her of defying their order for refusing to send car for BM porter.
Q. Did you help MO escape?
A. Only because she was sick, she had to be transferred to another hospital. I helped my MO transfer to another hospital. That's why they accused me of helping her escape from their hand.
Q. Boarding Hostel and your home in same town?
A. Yes, Falam.
Q. I know you were not there, but what did auntie tell you about the soldiers' visit?
A. My auntie came to me and said, "BM military came to our house looking for you b/c you helped your MO escape from their hand. They left message that if you come back you should report to the military."
Q. Did auntie agree to do anything?
A. No.
Q. Did auntie tell them where you were?
A. No. She said I was traveling.
Q. Did auntie say she would tell you to report yourself to the military?
A. Yes.
Q. What you do?
A. I decided to run away.
Q. When?
A. The same day.
Q. Activities between March 15 and April 17 when you crossed border?
A. I went to Kalaymo where I was hiding for 2 wks. And about 2 wks in Rangoon.
Q. Travel with anyone?
A. My MO and my SI.
Q. MO and SI stay with you whole time?
A. Yes.

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Q. Time of day when auntie told you?
A. Evening.
Q. Where?
A. Boarding hostel.
Q. Time fled?
A. About 3 hours from the inform. I got from my auntie.
Q. Why thought you would be arrested?
A. b/c they already see us as who is against the government.
Q. Can you go back to BM?
A. No.
Q. What would happen?
A. Military would arrest and imprison me.
Q. Reason?
A. 1st, since they already see us as people against their order, they see us as enemy. 2nd, b/c we run away from BM.
Q. Problem with running away from BM?
A. They think all of us who run away are enemy.
Q. Why?
A. They are gov't. We run away from them. So they think we are against what they do.
Q. Are you against gov't?
A. It's not that I am against them.
Q. Work in BM?
A. Just before I left I was a teacher at boarding school. And in Rangoon I was an assistant accountant.
Q. Ever involved in any protests /political activities?
A. No.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

RAD Supplement – Requirements for Each Page of Interview Notes

Refugee Officers should leave a margin at the top and bottom of each page of interview notes of about one inch (2.54 cm), for both handwritten and typed notes. This is to accommodate the use of A4-sized paper in most overseas locations. The Refugee Application Assessment and the notes of the interview are scanned into the Worldwide Refugee Application Processing System (WRAPS). If the interviewer takes notes on A4-sized paper without paying attention to margins, a person located in the United States who is printing the notes from the scanned document will not be able to read the portion of the notes that is outside the margin size of 8 ½ × 11- inch paper.

Each page of notes must identify the RSC case number and the page number.

RAD Supplement – Recording Credibility

Notes Must Indicate Instances When the Interviewee Was Confronted with Adverse Information

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The Refugee Application Assessment has a box the Refugee Officer must check to confirm that the interviewee was confronted during the interview with any potentially adverse information. However, checking the box does not take the place of recording in the interview notes all instances in which the interviewee was confronted with any adverse information.

Please see RAIO Training Module Introduction to the Non-Adversarial Interview for more information about confronting an interviewee about potentially adverse information.

RAD Supplement – Increased Detail in Note-Taking

When you are interviewing overseas for the Refugee Affairs Division, you must use a more detailed form to record your notes when the interviewee indicates that he or she has taken part in any activities listed in Section 3.1.2 Circumstances Requiring Sworn Statements or Increased Detail in Note-Taking. It is not necessary to record verbatim everything that is said; however, your notes must contain an accurate representation of every question asked and every response given using the wording and vocabulary used by the interviewee (most often through the interpreter). Once you have gone into the more detailed method of recording your interview notes, you must remain in that mode until the interview is completed. The Refugee Affairs Division does not use the sworn-statement format used by the Asylum Division because RAD interviews outside the U.S., and it is very unlikely that a refugee would appear in a U.S. Court.

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

ASM Supplement – Oath And Interpreter

Notes Must Include a Notation that Oath Was Administered and Indicate When Interpreter Was Present

- Include a Notation that the Oath was Administered to the Interpreter Monitor

  On some occasions during an asylum interview, a professional interpreter will be used to monitor (via telephone) the interpretation by the applicant's interpreter. As the interpreter monitor is not present at the interview to sign an oath form, the notes must indicate that the oath was administered to the interpreter monitor.

- Include Both Interpretations Where There is a Dispute in Interpretation Between the Applicant's Interpreter and the Interpreter Monitor

  When using a professional interpreter to monitor the interpretation of the interpreter provided by the applicant, there may be instances in which a dispute in interpretation between the interpreter monitor and the applicant's interpreter arise. If there is such a dispute, the asylum officer must give the applicant's interpreter an opportunity to provide a reasonable explanation for the discrepancy. If the applicant's interpreter is unable to do so and the interpreted testimony will be used in the assessment, the asylum officer must use the interpreter monitor's

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interpretation of the applicant's testimony in the assessment; however, the interview notes must preserve both the interpretation given by the applicant's interpreter and the interpreter monitor, clearly indicating which interpretation was provided by the monitor and which was provided by the applicant's interpreter.

Officers should consult the Affirmative Asylum Procedures Manual for note-taking procedures relating to the Use of Monitoring Services in Asylum Interviews.[8]

ASM Supplement – Include Identifying Information on Each Page

Each page should have the following information clearly written or typed in the top right-hand corner:

- A Number, Case Number or NIV Receipt number, depending on the type of case being interviewed
- Date of the interview
- Page number in the following format: 1 of 13, 3 of 15, etc.
- Officer's Name and ID number, if applicable
- Name of Applicant

ASM Supplement –Important Information to Record

Elements that Must be Included in the Notes

It is imperative that the interview notes be sufficiently detailed and clear. Furthermore, accurate interview notes are crucial for probing into the internal consistency of an applicant's claim.

Interview notes should include the following:

- Factors that address the elements of the refugee definition
- Factors that affect credibility, including the applicant's opportunity to respond to any perceived inconsistencies

[8] Affirmative Asylum Procedures Manual, Section II.J.4.b.v.

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- Factors that relate to mandatory bars and discretionary denials
- Indications that the Asylum Officer pursued all relevant lines of questioning, followed-up on relevant points, and provided the applicant an opportunity to add additional information before the conclusion of the interview
- The applicant's (and any dependent's) current immigration status
- Factors that relate to the one-year filing deadline

ASM Supplement – Sworn Statements[9]

Within the Asylum Division, when you have reason to believe that the interviewee has taken part in certain activities listed in Section 3.1.2 Sworn Statements, you must switch your note-taking format to that of a sworn statement. Sworn statements are of greater evidentiary value in a subsequent proceeding. They include having the interviewee initial and sign the statement. Note that not all testimony recorded in a Q&A format is considered a sworn statement. Notes taken in full Q&A format do not constitute a sworn statement unless and until they are reviewed and signed, page by page, by the interviewee.

Format for Sworn Statements

Officers should use the full Q&A format when preparing a sworn statement. The interview notes should be as close as possible to a verbatim record of everything said at the interview, and must provide an accurate and detailed record of the specific questions asked and the interviewee's answers. This format leaves less room for misinterpretation or for claims that important information given to an Officer has been omitted or misunderstood.

When you find you have to begin taking notes as a sworn statement, you draw a diagonal line through the remaining page of notes at the point at which you stop taking notes to signify the change of format to a sworn statement. The sworn statement should begin on a separate page from the earlier interview notes and should continue through to the conclusion of the interview.

Each page should include the same information that must be contained in regular interview notes: A-number or other identifying number, date, page number, name of applicant, name and number of Officer.

[9] Information about sworn statements is also available in the Affirmative Asylum Procedures Manual.

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Content of Sworn Statements

The sworn statement should generally be developed in chronological and logical sequence with respect to all pertinent details. You should avoid pursuing lines of questioning that are not relevant to the interviewee's eligibility for asylum. It is important that the Officer use the particular phraseology of the interviewee and his or her exact words, to the extent possible, when recording the Q&A statement. This will avoid any implication that the statement was not made freely and voluntarily, or that it does not represent a true record of the exchange between the Officer and the interviewee.

Proper Execution of Sworn Statements

At the conclusion of the interview, the Officer should review the sworn statement with the interviewee and representative, if applicable, and make any corrections requested, and the corrections should be initialed by both the Officer and the interviewee. Each page of the Q&A statement should be signed or initialed by the person being interviewed to demonstrate that he or she has reviewed the statement, understood the contents of the statement, and consented to any and all changes to the statement. All pages of the statement should be signed in the presence of the Officer taking the statement. Please see Affirmative Asylum Procedures Manual, Appendix 63 for sample sworn statement.

Both the Officer and the interviewee should print and sign the last page of the Q&A sworn statement and attest that the interviewee acted of his or her own free will and acknowledged the statement to be true and correct. As with the procedure for regular interview notes, the Officer should draw a diagonal line from the end of the testimony to the bottom of the page to prevent any substitutions or alterations to the statement.

Once all these steps are completed, the statement taken by the Officer in Q&A format is considered to be a sworn statement.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

IO Supplement – Sworn Statements

Within the International Operations Division, when you have reason to believe that the interviewee has taken part in certain activities listed in Section 3.1.2 Sworn Statements, you must switch your note-taking format to that of a sworn statement.

Note: In addition to the list in section 3.1.2, you must also take a sworn statement in certain I-730 (V9293) cases:

If in the normal course of the interview, the beneficiary's responses to the Officer's questions regarding the beneficiary's own eligibility for derivative asylum or refugee status cause the Officer to have significant concerns about possible fraud having occurred in the adjudication of the principal's case. Often, a sworn statement by the Petitioner or Beneficiary is required to support a Consular Return based on document fraud; and/or

If in the normal course of the interview, the beneficiary admits that he or she is not the person listed as the beneficiary of the I-730 or that the required relationship does not exist.

Please see IO Field Guidance: Overseas Processing of Asylee and Refugee

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Derivatives: Form I-730 Beneficiaries (Visas 92/93).

Sworn statements are of greater evidentiary value in a subsequent proceeding. They include having the interviewee initial and sign the statement. Note that not all testimony recorded in a Q&A format is considered a sworn statement. Notes taken in full Q&A format do not constitute a sworn statement unless and until they are reviewed and signed, page by page, by the interviewee.

Format for Sworn Statements

Officers should use the full Q&A format when preparing a sworn statement. The interview notes do not have to verbatim but should be as close as possible to a verbatim record of everything said at the interview, and must provide an accurate and detailed record of the specific questions asked and the interviewee's answers. This format leaves less room for misinterpretation or for claims that important information given to an Officer has been omitted or misunderstood.

When you find you have to begin taking notes as a sworn statement, you draw a diagonal line through the remaining page of notes at the point at which you stop taking notes to signify the change of format to a sworn statement. The sworn statement should begin on a separate page from the earlier interview notes and should continue through to the conclusion of the interview.

Each page should include the same information that must be contained in regular interview notes: A-number or other identifying number, date, page number, name of applicant, name and number of Officer.

Content of Sworn Statements

The sworn statement should generally be developed in chronological and logical sequence with respect to all pertinent details. You should avoid pursuing lines of questioning that are not relevant to the interviewee's eligibility for the benefit. It is important that the Officer use the particular phraseology of the interviewee and his or her exact words, to the extent possible, when recording the Q&A statement. This will avoid any implication that the statement was not made freely and voluntarily, or that it does not represent a true record of the exchange between the Officer and the interviewee.

Proper Execution of Sworn Statements

At the conclusion of the interview, the Officer should review the sworn statement with the interviewee and representative, if applicable, and make any corrections requested, and the corrections should be initialed by both the Officer and the interviewee. Each page of the Q&A statement should be signed or initialed by the person being interviewed to demonstrate that he or she has reviewed the statement, understood the contents of the statement, and consented to any and all changes to the statement. All pages of the statement should be signed in the presence of the

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Officer taking the statement.

Both the Officer and the interviewee should print and sign the last page of the Q&A sworn statement and attest that the interviewee acted of his or her own free will and acknowledged the statement to be true and correct. As with the procedure for regular interview notes, the Officer should draw a diagonal line from the end of the testimony to the bottom of the page to prevent any substitutions or alterations to the statement.

Once all these steps are completed, the statement taken by the Officer in Q&A format is considered to be a sworn statement.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

INTERVIEWING SURVIVORS OF TORTURE AND OTHER SEVERE TRAUMA

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

INTERVIEWING SURVIVORS OF TORTURE AND OTHER SEVERE TRAUMA

Training Module

MODULE DESCRIPTION

This lesson provides background information on torture, including what is meant by the term "torture," the motives and methods of torturers, and the recovery of survivors. The lesson focuses primarily on the effects of torture and severe trauma and how these effects can affect the interview process. Through discussion and practical exercises, you will gain exposure to effective interviewing techniques and the effects of secondary trauma.

Note: This lesson plan was originally developed in 1995 for use in training new Asylum Officers, and has changed little since that time. It is based on the experiences of the authors in their work with refugees, and was reviewed by several experts in the field of working with survivors of torture and other severe trauma, and who have continued to conduct training for RAIO, including Dr. Allan Keller, Dr. Antonio Martinez, Dr. Andrea Northwood, and Dr. Pamela Elizabeth. In addition, two individuals who work with survivors, one a survivor herself, gave invaluable input into the development of this lesson plan; they requested that their names not be included, however. The mock interview practical exercise that is used during the training is based on mock interview exercises developed by the clinical staff of the Bellevue-NYU Program for Survivors of Torture. Our thanks also to the staff at the Center for Victims of Torture in Minneapolis for their support of RAIO training efforts, and to all who have contributed to these training materials, to the day-long training that is conducted for new officers at RAIO, and to trainings on this topic that are conducted in the RAIO field offices.

TERMINAL PERFORMANCE OBJECTIVE(S)

Given the field situation of interviewing an applicant for asylum (and witnesses, if any), the asylum officer will be able to elicit in a non-adversarial manner all relevant information necessary to adjudicate the asylum or refugee request and to issue documents initiating removal proceedings.

ENABLING PERFORMANCE OBJECTIVES

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1. Explain how different factors can impede communication during an interview with a survivor of torture.
2. Identify symptoms of Post-Traumatic Stress Disorder or other trauma-related conditions.
3. Explain how interview techniques may be used to help elicit testimony from a survivor of torture or other serious trauma.
4. Recognize secondary trauma as it may arise in RAIO adjudications.

INSTRUCTIONAL METHODS

- Lecture/Presentation
- Discussion
- Practical exercise

METHOD(S) OF EVALUATION

Written test

REQUIRED READING

1.
2.

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. Aron, Adrianne; Corne, Shawn; Fursland, Anthea; Zelwer, Barbara. Committee for Health Rights in Central America (CHRICA). "The Gender-Specific Terror of El Salvador and Guatemala; Post-traumatic Stress Disorder in Central American Refugee Women," Women's Studies International Forum (Vol. 14, Nos. 1/2, 1991), p. 37-47.
2. Basoglu, Metin, M.D., PhD. "Prevention of Torture and Care of Survivors - an Integrated Approach," JAMA (Vol. 270, No. 5, August 1993), p. 606-608; 611.

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3. Center for Victims of Torture. Post-Traumatic Stress Disorder (Minneapolis, MN: December 1996), 1 p.

4. Eisenman, David P., M.D. Identifying Survivors of Traumatic Human Rights Abuses. Lecture (Hagerstown, MD: Public Health Service Annual Conference, 4 November 1996), p. 5-7.

5. Martín-Baró, Ignacio. Writings for a Liberation Psychology, (Cambridge, MA: Harvard University Press, 1994), p.110-115.

6. Martinez, Antonio, Ph.D.; Fabri, Mary, Psy.D. "The Dilemma of Revictimization: Survivors of Torture Giving Testimony," ?(p. 3-4).

7. Physicians for Human Rights. Examining Asylum Seekers.

8. Randall, Glenn R. and Ellen L. Lutz. "Approach to the Patient," Serving Survivors of Torture (Washington, DC: American Association for the Advancement of Science, 1991), p. 58-68.

9. Rovner, Sandy. "The Torture of the Refugee, Why Judges Don't Believe," Washington Post (Washington, DC: 2 September 1996).

10. Salimovich, Sofia, Elizabeth Lira and Eugenia Weinstein. "Victims of Fear," Fear at the Edge: State Terror and Resistance in Latin America (Berkeley, CA: University of California Press, 1992), p. 77-79.

11. Swiss, Shana, M.D. and Joan E. Giller, MA, MB, MRCOG, "Rape as a Crime of War - A Medical Perspective," JAMA (Vol. 270, No. 5, 4 August 1993), p. 612-615.

12. United Nations. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (June 1987). (Included in lesson, International Human Rights Law)

13. Weschler, Lawrence. A Miracle, A Universe: Settling Accounts with Torturers (Penguin, 1990).

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR11	Knowledge of policies and procedures for processing claims from survivors of torture (3)
ITK5	Knowledge of strategies and techniques for communicating with survivors of torture and other severe trauma (4)
IR2	Skill in interacting with individuals who have suffered trauma (e.g., considerate, non-confrontational, empathetic (4)
SMC2	Skill in recognizing and managing secondary trauma (4)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
1/31/19	Footer	Removed "draft" designation	Karrie Gurbacki

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

Officers in the RAIO Directorate conduct interviews primarily to determine eligibility for immigration benefits or requests; to corroborate information provided by applicants, petitioners, and beneficiaries; and/or to establish whether a person understands the consequences of his or her actions.

The modules of the RAIO Directorate – Officer Training Course and the division-specific training courses constitute primary field guidance for all officers who conduct interviews for the RAIO Directorate. The USCIS Adjudicator's Field Manual (AFM) also provides guidance for officers when conducting interviews, particularly for officers in the International Operations Division. There may be some instances where the guidance in the AFM conflicts with guidance provided by the RAIO Directorate. If this is the case, you should follow the RAIO guidance. Further guidance regarding interviews for specific applications will be discussed during division-specific trainings.

In this module, the term "interviewee" is used to refer to an individual who is interviewed by an officer in the RAIO Directorate for an official purpose.

1 INTRODUCTION

This lesson covers the definition of torture, the motives and methods of torturers, and the recovery of survivors. The lesson also discusses the effects of torture and severe trauma and how these effects can affect the interview process. The lesson offers interviewing techniques and discusses how you may be affected by secondary traumatization.

2 OVERVIEW

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2.1 The Global Situation

Torture victims are male, female, adults, children. The practice of torturing individuals is not limited to a particular political ideology; it is an abuse of power that covers the entire range of the political spectrum. Torture of prisoners is routine in many countries. Torture may occur while individuals are serving sentences for having committed crimes, are incarcerated pending judicial hearings, are detained without being formally charged, or are in the informal custody of another person (or persons) who have control over them.[1]

2.2 Common Experiences of Torture Survivors

In many cases, the experiences of torture survivors are similar in that usually the victims have been abruptly taken away from their familiar "world," held in captivity where they were tortured, then escaped or were released. The specter of the tortured individual instills terror in the community. The victim is stigmatized, often ostracized.

In addition, torture survivors have all experienced a loss of control. Usually when faced with danger, an individual can fight or run; torture victims cannot do either of these and have no control over their lives and fate. This loss of control and helplessness often remain with the survivor long after the experience, as does the sense of estrangement and isolation.

2.3 Treatment Centers

Because of the widespread use of torture and the problems encountered by survivors of torture, treatment centers for survivors have been increasing around the world in recent years, and the mental health field is learning more about the psychology of survivors of torture. There are several centers in the United States; a few of them are the "Center for Victims of Torture" in Minneapolis, the "Bellevue/NYU Program for Survivors of Torture" in New York, "The Marjorie Kovler Center for the Treatment of Survivors of Torture" in Chicago, and "Survivors International" in San Francisco.

2.4 Sensitivity to Torture Survivors

RAIO officers are not expected to be psychologists, but you can be sensitive to persons who have experienced torture and understand how the experience of torture can potentially inhibit applicants from fully expressing their claim.

3 DEFINITIONS

Article 1, United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 27 June 1987, states:

[1] Note that the UN definition of torture, cited below, limits the definition to that which is performed by or with the consent of a public official.

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> "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[2]

(Adopted and opened for signature, ratification, and accession by General Assembly resolution 39/46 of 10 December 1984; entry into force on 26 June 1987; ratified by the US Senate in 1990; US became a party in 1994.)

The World Medical Association, in its "Declaration of Tokyo," (1975), defines torture in the following manner:

> "For the purpose of this declaration, torture is defined as the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason."

A more descriptive definition of torture is offered by Elena O. Nightingale, M.D., Ph.D, in The Problem of Torture and the Response of the Health Professional," Health Services for the Treatment of Torture and Trauma Survivors, J. Gruschow & K. Hannibal, Eds., (Washington, DC: American Association for the Advancement of Science, 1990), p. 8-9:

> "Torture is the deliberate infliction of pain by one person on another--that is the unique feature of torture. It is very different from the trauma that is suffered from a natural event, such as an earthquake or flood... [3]

> "There are at least four characteristics of torture that seem to be quite consistent. First, at least two persons are involved--a perpetrator and a victim, and often, though not always, they are face-to-face. Second, the torturer has complete physical control over the victim. This is important because the helplessness of the victim[s] remains with [them] long after the torture episode is over. Third, pain and suffering are an integral part of torture, but the main purpose is not really pain and suffering but rather humiliation and breaking of the will. Therefore, there are means of torture that do not involve physical pain and suffering, including sensory deprivation, continuous noise, light, hunger, cold, and so on. Finally, torture is a purposeful, systematic activity. In addition to breaking the will of the victim, the intent is to obtain information or a confession, to punish the victim, or

[2] This definition of torture is for purposes of the Convention. Since only states are parties to the Convention, the focus is on severe harm inflicted by officials or individuals acting in official capacity.

[3] See also the article by Lira Salimovich noted above in the Additional Resources section of this lesson.

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to intimidate the victim and others. That is, the purpose is not only to destroy the person who is being tortured, but to have that person be a lesson to others so they will not do whatever the government that sanctions torture feels is not in its interests. And that's a very important component. The torture we are speaking about is the systematic government-sanctioned use of torture that is for political purposes."

4 MOTIVES OF TORTURERS

"[T]he body [is] abused to gain access to the mind."[4]

Torturers attempt to destroy the political opposition in order to gain or maintain power. Although the immediate goal of torturers in some cases is to extract information, obtain a confession, or to destroy the person as a participant in or leader of a group that the torturers oppose, in most cases the goal is to give an example for others; it is a means of destroying the emotional, spiritual, social, and political well-being of a group or community.

Torturers attempt to:

- destroy the personality of the victim
- weaken the individual, the family, the community, and/or the society
- create a climate of fear or apathy

Torture leaves the survivor as well as the family and community of the survivor feeling afraid, vulnerable, humiliated, intimidated, and isolated. Distrust among community members may also develop, diminishing supportive community ties.

5 FORMS OF TORTURE

5.1 Overview

Against all professional ethics, medical personnel and psychologists have sometimes assisted in torture, devising methods of torture that maximize the long-term effects of torture and do not leave physical signs. Medical personnel are often present when victims are being tortured to assure that the victims do not die. Their presence makes them culpable of crimes against humanity; it does not legitimate the acts being performed.

Though some methods of torture leave no physical marks, they may have devastating physical, neurological, and psychological effects, disabling the person for life.

[4] Amnesty International. "Treatment of Survivors of Torture," John Denford. A Glimpse of Hell - Reports of Torture Worldwide (London: 1996), p. 155.

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5.2 Methods

Torture can take many forms including:

- Psychological torture (e.g., threatening to harm or kill the victim or relatives of the victim; mock executions; witnessing or hearing the torture of others; forced nudity); most victims are subjected to some form of psychological torture
- Sensory deprivation (e.g., depriving the victim of food, sleep, light, and protection from the elements) or sensory overload (e.g. loud noises, glaring lights)
- Sexual violence (men, women, and children are all victims of sexual violence)[5]
- Electric shocks to all parts of the body (most frequently to the genitalia)
- Beatings / Physical assault (the majority of torture victims are subjected to beatings)
- Burning the victim
- Forcing the body into contorted positions or forcibly stretching it beyond normal capacity
- Non-therapeutic administration of drugs

The most common forms of torture are beatings and psychological torture.

6 The Effects of Torture and Other Forms of Severe Trauma

6.1 Overview

Torture can have lasting physical and psychological effects. The most debilitating long-term effects of torture, however, tend to be psychological rather than physical. Symptoms affect a high percentage of survivors. This is also true of other forms of traumatic abuse, such as witnessing the assault, mutilation, or murder of others; experiencing the burning or bombing of communities; forced separation from loved ones; and other exposure to horrific sights or events.

6.2 Physical Effects

There are many possible physical effects of torture. Physical effects include (but are not limited to) the following:

- Musculoskeletal pain
- Loss of use of body mobility (due to nerve damage, muscle damage, etc.)

[5] Sexual violence other than rape can also have lasting psychological effects.

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- Loss of complete use of certain body functioning
- Loss of vision
- Hearing loss
- Headaches
- Pregnancy
- Sexually transmitted diseases
- Scars (most forms of torture, however, do not leave lasting scars)

6.3 Psychological Effects

The psychological effects (and corresponding symptoms) of torture and other forms of severe trauma can include the following.[6]

Emotional

- blunted affect, or restricted affect (psychic numbing, showing no emotion or inappropriate emotion)
- depression
- panic disorders / panic attacks
- phobias
- anxiety
- suspiciousness; distrust
- detachment
- feelings of isolation / alienation
- feelings of guilt, shame, humiliation, worthlessness, or helplessness
- loss of confidence
- lack of interest in previously enjoyable activities
- anger (at those who perpetrated the trauma or those who were exempted)
- thoughts of death or suicide

Psychosomatic

- headaches
- pains for which there is no medical explanation

[6] The following list is one of several ways of categorizing the effects of trauma on survivors.

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- nervousness
- insomnia or hypersomnia
- gastrointestinal complaints; diarrhea
- fainting
- sweating
- weakness; fatigue
- loss of appetite; weight loss or gain
- nightmares
- flashbacks
- reliving the physical pain of what happened

Behavioral

- substance abuse
- aggressive behavior
- irritability
- withdrawal
- sexual dysfunction

Mental

- confusion
- loss of concentration
- loss of memory
- mental dullness
- attention blocking
- recurring thoughts of the traumatic event(s)

It is important to note that although most psychological effects of torture are universal, some may vary somewhat across cultures, and some may be culture specific. For example, to a Tibetan Buddhist, body fluids are considered to have a spiritual energy and are not replenishable.[7] A form of torture which has been used against Tibetans is drawing blood and discarding it in an inappropriate manner. This can have severe psychological effects on the individual; his or her energy and spirit is irreversibly depleted.

[7] Eisenman, Dr. David. Associate Medical Director, Bellevue/NYU Program for Survivors of Torture. Interview, 17 December 1997.

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Many of these psychological effects (as well as certain physical effects) can lead to a deterioration of the family structure and community ties. Social functioning of the individual is often impaired; this affects parenting skills, the ability to interact as a family member or part of a community, and the ability to hold a job and support oneself and one's family. The socioeconomic functioning of the entire community may suffer, as the effects of torture and other forms of severe trauma have a far-reaching impact on the community as well as the individual.

6.4 Post-Traumatic Stress Disorder (PTSD)

Although reactions to torture and other forms of severe trauma differ among individuals and cultures, the most common conditions are depression and "Post-Traumatic Stress Disorder" (PTSD). According to "The Dilemma of Revictimization: Survivors of Torture Giving Testimony" by Antonio Martinez, Ph.D., and Mary Fabri, Psy.D.,

> "The dynamics of the disorder are best understood by the interaction between two factors: the painful intrusive memories of the trauma, and the defenses used to ward off these memories. The questioning during investigations, hearings, etc. is an extremely emotional event for the survivor. The story is rarely recounted without an actual sensory reliving of the experience (physical pain, tastes, sounds, and smells). It is not simply a recollection of events." (emphasis added)

6.5 Other Factors

There are other issues which may compound the effects of torture and other forms of severe trauma on survivors.

1. The survivor may be overwhelmed by grief or bereavement due to separation from and/or loss of loved ones that has occurred as a secondary consequence of his or her torture.

2. The survivor may experience an overwhelming sense of guilt, especially if he or she survived while others continued to be tortured or were killed after the survivor was freed, or if their torture was due to their association with the survivor. Survivors may feel that they were somehow to blame for their own torture or for the torture of others.

3. Survivors who have resettled in a country other than their own face difficulties adjusting to unfamiliar customs and a new language. They may also feel that they do not fit into the new environment. Their established position in their family and society may have been greatly altered by their resettlement, and they may feel a loss of purpose in their lives, especially if it is difficult for them to get and keep a job, and if economic survival is problematic for them.

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4. Uncertain immigration status in the country of refuge can be very stressful for a survivor and can add greatly to his or her feeling of instability and uncertainty. The survivor may fear being deported and returned to the country where the abuse occurred. Waiting for a decision on a request for asylum or refugee status can be very stressful; being denied can have profound negative effect on a survivor.

5. The survivor may have a physical disability as a result of the torture / trauma that he or she experienced. He or she may also, as noted above, be especially susceptible to illness.

7 TRIGGERS

As noted above, torture and other severe trauma can leave lasting psychological effects on survivors. Often, symptoms appear after a latency period and do not usually subside merely with the passing of time. A survivor may appear to be adjusting fairly well, only to have symptoms triggered without warning.

There are many possible triggers: an event may trigger painful memories or an individual may remind the survivor of the torturer. Even sounds and smells can trigger symptoms.

The implications for the interview are great. Recollections of the traumatic events, such as are required in the interview, can be expected to trigger symptoms. If the survivor was interrogated, the mere experience of the interview can remind the survivor of being interrogated where his or her life was dependent upon the whim of the interrogator. Uniformed security guards, a particular manner of questioning or particular questions, certain objects in the interview room or office environment, etc., can trigger memories of the trauma and cause "flashbacks" for the survivor. A survivor may be very fearful of symptoms being triggered during the interview.

8 RECOVERY FOR SURVIVORS OF TORTURE AND OTHER FORMS OF SEVERE TRAUMA

8.1 Overview

Individuals heal in a variety of ways and at different rates. Individuals never fully recover from an experience of torture; rather, it is a question of healing as much as possible from the pain and trying to regain stability and normalcy in life.

8.2 Factors Affecting Recovery

It is difficult to predict how a particular individual might heal from a torture experience. Psychologists have found, however, that the situations listed below may help in recovery.

Certain situations can help in recovery

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- the survivor was an activist and was abused due to his or her activism
  - Such individuals tend to recover more easily than someone who was tortured merely to serve as an example or to get at others in the community.
- the survivor holds strong religious beliefs
- the survivor is able to seek legal redress for the past abuse (for himself or herself, or to help others)
- the survivor has access to rehabilitation
- the survivor is in a supportive environment where he or she can be productive
  - Being in an environment that is permanently safe where there is no threat of future harm is important in recovery. Having regularized his or her immigration status in the country of resettlement can add greatly to the feelings of safety and security of a survivor.
  - Being able to continue with normal family, social, and work-related functions without being viewed by others as having been somehow diminished by the past experiences can help in recovery.
  - In some instances, peers/the community may view the survivor as having been strong to have survived.
  - Having someone who is easily accessible with whom the survivor feels comfortable talking about the experience can also help in recovery.
  - The survivor has family with him or her in exile and/or is assured that his or her family is safe.
- certain cultural values can have a positive impact[8]
  - A survivor's belief in "karma" may help him or her to release feelings of revenge or anger toward the perpetrator: suffering is part of one's fate that one must accept; the perpetrator cannot escape his or her own fate because of his or her actions so justice will eventually prevail.

Certain situations can have a negative impact on recovery

- certain cultural values can adversely affect recovery

[8] Cultural factors can also have a negative impact; see the section immediately below.

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  - For example, women who have been sexually abused in cultures which view such women as responsible for their own abuse have an especially difficult time accepting what happened to them and overcoming their shame.

- culture differences or "culture shock" – difficulty living in a culture that is different from one's own – can have a negative impact on recovery

- lack of economic resources can also have a negative impact on recovery

- bias and discrimination (such as anti-immigrant bias) can have an adverse impact on the recovery of those survivors who resettle in a country other than their own, or in an area that is culturally different from their own

- uncertain future can negatively impact recovery

  - An uncertain future can negatively affect a survivor's rate of recovery. Survivors who are under the surveillance of their torturers may not know if or when they may be forced to again undergo torture. Even if survivors have resettled in another country and are out of immediate harm's way, their future may still be uncertain if they have no legal status in the country of resettlement or if their immigration status is pending.

9 How Trauma-Related Conditions Can Interfere with the Interview Process

9.1 Overview

If an applicant is suffering from Post-Traumatic Stress Disorder or other trauma-related conditions, your abillity to gather information on which to base a decision may be affected.[9]

An interview - even a job interview - can be a stressful experience for any individual. An interview as crucial to an individual's future as a refugee or asylum interview, by its very nature, is very stress-producing. Symptoms of trauma-related conditions are often exacerbated in stressful situations. Therefore, the interview can be extremely difficult for a survivor of torture or other severe trauma.

Undergoing questioning about the events that occurred can be very emotional for the survivor. The survivor can actually relive sensory experiences, such as sounds, smells, and physical pain. Various factors such as contact with persons in uniform (e.g. immigration inspectors, border patrol agents) or being questioned in a particular manner may trigger symptoms of Post-Traumatic Stress Disorder because this can remind the survivor of the individuals who harmed him or her. The survivor may feel robbed of

[9] See also Section 7 Triggers.

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power, vulnerable, and defenseless, as he or she felt during the torture experience. The survivor may react in a variety of ways during the interview.

9.2 Effect on Interview Process

Often, the symptoms of PTSD that may be triggered in the survivor during the interview are experienced internally and he or she will not discuss this with those present. These symptoms, however will have an impact on the survivor's ability to portray his or her claim.

Survivor may avoid discussing events

A survivor may use avoidance as a means of coping. He or she may do whatever necessary to avoid thinking about the events due to the humiliation and the emotional pain evoked. He or she may not wish to discuss the details of the experience with others, may not sleep to avoid having nightmares, or may isolate himself or herself from others to avoid talking about past events. A survivor may also avoid contact with others from his or her country who may remind him or her of the experience. A survivor also may avoid such contact because they are fearful that "spies" associated in some way with their abusers may have "infiltrated" their community. (This is not an unrealistic fear, as there have been cases in which government agents from countries have developed ties to communities in resettlement countries in order to report information back to their governments on the activities of certain individuals.)

A torture survivor may be more willing to discuss the physical symptoms resulting from the experience(s) than the psychological symptoms.

Survivor may have difficulty remembering events

A survivor may have suffered brain damage as a result of abuse such as blows to the head and other forms of trauma. This may lead to cognitive problems and an inability to remember certain things.

Additionally, a survivor may have an emotional remembrance of what happened but may not remember the details. He or she may experience intense fears and anticipation of going through the experience but may not be able to remember what it was that happened. This may be due to:

- defensive techniques to avoid reliving the events, which include
  - denial that events occurred
  - minimizing the events
  - blocking memory of the events

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  - dissociation (temporarily forgetting that the event occurred; this may be manifested by blank looks or stares, as well as losing track of questions or forgetting what one was about to say)

- overstimulation of the brain during the occurrence of the traumatic events so that the brain did not store all of the information

- confusion or distortion of memory due to anxiety (e.g., mixing up names and/or dates)

Survivor may respond in unpredictable ways

- He or she may lose composure. The question and answer format of the interview conducted by a stranger may remind the survivor of being interrogated and questioned for the "truth," and then punished for telling the truth or for lying. The survivor may see the interview as determining whether he or she will live or die. Even waiting to be interviewed may remind the survivor of waiting to be taken to be tortured.

- A torture survivor may manifest a wide variety of emotions when recounting past events. He or she may laugh at what appears to be inappropriate moments or may cry hysterically. The survivor may remember the details of the event(s) but be emotionally detached and recount events as if merely reciting a memorized story without any emotion at all.

- A torture survivor may avoid answering questions or may change the subject because he or she may be afraid of having an emotional outburst or a dissociation experience.

- A torture survivor may have difficulty following or tracking your questions or difficulty answering questions coherently. This can be due to severe concentration difficulties as a result of the memory problems listed previously.

- A torture survivor may avoid eye contact. Eye contact may be difficult for a torture survivor due to the experience of having been constantly watched while being detained and undergoing torture.

- A torture survivor may be unresponsive to questions you pose, even if he or she knows the answers and could speak extensively on the topic.

Survivor may distrust the interviewing officer and may therefore avoid revealing certain information

A torture survivor may have a distrust of others, particularly persons in positions of power or authority (e.g., asylum or refugee officers). (Survivors may also distrust even family members and friends.) The survivor may be fearful of what you will do with the

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information obtained at the interview, and so may not fully disclose to the officer the experiences he or she had.

Often, a distrust of others helped survivors escape further abuse and survive in their countries. Therefore, survivors may attempt to protect themselves by distrusting others in other situations as well.

The effects listed above can also have an impact on interactions other than at the interview.[10] Individuals who work with survivors in a counseling capacity are often not able to elicit all that happened to the survivor during the first few counseling sessions. In addition, a survivor may not have explained everything about the claim to his or her representative prior to the interview.

10 Interviewing Survivors of Torture and Other Severe Trauma

10.1 Interview Techniques

At every interview there is a potential for retraumatizing an applicant who may be a survivor of torture or other severe trauma. You must be aware of the effects of trauma on certain applicants and use this awareness in formulating interview strategies. You may have to modify your interview techniques to adapt to certain situations. Unfortunately, you will not always know who is a survivor and who is not a survivor. As noted above, some applicants will not fully disclose all information about their past to you. You should therefore treat each applicant as a possible survivor and attempt to be as sensitive as possible during all interviews.

Interview techniques that may be helpful include the following.

Treat the applicant with humanity

The manner in which you approach the applicant and the interview can greatly affect the way in which the applicant will respond and be able to express his or her claim at the interview.

You should attempt to build rapport as soon as he or she meet the applicant and should find some way to connect with the applicant about issues not related to the torture experience. Setting the tone at the beginning of the interview can assist you in eliciting the necessary information throughout the interview and can assist the applicant in relating his or her claim.

Try to help the person feel safe and in control

[10] Consider the implications for the interview.

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- You should recognize the power differential that exists between the applicant and yourself and take care not to exploit it.

- You should explain the purpose and process of the interview, including the fact that you will be taking notes and the reason for taking notes. In this way, a survivor will know what he or she can expect during the interview, thus relieving some of the anxiety of the unknown.

- If the claim involves sexual abuse and you are not the same sex as the applicant, you can give the applicant an opportunity to be interviewed by an officer of the same sex, if one is available.[11]

- You should start with easy topics in order to establish rapport.

- You can ask open-ended questions that give the applicant some control over the information he or she must give.

- You can acknowledge how difficult it may be for the applicant to answer certain questions; he or she can give the applicant permission to let you know when something is too difficult.

- You can acknowledge that an event may have been particularly traumatic for an applicant (e.g., "That must have been very difficult for you.")

- You can elicit sufficient detail to establish credibility and gain an understanding of the basis of the claim without probing too deeply into all the details of a painful experience.

- Questions such as "Was your life different after your experience?..... ....How?" can also give you further insight into the nature of the event as well as an understanding of the long-term effects of the experience on the applicant.

- If the applicant does not speak English, and it is necessary for you to discuss issues with the interpreter, attorney or legal representative, dependents on the applicant's file, or anyone else at the interview, you should have translated to the applicant what he or she is discussing. This keeps the applicant informed of what is going on and can diminish the loss of control the applicant may feel.[12]

- You should respect a survivor's need to protect himself or herself during the interview and should respect the survivor's need to have a sense of control during the interview.

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[11] Sometimes just giving the applicant the opportunity to be interviewed by someone else can relieve some of the applicant's stress about the interview as it indicates that the asylum officer is sensitive to and understanding of the applicant's situation.

[12] For additional information, see RAIO Training module, Interviewing – Working with an Interpreter.

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This is a major issue for survivors, as their control has been completely stripped from them in many situations; thus lack of control can be very unnerving.

Be thorough but sensitive

- You should explain to the applicant the process and roles of the individuals at the interview to reduce the feeling of anxiety.
- You can ask broader, open-ended questions in the beginning of the interview to give the applicant a feeling of control, then go back for details.
- You should not speak in a loud voice, should avoid changes in mood or attitude toward the applicant, should avoid reacting with disbelief, and should avoid being confrontational or argumentative with the applicant.
  - It is important to remember that there is a range of behavior that a survivor may exhibit when confronted with discrepancies in his or her story. Some survivors may be able to explain in a rational manner the discrepancy, while others may become more confused. This may have very little to do with an attempt to fabricate a claim.
- You should approach the interview as a means of gathering information rather than an interrogation, and should convey that message to the applicant by your manner.
- You should allow the applicant to ask questions or ask for clarification; the officer should rephrase questions that appear to be confusing or not understood by the applicant.

Remember the purpose of the interview

- You should be knowledgeable in human rights conditions in the applicant's country so that he or she can ask relevant questions and avoid unnecessary questions.
- You should give the applicant time to recompose himself or herself if necessary during the interview, and to relate the account of his or her experiences in a manner that is the most comfortable for the applicant.
  - At times after asking a question, it may be appropriate to allow the applicant several seconds of silence to organize his or her thoughts and determine how to answer a particularly difficult question. Although you may feel a need to fill in the silence by asking additional questions, it may be more beneficial to allow for some silence at particular times during interview.[13]

[13] For additional information, see RAIO Training module, Eliciting Testimony.

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  - If an interview with a survivor of torture is particularly long or difficult, you can give the applicant an opportunity to take a break, get water, etc.

- You can emphasize mutual goals you and the applicant have.

- You should respond non-defensively if an applicant exhibits suspiciousness or distrust.

It is important to keep in mind that you will not be aware of what the applicant is going through during the interview and that you cannot change the manner in which the applicant presents himself or herself. Rather, you must be aware of how you are conducting the interview, and adapt your own behavior whenever necessary to be able to effectively elicit the applicant's claim.

10.2 Documentation

Documentation of a survivor's experience from his or her country is usually not available; persons who practice torture usually do not leave written accounts of their actions, and physicians and psychologists who might provide treatment and/or documentation may themselves be harmed if caught.[14] In addition, many in the medical profession may not be trained in recognizing the signs of torture. Furthermore, a survivor may be afraid to go to a doctor if a doctor was present during and involved in the torture. Although survivors are often not able to seek medical or psychological attention, some are able to obtain care and documentation of their abuse.

Documentation of physical symptoms and conditions, however, may not necessarily be able to verify the cause of the symptoms or conditions.

11 Effects on Individuals who are Close to or who Work with Survivors

11.1 Secondary Trauma

The term "secondary trauma" (also called "vicarious trauma") is used to refer to the psychological and physiological effects experienced by individuals who work with or are close to trauma survivors. Symptoms of secondary trauma mimic the symptoms of PTSD. Secondary trauma is a normal reaction and is experienced in varying degrees by most individuals who are in constant contact with survivors of trauma.

11.2 Family Members of Survivors

Secondary trauma may affect family members of the survivor as well as individuals who were closely associated with the survivor, such as a friend or colleague who escaped

[14] See the articles by Adrianne Aron and Sandy Rovner, noted in the Additional Resources section of this module. See also the sample letters from medical personnel referred to in the Additional Resources section of this module.

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being tortured. (This is important to note when interviewing an applicant who is related to or closely associated with someone who was a victim of torture or other severe trauma.)

11.3 Care-Givers and Others

Secondary trauma can affect individuals who work intensely or frequently with survivors, including service providers such as doctors, nurses, social workers, and mental health care providers.

Although asylum and refugee officers do not have the same in-depth contact with torture survivors that certain service providers have, you may still be affected by the stress from continually interviewing applicants who have undergone hardships and may be survivors of torture or other forms of trauma. You must recognize how this stress may be affecting them, and should address problems that may arise as a result.

11.4 Interactions with Others

Secondary trauma can have an effect on an your interactions with others and your work performance, decreasing objectivity, tolerance, patience, and the ability to listen dispassionately to others. You may overreact or react with disbelief and sarcasm to stories of torture or other forms of abuse and may develop a decreased sense of personal accomplishment.

11.5 Prevention

There are various ways you can prevent or treat secondary trauma, including getting regular physical exercise, adequate sleep, and proper nutrition. Taking breaks and being assigned to different types of tasks can also help. It is also important to have a supportive environment of family and friends with whom to discuss feelings. In addition, a service provider who is suffering from secondary trauma can share his or her experiences with co-workers who are likely to understand what he or she is going through.

12 SUMMARY

Torture is practiced in many countries. It affects persons of all ages, including children.

Motive of Torturers

- To give an example to others
- A means of destroying the emotional, spiritual, social, and political well-being of a group or community
- Torturers attempt to:
  - destroy the personality of the victim

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- weaken the individual, the family, the community, and/or the society

Forms of Torture

Torturers use a variety of methods of torture that leave long-lasting psychological damage but that do not usually leave lasting physical evidence.

- Psychological torture
- Sensory deprivation / Sensory overload
- Sexual violence
- Electric shocks
- Beatings
- Burns
- Forcing the body into contorted positions or forcibly stretching it beyond normal capacity
- Non-therapeutic administration of drugs

Effects of Torture and Other Trauma

Symptoms affect a high percentage of survivors. Symptoms exhibited by applicants suffering from trauma-related conditions may be physical or psychological and include:

- Emotional
- Psychosomatic
- Behavioral
- Mental

Such symptoms can affect the asylum officer's ability to elicit necessary information.

Post-Traumatic Stress Disorder (PTSD) and depression are the most common long-term reactions to torture and other forms of severe trauma.

Often, symptoms appear after a latency period and they do not usually subside merely with time. Symptoms may be "triggered" without warning at any time. The rate of recovery for survivors varies from individual to individual and a variety of factors can influence the rate of recovery. However, survivors never fully recover from a torture experience.

An applicant suffering from PTSD or other trauma-related condition may

- avoid discussing events
- have difficulty remembering events

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- respond in unpredictable ways
- avoid revealing certain information

Interviewing Survivors of Torture

Asylum officers need to be aware of the possible symptoms of trauma-related conditions and elicit information in the most effective and sensitive way possible.

- Treat the applicant with humanity
- Try to help the applicant feel safe / in control
- Be thorough but sensitive
- Remember the purpose of the interview

Effects on Individuals who are Close to or Who Work with Survivors

Individuals who work with trauma survivors, as well as family members and others who are close to trauma survivors may experience secondary trauma, the symptoms of which are similar to those of PTSD.

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PRACTICAL EXERCISES

Materials for Practical Exercises will be handed out at the training.

Practical Exercise # 1

- Title:
- Student Materials:

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OTHER MATERIALS

There are no Other Materials for this module.
Any additional materials will be handed out at the training.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

There are no IO Supplements

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

RAD Supplement

Module Section Subheading

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

There are no IO Supplements

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

ASM Supplement

Module Section Subheading

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

There are no IO Supplements

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

IO Supplement

Module Section Subheading

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

INTERVIEWING – WORKING WITH AN INTERPRETER

TRAINING MODULE

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RAIO Directorate – Officer Training / *RAIO Combined Training Course*

INTERVIEWING – WORKING WITH AN INTERPRETER

Training Module

MODULE DESCRIPTION

This module describes the role and responsibilities of an interpreter, and how to communicate effectively through the use of an interpreter.

TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing in the field, you will recognize when an interpreter is necessary, and will work with an interpreter effectively to communicate with an interviewee.

ENABLING PERFORMANCE OBJECTIVES

1. Explain the role and responsibilities of the interpreter in the interview.
2. Identify signs of misinterpretation during the interview.
3. Explain techniques for corrective action when you encounter misinterpretation problems.
4. Explain ways to facilitate proper interpretation during the interview.
5. Explain strategies for effective communication through an interpreter.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Practical Exercises

METHOD(S) OF EVALUATION

- Written exam

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- Practical exercise exam

REQUIRED READING

None

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

Collopy, Dree K, "Lost In Translation: Why Professional Interpreters are Critical to the Fairness of Asylum Interviews," *Immigration Law Today* 27, no. 3, May/June 2008, pp.12-22, http://www.ailadownloads.org/ilt/2008/May-June08ILTFullText.pdf, accessed 25 November 2015.

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

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CRITICAL TASKS

Task/ Skill #	Task Description
ITK8	Knowledge of policies, procedures, and guidelines for working with an interpreter (4)
ITS9	Skill in interviewing through an interpreter (4)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
12/12/2012	Entire Lesson Plan	Lesson Plan published	RAIO Training
11/25/2015	Throughout document	Corrected links and minor typos	RAIO Training
04/11/2017	RAD Supplement	Issued new RAD Supplement	RAD
09/17/2018	Throughout document	Fixed formatting	RAIO Training
08/22/2019	ASM Supplement	Issued new ASM Supplement	ASM

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

Officers in the RAIO Directorate conduct interviews primarily to determine eligibility for immigration benefits or requests; to corroborate information provided by applicants, petitioners, and beneficiaries; and/or to establish whether a person understands the consequences of his or her actions.

The modules of the RAIO Directorate – Officer Training Course and the division-specific training courses constitute primary field guidance for all officers who conduct interviews for the RAIO Directorate. The USCIS Adjudicator's Field Manual (AFM) also provides guidance for officers when conducting interviews, particularly for officers in the International Operations Division. There may be some instances where the guidance in the AFM conflicts with guidance provided by the RAIO Directorate. If this is the case, you should follow the RAIO guidance. Further guidance regarding interviews for specific applications will be discussed during division-specific trainings.

In this module, the term "interviewee" is used to refer to an individual who is interviewed by an officer in the RAIO Directorate for an official purpose.

1 INTRODUCTION

This module is part of a series of interviewing modules that discuss various topics including the basic principles and components of conducting a non-adversarial interview, how to elicit information through various question types and techniques, and the proper procedures for taking notes. This module provides information on procedures governing the use of interpreters, the role of interpreters in the RAIO context, factors that may affect the integrity of interpretation, and how to facilitate communication through an interpreter. The ability to communicate with an interviewee through an interpreter is one of the many skills you must develop as an officer. Please refer to the other interviewing modules for additional guidance on conducting RAIO interviews.

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- Interviewing – Introduction to the Non-Adversarial Interview
- Interviewing – Note-Taking
- Interviewing – Eliciting Testimony
- Interviewing – Interviewing Survivors of Torture

As an officer in the RAIO Directorate, you will conduct different types of non-adversarial interviews in the course of your duties.

Although some interviewees you encounter will speak English well enough to proceed with the interview in English, many interviewees will need the assistance of an interpreter in order to communicate during the interview. Accurate interpretation is crucial in these interviews.

The main goal in conducting an interview is to elicit testimony from the interviewee so that you are able to determine eligibility for the benefit sought, or for some other purpose as noted above. The interpreters you encounter may be professionally trained interpreters, but in many cases, they will be friends or family members who have not had formal training to be an interpreter and may not have interpreted previously. Regardless of the interpreter's level of experience and/or training, it is your responsibility to ensure that everyone present understands the procedures for facilitating interpretation during the interview and that the interpretation contributes to the primary goal of effectively eliciting relevant information during the interview.[1]

Very often the terms "interpret" and "translate" are used interchangeably; however, for the purpose of this module it is important to understand the distinction between these two processes. The main difference between interpret and translate is the medium: "interpret" involves oral communication; "translate" involves written text.

Interpreting is essentially the art of orally conveying information from one language to another. The interpreter listens to a speaker in one language, grasps the content of what is being said, and then restates in another language what was said, using wording that is as close as possible to the original statement while still maintaining the meaning of what was said.

In this module, the terms "interpretation," "interpret," and "interpreter" refer to oral communication. Interpreters utilized in the RAIO Directorate usually provide only interpretation; on occasion, however, they may be asked to translate written

[1] For additional information on the interview process, see RAIO Training module, *Interviewing: Introduction to the Non-Adversarial Interview.*

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documents from another language into English and vice versa.

2 IDENTIFYING THE NEED FOR AN INTERPRETER

2.1 Language Ability of the Interviewee

The individuals you interview will have varying degrees of English language proficiency. When the interviewee cannot speak English well enough to fully understand you or to express himself or herself, you will need to conduct the interview utilizing an interpreter. The interpreter must be proficient in both English and the interviewee's native language, or another language in which the interviewee is fluent. [ASM Supplement – 1]

Some interviewees can speak English well enough to be interviewed in English without utilizing an interpreter. Nonetheless, many will need an interpreter during the interview to fully comprehend the information conveyed and questions asked and to provide testimony. Even an interviewee who is competent in English may feel more comfortable being interviewed in his or her native language. There may be times when it appears that the interviewee speaks English and should proceed with the interview in English; however, in almost all cases, it is in the applicant's best interest to conduct the interview in the language he or she can most fully express himself or herself.

2.2 Interpreters Utilized for RAIO Interviews

The U.S. Government provides interpreters for some but not all RAIO interviews where the interviewees are not proficient in English. These interpreters are professional interpreters or USCIS staff members who are fluent in the interviewee's language. At USCIS offices overseas, USCIS employees, including Locally Engaged Staff (LES), serve as interpreters due to local security protocols or the unavailability of competent interpreters. Each division has specific procedures providing guidance on who can serve as an interpreter. [RAD Supplement - 1, ASM Supplement -2, IO Supplement – 1].

For certain USCIS interviews conducted overseas, Resettlement Support Centers (RSC's), under contract with the Department of State (DOS), and on occasion the United Nations High Commissioner for Refugees (UNHCR), provide interpreters. [RAD Supplement - 1].

USCIS does not provide interpreters for non-English speaking interviewees at affirmative asylum interviews. Accordingly, interviewees are required to bring their own interpreter to the interview. In addition, during affirmative asylum interviews, the Asylum Division utilizes professional interpreter monitors (via telephone). Their function is not to interpret, but to monitor the quality of the interpretation provided by the interviewee's interpreter to ensure that the interpretation is accurate, complete, adequate, and neutral.[2]

[2] For additional information on Asylum Division procedures governing the use of interpreter monitors, see Affirmative Asylum Procedures Manual Section II.J.4(b) and Memorandum from Joseph E. Langlois, Chief, USCIS

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The Asylum Division does, however, provide professional interpreters (via telephone) during credible fear and reasonable fear interviews.

2.3 Conducting an Interview if you are Fluent in the Interviewee's Language

Ideally, the services of a disinterested person should be employed as an interpreter.[3] However, in some circumstances, if you are fluent in a language that the interviewee speaks, you may conduct the interview in that language without utilizing an interpreter. If you conduct an interview in the interviewee's language without an interpreter, you do not have to be sworn in but you should note in the record the language in which you conducted the interview.

If there are others present at the interview who do not speak the interviewee's language (e.g., an attorney or family member), it is important that the other parties understand everything that occurs while they are present in the interview. Even though you may speak the interviewee's language, using an interpreter may be the best way to assure that all present understand what takes place during the interview. Each division has procedures on when an officer can conduct an interview in a language other than English. Within the Asylum Division, this can only be done if your language ability has been certified by the Department of State. Refer to your division's procedures for specific guidance. [RAD Supplement – 2, ASM Supplement – 3, IO Supplement – 2].

2.4 Verifying the Identity of the Interpreter

At the onset of most interviews, you will request identification from the interpreter. Each RAIO division has specific procedures regarding verifying the identity of the interpreter and the documentation that is needed. Because the interpreters used by the Refugee Affairs Division are usually hired by the UNHCR or the RSCs, officers interviewing during RAD circuit rides are not required to check the identity documents of the interpreters. Officers in the Asylum and International Operations divisions should make a copy of the identification document(s) provided by the interpreter to retain as part of the record. [RAD Supplement – 3, ASM Supplement – 4, IO Supplement – 3].

3 ROLE OF THE INTERPRETER

3.1 Interpreter's Role is Crucial

In an interview requiring an interpreter, the role of the interpreter is crucial. Misinterpretations can impede your ability to elicit accurate information and therefore can lead to incorrect determinations of eligibility or dissemination of incorrect

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Asylum Division, to Asylum Office Directors, et al., *Award of Interpreter Services Contracts and Guidance on Use of Interpreter Services*, (HQRAIO 140/12) (23 May 2011).

[3] USCIS Adjudicator's Field Manual, Section 15.7 "Use of Interpreters" (Rev. March 5, 2010).

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information. Interpretation during the interview should be a collaborative effort between you and the interpreter to ensure that the interpretation is accurate.

Due to the inherent complexities of interpretation and communicating in a second language, the interpreter may not be able to restate information word for word.[4] The interpreter is, in many ways, a "filter" through which information is passed. It is your responsibility to ensure that the interpreter understands and performs his or her role, which is to interpret as close as possible the meaning of the words and concepts being communicated.

If, at any point during the interview, there are indications that the interpreter is not able to interpret effectively, you should work with the interpreter to evaluate whether he or she is capable of continuing and take appropriate action as described below.

3.2 Advising the Interpreter of His or Her Role

It is important to explain the roles of all parties present, including the interpreter, at the beginning of the interview to mitigate any confusion and to manage expectations. When the interpreter, interviewee, and attorney or witness(es), if applicable, understand their role in the interview process, there is a higher likelihood that the interview will go smoothly. By explaining clearly what you expect of the interpreter, you will be better able to maintain control of the interview and identify and address any problems that may arise with the interpretation. [RAD Supplement – 4]

Some interpreters may have a great deal of experience interpreting or may have interpreted at RAIO interviews previously. Such interpreters may be aware of the general mechanics of the process and the interpreter's role. Individual interviewing styles vary from officer to officer, however, and interpreters should not assume that one interview will be conducted in the same manner as a previous interview. Therefore, you should still always explain to both inexperienced and experienced interpreters the rules for interpreting.

As you explain to the interpreter his or her role and the accompanying "ground rules" for interpreting, you should have the interpreter interpret to the interviewee your explanation. This will help the interviewee understand how the interpretation should take place as well as address the goal of keeping the interviewee informed at all times of what is transpiring during the interview. The following chart outlines the ground rules for interpreting during any interview conducted by RAIO staff.

INTERPRETER GROUND RULES

[4] For additional information, see RAIO Training module, *Cross-Cultural Communication*.

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The Interpreter <u>Should</u> Do the Following:	
1	***Keep all information discussed by all parties at a USCIS interview confidential*** [<u>RAD Supplement – 5</u>, <u>ASM Supplement – 5</u>, <u>IO Supplement – 4</u>].
2	***Interpret verbatim (word for word) as much as possible*** • Use your (the officer's) and the interviewee's choice of words, rather than using the interpreter's choice of words, while maintaining the meaning of what was said. • Advise you if certain terminology cannot be interpreted verbatim and therefore needs a lengthy interpretation in order to accurately convey the meaning of what was said. • Use the same person that you and the interviewee use. For example: **You**: What did you do next? **Interpreter** (to interviewee): (proper): What did you do next? (not proper): He asked what you did next. **Interviewee**: I went to the U.S. Embassy to request a visa. **Interpreter** (to you): (proper): I went to the U.S. Embassy to request a visa. (not proper): He went to the U.S. Embassy to request a visa. • Another way of thinking about this is that the interpreter is, in effect, an echo, interpreting everything that she or he hears, not selectively interpreting what he or she chooses to interpret.
3	***Interpret the interviewee's responses to your questions even if the***

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	responses do not appear to answer the questions
4	***Inform you if he or she does not understand what you have said***
5	***Inform you if he or she does not understand something the interviewee has said and that he or she needs to ask the interviewee for clarification***
6	***Advise you or the interviewee if the length of a question or response would pose difficulties for him or her to interpret*** You and/or the interviewee can then break the statement/question into shorter chunks of information for the interpreter to convey.
7	***Interpret all conversations that take place between you and him or her during the interview so that the interviewee is aware at all times of what is transpiring during the interview***
8	***Advise you if the interviewee expresses any confusion about your question or statement***

The Interpreter Should <u>NOT</u> do the following:	
1	***Engage in private conversations with the interviewee during the interview***
2	***Attempt to explain the meaning of anything that is said during the interview, including your questions and statements, even if the interviewee appears confused.*** It is the interpreter's role to simply interpret the questions asked and the responses provided.[5] He or she should inform you if the interviewee appears confused at any time during the interview. This

[5] For additional information on follow-up questions to clarify confusion by the interviewee, see RAIO Training module, *Interviewing – Eliciting Testimony*.

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	will then allow you to clarify any confusion with follow up questions.
3	***Condense or elaborate upon what you say or what the interviewee says***
4	***Attempt to answer for the interviewee or explain the meaning of what the interviewee says***
5	***Begin the interview ahead of you;*** it is you, not the interpreter who begins, directs, and concludes the interview. When interpreters interpret for multiple interviews, they become familiar with the interview procedures and so may proceed without the officer directing them. As the interviewing officer, you must maintain control of the interview and ensure that the interpreter does not proceed without your direction.
6	***Allow any personal biases and opinions to affect the interpretation during an interview***

Explain to the interpreter that these ground rules are necessary because the interview is important to the interviewee and the officer and that these rules enable the interviewee and officer to communicate fully and avoid any misunderstanding. The interpreter may be more likely to follow instructions if he or she understands the rationale for them.

3.3 Interpreter's Oath

As stated in the Adjudicator's Field Manual Chapter 15.7, interpreters interpreting before a USCIS officer must be placed under oath. "He or she should be placed under oath to interpret and translate all questions and answers accurately and literally."[6]

All USCIS officers must, at a minimum, comply with the *AFM* 15.7 requirements as stated above. Each division within RAIO has developed guidance with regard to the specific wording of the interpreter's oath and the context in which it is used. Officers in the RAIO Directorate should follow any additional division-specific guidance when administering the oath and, where applicable, signing an Interpreter's Oath form prior to the interview. [RAD Supplement - 6, ASM Supplement- 6, IO Supplement – 5]. If the

[6] USCIS Adjudicator's Field Manual, Section 15.7 "Use of Interpreters" (Rev. March 5, 2010).

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interpreter used is an employee of USCIS or DHS, he or she need not be sworn in. He or she should, however, be identified for the record.[7]

As stated above, the Asylum Division utilizes telephonic interpreter monitors for affirmative asylum, reasonable fear, and credible fear interviews. Asylum Officers are required to administer an oath to the interpreter monitor at the beginning of the interview. [ASM Supplement – 7].

4 COMPETENCY OF THE INTERPRETER

4.1 General

In order to achieve the goals of the interview, you and the interviewee must be able to understand each other. When an interpreter is involved, the interpreter's ability to effectively interpret is crucial to the success of the interview. The interpreter must be proficient in both English and the interviewee's native language (or another language in which the interviewee and interpreter are fluent). During the interview, there may be indicators leading you to determine that the interpreter is not competent and you should stop the interview. It is best if you make this determination as early as possible during the interview for a variety of reasons including time constraints and/or the limited availability of other interpreters.

4.2 Indicators of Misinterpretation During the Interview

There are a number of indicators that can signal that there may be miscommunication between the individuals at the interview and/or that the interpreter is having difficulty interpreting. These indicators include:

- The response to a question you ask does not answer the question, or the response only partially answers the question.
- Words you recognize without interpretation (e.g., proper names, English words) are not interpreted.
- The interpreter uses more words to interpret a question or response than appears to have been required.
- The interpreter uses very few words to interpret a lengthy question or response by either the interviewee or officer.
- There is back and forth dialogue between the interpreter and interviewee, without explanation from the interpreter.

[7] USCIS Adjudicator's Field Manual, Section 15.7 "Use of Interpreters" (Rev. March 5, 2010).

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- The interviewee indicates non-verbally that he or she is confused or doesn't understand, such as not responding or looking surprised or confused. Keep in mind, however, that non-verbal expressions can be culturally bound, so what may indicate confusion in one culture may indicate something different in another culture.[8]

You need to be alert continually for any signs of miscommunication during the interview and to clarify with the interpreter immediately if problems arise. As the interviewing officer, you are responsible to look for signs of inaccurate, incomplete, inadequate, or biased interpretation by the interpreter, and to address these problems if they occur. When using a telephonic interpreter, you will not be able to *see* signs of miscommunication and must remain alert and listen carefully for verbal indicators of miscommunication.

4.3 Determining the Interpreter's Competency

The indicators listed in the section above should alert you to potential problems with the interpretation during the interview. [ASM Supplement – 8]. You may need to stop the interview due to an interpreter's lack of competency. The decision to stop the interview is left to your discretion; however, before stopping the interview you should first make every reasonable effort to resolve any interpretation problems or issues. Once you make a determination that the interpreter is not competent, you should consult with your supervisor, if necessary, and then stop the interview. Generally, you should determine that an interpreter is not competent if you encounter the following:

- The interpreter is not sufficiently competent in English and/or the interviewee's language, and is not able to accurately interpret during the interview; and/or

- You have good reason to believe that the interpreter is providing answers to the interviewee, altering or embellishing answers, or changing the questions you ask, and when working with the interpreter, you are not able to resolve these issues.

4.4 What to Do Once You Have Stopped the Interview Due to the Interpreter's Incompetence or if Another Interpreter is Not Available

Each division has specific procedures you must follow once you have determined that an interpreter is not competent or that the interviewee is unable to continue in English and an alternate interpreter is unavailable. [RAD Supplement – 7, ASM Supplement – 9, IO Supplement – 7]. This includes guidance on stopping the interview, rescheduling the interview, providing written notice if applicable, stopping the "clock" (in the Asylum context), etc.

[8] For additional information, see RAIO Training module, *Cross-Cultural Communication* (under development; please refer to RAD and ASM lesson plans on this topic).

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5 FACTORS THAT MAY AFFECT THE ACCURACY OF INTERPRETATION AT THE INTERVIEW

There are a number of reasons why the quality and accuracy of interpretation at an interview may be impaired. These reasons are outlined below. It is important that you are aware of these factors and their impact on the interpretation during the interview in order to mitigate, as much as possible, any negative impact on the communication between you and the interviewee.

5.1 Interpreters at the Interview are Often Not Professionally Trained

The interpreter may or may not have had professional training as an interpreter or experience interpreting or translating. Even if an interpreter has prior experience interpreting or translating, he or she may not fully understand the role of an interpreter and how to best interpret during an interview in the RAIO context.

5.2 The Interpreter and the Interviewee May Not Have Met Prior to the Interview

In some cases, the interviewee and interpreter may be meeting for the first time at the interview. Therefore, the interviewee and interpreter may be unfamiliar with one another's accent, pronunciation, mannerisms, etc. Generally, the less familiar an interpreter is with the interviewee, the more challenging it is for the interpreter to interpret. There may be several ways of interpreting a particular word or phrase, some of which may be more appropriate to a particular situation. (Think of a thesaurus, which lists numerous synonyms for one word.) When interpreting, the interpreter chooses his or her words in a "split second." Once the interpreter has chosen the words to use, it may be difficult later for him or her to change or correct the choice of words. If an interpreter is familiar with the interviewee as well as the interviewee's country and culture, the interpreter will be more capable to make these split second determinations to interpret particular words or phrases. Conversely, the less time an interpreter has spent with an interviewee, the more challenging it will be for the interpreter to accurately make these decisions.

On the other hand, an interpreter who knows the interviewee and his or her culture and background may think he or she knows in advance what the interviewee is going to say, and may not listen as intently as an interpreter who does not know the interviewee.

5.3 The Interpreter May Not be Sufficiently Competent in English

The interpreter's English language proficiency may vary in quality from excellent to poor. For example, a Spanish speaker, for whom English is not his or her native language, may mistakenly interpret the Spanish word, "*embarazada,*" (*pregnant* in Spanish) as "embarrassed." Even if an interpreter is competent in English, English is not the native language of the interpreter in most cases. Therefore, the interpreter may not completely understand certain subtleties of the English language. Furthermore, some terms that may be used in an interview, such as "threatened," "torture," "organization,"

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etc., may not be among the words in a non-native English speaker's English vocabulary. In addition, an interpreter may not be familiar with or understand the various accents of officers, which may create an additional layer of difficulty for the interpreter.

5.4 The Interpreter May Encounter the Inherent Difficulties of Interpreting from One Language to Another

It is not always possible to interpret verbatim (word for word) from one language to another and retain the meaning of what is being said. The structure and syntax of one language can vary considerably from another language. Consider the simple sentence, "I am thirsty." In the French language, one would say, "*J'ai soif,*" which means, "I have thirst." In the Mòoré language, spoken in Burkina Faso, one would say "*Ko yuud n tar mam*," which means, "Thirst has me."

Word order can be essential to the meaning of a phrase or sentence; changing the word sequence can change the meaning. For example, in Spanish, when the word order of "*un amigo viejo*" which means "a friend who is old," changes to "*un viejo amigo*" the meaning becomes "a longtime friend."

When colloquial expressions, sayings, and idioms are interpreted verbatim, the meaning of what was said can be altered or may not make sense. Consider the Spanish, "*me costó un ojo de la cara*," which is interpreted word for word into English as, "it cost me an eye from the face," rather than the familiar English equivalent, "it cost me an arm and a leg."

Rather than interpret word for word, an interpreter must interpret meaning for meaning to accurately convey what is being said. This involves knowledge of the subtleties of the interviewee's language and English. Because interpreters vary in their knowledge of the subtleties of languages used and in their ability to interpret meaning for meaning, you should always be vigilant for signs of misinterpretation.

5.5 The Interviewee and Interpreter May be Communicating Through a Second Language

It is important to determine the native languages of both the interviewee and the interpreter, and the language they will be using to communicate during the interview and how proficient both are in that language. The interviewee and interpreter may be communicating through a language that is a second language for one or both of them. For example, the native language of many I-730 beneficiaries from the People's Republic of China is Fuzhou and their second language is Mandarin, which they may not speak as well as Fuzhou. Often, the interpreter for such cases is proficient in Mandarin but does not speak Fuzhou. Because the interviewee may have only a rudimentary understanding of Mandarin, it may be challenging to elicit information from him or her.

Therefore, it is important to determine at the beginning of the interview the native languages of the interviewee and interpreter. You can do this by asking the interviewee

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and interpreter what their native language is or by asking "What language do you understand best?" or "What language do you speak at home?"

5.6 The Interviewee and Interpreter May Speak Different Versions of the Same Language

Although an interviewee and interpreter may speak the same language, they may have learned different versions of that language and/or speak with different accents. This may be the case if they are from different socio-economic groups, from different parts of the same country, or from different countries that speak the same language. Even within the English language there are inconsistencies in terminology among different regions in the U.S. or different English-speaking countries, as the following example illustrates.

British English	**American English**
Lift	Elevator
Flat	Apartment
Chemist	Pharmacist
Boot	Trunk
Football	Soccer
Jumper	Sweater

Such minor inconsistencies in terminology, as well as variations in usage between different versions of a language, can lead to subtle differences in interpretation, which can impact the outcome of an interview. Consider the possible effect at an interview of the following:

- The word "*ahorita*" in the Dominican Republic means "in a little while;" in Mexico it means "right now."

- A Spanish language interpreter who is not from Guatemala may not understand the term for "civil patrol" expressed by a Guatemalan interviewee and may interpret it as "military."

5.7 Cultural Factors Can Influence Interpretation[9]

Interviewees and interpreters are usually from a culture that is different from the culture of the officer who is conducting the interview. Therefore, the exchange of information through an interpreter is not only being interpreted from one language to another, but also from one culture to another. If the interviewee and the interpreter are also from different cultural backgrounds, there is an additional cultural layer through which the information must pass.

[9] For additional information, see RAIO Training module, *Cross-Cultural Communication* .

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For example, it may be taboo for an interpreter to openly discuss rape in his or her culture. During the interview, if the applicant discusses a rape that he or she experienced, the interpreter may feel uncomfortable and may therefore substitute the word "harm" for "rape."

5.8 The Interpreter's Personal Opinions or Biases Can Influence Interpretation

Interpreters are rarely neutral. In some circumstances, they may have a certain disposition toward you or the interviewee. They may also bring biases, preconceived ideas, or personal opinions to the interview. Examples of this are listed below.
The interpreter may:

- Try to impress you with his or her knowledge of English or country conditions, and may add editorial comments about the interviewee's country
- Want to distance him or herself from the interviewee if he or she feels that the interviewee is of a lower socio-economic group or if he or she believes the interviewee may be fabricating a claim
- Want to put his or her country and culture in a favorable light so may not interpret the abuse the interviewee suffered at the hands of the authorities as graphically as the interviewee's depiction
- Want to help the interviewee so may not interpret some information accurately because he or she may think that it could have negative consequences for the interviewee
- Want you to know that he or she is acquainted with the interviewee and that the interviewee is a "good person"

Whatever the reason, the interviewee's testimony may be distorted by the interpreter. Often, the interpreter is not consciously aware of his or her personal opinions or biases and how these can affect the interview.

You must remain vigilant to the possible presence of these factors and take appropriate steps to control the interview when necessary. This applies to all interviews, even asylum interviews where an interpreter monitor is present and the effects these factors may have on communication during the interview may be lessened by the presence of the interpreter monitor.

6 WAYS TO FACILITATE INTERPRETATION THROUGH AN INTERPRETER

There are certain inherent difficulties in interpreting from one language to another and in working with an interpreter. Everyone has a particular way of speaking in which he or she incorporates accent, speech patterns, rates of speech, and other personal behavior. Some ways of speaking can be easy for an interpreter to understand while others may

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pose problems. There is also a cultural filter through which information is exchanged.[10] In addition, as explained earlier in this module, there are a variety of other factors that may adversely impact the interpretation of information exchanged during the interview.

The following are the steps in the communication process during an interview when working through an interpreter.[11]

- You ask a clearly-worded question.
- The interpreter correctly understands the question.
- The interpreter correctly interprets the question.
- The interviewee correctly understands the interpreted question.
- The interviewee answers the question.
- The interpreter correctly understands the answer.
- The interpreter correctly interprets the answer.
- You understand the interpreted answer.
- You correctly record the answer.

Miscommunication during any of these steps can lead to incorrect information being relayed, with the potential for affecting the outcome of the interview. It is your responsibility as an officer within RAIO to develop interviewing skills that can facilitate accurate interpretation. Incorporating the techniques listed in this module and other RAIO training modules can assist you in developing these skills.

6.1 Address the Interviewee Directly and Maintain Eye Contact

Face the interviewee when speaking and direct questions and comments to him or her. Stay focused throughout the interview on the interviewee, not the interpreter, and make eye contact with the interviewee. Keep in mind, however, that some interviewees may not maintain eye contact with you due to cultural norms.[12] Do not tell the interpreter to ask the interviewee something or refer to the interviewee in the third person.

Example

[10] For additional information, see RAIO Training module, *Cross-Cultural Communication*.

[11] European Asylum Curriculum, Submodule 1, *Introduction*. Unit 1.2: *Challenges and Definitions*, "The difficulty of obtaining evidence."

[12] For additional information, see RAIO Training module, *Cross -ultural Communication* (under development; please refer to RAD and ASM lesson plans on this topic).

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Proper: What did you do next? (looking at the interviewee)

Not proper: Ask her what she did next. (looking at the interpreter)

6.2 Explain the Interpreter's Role to the Interviewee

As noted above, the interview is an exchange of information between you and the interviewee, with the interpreter acting only as a conduit through which information is passed. You should explain this to the interviewee at the beginning of the interview when you explain the role of the interpreter. Tell the interviewee that although you do not speak the interviewee's language, you will still communicate with him or her during the interview, utilizing an interpreter. You should also explain to the interviewee that the interpreter has no influence upon the outcome of the case and that anything discussed during the interview will remain confidential. With a few exceptions, neither you nor the interpreter may disclose any aspect of the interview to anyone else. [RAD Supplement - 5].[13]

6.3 Make Sure the Interpreter's Physical Placement During the Interview is Appropriate

The presence of an interpreter at an interview can sometimes create a "distance" between you and the interviewee. It is your job to ensure that the interviewee understands that the interview is in effect an exchange of information between you and him or her. The physical placement of the interpreter during the interview can reduce this distance. The interpreter is a secondary participant, and should not sit between you and the interviewee. He or she may sit beside the interviewee or next to you. If you decide to have the interpreter sit next to you during the interview, maintain proper security measures by ensuring that the interpreter cannot view the computer screen (if you are using a computer), or any documents or handwritten notes.[14]

6.4 Have all Conversations between You and the Interpreter Interpreted to the Interviewee

If it is necessary to discuss an issue with the interpreter (e.g., the manner of interpretation), you should explain to the interviewee what you are discussing with the interpreter. That is, you should have the interpreter interpret for the interviewee what you said to the interpreter, and the interpreter's response, if any. This procedure should also be followed when necessary to discuss something with the representative, or anyone else present at the interview. This will avoid confusion about what the interpreter should interpret and will reinforce to the interpreter that the interviewee must be aware of all that transpires during the interview. Additionally, this keeps the interviewee informed at all times of what is occurring during the interview.

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[13] For additional information on confidentiality provisions, see *Interpreter Ground Rules* above.

[14] For additional information on precautionary measures to take when taking notes during an interview, see RAIO Training module, *Interviewing – Note-Taking.*

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6.5 Be Conscious of Your Speech Patterns

Be aware of your particular speech patterns and consider how they may impact the interpretation during the interview. Ask yourself, "Do I speak quickly? Do I speak softly? Do I change thoughts in mid-sentence? Do I mumble? Do I frequently use idiomatic expressions?" Pay attention to the circumstances under which your speech patterns change (e.g. when confused, irritated, tired) and how they change. Once you have identified any speech patterns that may impede effective interpretation, you can work to avoid these patterns during the interview.

6.6 Choose Words Carefully and Avoid Idioms

You should be conscious of the language you use. Carefully choose words that have clear meanings and are easily understood. Certain idiomatic expressions used in English may be familiar only to native speakers of the language or to someone who has lived in the U.S for some time. For example, if you asked a refugee applicant, "Did you keep tabs on your family after you fled your village?" he or she may not understand what you mean, as "keeping tabs on" is an idiom that most likely would only be familiar to an English speaker in the U.S.

6.7 Avoid the Use of Certain Pronouns Whenever Possible

When speaking to the interviewee through an interpreter, avoid to the extent possible using certain pronouns. Questions such as "What did he do?" or "What did they do?" may seem clear to you, but the interpreter or interviewee may be using a different referent for "he" and "they." It is better to use words that denote relationships rather than certain pronouns (e.g., "What did your brother do?") or to refer to specific individuals by name or position (e.g., "What did the policeman do then?").[15]

Even though interpreters are advised to interpret using the same person as the officer and the interviewee (see the section above, *Advising the Interpreter of His or Her Role*), interpreters occasionally interpret the interviewee's statements into the third person referring to the interviewee – as well as anyone to whom the interviewee refers — as "he" or "she." If you and the interpreter use pronouns frequently during the interview, it can become confusing to the interviewee, as he or she may not understand who is being discussed.

Similarly, when terms such as "he" or "they" are used by the interviewee, clarify to whom the interviewee is referring. Simply ask, "When you said 'she,' who did you mean?"

Example

Interviewee: He reported him, but he escaped before they caught him.

[15] For additional information, see RAIO Training module, *Interviewing – Eliciting Testimony*.

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You: When you say 'He reported him,' who do you mean?

6.8 Speak Clearly, and, When Necessary, Speak Slowly

You may find that, especially at the beginning of an interview, you need to adjust your rate of speech and enunciate more clearly than usual until the interpreter is somewhat familiar with the particular characteristics of your speech and accent. When speaking to an interviewee, you should not combine two words together in spoken American English, such as the following, as they may not be easily understood by the interpreter.

Examples:

Avoid:	**Say:**
gonna	going to
wanna	want to
goin'	going
whaddaya	what do you
whad'ja	what did you
'n'	and

Think of the difficulty that non-native English speakers may have when trying to interpret the words listed above if they run together. Therefore, be conscious of your speech patterns and enunciate each word clearly.

6.9 Keep Questions Clear and Simple, Asking Specific Questions One at a Time

Avoid asking the interviewee several questions at once, such as: "Please tell me why you are abandoning your permanent resident status at this time and if you understand what the consequences of abandonment are." Ask one question at a time and allow the interviewee to completely respond before asking the next question.

6.10 Break Down What is Said at the Interview into Reasonable Amounts of Information

As noted in the section above, *Role of the Interpreter*, break down what you say into reasonable amounts of information to facilitate accurate interpretation. If the interviewee is giving lengthy responses, you can stop him or her at what appear to be natural pauses so the interviewee can give shorter statements that the interpreter can interpret more easily. Assure the interviewee that he or she will be allowed an opportunity to finish, and then make sure you honor this assurance.[16] You should work with the interpreter to find the comfortable rhythm for him or her to interpret.

[16] For additional information, see RAIO Training module, *Interviewing – Introduction to the Non-Adversarial Interview*.

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6.11 Repeat the Question/Statement Slowly or Rephrase it if the Interpreter does not Appear to Understand

Repeat the question/statement if the interpreter or interviewee does not appear to understand. Rephrase the question if, after repeating the question, the interpreter or interviewee still does not understand.

6.12 Provide Pen and Paper to the Interpreter if Necessary

Some interpreters are more effective in interpreting if they have a pen and paper they can use to jot down key terms said by the interviewee or the officer. Providing pen and paper to the interpreter may also be useful if you want a person's name, location, or other information spelled out for you during the interview. You should collect all interpreter notes after the interview and follow your division's procedures regarding proper placement and handling of interpreter notes.

6.13 Resolve all Communication Problems as Quickly as Possible

Periodically, particularly at the beginning of an interview, you should ask the interpreter if he or she has any difficulty understanding you, if you are speaking too quickly, or if you are saying too much at one time. An interpreter may state that he or she understands you when in fact this is not the case. Due to embarrassment, pride, loss of face, etc., the interpreter may be reluctant to admit that he or she cannot understand what you are saying. Therefore, as noted above, you must watch for signs that the interpreter may be having difficulty understanding and interpreting, and you must try to resolve any problems immediately.

If it appears that there is a problem in communication, speak to the interpreter and the interviewee immediately about what you perceive to be a problem. Ask the interviewee if he or she understands the interpreter and ask the interpreter if he or she understands both you and the interviewee.

To ascertain whether the interpreter has understood a question you asked the interviewee, ask the interpreter to repeat the question back to you in English. You can also ask the interpreter to repeat back to you in English what he or she said to the interviewee.

6.14 Remind the Interpreter of His or Her Role When Necessary

At times, the interpreter may forget his or her role during the interview. He or she may begin to condense what the interviewee says, engage in a lengthy discussion with the interviewee when something is not clear, provide a lengthy explanation to contextualize an answer to help you understand the answer, etc. At such times, you need to tactfully remind the interpreter of his or her role and responsibilities, as noted above under *Advising the Interpreter of His or Her Role*.

6.15 Be Certain that all Parties Remain in the "Communication Loop"

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When an interpreter is present, the interview involves an exchange of information among three people: in general, the interviewing officer asks questions, the interviewee provides responses, and the interpreter relays information between the officer and the interviewee. On occasion, the legal representative or other parties present at the interview may also participate in the process.

It is critical that throughout the interview, all parties present understand everything that is communicated – everyone needs to remain in the "communication loop." There may be times when you are tempted to stop using the interpreter, particularly if you have some fluency in the interviewee's language, or if the interviewee understands some English. You should avoid communicating in this way with the interviewee or any other person at the interview, however, without using the interpreter. All parties involved must understand all that transpires during the interview in order to perform their respective duties in the interview process.

7 CONCLUSION

Your responsibility is to ensure that everyone at the interview understands one another. Although you will encounter some interviewees who speak English well enough to proceed with the interview in English, most interviewees will need the assistance of an interpreter. Accurate interpretation is essential in any interview in which an interpreter is utilized. As the interviewing officer, you are responsible for ensuring that all participants at the interview, including the interpreter, understand their role in the interview process, and that the interpreter is utilized properly throughout the interview. You are also responsible for ensuring that all interactions during the interview are interpreted correctly to everyone present. To do so, pay attention to your speech patterns and modify them as appropriate, and watch for any factors impeding communication and take corrective action so miscommunication does not continue to occur. Your objective is to elicit the information you need from the interviewee in the most efficient manner while maintaining control of the interview in a manner that is conducive to communication.

8 SUMMARY

8.1 Identifying the Need for an Interpreter

8.1.1 The Language Ability of the Interviewee

- The individuals you interview will have a varying degree of English language proficiency.

- Whether you use an interpreter or not, it is always in the interviewee's best interest to conduct the interview in the language in which the interviewee can most fully express himself or herself.

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- An interviewee should not be required to participate in an interview in a language other than the interviewee's primary language.

8.1.2 Interpreters Utilized for RAIO Interviews

- USCIS provides interpreters for some, but not all RAIO interviews.
- For Refugee interviews, the interpreters are provided by the RSC, and sometimes by UNHCR.
- For affirmative asylum interviews, interviewees are required to provide their own interpreter; the quality of the interpretation is telephonically monitored by a professional interpreter.
- For credible fear and reasonable fear interviews, the Asylum Division utilizes professional interpreters via telephone.
- At USCIS Offices overseas, USCIS employees, including Locally Engaged Staff (LES), may serve as interpreters when required.
- Please refer to your division's procedures and requirements regarding who can serve as an interpreter.

8.1.3 Conducting an Interview if You are Fluent in the Interviewee's Language

- If you are fluent in a language that the interviewee speaks, you may, in certain circumstances, conduct the interview in that language without utilizing an interpreter.
- Refer to your division's procedures for specific guidance on when you may conduct an interview in a language other than English.

8.1.4 Verifying the Identity of the Interpreter

- If your RAIO division requires verifying the identity of the interpreter this should be done at the beginning of the interview. You should:
  - Request identification from all parties at the interview, including the interpreter.
  - Make a copy of the identification collected from all parties at the interview to retain as a part of the record.

8.2 Role of the Interpreter and Interpreter Ground Rules

- At the beginning of the interview, explain the role of the interpreter and the role of each person who is present.
- During the interview, the interpreter should:

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- Keep all information discussed at the interview confidential—please see your division procedures for specific guidance.
- Interpret verbatim (word for word) as much as possible.
- Interpret the interviewee's responses to your questions even if the responses do not appear to answer your questions.
- Inform you if he or she does not understand what you have said.
- Inform you if he or she does not understand something the interviewee has said and needs to ask the interviewee for clarification.
- Advise you or the interviewee if the length of a question or response makes it difficult for him or her to interpret.
- Interpret all conversations that take place between you and him or her during the interview.
- Advise you if the interviewee expresses any confusion about your question or statement

- During the interview, the interpreter should **not**:
  - Engage in private conversations with the interviewee.
  - Explain anything to the interviewee if the interviewee is confused or does not understand.
  - Condense or elaborate upon what you or the interviewee says.
  - Attempt to answer for the interviewee or explain what the interviewee says.
  - Begin the interview ahead of you.
  - Allow any interpersonal biases and opinions to affect the interpretations during an interview.

8.2.1 Interpreter's Oath

- The Adjudicator's Field Manual Section 15.7 requires that interpreters in a USCIS interview must be placed under oath.
- Please refer to your division's procedures for placing an interpreter under oath.

8.3 Competency of the Interpreter

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- If you think the interpreter is not competent, it is best to make this determination as early as possible during the interview.

8.3.1 Signs of Misinterpretation during the Interview

- You must be continually alert throughout the interview for signs of miscommunication, which include, but are not limited to:
  - Interviewee's response does not answer the question, or only partially answers a question
  - Words that you recognize without interpretation (ex. proper names or English words) are not interpreted
  - Interpreter uses many more words to interpret a question or response than appear to have been required
  - Interpreter uses very few words to interpret a lengthy question or response
  - Back-and-forth dialog between the interpreter and interviewee occurs without explanation from the interpreter
  - Interviewee indicates non-verbally that he or she is confused or doesn't understand
- You should also determine the interpreter is incompetent if you encounter any these circumstances:
  - The interpreter is not sufficiently competent in English and/or the interviewee's language and is not able to accurately interpret during the interview
  - You have good reason to believe that the interpreter is providing answers to the interviewee, altering or embellishing answers, or changing the questions you ask, and in working with the interpreter, you are not able to resolve these issues
- If you determine that the interpreter is not competent, stop the interview and follow division-specific procedures or guidance.

8.4 Factors that May Affect the Accuracy of Interpretation at the Interview

- Many factors may affect the accuracy of interpretation during an interview, including:
  - Interpreters may not be professionally trained
  - The interpreter and the interviewee may not have met prior to the interview
  - The interpreter may not be sufficiently competent in English

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- The difficulties inherent in interpreting from one language to another
- The interviewee or the interpreter may be communicating through a second language rather than a native language
- The interviewee and the interpreter may speak different versions of the same language
- There may be cultural factors present that influence the interpretation
- The interpreter's personal opinions or biases may influence the interpretation

8.5 Ways to Facilitate Interpretation through an Interpreter

- There are a number of ways in which you can facilitate the interpretation during an interview, such as:
  - Address the interviewee directly and maintain eye contact
  - Explain the interpreter's role to the interviewee
  - Make sure the interpreter's physical placement during the interview is appropriate
  - Have all conversations between you and the interpreter interpreted for the interviewee
  - Be conscious of your speech patterns
  - Choose your words carefully and avoid the use of idioms
  - Avoid the use of pronouns whenever possible
  - Speak clearly, and when necessary, speak slowly
  - Keep your questions clear and simple, and ask questions one at a time
  - Break down what you say during the interview into reasonable amounts of information
  - Repeat the question/statement slowly or rephrase it if the interpreter does not appear to understand
  - Resolve all communication problems as quickly as possible
  - Remind the interpreter of his or her role when necessary
  - Be certain that all parties remain in the "communication loop"

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PRACTICAL EXERCISES

There are no student materials for Practical Exercises 1 – 10.

Please note that there are a number of potential practical exercises, but not all will be used. Your instructor has discretion to choose the practical exercises that will suit the needs of the class.

Practical Exercise # 11

- **Title**: *Foo Chow, Not Mandarin*
- **Student Materials:**

  He v. Ashcroft, 328 F.3d 593 (9th Cir. 2003)*

  * For AOBTC students, if the link to Westlaw does not work, please see the case located in your training folder.

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OTHER MATERIALS

Other Materials – 1

Adjudicator's Field Manual

15.7 Use of Interpreters

Following are guidelines for interviews requiring the use of interpreters:

- If the person being questioned exhibits difficulty in speaking and understanding English, arrangements should be made for use of an interpreter even though the person may be willing to proceed without an interpreter. Any doubt should be resolved in favor of the use of an interpreter.

- Ideally, the services of a disinterested person should be employed as an interpreter. However, in the exercise of judgment, a witness, friend, or relative of the subject may be utilized as an interpreter, depending upon the issues involved and the possibility of adverse action against the subject.

- If the interpreter used is an employee of USCIS or DHS, he or she need not be sworn. He or she should, however, be identified for the record.

- If the interpreter is not a USCIS or DHS employee, he or she should be identified and questioned as to his ability to speak and translate into English the language of the person being questioned, and vice versa. Also, he or she should be placed under oath to interpret and translate all questions and answers accurately and literally.

The interpreter's oath should be administered as follows:

> "Do you solemnly swear (or affirm) that in connection with this proceedings you will truthfully, literally, and fully translate the questions asked by me into the _____ language and that you will truthfully, literally, and fully translate answers to such questions into the English language?"

If a verbatim record is made, the oath should be shown in the record.

- The subject's attorney or representative should not be utilized as an interpreter in his client's behalf although under some circumstances an exception to this may be made if the interests of the Government will not

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be prejudiced.

- The record should show that the interpreter and the person being questioned have conversed in the latter's language and that they understand each other. This is especially important when questioning persons whose native language has many dialects, such as Chinese. The record should also indicate what language and dialect is being used in the questioning.

- The subject should be informed at the beginning of the questioning that he should advise the adjudicator if he fails to understand the interpreter.

- It is desirable in taking a verbatim record in a complex case to check from time to time to ensure that the interpreter and the person being questioned understand each other. Such checks should be noted in the record.

- In using an interpreter it is imperative that the adjudicator instruct the interpreter in his or her duties.

- It is essential that the interpreter be strictly limited to furnishing verbatim interpretations. For example, if the subject answers, "I don't understand the question", the answer is to be given by the interpreter. Under no circumstances is the interpreter to attempt an explanation of his own. The interpreter must understand that he or she acts only as a voice, nothing else. Constant guard is needed to overcome the natural impulse of an interpreter to attempt to explain or clear up questions asked. The adjudicator will lose control of the situation and be unaware of what is transpiring unless he or she insists that the interpreter repeat verbatim the answer the subject makes. If any explanation is required, it is the function of the adjudicator and not of the interpreter to rephrase or change the question. In this manner the adjudicator knows exactly what is being adduced and is not being given a summary by the interpreter of what the witness says. The interpreter should never be permitted to say, "He says". He or she is to repeat by translation into the appropriate language the exact question or answer as it was expressed initially.

- The adjudicator should not permit conversations or explanations, and should not accept a reply such as "He says, 'No'" after a lengthy conversation between the interpreter and the subject.

The interviewer must remain alert to the possibility that shades of meaning may be missed.

USCIS Adjudicator's Field Manual, Section 15.7 "Use of Interpreters" (Rev. March 5, 2010).

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. USCIS Refugee Affairs Division, *Standard Operating Procedure: Working with an Interpreter*, October 2017.

2. USCIS Refugee Affairs Division, Section III of *Standard Operating Procedure: Introduction*, July 2017.

3. Memorandum from Barbara L. Strack, Chief, USCIS Refugee Affairs Division, and Joanna Ruppel, Chief, USCIS International Operations Division, to Refugee Affairs Division, Overseas Staff, *Information Consent Form For Use in Refugee Interviews*, (120/6), June 17, 2009.

ADDITIONAL RESOURCES

None

SUPPLEMENTS

RAD Supplement

Module Section Subheading

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. USCIS Refugee, Asylum, and International Operations Directorate, Asylum Division, *Affirmative Asylum Procedures Manual* (AAPM), Section II.J.

2. Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Directors, et al., *Award of Interpreter Services Contracts and Guidance on Use of Interpreter Services* (HQRAIO 140/12) (23 May 2011).

3. Memorandum from John Lafferty, Chief, USCIS Asylum Division, to All Asylum Division Staff, *Updated Procedures on Working with Interpreters in Affirmative Asylum Interviews* (HQRAIO 120/12a) (14 June 2019).

ADDITIONAL RESOURCES

None

SUPPLEMENTS

ASM Supplement – 1

2.1 Language Ability of the Interviewee

8 CFR § 208.9(g):

An applicant unable to proceed with the interview in English must provide, at no expense to the Service, a competent interpreter fluent in both English and the applicant's native language or any other language in which the applicant is fluent. The interpreter must be at least 18 years of age. Neither the applicant's attorney or representative of record, a witness testifying on the applicant's behalf, nor a representative or employee of the applicant's country of nationality, or if stateless, country of last habitual residence, may serve as the applicant's interpreter. Failure without good cause to comply with this paragraph may be considered a failure to appear for the interview for purposes of § 208.10.

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ASM Supplement – 2

2.2 Interpreter Used for Asylum Interviews

An interpreter in the Asylum Division must meet the following qualifications:

- Must be fluent in both English and a language in which the applicant is fluent;
- Must be 18 years of age;
- Must not be the applicant's attorney or representative, or a witness testifying on behalf of the applicant (an employee of the attorney, such as a paralegal, may serve as the interpreter);
- Must not be a representative or employee of the applicant's country of nationality, or if stateless, country of last habitual residence; and
- Must not be an individual with a pending asylum application.

There are no other regular requirements regarding who can serve as an interpreter. The immigration status of the interpreter is not a bar nor is the interpreter's relationship to the applicant (the interpreter may be a family member), as long as the interpreter meets the requirements listed above.

Please note that there are fewer requirements for interpreters in ABC/NACARA interviews.

For ABC/NACARA case interpreters, the interpreter:

- May be under age 18 and
- May be a country representative or employee.

For additional information, see *American Baptist Churches (ABC) Settlement Agreement* and the Asylum Division Lesson Plan, *Suspension of Deportation and Special Rule Cancellation of Removal under NACARA*.

ASM Supplement – 3

2.3 Conducting an Interview if You are Fluent in the Interviewee's Language

Conducting an Interview in a Language Other than English

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Each asylum office has a local policy on whether an AO may conduct an asylum interview in a language other than English in accordance with the below guidance. If the local policy allows an AO to conduct interviews in a language other than English, the AO must be certified by the Department of State (DOS).

An applicant who is not fluent in English is required to bring an interpreter with him/her to the asylum interview. Depending upon local policy and with the asylum applicant's approval, an AO who has been certified by the Department of State can either conduct the interview in the applicant's language, if the applicant agrees, or use the services of the interpreter. The AO must make a clear notation in the interview notes that the interview was conducted in a language other than English and indicate the language used by the AO. If the AO conducts an interview in the applicant's language, it is preferable that a competent interpreter be present during the interview to monitor the level of understanding between the Asylum Officer and applicant.

Because 8 CFR § 208.9(g) requires an applicant who is not competent in English to bring an interpreter to an asylum interview, as a general rule, asylum applicants are required to bring interpreters regardless of whether there are asylum office personnel available to conduct interviews in languages other than English. Nevertheless, the asylum office Director maintains the discretion to allow qualified asylum office personnel to conduct or assist in the conducting of an interview in the applicant's preferred language, with the applicant's consent, if there are extraordinary circumstances for doing so, such as (but not limited to) the disqualification of an interpreter through no fault of the applicant combined with the applicant's having traveled a very long distance for the interview, etc.

See *Affirmative Asylum Procedures Manual*, Section II.J.11, "Conducting an Interview in a Language Other than English."

ASM Supplement – 4

2.4 Verifying the Identity of the Interpreter

8 CFR § 208.9(c):

The Asylum Officer shall have authority to administer oaths, verify the identity of the applicant (including through the use of electronic means), verify the identity of any interpreter, present and receive evidence, and question the applicant and any witnesses.

Affirmative Asylum Procedures Manual, Section II.J.4.a.iii:

Like asylum applicants, interpreters are not required to present identity documents

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in order to interpret for an asylum applicant. Regulations give an AO the authority to verify the identity of the interpreter, which is best accomplished through the review of identity documents. However, an AO may not terminate or reschedule an interview if the interpreter is lacking identity documents, or presents identity documents that the AO does not wish to accept. Local asylum office policy dictates whether an AO should photocopy any identity documents of an interpreter, or whether the AO should indicate on the *Record of Applicant and Interpreter Oaths* the type of identity documents, if any, the interpreter provided. AOs must base an individual's ability to interpret on interpretation skills and not on questions of identity.

There may be instances where an AO believes that the issue of an individual's identity is material to his/her ability to interpret. The AO must consult with the SAO in these circumstances. Only the Asylum Office Director or his/her designee has the authority to dismiss/bar an individual from interpreting in an office.

See *Affirmative Asylum Procedures Manual*, Section II.J.4.a.iii, "Identity."

ASM Supplement – 5

3.2 Advising the Interpreter of His or Her Role

Interpreter Ground Rules # 1: ***Keep all information discussed by all parties at a USCIS interview confidential***

Asylum Officers must inform applicants of the confidential nature of the interview. Regulations prohibit disclosure of information pertaining to an alien's application for asylum, without the written consent of the applicant. Some information may be given to some other government officials; however, they are required to keep this information confidential. Even the fact that an applicant has applied for asylum is confidential.

See 8 C.F.R. § 208.6 and Memorandum from Bo Cooper, INS Office of the General Counsel, to Jeffrey Weiss, Director, INS Office of International Affairs, *Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information*, (HQCOU 120/12.8) (21 June 2001).

Confidentiality Requirements

When information contained in or pertaining to an asylum application is disclosed to a DOS employee, the USCIS or DHS officer must inform the DOS employee of the confidentiality requirements of 8 C.F.R. § 208.6. Confidentiality requirements for asylum applications and the Department of State are discussed in more detail in Memorandum from Bo Cooper, INS Office of the General Counsel, to Jeffrey

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Weiss, Director, INS Office of International Affairs, *Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information*, (HQCOU 120/12.8) (21 June 2001), and in Memorandum from Joseph E. Langlois, Director, Asylum Division, to Asylum Office Directors and Deputy Directors, *Fact Sheet on Confidentiality*, (HQASM 120/12.8) (15 June 2005), including the attached fact sheet, *Federal Regulations Protecting the Confidentiality of Asylum Applicants*. See also 8 C.F.R. § 208.6(b).

Asylum Officers should be familiar with exceptions to the confidentiality procedures as provided by regulation (information on asylum applicants can be disclosed to other federal entities and state and local governments when there is an action arising out of the asylum adjudication (8 C.F.R. § 208.6(c)) and explained in Asylum Division policy.

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3.3. Interpreter's Oath

The interpreter must fill out an Interpreter's Oath form (sworn statement) at the beginning of the interview. The Asylum Officer must explain the meaning of this document to the interpreter and have the interpreter explain the meaning of the document to the applicant.

By signing the interpreter's oath form, the interpreter swears to "truthfully, literally, and fully interpret the questions asked by the Asylum Officer and the answers given by the applicant." Should a concern arise that an interpreter is not fulfilling that oath, the Asylum Officer should follow procedures set out in the *Affirmative Asylum Procedures Manual*, Section II.J.a.vi, "Inability to Perform, or Abuse of, the Interpreter's Role."

See also *Affirmative Asylum Procedures Manual* for a copy of the Interpreter's Oath.

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ASM Supplement – 7

3.3. Interpreter Monitor's Oath

At the beginning of the interview, the Asylum Officer explains to the applicant, through the applicant's interpreter, that a contract interpreter will be monitoring the interview to ensure the accuracy of interpretation by the applicant's interpreter. The Asylum Officer should also remind the contract interpreter, in the presence of the applicant, of the confidentiality requirements of the interview and should inform the applicant that the interpreter has pledged to keep any and all information the applicant provides during the interview confidential. See *Affirmative Asylum Procedures Manual,* Section II.J.4.b.iv, "Role of the Contract Interpreter when Acting As Monitor."

The Asylum Officer will administer an oath to the interpreter monitor in which he or she will swear or affirm:

- to immediately report to the Asylum Officer any errors in interpretation;
- to notify the Asylum Officer if he or she is unable to monitor in a neutral manner due to bias against the applicant because of race, religion, nationality, membership in a particular social group, or political opinion; and
- that he or she understands the matters discussed during the interview are confidential.

The Asylum Officer's notes must reflect that the oath was administered to the interpreter monitor.

Should concerns arise that the interpreter monitor is not fulfilling the oath, the Asylum Officer should follow the procedures set out in the *Affirmative Asylum Procedures Manual,* as well as any local asylum office procedures that may apply. *Affirmative Asylum Procedures Manual,* Section II.J.4.b.iv, "Role of the Contract Interpreter when Acting As Monitor," and *Affirmative Asylum Procedures Manual*, Section II.J.4.b.v.(a), "Introduction and Orientation."

For further information on procedural requirements pertaining to the use of interpreter monitors in Asylum interviews, including the oath requirement, refer to *Affirmative Asylum Procedures Manual*, Section II.J.4.b.v.(a), "Introduction and Orientation" and any additional local asylum office procedures that may apply.

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4.3 Determining the Interpreter's Competency

If the interpreter monitor frequently corrects the interpretation provided by the applicant's interpreter, this *may* be an indication that the primary interpreter is not competent to interpret at the interview or is abusing his or her role. However, the asylum officer must verify that the interpreter monitor understands that his or her monitoring role is not to call attention to minor mistranslations that do not affect the applicant's meaning, but to alert the Asylum Officer if the primary interpreter fails to provide adequate, accurate, and neutral interpretation. "If the interpreter monitor frequently interjects, the Asylum Officer must determine whether frequent interjections occur because the applicant's interpreter has abused his or her role, or whether the contract interpreter misunderstands his or her role as a monitor, and take appropriate action." See *Affirmative Asylum Procedures Manual,* Section II.J.4.b.iv, "Role of the Contract Interpreter when Acting as Monitor."

Despite the use of an interpreter monitor, the Asylum Officer retains the duty of determining the primary interpreter's competency. The Asylum Officer may rely on information given by the interpreter monitor to arrive at a decision regarding the primary interpreter's competency; however, this duty cannot be delegated to the interpreter monitor.

See also Memorandum from Joseph E. **Langlois, Chief, Asylum Division, to** Asylum Office Directors, et al., *Award of Interpreter Services Contracts and Guidance on Use of Interpreter Services*, (HQRAIO 140/12) (24 February 2010).

ASM Supplement – 9

4.4. What to Do Once You Have Stopped the Interview Due to the Interpreter's Incompetence, Misconduct, or if a Contract Interpreter is Not Available

Problems with Applicant's Interpreter

An AO may believe that a particular interpreter is unable to perform the role of interpreter or is abusing his or her role as an interpreter because the interpreter has engaged in misrepresentation, is incompetent, or has engaged in other improper conduct. See *Affirmative Asylum Procedures Manual*, Section II.J.4.a.vi, "Inability to Perform, or Abuse of, the Interpreter's Role."

If any of the scenarios in Section II.J.4.a.vi applies, and it is appropriate to do so, the AO or supervisory asylum office personnel may inform the interpreter of the problem and ask the interpreter to correct the behavior. If the behavior continues or

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the applicant brings a prohibited interpreter, the appropriate asylum office personnel will take action based on the scenario.

In cases related to misrepresentation, fraud, other improper conduct on the part of the applicant's interpreter or a prohibited interpreter (unless the interpreter is the applicant's attorney or accredited representative), asylum officer personnel will dismiss the applicant's interpreter from the interview and immediately attempt to secure a contract interpreter to provide direct interpretation.

In the case of incompetence on the part of the applicant's interpreter, asylum officer personnel will immediately attempt to secure a contract interpreter to provide direct interpretation. If a contract interpreter provides direct interpretation for the interview, the applicant's interpreter may remain in the interview room, and may, in the discretion of the AO, help facilitate communication as needed.

If there is no contract interpreter available to provide direct interpretation or the applicant declines the use of a contract interpreter, asylum office personnel will:

- Terminate or cancel the interview with SAO approval;
- Explain to all parties (the applicant, interpreter, and representative) the reason for the termination or cancellation of the interview;
- Explain to all parties that the applicant will be rescheduled only once and that the applicant must reappear with a different interpreter who is competent, not prohibited from interpreting, and who has not previously been found to have abused his or her role as an interpreter;
- Complete a Rescheduling of Asylum Interview – Interpretation Problems (Appendix 7) form, providing the original to the applicant and maintaining a copy in the file. Attach copies of any identity documents submitted by the interpreter to the file copy of the letter;
- Explain to all parties that a copy of the letter will be submitted to asylum office management, which may result in the interpreter being barred from the office; and
- Reschedule the interview in Global, indicating the rescheduling is caused by the applicant.

APPLICANTS WITHOUT INTERPRETERS

Stopping the Interview

If the applicant has not provided an interpreter and the Asylum Officer determines that the applicant does not understand the questions and/or cannot express the claim, the Asylum Officer must stop the interview. There may be times when the

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applicant wishes to proceed in English even though his or her English is not proficient enough. Due to the potential for misunderstandings, however, the Asylum Officer must terminate the interview if he or she determines there are difficulties in communication.

Rescheduling the Interview

At the Asylum Officer's discretion and in consultation with a supervisor, the Asylum Officer may reschedule the interview so that the applicant can return with an interpreter. See *Affirmative Asylum Procedures Manual*, Section II.J.4.a.vi, "Inability to Perform, or Abuse of, the Interpreter's Role."

An applicant's failure without good cause to provide a competent interpreter may result in ineligibility for employment authorization. Therefore, all applicants should be given a second chance to provide a competent interpreter if he or she has failed to bring an interpreter, or if the interview is terminated due to problems with an applicant's interpreter and inability to secure a contract interpreter. However, the interview can only be rescheduled once and the applicant must bring a different, competent interpreter to the rescheduled interview. In order to discourage solicitation at Asylum Offices, applicants should not be permitted to return to the waiting room to seek alternate interpreters. See 8 C.F.R. §§ 208.7(a)(4), 208.9(g), 208.10.

Written Notice

If an applicant does not provide an interpreter, the Asylum Office must give the applicant written notice explaining the consequences of failing to bring a competent interpreter. This must be given to all non-*Mendez* and non-*ABC* asylum applicants who appear without a competent interpreter. (There are certain provisions regarding interpreters for *Mendez* and *ABC* applicants that do not apply with other asylum applicants.)

Similarly, if an affirmative asylum interview is rescheduled due to interpreter problems, the Asylum Officer must complete the form, *Rescheduling of Asylum Interview – Interpretation Problems. Affirmative Asylum Procedures Manual*. Note: There is a special notice for *ABC* applicants.

The "CLOCK"

For purposes of work authorization, if the asylum application was filed on or after January 4, 1995, the 150-day processing "clock" will be tolled (stopped) between the dates of the first scheduled interview and the rescheduled interview.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. Overseas Processing of Asylee and Refugee Derivatives: Form I-730 Beneficiaries ("Visas 92/93"), Version 1.0, September 30, 2010.

2. Please see Required Reading list in Supplement A – Refugee Affairs Division. IO employees will be responsible for all Refugee Affairs Division information.

ADDITIONAL RESOURCES

None

SUPPLEMENTS

IO Supplement – 1

2.2 Interpreters Utilized for RAIO Interviews

International Operations field guidance regarding the use of an interpreter during I-730 interviews indicates:

> Subject to local field office policy, the beneficiary may be required to bring his or her own interpreter. In posts that will not allow anyone other than the beneficiary into the interviewing facility, interpreters may be provided by the OPE or other Embassy-endorsed organization. As noted, USCIS LES staff may serve as interpreters when required.

Overseas Processing of Asylee and Refugee Derivatives: Form I-730 Beneficiaries ("Visas 92/93"), Version 1.0, September 30, 2010.

IO Supplement – 2

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2.3 Conducting an Interview if You are Fluent in the Interviewee's Language

Currently, IO has no written policy governing its officers interviewing in a language other than English. IO officers should refer to local office procedures.

IO Supplement – 3

2.4 Verifying the Identity of the Interpreter

Refer to local office procedures.

IO Supplement – 4

3.2 Advising the Interpreter of His or Her Role

Interpreter Ground Rules # 1: ***Keep all information discussed by all parties at a USCIS interview confidential***

International Operations Division procedures provide the following guidance on privacy and confidentiality requirements:

> Confidentiality issues mandated in 8 CFR 208.6 apply to the beneficiaries of I-730petitions, whether they are following-to-join asylees or refugees. (*See* Appendix L, *Asylum Confidentiality Memos*: Joseph E. Langlois, *Fact Sheet on Confidentiality*, Memorandum to Asylum Office Directors and Deputy Directors, June 15, 2005, plus attachments; and Cooper, Bo., INS Office of the General Counsel, *Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information,* Memorandum to Jeffrey Weiss, Director, Office of International Affairs, June 21, 2001).
>
> Asylum information is protected from disclosure to a third party, including a beneficiary of an approved Form I-730. The confidentiality regulations governing asylum applications are equally applied to refugee applications as a matter of policy. While information contained within the petitioner's asylum or refugee case records may provide the interviewer with pertinent questions, *the interviewing officer must exercise caution in revealing protected information contained in the petitioner's refugee or asylee case record.* (*See* Section III.B, *Confidentiality Issues*, for further guidance).

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Each officer conducting Visas 92/93 interviews must, to the maximum extent possible given office limitations, provide suitable interviewing space that allows for privacy.

Overseas Processing of Asylee and Refugee Derivatives: Form I-730 (V92/93)-Section I(H): Privacy/Confidentiality, Version 1.0, September 30, 2010.

IO Supplement – 5

3.3 Interpreter's Oath

International Operations field guidance provides regarding interpreter oaths indicates:

ii. Interpreter

The officer must also place the interpreter under oath, including LES or OPE staff serving as interpreters. They are similarly bound to the confidentiality provisions associated with Visas 92/93 cases. Before proceeding with the interview, the officer should ensure that the interpreter answers affirmatively the following questions:

- Are you here today at the request of [beneficiary being interviewed]?
- Do you speak and understand both English and the [language spoken by the beneficiary] fluently and know from talking with [the beneficiary] that you understand each other?
- Do you solemnly swear/affirm to truthfully, literally and fully interpret the questions asked by me and the answers given by [the beneficiary]?
- Do you understand that you must translate every word as precisely as possible and not summarize, paraphrase, reduce, expand, or change the content of [beneficiary's name]'s testimony to me?
- Do you understand that DHS may choose to collect, retain, and verify the identity information you have provided?
- Do you understand that you must keep all information discussed during this interview confidential?

Overseas Processing of Asylee and Refugee Derivatives: Form I-730 (V92/93), Section III(C)(3)(c)(ii): "Interpreter," Version 1.0, September 30, 2010.

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IO Supplement – 7

4.4. What to Do Once You Have Stopped the Interview Due to the Interpreter's Incompetency or if the Interpreter is Not Available

Refer to local office procedures.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

INTERNATIONAL RELIGIOUS FREEDOM ACT (IRFA) AND RELIGIOUS PERSECUTION

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

INTERNATIONAL RELIGIOUS FREEDOM ACT (IRFA) AND RELIGIOUS PERSECUTION

Training Module

MODULE DESCRIPTION:

This module introduces you to the International Religious Freedom Act (IRFA) and the responsibilities that the Act creates for adjudicating protection claims. The training you receive will also be useful in adjudicating immigration benefits, petitions, and other immigration-related requests. Through reading and discussing country conditions information, you will increase your awareness of religious freedom issues around the world. Through discussion and practical exercises, you will learn how to conduct an interview and adjudicate a claim with a religious freedom issue.

TERMINAL PERFORMANCE OBJECTIVE(S)

Given a request for protection (an asylum or refugee application, or a reasonable fear or credible fear screening[1]) with a religious freedom issue, you will apply IRFA and case law.

ENABLING LEARNING OBJECTIVES

1. Summarize the IRFA requirements for RAIO officers.
2. Explain the statutory and regulatory requirements for consideration of protection claims and benefits requests involving religious freedom and religious persecution.
3. Summarize legal rulings that must be followed or that provide guidance when making decisions based on religious freedom or religious persecution.
4. Distinguish between appropriate and inappropriate interview questions involving religious freedom issues

[1] Reasonable fear and credible fear screenings are processes in which an Asylum Pre-screening Officer determines if an applicant, who is subject to expedited removal, re-instatement of removal, or administrative removal, and who expresses a fear or concern of being removed, has a credible or reasonable fear of persecution or torture.

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5. Explain the broad interpretation of "religion" as a protected ground under IRFA and the refugee definition.

INSTRUCTIONAL METHODS

- Lecture
- Discussion
- Practical exercises

METHOD(S) OF EVALUATION

Written test

REQUIRED READING

1. U.S. Department of State, International Religious Freedom Report for 2013 (July 28, 2014), Executive Summary.
2. Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000).
3. Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011).

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. U.S. Department of State, International Religious Freedom Reports.
2. U.S. Commission on International Religious Freedom, Annual Reports.
3. International Religious Freedom Act of 1998, P.L. 105-292, 112 Stat. 2787 (Oct. 27, 1998).
4. UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (28 April 2004).

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5. Lawyers Committee for Human Rights. Testing the Faithful: Religion and Asylum Summary Results of Survey, A Briefing Paper Prepared for the Roundtable on Religion-based Persecution Claims (New York: November 2002).

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

Task/ Skill #	Task Description
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
IRL7	Knowledge of International Religious Freedom Act (3)
IRL14	Knowledge of nexus to a protected characteristic (4)
ILR15	Knowledge of the elements of each protected characteristic (4)
ILR22	Knowledge of criteria for establishing credibility (4)
ITK6	Knowledge of principles of cross-cultural communications (e.g., obstacles, sensitivity, techniques for communication) (4)
OK11	Knowledge of Department functions and responsibilities, as they relate to RAIO (2)
RI1	Skill in identifying issues of claim (4)
RI3	Skill in conducting research (e.g., legal, background, country conditions) (4)
RI4	Skill in integrating information and materials from multiple sources (4)
IR3	Skill in responding to cultural behavior in an appropriate way (e.g., respectful, accepting of cultural differences) (4)
DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5)
DM4	Skill in determining applicant's credibility (5)
DM5	Skill in analyzing complex issues to identify appropriate responses or decisions (5)
ITS3	Skill in framing interview questions and requests for information (4)
ITS6	Skill in conducting non-adversarial interviews
C3	Skill in tailoring communications to diverse audiences (3)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
1/28/15	Throughout document	Fixed links and citations; added new case law; deleted references to 2011-2012 COI materials	RAIO Trng
03/24/2017	Throughout document	Updated links; added citation; updated TOC; changed indentations for consistency.	RAIO Training

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

The purpose of this module is to introduce you to the International Religious Freedom Act (IRFA) and the proper way to analyze protection claims involving religious freedom issues with the goal of ensuring that religious freedom is respected during the course of interviews and throughout the adjudication process.

Sections 2 and 3 of this module provide an overview of IRFA and a detailed analysis of Title VI, the section of IRFA that is most relevant to you. Sections 4, 5, 6, and 7 of this module discuss the nature of religion and violations of religious freedom, and explore the issues that you should consider when interviewing, analyzing and adjudicating a protection claim or benefit request where religion may be a factor. Finally, Section 8 of this module lists resources you may find useful when deciding claims based on religious freedom.

2 OVERVIEW OF IRFA

In 1998, Congress adopted the International Religious Freedom Act (IRFA) in response to growing concerns about the persecution of various religious groups throughout the world. IRFA was signed into law on October 27, 1998.

While IRFA specifically noted Congressional concern for Christians in the Sudan and China, Tibetan Buddhists and Baha'is in Iran, Congress recognized the importance of protecting religious freedom throughout the world. In its findings, Congress cited, among other reasons, the following as a basis for adopting the Act:

The right to freedom of religion undergirds the very origin and existence of the United States. Many of our Nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established a law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion. From its

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birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution.[2]

IRFA seeks to address two different though equally important issues. First, IRFA addresses the issues of religious freedom and religious persecution directly, including a series of diplomatic and foreign policy provisions designed to enhance the ability of the United States to promote religious freedom around the globe. Second, IRFA addresses perceived problems within the Department of State (DOS), the Department of Justice (DOJ), and the former Immigration and Naturalization Service (INS) that may lead to diminished attention to the problems of religious persecution. These latter provisions now apply to the relevant components of the Department of Homeland Security (DHS).

IRFA is divided into seven titles. For this training, Title VI is the most important and will be the focus of this lesson. It is helpful, however, to briefly review the scope of the entire law. The following are the highlights of the provisions in each Title of IRFA. You should read the entire law for a complete understanding of all its provisions.

2.1 Title I – Department of State (DOS) Activities

- Establishes within DOS an Office on International Religious Freedom and an Ambassador-at-Large for International Religious Freedom
- Requires DOS to provide specific training and outreach to Foreign Service Officers, including instruction on internationally recognized human rights and religious freedoms
- Requires DOS to set up a website for religious freedom and to maintain country-by-country lists of prisoners of conscience
- Requires DOS to publish various papers on religious freedom and an annual report that documents religious persecution throughout the world[3]

2.2 Title II – Commission on International Religious Freedom

- Creates a Commission on International Religious Freedom (USCIRF) comprised of nine members from outside the U.S. Government, to monitor religious freedom in other countries, and to advise the U.S. Government on how best to promote religious freedom

2.3 Title III – National Security Council (NSC)

- Creates an NSC Special Advisor to the President on International Religious Freedom

[2] 22 U.S.C. § 6401(a)(1) (1999).

[3] The annual report may be found on the DOS website for international religious freedom

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- Special Advisor serves as a resource for executive branch officials and makes policy recommendations

2.4 Title IV – Presidential Actions

- Provides the President with the power to sanction violators of religious freedom
- Requires the President to designate "countr[ies] of particular concern for religious freedom" if the countries have engaged in or tolerated certain violations of religious freedom[4]

2.5 Title V – Promotion of Religious Freedom

- Requires the United States to promote religious freedom through broadcasts, international exchanges, and foreign service awards

2.6 Title VI – Refugee, Asylum, and Consular Matters

This Title is discussed in detail below in Refugee, Asylum, and Consular Matters under IRFA.[5]

2.7 Title VII – Miscellaneous Provisions

These provisions note that it is the "sense of Congress that transnational corporations operating overseas" should adopt codes of conduct that encourage respect of employees' religious beliefs and practices.

3 REFUGEE, ASYLUM, AND CONSULAR MATTERS UNDER IRFA

Title VI contains five sections, which you must know in order to adjudicate refugee and asylum claims. A description of each section follows.

3.1 Section 601 -Use of Annual Report

This section specifically mandates Asylum Officers, Immigration Judges, and Refugee and Consular Officers use the DOS Annual Report on Religious Freedom and other country of origin information when analyzing claims for asylum or refugee status on account of religion.[6]

[4] The President has delegated this authority to the Secretary of State and the countries of particular concern are found on the DOS website.

[5] 22 U.S.C. §§ 6471-6474 (1999). You should read Title VI for the complete provisions in each section. These are just the highlights.

[6] Publication of the annual report is a requirement under Title I.

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Furthermore, this section specifically prohibits the denial of a refugee or asylum claim solely because the conditions of religious persecution as stated by an applicant do not appear in the DOS annual report.[7] [ASM Supplement – Use of DOS Annual Report].

3.2 Section 602 - Reform of Refugee Policy

This section[8] contains four important components:

1. Mandates training for Refugee Adjudicators that is the same as Asylum Adjudicators' training and that includes country conditions information and information on religious persecution.

2. Mandates training for Consular Officers on refugee law and adjudication, and religious persecution.

3. Requires DOS and DHS to jointly create guidelines to ensure that interpreters and other foreign personnel who come into contact with refugee applicants do not show improper bias on account of an individual's religion, race, nationality, membership in a particular social group, or political opinion.

4. Requires greater scrutiny of the manner in which refugee cases are screened and prepared and interviews are conducted to ensure that the files contain information that is unbiased and accurate.

3.3 Section 603 - Reform of Asylum Policy

This section[9] contains three important components:

1. Requires DOS and DHS to jointly create guidelines to ensure that individuals possibly biased against a person's race, religion, nationality, membership in a particular social group, or political opinion are not permitted to act as interpreters between aliens and Inspection or Asylum Officers. This includes interpreters and employees of airlines owned by governments known for persecutory actions.

2. Requires Asylum Officers and any Immigration Officers working in the expedited removal[10] context to receive training on "the nature of religious persecution abroad, including country-specific conditions, instruction on the internationally recognized

[7] See also Gaksakuman v. U.S. Att'y Gen., 767 F.3d 1164 (11th Cir. 2014) (holding that State Department reports cannot be found to undercut evidence presented by an applicant simply because they fail to comment on the facts of an individual application).

[8] 22 U.S.C. § 6472 (1999).

[9] 22 U.S.C. § 6473 (1999).

[10] Persons who are in expedited removal proceedings and express a fear or concern of being removed to the country DHS has designated for removal, must be referred to an Asylum Pre-screening Officer for a credible fear determination.

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right to freedom of religion, instruction on methods of religious persecution practiced in foreign countries, and applicable distinctions within a country in the treatment of various religious practices and believers."[11]

3. Under Section 602, all training mandated for Asylum Officers, must also be provided to officials adjudicating refugee cases.[12]

3.4 Section 604 - Inadmissibility of Foreign Government Officials who Have Engaged in Particularly Serious Violations of Religious Freedom

This section[13] creates a new ground of inadmissibility to prevent religious persecutors from entering the United States. This ground, codified in Section 212(a)(2)(G) of the INA, 8 U.S.C. § 1182(a)(2)(G), and later amended by the Intelligence Reform Act of 2004, makes inadmissible any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section three of IRFA. This inadmissibility ground also includes the spouse and children of any such individual. The inadmissibility ground applies only to aliens seeking admission on or after October 27, 1998, the date of the enactment of IRFA. However, note that refugee applicants may apply for a waiver of this ground of inadmissibility pursuant to INA § 207(c)(3).

In 1999, INS issued a policy memorandum on how to process applications for admission from individuals who may fall within this section of the INA.[14]

3.5 Section 605 - Studies on the Effect of Expedited Removal Provisions on Asylum Claims

The U.S. Commission on International Religious Freedom has the ability to request from the Attorney General a study by the Comptroller General on certain aspects of the expedited removal process.[15]

- On September 1, 2000, the General Accounting Office (GAO)[16] released a report on the expedited removal process as required under IRFA; however, it did not

[11] IRFA also requires that immigration judges receive training on religious persecution.

[12] 22 U.S.C. 6472(a).

[13] Intelligence Reform and Terrorism Prevention Act of 2004 § 7119, PL 108-458, 118 Stat. 3638 (2004) (removing a restriction that the particularly severe violations of religious freedom must have taken place within the 24-month period prior to the inadmissibility determination).

[14] For specific instructions, see Michael A. Pearson, INS Office of Field Operations, Amendment to the Immigration and Nationality Act adding section 212(a)(2)(G), relating to the inadmissibility of foreign government officials who have engaged in particularly serious violations of religious freedom, Memorandum to Regional and Service Center Directors, (Washington, DC: 9 July 1999), 4 p. Note that if these individuals are in the United States, they are not necessarily precluded from applying for asylum, withholding of removal, or protection under the Convention Against Torture.

[15] 22 U.S.C. § 6474 (1999).

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specifically address the issue of how the agency handles the religious-based claims of individuals in the expedited removal process. The GAO report found that the agency was generally in compliance with its expedited removal procedures at selected ports of entry and in compliance with the credible fear process at selected asylum offices.

- The U.S. Commission on International Religious Freedom commissioned a study on asylum seekers in expedited removal, and issued its Report in February 2005. The study sought to answer the following four questions:

1. Are immigration officers, exercising expedited removal authority, improperly encouraging asylum seekers to withdraw applications for admission?

2. Are immigration officers, exercising expedited removal authority, incorrectly failing to refer asylum seekers for a credible fear interview?

3. Are immigration officers, exercising expedited removal authority, incorrectly removing asylum seekers to countries where they may face persecution?

4. Are immigration officers, exercising expedited removal authority, detaining asylum seekers improperly or under inappropriate conditions?

Based on the problems identified in the study, the Report proposed five recommendations to DHS to ensure that asylum seekers are protected under the expedited removal process.[17] The recommendations were:

- Creating an office authorized to address cross cutting issues related to asylum and expedited removal – in response, DHS created a new position of Special Advisor for Refugee and Asylum Affairs in 2006 and appointed Igor Timofeyev to serve.

- Allowing asylum officers to grant asylum at the credible fear stage – in response, after careful consideration DHS rejected this recommendation due to resource constraints and the potential for a negative impact on some asylum-seekers.

- Establishing asylum detention standards – in response, ICE issued a directive in 2007 to its field components designed to ensure transparency, consistency, and quality in parole decisions.

- Facilitating legal assistance to asylum-seekers – in response DHS cited to its collaboration with DOJ on Legal Orientation Programs for detained individuals and

[16] General Accounting Office. ILLEGAL ALIENS: Opportunities Exist to Improve the Expedited Removal Process. GAO/GGD-00-176 (Washington, DC: 1 September 2000) 107p. This agency was renamed the Government Accountability Office in 2004.

[17] U.S. Commission on International Religious Freedom, Report on Asylum Seekers in Expedited Removal (Washington, DC: 8 Feb. 2005). The USCIRF Report is available on the USCIRF website. Note that the Congress authorized the Commission to examine how expedited removal was affecting asylum seekers, regardless of whether the claim was based on religion, race, nationality, membership in a particular social group, or political opinion.

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to its partnerships with NGOs, notably the Capital Area Immigrants' Rights Coalition.

- Implementing quality assurance procedures to ensure asylum-seekers are not turned away in error – in response, DHS implemented robust quality assurance procedures.

For more on DHS's response, see Stewart Baker letter to U.S. Commission on International Religious Freedom (Nov. 28, 2008).

4 THE NATURE OF RELIGION

4.1 Identifying Religious Beliefs and Practices

Religion is explicitly listed as one of the five protected characteristics in the refugee definition, and religion has been broadly understood to include freedom of thought and conscience.[18] In IRFA, Congress invoked the understanding of religion found in international instruments, such as the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, and found that freedom of religious belief and practice is a universal human right and fundamental freedom.[19] Defining "religion" to include an individual's thought, conscience, and belief requires for a broad interpretation of this protected ground in the asylum and refugee adjudications.

Familiar and Unfamiliar Religions

Religion, as a protected ground, is not limited to familiar, or widely accepted religious beliefs and practices. For purposes of establishing asylum and refugee eligibility, persecution suffered or feared on account of a belief system with which you may not be familiar may be considered persecution "on account of religion." IRFA refers to religious freedom without defining what makes a particular practice or belief a religion, or placing any particular religious group in a position of privilege over any other. While many applicants base their claim to refugee or asylum status on their inclusion in a faith group that is recognizable to the adjudicator (e.g. Hindus, Christians, or Muslims), other individuals may seek protection based upon unfamiliar religious beliefs and practices.[20]

The mere fact that an individual's faith or faith group is not familiar to an adjudicator, or that a particular practice or belief appears to be unusual, does not mean that the particular faith group or set of practices and beliefs are not "religious." "Popularity, as well as verity, are inappropriate criteria."[21] Neither courts nor adjudicators may inquire into the

[18] Zhang v. Ashcroft, 388 F.3d 713, 720 (9th Cir. 2004) (per curiam) (citing Paragraph 71 of the UNHCR Handbook).

[19] 22 U.S.C. § 6401(a)(1) - (3) (1999).

[20] See UNHCRGuidelines on International Protection: Religion-Based Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees. HCR/GIP/04/06, 28 April 2004, Section II.

[21] Stevens v. Berger, 428 F. Supp. 896, 899 (E.D.N.Y. 1977)

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truth, validity, or reasonableness of a claimant's religious beliefs. Therefore, your role is not to determine whether a belief system may be considered a "religion," but to determine whether the applicant has suffered or might suffer persecution on account of those beliefs.[22]

Denial of Religion

The protected ground of religion also covers an individual's failure or refusal to observe a religion. An individual may also face persecution on account of religion, even if he or she denies that his or her belief, identity or way of life constitutes a "religion."[23]

Inability to Practice a Religion

The definition of religion and religious freedom necessarily includes the ability to worship and to otherwise practice one's religion. Courts have held that "it is virtually the definition of religious persecution that the votaries of a religion are forbidden to practice it."[24] The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) states that the fundamental right to religious freedom includes "the freedom of a person to . . . manifest it in public or private, in teaching, practice, worship and observance."[25]

UNHCR Guidance on Religion-Based Claims

A useful way to consider this protected ground is to consider the elements UNHCR has identified for claims based on "religion." UNHCR notes that such claims may involve one or more of the following elements:[26]

- religion as a belief (including non-belief)
- religion as identity
- religion as a way of life

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[22] For example, in the First Amendment context, "a religious belief can appear to every other member of the human race as preposterous, yet merit the protections of the Bill of Rights." Stevens v. Berger, 428 F. Supp. at 899; see also Najafi v. INS, 104 F.3d 943, 949 (7th Cir. 1997) (stating that "determination of a religious faith by a tribunal is fraught with complexity as true belief is not readily justiciable"); Callahan v. Woods, 658 F.2d 679, 685 (9th Cir. 1981).

[23] See UNHCR Guidelines on International Protection: Religion-Based Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees. HCR/GIP/04/06, 28 April 2004, para. 9. See Zhang v. Ashcroft, 388 F.3d 713 (9th Cir. 2004) (per curiam) (holding that Falun Gong practitioner faced persecution on account of his spiritual and religious beliefs, even though Falun Gong does not consider itself a religion).

[24] Bucur v. INS, 109 F.3d 399, 405 (7th Cir. 1997).

[25] See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (2011), ¶ 71.

[26] See UNHCR Guidelines on International Protection: Religion-Based Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (2004), at para. 5.

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Belief

According to UNHCR, a person's "beliefs" may be theistic, non-theistic, and atheistic. They also include a person's convictions or values about "divine," "ultimate reality," or "spiritual destiny." Because of his or her beliefs, a person may be considered a heretic, apostate or a pagan by members of the same religious group.[27]

Identity

A religious persecution claim may also be based on the applicant's ancestry, nationality, ethnicity, traditions and rituals and less on the applicant's actual theological beliefs.[28] Persecutors may target religious groups that are different from theirs because they view such groups as a threat to their own identity.

Way of Life

Religion, for some individuals, may also be a "way of life" characterized by a manner of dress, observance of religious practices and holidays, dietary restrictions, and other requirements. Such practices may be at the core of the religion for the applicant.

Resources

The following sources are useful reference tools for understanding different faith groups around the world:

- CIA World Factbook: Religions
- Bowker, John (ed.), The Oxford Dictionary of World Religions
- Crim, Keith (ed.), The Perennial Dictionary of World Religions
- Eederman's Handbook to World Religions
- Hinnells, J.R. (ed.), Penguin Dictionary of Religions
- Smith, J.Z., The Harper Collins Dictionary of Religion

4.2 Credibility Considerations in Religious Persecution Cases

Credibility determinations can be particularly complex in religious persecution cases. You may need to judge the sincerity of the applicant's claimed religious beliefs, but you cannot judge the validity of the belief system itself. Additionally, you may have certain assumptions or biases about religious issues, which must be put aside in order to render a legally sufficient and unbiased credibility determination. The following considerations should be taken into account:

[27] Id. at para. 6.

[28] Id. at para. 7.

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4.2.1 Refrain from Judging the Validity of a Belief System

You should not question the validity of a belief, even if the belief appears to be strange, illogical, or absurd.

Distinguish between the Sincerity of Belief and the Validity of Belief

You may evaluate whether a belief is sincerely held. In doing so, you should not make disrespectful or disparaging remarks about the belief or about the applicant's adoption of such a belief. If you suspect that an individual adopted a belief system solely for the purposes of trying to obtain asylum or refugee status, you must still evaluate whether the applicant's belief is sincerely held. In your questioning, you may elicit testimony about the sincerity of the belief, but you may not question whether the belief system itself has merit or has merit in comparison to other religions.

Refrain from Judging Credibility based on Knowledge of Religious Tenets

An individual's lack of knowledge of religious tenets does not necessarily mean the individual does not hold the belief or religious identity in question. Just as no individual's personal religious experience could be summed up in the history of his or her church, the words of a few prayers, or a description of his or her place of worship, a religious identity cannot be verified solely on a test of religious tenets.[29]

Furthermore, any inquiry into the applicant's knowledge of the tenets of his or her religion must take into account "individual circumstances, particularly since knowledge of a religion may vary considerably depending on the individual's social, economic or educational background and/or his or her age or sex."[30] In Ren v. Holder, for example, the

[29] See Iao v. Gonzales, 400 F.3d 530, 534 (7th Cir. 2005) ("many deeply religious people know very little about the origins, doctrines, or even observances of their faith"); Rizal v. Gonzales, 442 F.3d 84, 90 (2d Cir. 2006) (reversing an adverse credibility finding based solely on the applicant's lack of detailed knowledge of Christian doctrine where the IJ failed to consider the applicant's self-identification as a religious adherent, his religious activities, and that other Indonesians perceived him to be Christian); Cosa v. Mukasey, 543 F.3d 1066, 1069-1070 (9th Cir. 2008) (vacated IJ decision, in part because IJ incorrectly faulted applicant for her inability to explain relationship between Millenism and similar religions, and set up Bible quiz and academic trivia contest); see also David Landau, Chief Appellate Counsel, ICE Office of the Principal Legal Advisor, Guidance on Religious Persecution Claims Relating to Unregistered Religious Groups, Memorandum for ICE Chief Counsel, (Washington, DC: February 25, 2008), section VI.

[30] U.N. High Commissioner for Refugees, Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, paras. 28 and 30, U.N. Doc. HCR/GIP/04/06 (Apr. 28, 2004). See also Yan v. Gonzales, 438 F.3d 1249, 1252 (10th Cir. 2006) (reversing an adverse credibility finding that relied on the applicant's incorrect responses to a " a mini-catechism" test and failed to consider the applicant's personal experiences with Christianity and his personal circumstances including: "his very personalized notion" of certain doctrinal elements of Christianity, high school level education, that the applicant had only converted to Christianity 5 years earlier, and that the applicant's lack of knowledge regarding when he celebrated Easter could result from the fact that the holiday is celebrated on different days each year.); Matter of J-Y-C-, 24 I&N Dec. 260, 265 (BIA 2007) (finding that a Chinese applicant who claimed to be Christian could reasonably have been expected to identify the Bible during an airport interview since the applicant later

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Ninth Circuit rejected an adverse credibility determination based, in part, on the applicant's inability to recite The Lord's Prayer.[31] The court held that questioning an applicant on his knowledge of religious doctrine to determine if he is a true believer is "not an appropriate method for determining eligibility for asylum."[32]

1. Recognize that religions are practiced differently around the world

Location, time period, and culture will produce variations in religious beliefs or practices.[33] Religious practices may vary from country to country and even within countries.

Example

An officer familiar with the practices of a Protestant church finds unbelievable an applicant's claim that he was baptized in an indoor baptismal font rather than in a natural body of water, as the officer believes is the church custom. However, the applicant lives in a near-Arctic climate in which the temperature of the bodies of water never rises above 45 degrees and baptisms are, therefore, not conducted in natural bodies of water.

2. Recognize that suppression of a religious group affects practice

Many persons who fear harm on account of religion have been forced to practice their faith in secret or not allowed to practice their faith at all. Sometimes these groups have been without a formal leader or religious texts and have simply passed on traditions from one generation to the next. Absent formal religious education, such individuals may not be able to discuss church history or the theological significance of particular practices. Additionally, underground or illegal religious institutions may not adhere to all formal practices of the faith for lack of training, worship or gathering space, materials, or for other reasons.[34]

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testified before the IJ that his experiences with Christianity before coming to the US and while in China included having been given a Bible by a friend who also told him to read it.)

[31] Ren v. Holder, 648 F.3d 1079, 1088 (9th Cir. 2011).

[32] Id.

[33] [33] U.N. High Commissioner for Refugees, Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees (2004), para. 28. Note, however, that "[g]reater knowledge may be expected . . . of individuals asserting they are religious leaders or who have undergone substantial religious instruction." Id. at para. 32. See Mezvrishvili v. U.S. Att'y Gen., 467 F.3d 1292, 1295-1297 (11th Cir. 2006))(finding error where an IJ held that the applicant did not demonstrate sufficient knowledge of his religion given that the applicant had been a Jehovah's Witness for only four years and did not represent that he had undertaken active study of the religion for those four years).

[34] See Huang v. Gonzales, 403 F.3d 945, 949 (7th Cir. 2005) (rejecting IJ's adverse credibility finding because, among other things, the IJ failed to consider that members of an illegal underground Chinese Catholic church might have to deviate from formal practices); see also Jiang v. Gonzales, 485 F.3d 992, 994-995 (7th Cir. 2007)(noting that the IJ had "an exaggerated notion of how much people in China actually should know about Christianity." The court compared the IJ's finding that the applicant could not have been be persecuted for being a Christian because he

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Example

A 35 year-old woman claiming to be Ukrainian Catholic cannot describe how she would receive the Eucharist. This could be explained by the fact that in her rural town there were very few families who were Catholic and they had not had a priest since 1925.

3. Recognize your personal perceptions of a religion may not be accurate

You are not expected to be a theological scholar. Good research on a particular religion, and how it is practiced in a particular region, is crucial to conduct a thorough interview. Even if you are familiar with a religion through personal study or experience, you must be careful when questioning applicants and making credibility determinations.[35] You must not make assumptions, but should instead attempt to verify the applicant's statements with country of origin information.

This is particularly important when the claimant is a member of the same faith group as you. You may be tempted to rely on your personal experiences in the faith to evaluate the testimony of the applicant. It is unlikely, however, that applicants for asylum or refugee status will practice their religion as it is practiced in the United States.

4. Do not judge sincerity based on the applicant's manner of religious practice

You should not assume that the applicant's religious beliefs are not sincere based solely on the manner in which the applicant engaged in religious worship or the applicant's attendance at religious services. Religious practices can vary from country to country, community to community, and even person to person. You may notice, if you practice a religion, that the way you practice it may be different than other members of your family. How a religion is practiced may not be indicative of religious sincerity.[36] For example, attendance or lack of attendance at religious services may be affected by numerous factors, such as the availability of places for religious observance, personal circumstances that may inhibit or prevent religious attendance, fear of serious harm when attending religious services, or personal preferences. The frequency of or lack of attendance at religious services may not be indicative of religious sincerity.

Religious Beliefs Can Be Imputed to an Applicant

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could not interpret a Biblical passage to a finding that an individual is not "a baseball devotee because he can't explain the intricacies of the balk rule.").

[35] Cosa v. Mukasey, 543 F.3d 1066, 1069 (9th Cir. 2008) (reversing adverse credibility finding because IJ wrongly relied on speculation and conjecture regarding how Millenists dress and behave to fault the applicant's dress and demeanor, and used personal opinion to find that it was "preposterous" that applicant was baptized after only a short period of association with the religion).

[36] See, e.g., Singh v. Holder, 720 F.3d 635, 643-644 (7th Cir. 2013) (finding "inappropriate" behavior of IJ who doubted that applicant was Sikh because the applicant did not follow all tenets of Sikhism listed in a Wikipedia entry and noting that "Rather than seeking a verbatim recitation of an encyclopedia article, IJs should listen to a petitioner's personal explanation of religious beliefs…Orthodoxy is no substitute for sincerity.")

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An applicant's knowledge of her religion, or the depth of her beliefs, may not be relevant if she faces persecution on account of beliefs a persecutor perceives her to hold. An adjudicator must look at the totality of the applicant's circumstances, and country conditions information, when assessing whether an applicant has been or would be persecuted on account of an imputed religious belief.[37] For example, in Bastanipour v. INS, the court found that "[w]hether Bastanipour believes the tenets of Christianity in his heart of hearts or . . . is acting opportunistically (though at great risk to himself) in the hope of staving off deportation would not, we imagine, matter to an Iranian religious judge."[38]

5 RIGHT TO RELIGIOUS FREEDOM

In Section 2 of IRFA, Congress acknowledged that freedom of religious belief and practice is a universal human right and a fundamental freedom articulated in numerous international instruments. A review of these international instruments is important background information, given IRFA's training requirements for Refugee and Asylum Officers, which includes instruction on the internationally recognized right to freedom of religion. Some of the relevant provisions in the listed international instruments are below.[39]

5.1 United Nations Charter

Article 1 of the United Nations Charter provides that one of the purposes of the United Nations is to achieve international cooperation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[40]

5.2 Universal Declaration of Human Rights

Article 18 of the Universal Declaration of Human Rights states that "[e]veryone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance." The text of this Article is quoted in IRFA.[41]

5.3 International Covenant on Civil and Political Rights

[37] For additional information, see RAIO Training module, Nexus and the Five Protected Grounds.

[38] Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992).

[39] 22 U.S.C. § 6401(a)(2) (1999).

[40] Charter of the United Nations. (San Francisco: 26 June 1945).

[41] Universal Declaration of Human Rights. G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

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Article 18 of the International Covenant on Civil and Political Rights[42] provides that:

1. Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in a community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.

2. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

5.4 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief reaffirms the provisions in Article 18 of the International Covenant on Civil and Political Rights.[43]

Religious Discrimination and Intolerance

Article 2 addresses issues of discrimination based on religion or other beliefs and defines religious discrimination and intolerance as follows:

1. No one shall be subject to discrimination by any State, institution, or group of persons on the grounds of religion or other belief.

2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Parents' Right to Choose Religion

Article 5 addresses the rights of parents to choose the belief or religion in which they desire their children to be raised and the rights of children to have access to education in that belief.

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[42] International Covenant on Civil and Political Rights. G.A. Res. 2200A (XXI), UN GAOR, Dec. 16, 1966. The text of Article 18(1) is quoted in IRFA.

[43] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A.. Res. 36/55, UN GAOR, Nov. 25, 1981.

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1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child serving as the guiding principle.

3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of others to practice a religion or belief, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

4. In the case of a child who is not under the care of either of his parents or legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes regarding the religion or belief in which they would have wished their child to be raised, the best interests of the child serving as the guiding principle.

5. Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account Article 1, paragraph 3, of the present Declaration.

Freedom of Thought, Conscience, Religion, or Belief

Article 6 states that the right to freedom of thought, conscience, religion, or belief shall include, among others, the following:

1. To worship or assemble in connection with a religion or a belief, and to establish and maintain places for these purposes

2. To establish and maintain appropriate charitable or humanitarian institutions

3. To make, acquire and use to an adequate extent the necessary articles and materials related to the rites and customs of a religion or belief

4. To write, issue and disseminate relevant publications in these areas

5. To teach a religion or belief in places suitable for these purposes

6. To solicit and receive voluntary financial and other contributions from individuals and institutions

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7. To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief

8. To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief

9. To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels

5.5 Other International Instruments

Other international instruments that promote the right to religious freedom include the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter of Human and People's Rights, the American Convention on Human Rights, and the Final Act of the Conference on Security and Cooperation in Europe (the "Helsinki Accords").

6 VIOLATIONS OF RELIGIOUS FREEDOM ACCORDING TO IRFA

IRFA highlights the wide range of actions that persecuting regimes take to violate religious freedoms, and provides a non-exclusive list of actions that constitute "violations of religious freedom" and a separate list of violations that constitute "particularly severe violations of religious freedom."[44] The range of violations listed in IRFA is instructive for determining persecution under the INA given IRFA's training requirements for asylum and refugee adjudicators on the nature and methods of religious persecution practiced in foreign countries.

The codification of this categorical framework, however, does not mandate a particular result in an individual case. As discussed below in the Religious Persecution section, these violations may or may not constitute persecution, depending upon whether the harm the applicant experienced or fears is sufficiently serious to amount to persecution.

This categorical framework also gives the President a vehicle for identifying and sanctioning violations of religious freedom in other countries.[45]

These categories generally reflect the rights enshrined in the international instruments discussed above, and compose the framework used to determine if countries will be designated as "countries of particular concern for religious freedom."[46]

6.1 Particularly Severe Violations of Religious Freedom

[44] See 22 U.S.C. §§ 6204 (11) and (13).

[45] See section on Religious Freedoms, above.

[46] 22 U.S.C § 6441,

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Particularly severe violations are systematic, ongoing, egregious violations of religious freedom, including violations such as:

- Torture or cruel, inhuman, or degrading treatment or punishment
- Prolonged detention without charges
- Causing the disappearance of persons by the abduction or clandestine detention of those persons
- Other flagrant denial of the right to life, liberty, or the security of person

6.2 Violations of Religious Freedom

Violations of religious freedom are violations of the internationally recognized right to freedom of religion and religious belief and practice, including violations such as:

Arbitrary prohibitions on, restrictions of, or punishment for:

- Assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements
- Speaking freely about one's religious beliefs
- Changing one's religious beliefs and affiliation
- Possession and distribution of religious literature, including Bibles
- Raising one's children in the religious teachings and practices of one's choice

Example

The government of China requires that unofficial house churches register with the government. Those that refuse to register, on either theological or political grounds, are subject to intimidation, extortion, harassment, detention, and closure of their churches. See 2011 USCIRF Annual Report, "China."

Any of the following acts are violations of religious freedom if committed on account of an individual's religious belief or practice:

- Detention
- Interrogation
- Imposition of an onerous financial penalty
- Forced labor
- Forced mass resettlement
- Imprisonment

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- Forced religious conversion[47]
- Beating
- Torture
- Mutilation
- Rape
- Enslavement
- Murder
- Execution

IRFA also identifies

"state-sponsored slander campaigns, confiscations of property, surveillance by security police, including by special divisions of 'religious police[,'] severe prohibitions against construction and repair of places of worship, denial of the right to assemble and relegation of religious communities to illegal status through arbitrary registration laws, prohibitions against the pursuit of education or public office, . . . prohibitions against publishing, distributing, or possessing religious literature and materials," forcing religious believers to meet secretly, and targeting religious leaders by national security forces and hostile mobs, as additional forms of religious freedom violations.[48]

7 RELIGIOUS PERSECUTION

7.1 Persecution Generally

A variety of harms, ranging from physical abuse to mental suffering may rise to the level of persecution. In certain cases, severe forms of discrimination may constitute persecution.[49] The difference between persecution and discrimination is one of degree, which makes a hard and fast line difficult to draw.[50] Moreover, the Board of Immigration Appeals (BIA) has held that harms and abuses that might not individually rise to the level of persecution may, in the aggregate, constitute persecution.[51] For example, in Shi v. U.S. Att'y Gen., the Eleventh Circuit held that the evidence compelled the conclusion that a Chinese Christian applicant had suffered persecution where he had been arrested during an underground church service, interrogated, detained for a week, and chained to an iron

[47] Being forced to change one's religion and being prohibited from voluntarily changing one's religion are both considered violations of religious freedom.

[48] 22 U.S.C. § 6401(a)(4) and (5).

[49] See Kovac v. INS, 407 F.2d 102, 105-07 (9th Cir. 1969) (holding that persecution is not limited to physical suffering).

[50] Bucur v. INS, 109 F.3d 399, 405 (7th Cir. 1997).

[51] Matter of O-Z- and I-Z-, 22 I&N Dec. 23, 26 (BIA 1998)

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bar outside in the rain for a night; the Court found it especially significant that the police had confiscated the applicant's religious group's bibles and attempted to force him to abandon his religious principles.[52]

In Sumolang v. Holder, the Ninth Circuit found that "[h]arm to a child can amount to past persecution of the parent when that harm is, at least in part, directed against the parent 'on account of' or 'because of' the parent's race, religion, nationality, membership in a particular social group, or political opinion" in the context of a religious persecution claim. It noted that, where a child is so young that she lacks the capacity to have a religious belief of her own, harm to the child on account of religion must be understood as intended to punish the parent for the parent's religious belief.[53]

When determining whether particular harm or abuses constitute persecution, you must consider their impact on the individual applicant. See RAIO Training modules, Refugee Definition and Persecution.

7.2 Religious Persecution

IRFA lists a wide array of actions that persecuting regimes may take to violate religious freedoms, ranging from severe physical abuse and torture, to various forms of psychological harm. These violations may or may not constitute persecution, depending upon the severity of the harm imposed, and the applicant's individual circumstances.

1. Relevance of inclusion on IRFA list of violations

   As noted in "Violations of Religious Freedom According to IRFA," above, the range of violations listed in IRFA is instructive for determining persecution, given IRFA's training requirements on the nature and methods of religious persecution practiced abroad.[54] That a particular type of harm is listed in IRFA as a violation of religious freedom does not necessarily mean that the violation rises to the level of persecution. Similarly, the omission from IRFA of a type of harm does not mean that the harm cannot amount to religious persecution under the INA.

   In most instances, the serious forms of mistreatment categorized in IRFA as "particularly severe violations of religious freedom," such as torture or cruel, inhuman, or degrading treatment or punishment; prolonged detention without charges; disappearance by abduction, and other flagrant denial of the right to life, liberty, or the security of persons, will constitute persecution.[55]

[52] Shi v. U.S. Att'y Gen., 707 F.3d 1231, 1236-1237 (11th Cir. 2013).

[53] Sumolang v. Holder, 723 F.3d 1080, 1084 (9th Cir. 2013).

[54] See 22 U.S.C. § 6473(b) & (c).

[55] 22 U.S.C. § 6402(11).

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IRFA states that other "severe and violent forms of religious persecution," include "detention, torture, beatings, forced marriage, rape, imprisonment, enslavement, mass resettlement, and death merely for the peaceful belief in, change of, or practice of their faith."[56] Additional violations of religious freedom listed in IRFA, including arbitrary prohibitions on, restrictions of, or punishment for various religious activities, may constitute persecution, depending on the circumstances.[57]

2. Restrictions on practicing religion

   As noted above, prohibitions on or restrictions of religious beliefs and practices may rise to the level of persecution, even without physical mistreatment. The Seventh Circuit has held that "[i]f a person is forbidden to practice his religion, the fact that he is not imprisoned, tortured, or banished, and is even allowed to attend school, does not mean that he is not a victim of religious persecution."[58]

   Where religious beliefs or practices have been restricted or banned, and the individual has not been physically harmed, the adjudicator must determine the degree of suffering or psychological harm caused by the religious freedom violation. In these cases it will be useful to determine the importance or centrality of the particular practice in the religion or to the individual applicant, in order to assess whether the suffering caused by the restriction amounts to persecution.[59]

3. Forced compliance with religious laws or practices that are abhorrent to an applicant's beliefs

   The U.S. Courts of Appeals for the Third and Seventh Circuits have indicated that forced compliance with laws that are "profoundly" or "deeply" abhorrent to a person may rise to the level of persecution.[60] In Fatin v. INS, the Third Circuit upheld the denial of asylum to an Iranian applicant who testified that, although she objected to a law requiring that women wear the chador and she did not want to wear it, she would be willing to do so rather than be punished; therefore, the Court reasoned, she had not demonstrated that compliance with the law would be profoundly abhorrent to her. In Yadegar-Sargis v. INS, however, the Seventh Circuit cautioned that the refugee definition does not require "that one be willing to suffer martyrdom to be eligible for asylum."[61]

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[56] 22 U.S.C. § 6401(a)(5); see also § 6402(13)(B) (listing the following additional religious freedom violations: interrogation, imposition of an onerous financial penalty, forced labor, forced religious conversion, and mutilation).

[57] 22 U.S.C. § 6402(13)(A).

[58] Bucur v. INS, 109 F.3d 399, 405 (7th Cir. 1997); see also Membership in a Religious Community, below.

[59] For additional information on considering the importance of the feelings, opinions, and physical and psychological characteristics of the applicant, see RAIO Training modules, Refugee Definition and Persecution.

[60] Fatin v. INS, 12 F.3d 1233, 1241-42 (3d Cir. 1993); see also Yadegar-Sargis v. INS, 297 F.3d 596, 604-05 (7th Cir. 2002).

[61] Yadegar-Sargis, 297 F.3d at 603 n.5.

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4. Guidance from UNHCR Handbook

The UNHCR Handbook also provides that various violations of religious freedom, even without physical mistreatment or abuse, can constitute persecution.[62] Religious persecution may include:

1. Prohibition of membership in a religious community
2. Prohibition of worship in private or in public
3. Prohibition of religious instruction
4. Serious measures of discrimination imposed on persons because they practice their religion or belong to a religious community

7.3 Agents of Persecution

Religious persecution is not limited to government-sponsored violence; it can also include "[d]iscrimination, harassment, and violence by groups that the government is unwilling or unable to control" as well as acts of persecution by private entities that are either tolerated or outright sponsored by the government.[63]

An applicant may meet the burden of proving that the government is "unable or unwilling" to control nongovernmental entities by specific evidence of government inaction and evidence that generally the government is complicit in, or tacitly approves of the private persecution.[64] See RAIO Training Modules, Persecution and Well-Founded Fear.

7.4 No Requirement to Conceal Religious Beliefs

Recognizing that "[o]ne aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population," you cannot require applicants to conceal their religion upon return in order to avoid persecution.[65] In Muhur v. Ashcroft, the Seventh Circuit rejected an Immigration Judge's determination that a Jehovah's Witness could not establish a well-founded fear of persecution in Eritrea because she was "not a religious zealot."[66] The court held that the IJ improperly assumed that one is not entitled to asylum on the basis of religious

[62] See UNHCR Handbook, para. 72.

[63] Singh v. INS, 94 F.3d 1353, 1359 (9th Cir.1996)

[64] Ivanov v. Holder, 736 F.3d 5 (1st Cir. 2013); see also Matter of O-Z- & I-Z-, 22 I&N Dec. 23, 26 (BIA 1998).

[65] Muhur v. Ashcroft, 355 F.3d 958, 961 (7th Cir. 2004).

[66] Muhur v. Ashcroft, 355 F.3d 958, 960-961 (7th Cir. 2004);

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persecution if one can escape the notice of persecutors by concealing one's religion.[67] The Ninth Circuit has also held that forcing an individual to practice his or her religion in hiding is contrary to our basic principles of religious freedom and the protection of religious refugees.[68] In Kazemzadeh v. U.S. Att'y Gen., the Eleventh Circuit adopted a similar approach, finding that being forced to practice a religion underground to avoid punishment is itself a form of persecution.[69]

Cases in which applicants are forced to conceal their religion in order to avoid persecution are distinct from those in which the evidence indicates that the applicant voluntarily practices his or her religion in such a way that it is not reasonably likely to come to the attention of the feared persecutors. In such cases, the applicant may not have a well-founded fear of persecution. For example, in Yi Xian Chen v. Holder, the Seventh Circuit upheld a determination that an applicant who began practicing Falun Gong in the United States, had never had any problems with the Chinese government, and testified that he planned to practice Falun Gong inside his house or on a nearby farm outside rather than in public did not have a well-founded fear because he was not reasonably likely to draw the Chinese government's attention.[70]

7.5 Religious Discrimination

Although serious forms of religious discrimination may constitute persecution, lesser forms of religious discrimination, without more, may not rise to the level of persecution. For example, in Sofinet v. INS, a Romanian Seventh Day Adventist claimed that he suffered religious persecution because he was reprimanded for not working on his Sabbath.[71] The U.S. Court of Appeals for the Seventh Circuit held that although the applicant was occasionally reprimanded for failing to work as a police officer on Saturdays, he enjoyed steady employment for the five years between his conversion and his departure from Romania, and he failed to provide any evidence that he sought work that did not require Saturday hours. The Court further added that the totality of the evidence Sofinet presented was insufficient to demonstrate his claimed religious persecution. The Court noted that the evidence highlights only that Sofinet, at worst,

[67] Id.; Antipova v. U.S. Att'y Gen., 392 F.3d 1259, 1263-1265 (11th Cir. 2004)(overturning an IJ decision noting with disfavor that the applicant had been subjected to acts of persecution because she "advertised" that she was a practitioner of Judaism by displaying her menorah on a window. The court noted that neither the INA provision on withholding of removal nor the related regulations required the applicant to avoid "signaling" her religious affiliation.).

[68] See Zhang, 388 F.3d at 719 (rejecting IJ's finding that petitioner could avoid persecution by practicing Falun Gong in secret); see also Iao v. Gonzales, 400 F.3d 530, 532 (7th Cir. 2005) ("[T]he fact that a person might avoid persecution through concealment of the activity that places her at risk of being persecuted is in no wise inconsistent with her having a well-founded fear of persecution.").

[69] Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1354-55 (11th Cir. 2009).

[70] Yi Xian Chen v. Holder, 705 F.3d 624, 630 (7th Cir. 2013).

[71] Sofinet v. INS, 196 F.3d 742, 744 (7th Cir. 1999).

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experienced ridicule, harassment and self-initiated job termination because of his religious beliefs."[72]

Similarly, in Nagoulko v. INS, the Ninth Circuit held that occasional disruptions in worship services and other church activities, where the applicant was not prevented from practicing her religion and did not suffer physical violence, did not amount to treatment so extreme as to compel a finding of past persecution.[73]

On the other hand, discrimination or harassment, especially in combination with other harms, may be sufficient to establish persecution if the adverse practices or treatment accumulates or increases in severity to the extent that it leads to consequences of a substantially prejudicial nature. Discriminatory measures that lead to serious restrictions on an individual's right to practice his or her religion could amount to persecution.[74]

In Krotova v. Gonzales, a Russian Jewish family presented evidence of sustained economic discrimination and pressure, physical violence and threats against the principal applicant and her close associates, and serious restrictions on the applicant's ability to practice her religion.[75] The court rejected the BIA's determination that the family experienced discrimination, and held that the cumulative impact of the anti-Semitic harms amounted to persecution. The Krotova opinion includes a useful discussion comparing cases finding discrimination with cases where the harm constitutes persecution.[76]

7.6 Reduced Evidentiary Burden: Lautenberg-Specter Cases in the Refugee Program

Under the Lautenberg Amendment,[77] certain categories of overseas refugee applicants – largely religious minorities from the former Soviet Union, Southeast Asia, and Iran – may establish a well-founded fear of persecution under a reduced evidentiary burden. Specifically, a category member may show a well-founded fear by establishing a "credible basis for concern about the possibility of persecution." Applicants generally establish a credible basis of concern by showing multiple instances of discrimination in one or more of the following areas:

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[72] Id. at 747.

[73] Nagoulko v. INS, 333 F.3d 1012, 1016-1017 (9th Cir. 2003); see also Matter of V-F-D-, 23 I&N Dec 859, 863 (BIA 2006) (holding that discrimination in school, neighborhood and employment opportunities on account of religion did not amount to past persecution).

[74] For additional information on discrimination and harassment, see RAIO Training modules, Refugee Definition and Definition of Persecution and Eligibility Based on Past Persecution. See also UNHCR Handbook, para. 54.

[75] Krotova v. Gonzales, 416 F.3d 1080, 1082 (9th Cir. 2005); see also Matter of O-Z- & I-Z-, 22 I&N Dec. 23, 26 (BIA 1998) (holding that Ukrainian father and son who experienced anti-Semitic attacks, vandalism, threats and a humiliating incident suffered persecution).

[76] Krotova, 416 F.3d at 1084-1087.

[77] The Lautenberg Amendment amended the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. No.101-167. For a list of Lautenberg category members, please see the Lautenberg Lesson Plan.

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- Inability to study or practice religion or cultural heritage
- Denial of access to educational, vocational or technical institutions
- Adverse treatment in the workplace
- Loss of home, job or educational opportunities

Lautenberg-Specter applicants may also establish a credible basis of concern by showing mistreatment against similarly situated individuals or by showing that they suffered harm on account of their request to emigrate. There is no provision in the law for asylum applicants to be covered by the reduced evidentiary burden set forth in the Lautenberg Amendment.

7.7 Membership in a Religious Community

Generally, mere membership in a religious community will not be sufficient to establish eligibility for asylum or refugee status on the basis of religious persecution.[78] Each case requires an analysis of whether the individual suffered or may suffer harm amounting to persecution. Of course, an individual need not show that she will be singled out individually for persecution if she shows that she is included in a group that suffers a pattern or practice of persecution.[79]

7.8 Issues with "on Account of" in Religious Persecution Cases

In many countries, politics and religion are intertwined, making the analysis of nexus more complex. In such cases, you must determine whether the applicant was targeted on account of his or her religious beliefs, political opinion, in the course of legitimate government investigation of crimes, or some combination of all three. Motivation of the persecutor is a critical element in the analysis of nexus.[80]

In two separate cases before the BIA, Matter of R-[81] and Matter of K-S-,[82] each respondent based his asylum claim, in part, upon the premise that the Indian authorities persecute Sikhs on account of religion. In Matter of R-, the BIA held that harm suffered incidental to the government's pursuit of Sikh militant separatists was not persecution on account of religion. Likewise in Matter of K-S-, the BIA relied heavily on a State Department opinion which stated that the government of India does not take action against individuals solely on account of their membership in the Sikh faith, but against those accused of committing acts of violence.

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[78] UNHCR Handbook, para. 73.

[79] See 8 C.F.R. 208.13(b)(2)(iii). For additional information, see also RAIO Training module, Well-Founded Fear, section on Pattern or Practice of Persecution.

[80] For additional information, see RAIO Training module, Nexus and the Five Protected Grounds.

[81] Matter of R-, 20 I&N Dec. 621, 623-625 (BIA 1992).

[82] Matter of K-S-, 20 I&N Dec. 715, 722 (BIA 1993).

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In both cases the BIA rejected the notion that the respondents' membership in the Sikh faith was the reason ("on account of") for the harm suffered, because they presented no direct or circumstantial evidence that the authorities were motivated by the respondents' religious beliefs.

7.8.1 Conversion

It may be illegal in some countries to convert from one religion to another and the penalties may be severe. In some countries, for example, conversion from Islam to another religion is considered apostasy (renunciation of faith) and may be punishable by imprisonment or death. Punishment for conversion may be considered persecution on account of religion, depending on the degree of the harm threatened or imposed.

7.8.2 Prosecution v. Persecution

Cases involving forced compliance with laws of general applicability raise challenging questions of nexus and motive. In general, prosecution for a criminal offense is not persecution, and a government has the right to investigate and punish individuals for violations of legitimate laws. In Matter of H-M-, the BIA held that the applicant's prosecution for foreign currency speculation, black market sales, and conspiracy to possess illegal weapons did not constitute persecution.[83] However where a law of "general applicability" punishes individuals because of a protected ground and the punishment for violations of the law rises to the level of persecution, an applicant who has been punished for violating the law may be able to establish past persecution, and an applicant who is reasonably likely to violate the law may have a well-founded fear. For example, in Karouni v. Gonzales, the Ninth Circuit Court of Appeals noted that the applicant's feared arrest and detention for violating a law prohibiting same-sex acts would constitute persecution on account of membership in a particular social group defined by his sexual orientation.[84]

General Considerations

To determine whether punishment for violation of a generally applicable law constitutes religious persecution, you should consider:

- Is the law neutral in intent?
- Is the law neutrally or unequally enforced?
- How does the persecutor view those who violate the law?

[83] See Matter of H-M-, 20 I&N Dec. 683 (BIA 1993); Abedini v. INS, 971 F.2d 188 (9th Cir. 1992) (holding that prosecution for violation of generally applicable anti-propaganda and conscription laws is not persecution on account of protected ground). For additional information, see also RAIO Training module, Nexus and the Five Protected Grounds.

[84] Karouni v. Gonzales, 399 F.3d 1163, 1174 (9th Cir. 2005).

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Laws Based on Religious Principles

Laws that target particular religious beliefs and practices generally are not neutral in intent. When a law criminalizes a particular religious practice, punishment for violation of the law may amount to persecution on account of religion.

Examples

Prosecution for the crime of attending religious services, or for providing "illegal" religious instruction to a child, could constitute persecution on account of religion.[85]

Punishment for refusal to comply with religious norms or laws (such as dress codes or gender roles based on religious principles) may, in some cases, constitute persecution on account of religion or another protected ground.[86]

> Punishment for violation of a law that is designed to prevent the commingling of individuals of different faiths, such as laws against interfaith dating or marriage, could amount to persecution on account of religion.[87]

When a civil or criminal law is itself based on religious laws or principles in a country where there is little separation between church and state, the evaluation of the persecutor's intent may be complex. A thorough understanding of country conditions will help you evaluate how the authorities view individuals who violate religious laws. Keep in mind that Section 601 of IRFA requires Immigration Judges, Asylum, Refugee, and Consular Officers to use the Department of State Annual Report on International Religious Freedom, and other country conditions reports, when analyzing claims of religious persecution.

Laws of Neutral Intent that Affect Religious Practices

While laws that require punishment for holding a particular belief would almost always be considered a violation of religious freedom, punishment for violation of laws that proscribe particular actions or practices associated with a religion may or may not be linked to the protected ground of religion.

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[85] UNHCR Handbook, para. 57

[86] See, e.g., Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000)(granting asylum to a woman with liberal Muslim beliefs who was persecuted by her father who had more orthodox Muslim beliefs); Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011)(although this is a particular social group case, the court noted that "[s]ociety as a whole brands women who flout its norms as outcasts, and it delegates to family members the task of meting out the appropriate punishment—in this case, death.").

[87] Bandari v. INS, 227 F.3d 1160, 1168 (9th Cir. 2000)(finding applicant suffered persecution for interfaith dating), citing with approval Maini v. INS, 212 F.3d 1167 (9th Cir. 2000)(finding applicants suffered persecution for interfaith marriage).

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Example

In Romeike v. Holder, the Sixth Circuit Court of Appeals held that prosecution for violating a truancy law by a couple who homeschooled their children in accordance with their religious values did not constitute persecution on account of religion because the law applies equally to all parents, is not intended to target the applicant's religion, and does not impose disproportionately harsh treatment on parents who homeschool for religious reasons.[88]

Some state restrictions on religious practice can be legitimate. It is important, therefore, to focus on the intent or the purpose of the law. Article 18 of the International Covenant on Civil and Political Rights provides that the "freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights of others."[89]

Example

A curfew imposed during a period of civil strife may prevent individuals from attending evening religious services. Because the law was not intended to overcome a characteristic, but rather to protect public safety, no nexus to religion would be established.[90]

Unequal or Pretextual Enforcement of the Law or Disproportionately Severe Punishment

Unequal enforcement of a law that appears neutral may be evidence of persecutory intent. Prosecution that is used as a pretext to harm an individual on account of any of the five protected grounds may constitute persecution. Punishment that is unduly harsh or disproportionately severe, given the nature of the offense committed, may be evidence of pretext.[91]

Examples

A law that prohibits public gatherings on public property without a permit is enforced only against members of one particular religion, but not against other groups. The unequal enforcement is evidence that the persecutor's intent is to punish members of a particular religious group because of their religious beliefs.

[88] Romeike v. Holder, 718 F.3d 528, 533-534 (6th Cir. 2013).

[89] Art. 18 of International Covenant on Civil and Political Rights (ICCPR) (16 December 1966).

[90] See also UNHCR Religion Guidelines, para. 15 (discussing examples of permissible restrictions, including, for example, prohibition on ritual killings).

[91] Matter of A-G-, 19 I&N Dec. 502, 506 (BIA 1987); Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996); UNHCR Handbook, para. 57-59.

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In Ghebremedhin v. Ashcroft, the Seventh Circuit overturned an Immigration Judge's finding that a Jehovah's Witness who feared that he would be harmed because of his failure to perform national service would not be targeted on account of his religion because all Eritreans are required to. According to the Court, the IJ failed to consider evidence both from the applicant's testimony and from country conditions reports that Jehovah's Witnesses are singled out for disproportionately severe treatment, such as extended detention and extreme physical punishment, for their failure to serve.[92]

The Ninth Circuit, in Bandari v. INS, considered the claim of an Iranian Christian who had been arrested by police for violating a law that prohibited public displays of affection when he kissed a Muslim girl. The initial stop of the applicant by the police may have been characterized as equal enforcement of a neutral law. The police, however, detained the applicant for several days, beat him, insulted his religion, and sentenced him for violation of a law that prevented interfaith dating. These actions by police demonstrated that the harm the applicant suffered was persecution on account of his religion, rather than prosecution.[93]

The Persecutor's View of Violators

Where an individual is punished for his or her refusal to comply with a religious law, the persecutor may view the individual as both a law-breaker and as an individual with "improper" religious values. You must, therefore, explore all possible motives, as well as the possibility that the persecutor had mixed motives, when assessing whether the harm the applicant suffered or fears is on account of a protected ground. See Mixed Motives section, below.

7.8.3 Refusal to Comply with or Alleged Flouting of Religious Norms

Harm resulting from an applicant's refusal to comply with religious norms may constitute persecution on account of religion. In Matter of S-A-, a woman with liberal Muslim beliefs differed from her father's orthodox Muslim views concerning the proper role of women in Moroccan society. As a result of her refusal to share or submit to her father's religion-inspired restrictions and demands, her father subjected her (but not her brothers) to repeated physical assaults, imposed isolation, and deprivation of education. The BIA held that harm inflicted on the applicant by her father because she refused to comply with religious norms amounted to past persecution on account of religion.[94]

Harm to a person who is alleged to have flouted repressive moral norms may also constitute persecution on account of the person's membership in a particular social group. In Sarhan v. Holder, the Seventh Circuit noted that honor killings occur where a woman

[92] Ghebremedhin v. Ashcroft, 385 F.3d 1116, 1120 (7th Cir. 2004).

[93] Bandari v. INS, 227 F.3d 1160, 1168 (9th Cir. 2000).

[94] Matter of S-A-, 22 I&N Dec. 1328, 1336 (BIA 2000).

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commits the "sin" of going for a walk with a man who is not her husband or relative.[95] The applicant in Sarhan was falsely accused of adultery by her sister-in-law and was threatened with death by her brother for bringing dishonor to her family. The court found that Jordanian society as a whole brands women who flout its norms as outcasts, and it delegates to family members the task of meting out the punishment.[96] The court rejected the BIA's conclusion and the government's argument that this was merely a "personal dispute" between the applicant and her brother. The court held that the dispute is a "piece of complex cultural construct that entitles male members of families dishonored by perceived bad acts of female relatives to kill those women."[97]

7.8.4 Mixed Motives

A persecutor may have more than one motive in seeking to harm an individual. One or more of the persecutor's motives may be a protected ground. There is no requirement that the applicant demonstrate that the protected characteristic is or was the only factor motivating the persecutor to harm the applicant.

For example, organized criminal groups may be motivated to harm religious people both to further their criminal goals and because of their religious beliefs. In Ivanov v. Holder, the First Circuit Court of Appeals considered the case of a Russian applicant who practiced the Pentecostal faith and volunteered at a drug rehabilitation center run by his church. One night, while the applicant was leaving the center, a group of skinheads involved in drug trafficking beat him, kidnapped him, and detained him for three days in a basement without food and water. The Court rejected the Board's conclusion that the group was motivated solely by the applicant's interference with its drug trade, holding that it failed to consider the possibility that the group had mixed motives given that it also had an "overarching mission" of intolerance toward adherents of "foreign" religions and specifically expressed opposition to the center's religious methods.[98]

A mixed motive analysis for asylum applications filed on or after May 11, 2005 is governed by the REAL ID Act of 2005, which amended INA § 208. Under the amendment, an asylum applicant "must establish that race, religion, nationality, membership in a particular social group, or political opinion, was or will be at least one central reason for persecuting the applicant."[99] See ASM Supplement – Mixed Motives at the end of this module.

Refugee adjudications are governed by case law interpreting the refugee definition, prior to the 2005 amendment. In Matter of Fuentes, for example, the BIA held that an applicant

[95] Sarhan v. Holder, 658 F.3d 649, 654 (7th Cir. 2011).

[96] Id. at 655.

[97] Id. at 656.

[98] Ivanov v. Holder, 736 F.3d 5, 15 (1st Cir. 2013).

[99] INA §208(b)(1)(B)(i).

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does not need to establish the exact motivation of his persecutor, but he does need to establish that a reasonable person would fear the danger arises on account of a protected ground.[100] See RAD Supplement – Mixed Motives at the end of this module. See RAIO Training module, Nexus the Five Protected Grounds.

7.9 Persecution by Members of Applicant's Religion

You may encounter cases in which the persecutor belongs to the same religious group as the applicant. This may occur, for example, when the persecutor believes that the applicant is not sufficiently complying with religious tenets. In Matter of S-A- (see above, Refusal to Comply with Religious Norms), the BIA found that the applicant had been persecuted by her father because her beliefs regarding the proper role of Muslim women differed from his. Both the applicant and her father practiced Islam.[101] Similarly, in Maini v. INS, the petitioners argued that despite the fact that the Communist Party Marxist (CPM) of India is comprised of both Sikhs and Hindus, Maini and his wife were persecuted on account of their interfaith marriage. The U.S. Court of Appeals for the Ninth Circuit held that "if an applicant can establish that others in his group persecuted him because they found him insufficiently loyal or authentic to the religious, political, national, racial, or ethnic ideal they espouse, he has shown persecution on account of a protected ground. Simply put, persecution aimed at stamping out an interfaith marriage is without question persecution on account of religion."[102]

8 RESOURCE MATERIALS

Title VI of IRFA requires Asylum and Refugee Officers and other immigration officials to consult the Department of State annual report on religious freedom, as well as other country conditions reports, when analyzing claims for asylum or refugee status based on religion. A body of resource materials is available to document the status of religious freedom in the world.

8.1 Countries of Particular Concern

The President is required to designate as "countries of particular concern" those countries that have engaged in or tolerated violations of religious freedom. The United States uses sanctions against these countries to encourage them to improve their treatment of religious groups.[103]

8.2 The US Department of State Annual Report on International Religious Freedom

[100] Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988).

[101] Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000).

[102] Maini v. INS, 212 F.3d 1167, 1175 (9th Cir. 2000) ("That a person shares an identity with a persecutor does not foreclose a claim of persecution on account of a protected ground.").

[103] See U.S. Dep't of State, "Countries of Particular Concern."

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Each year the Department of State publishes an annual report which provides information on the treatment of religious groups in most countries of the world, much in the same way as the annual Country Reports on Human Rights Practices.[104]

8.3 U.S. Commission on International Religious Freedom Reports

Established by the International Religious Freedom Act, the U.S. Commission on International Religious Freedom (USCIRF) monitors the status of religious freedom in other countries and advises the President and Congress on how best to promote religious freedom.

Annual Reports

Each year the U.S. Commission on International Religious Freedom issues its Annual Report.[105] Mindful of its mandate to make recommendations on how to combat violations of religious freedom in the world, its reports focus on particular countries that it sees as "priorities" in the fight for global religious freedom.

In its annual report, the Commission summarizes its activities over the course of the past year and recommends policies to the United States Government that would promote and protect religious freedom around the world. The Commission also recommends that the State Department designate certain "Tier 1" countries as Countries of Particular Concern and has a "Tier 2" list of countries where the Commission believes that religious freedom conditions do not rise to the statutory level requiring designation as Countries of Particular Concern, but which require close monitoring of the situation.

Individual Country Reports, Hearings, and Testimony

In addition to its annual report, the Commission periodically publishes reports dealing with particular countries. Quite often, these reports are issued in response to particular issues or violations of religious freedom in a given country.

The Commission also organizes hearings on issues of religious freedom when it determines that greater examination of the situation in a country is required. Human rights monitors, religious scholars, and other interested parties have presented their views to the Commission in such fora.

Finally, Commission members occasionally testify before Congress on issues of religious freedom and concerns regarding threats to that freedom around the world.

8.4 Comments on the DOS Annual Report on International Religious Freedom

[104] See U.S. Dep't of State, "Annual Reports to Congress on International Religious Freedom."

[105] USCIRF, Frequently Asked Questions.

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Each year the U.S. Commission on International Religious Freedom responds to the statements made by the Department of State in its Annual Report. These comments may be published in a separate report or as part of the USCIRF Annual Report.The comments intend to balance the body of material on international religious freedom by pointing out omissions of information and to critique the implementation of policy on international religious freedom.

9 SUMMARY

9.1 Overview of IRFA

IRFA, the International Religious Freedom Act, was enacted on October 27, 1998, to promote religious freedom and call attention to its abuse worldwide. IRFA also created new foreign policy mechanisms for use by the United States to act against religious persecution abroad.

9.2 Title VI of IRFA

Title VI of IRFA speaks directly to the role of Asylum, Refugee, and Consular officers in improving the U.S. government response to religious persecution.

1. Section 601 mandates that immigration judges, asylum officers, and immigration officers refer to the Department of State Annual Report on International Religious Freedom when adjudicating requests for asylum or refugee status.

2. Section 602 requires greater attention to issues of refugee law and religious persecution by those involved in the processing of refugees overseas, including DOS consular officers, immigration officers, and interpreters.

3. Section 603 requires greater scrutiny of the potential biases of those individuals used as interpreters during inspection or interviews. The section also requires training on religious persecution for all those involved in the expedited removal process.

4. Section 604 creates a new ground of inadmissibility for any foreign government official who has been responsible for or has directly carried out severe violations of religious freedom.

5. Section 605 provides the U.S. Commission on International Religious Freedom with the authority to request studies by the Comptroller General on certain aspects of the expedited removal process.

9.3 The Nature of Religion

1. The protected ground of religion is broadly understood, and protects familiar as well as unfamiliar belief systems.

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2. The definition of religion includes religious beliefs (and non-belief) and religious practices.

3. Religious beliefs and practices may vary by sect, region, country, and culture, and you must put aside preconceived notions of what can be considered a religion and how religions are practiced across the globe.

4. An individual's religious identity generally cannot be verified by "testing" the applicant on his or her knowledge of the tenets of the religion.

9.4 Right to Religious Freedom

Internationally-recognized standards regarding religious freedom are codified in various international instruments and cited in IRFA. These instruments, such as the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, provide invaluable guidance in determining what actions may be considered violations of religious freedom.

9.5 Violations of Religious Freedom

IRFA highlights the wide range of actions that persecuting regimes take to violate religious freedoms, and provides a non-exclusive list of actions that constitute "violations of religious freedom" and a separate list of violations that constitute "particularly severe violations of religious freedom." The range of violations listed in IRFA is instructive for determining persecution under the INA given IRFA's training requirements for asylum and refugee adjudicators on the nature and methods of religious persecution practiced in foreign countries.

Whether or not a particular violation of religious freedom (either particularly severe or not) could be considered persecution on account of religion depends upon the degree of harm threatened or imposed, and the applicant's individual circumstances.

9.6 Religious Persecution – General Considerations

1. Prohibitions or restrictions on religious beliefs and activities can, without physical mistreatment, rise to the level of persecution.

2. Forced compliance with religious laws or practices that are fundamentally abhorrent to a person's deeply held religious convictions may constitute persecution.

3. Persecution by government, as well as by private individuals whom the government is unable or unwilling to control, may establish a religious persecution claim.

4. Adjudicators cannot require an applicant to conceal his religious beliefs upon return in order to avoid persecution.

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5. Serious measures of discrimination on account of religion may be sufficient to establish persecution if the adverse practices accumulate or increase in severity leading to consequences of a substantially prejudicial nature. Other forms of religious discrimination, without more, may not be sufficient to establish persecution.

6. Generally, mere membership in a religious community will not be sufficient to establish eligibility for asylum or refugee status on the basis of religious persecution.

7. The motivation of the persecutor must be examined to determine if:

    i. the applicant has been targeted or could be targeted

    ii. the applicant's religion is the targeted characteristic

8. Laws that impose harsh penalties for conversion from one religion to another may constitute persecution on account of religion.

9. Punishment for violation of a generally applicable law affecting religious beliefs or practices may constitute persecution on account of religion. You must analyze the intent and purpose of the law, whether the law is unequally enforced, and how the persecutor views those who violate the law.

10. It is possible for individuals to establish that they have been persecuted on account of their religion by members of the same faith community. For example, an individual could be harmed because he or she is perceived by others to be failing in the faith or to have violated moral norms.

9.7 Resource Materials

You have at your disposal a number of tools to aid in the adjudication of cases of claimed religious persecution. IRFA requires you to consider the information contained in the Department of State Annual Report on International Religious Freedom when adjudicating asylum and refugee cases. In addition, you may consult other resources, such as the reports and press releases issued by the U.S. Commission on International Religious Freedom.

You must not assume that a religious persecution claim is unfounded because of the absence of information on persecution of a particular group in either of the above-mentioned reports, or the fact that a refugee-producing country is not designated as a country of particular concern.[106]

[106] Gaksakuman v. U.S. Att'y Gen., 767 F.3d 1164 (11th Cir. 2014).

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PRACTICAL EXERCISES

[NOTE: Practical Exercises for this module to be added later.]

Practical Exercise # 1

- Title:
- Student Materials:

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OTHER MATERIALS

There are no Other Materials for this module.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

None

ADDITIONAL RESOURCES

1. Matter of S-P-, 21 I&N Dec. 486 (BIA 1996).
2. Maini v. INS, 212 F.3d 1167, 1176 n.1 (9th Cir. 2000).

SUPPLEMENTS

RAD Supplement – Mixed Motives

As mentioned in the Mixed Motives section of the module, refugee resettlement adjudications are not governed by the 2005 amendments to the asylum statute. As with asylum adjudications, however, you must explore all possible motives, including mixed motives, when assessing a claim based on an applicant's religious beliefs or practices. An applicant bears the burden of establishing that "a reasonable person would fear that the danger arises on account of" a protected ground.[107] In Maini v. INS, for example, the court found that the applicants suffered past persecution, at least in part, on account of religion, in addition to non-protected economic grounds.[108]

[107] Matter of S-P-, 21 I&N Dec. 486, 490, 497 (BIA 1996).

[108] Maini v. INS, 212 F.3d 1167, 1176 n.1 (9th Cir. 2000).

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

INA §208(b)(1)(B)(i) – REAL ID Act amendment regarding mixed motives for persecution.

ADDITIONAL RESOURCES

1. Matter of J-B-N- & S-M-, 24 I&N Dec. 208 (BIA 2007).
2. Ndayshimiye v. Att'y Gen. of U.S., 557 F.3d 124 (3d Cir. 2009).
3. Rizal v. Gonzales, 442 F.3d 84 (2d Cir. 2006).
4. Huang v. Gonzales, 403 F.3d 945 (7th Cir. 2005).
5. Elwood, Kenneth J., Deputy Executive Associate Commissioner, INS Office of Field Operations. Implementation of the International Religious Freedom Act of 1998, Memorandum for Jeffrey L. Weiss, Acting Director, Office of International Affairs. (Washington, DC: 5 April 1999), 3 p.
6. Langlois, Joseph E., Deputy Director, Asylum Division. Religious Persecution, [with two attachments: letter to William Bartlett, Office of Asylum Affairs, Department of State, concerning training conducted for Asylum Officers on religious persecution; list of documentation distributed by the Resource Information Center on religious persecution, 1992-1998] Memorandum for Asylum Office Directors. (Washington, DC 5 May, 1998), 12 p.
7. Pearson, Michael A., Executive Associate Commissioner, INS Office of Field Operations. Amendment to the Immigration and Nationality Act (the Act) adding section 212(a)(2)(G), relating to the inadmissibility of foreign government officials who have engaged in particularly serious violations of religious freedom, Memorandum to Regional and Service Center Directors, (Washington, DC: 9 July 1999), 4 p.
8. Landau, David, Chief Appellate Counsel, ICE Office of the Principal Legal Advisor, Guidance on Religious Persecution Claims Relating to Unregistered Religious

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Groups, Memorandum for ICE Chief Counsel, (Washington, DC: February 25, 2008), 12 pp.

SUPPLEMENTS

ASM Supplement - Mixed Motives

Under INA section 208, as amended by the REAL ID Act of 2005, the applicant must establish that religion, or any other protected ground, was or will be "at least one central reason for the persecution."[109] In Matter of J-B-N- & S-M-,[110] the Board found that amendments added by the REAL ID Act did not radically alter the BIA's mixed motive analysis. This decision was modified by the Third Circuit in Ndayshimiye v. Att'y Gen. of U.S.,[111] which held that the BIA's interpretation of the "one central reason" standard is in error only to the extent that it would require an asylum applicant to show that a protected ground for persecution was not "subordinate" to any unprotected motivation.

The REAL ID Act changes only apply to asylum applications filed on or after May 11, 2005. For applications filed prior to the REAL ID Act, the applicant bears the burden of establishing that "a reasonable person would fear that the danger arises on account of" a protected ground.[112] In Maini v. INS, for example, the court found that the applicants suffered past persecution, at least in part, on account of religion, in addition to non-protected economic grounds.[113]

ASM Supplement – Use of DOS Annual Report

Although section 101(a)(3) of the REAL ID Act of 2005, codified at 8 U.S.C. §1158(b)(1)(B)(iii), states that credibility determinations may be based on the consistency of an applicant's statements with DOS country reports, IRFA prohibits Adjudicators from making an adverse determination based solely on the fact that an applicant's claims are not mentioned in the DOS annual report.

Section 601 of IRFA requires immigration judges, asylum officers, and refugee and

[109] INA § 208(b)(1)(B)(i). For additional information, see also RAIO Training module, Nexus the Five Protected Grounds.

[110] Matter of J-B-N- & S-M-, 24 I&N Dec. 208 (BIA 2007).

[111] Ndayshimiye v. Att'y Gen. of U.S., 557 F.3d 124 (3d Cir. 2009).

[112] Matter of S-P-, 21 I&N Dec. 486, 490 (BIA 1996).

[113] Maini v. INS, 212 F.3d 1167, 1176 n.1 (9th Cir. 2000).

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consular officers to use the US Department of State Annual Report on International Religious Freedom, and other country conditions reports, when analyzing claims of religious persecution. Asylum Officers are required to cite the Department of State's Annual Report On Religious Freedom and other reliable country of origin information during the adjudication of an affirmative asylum claim.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

IO Supplement

Module Section Subheading

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS

Training Module

MODULE DESCRIPTION:

This module provides guidelines for adjudicating and considering immigration benefits, petitions, protections, or other immigration-related requests by lesbian, gay, bisexual, transgender, and intersex, (LGBTI) individuals. The module addresses the legal analysis of claims that involve LGBTI applicants as well as related interviewing considerations.

FIELD PERFORMANCE OBJECTIVE(S)

When interviewing in the field, you (the Officer) will elicit all relevant information from an LGBTI applicant to properly adjudicate and consider the immigration benefit, petition, protection, or other immigration-related request before you.

INTERIM PERFORMANCE OBJECTIVES

1. Summarize the developments in U.S. law that focus on LGBTI applicants.
2. Describe the types of harm that may be present in refugee and asylum claims involving LGBTI issues.
3. Describe how membership in a particular social group is analyzed when looking at the refugee or asylum claims involving LGBTI issues.

   Identify factors to consider when evaluating evidence presented by LGBTI applicants.
5. Identify factors that may hinder an interview of an LGBTI applicant.
6. Identify methods and techniques to put an LGBTI applicant at ease during an interview.

   Use sensitive questioning and listening techniques that aid in eliciting information from LGBTI applicants.

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INSTRUCTIONAL METHODS

- Interactive presentation
- Discussion
- Practical exercises

METHOD(S) OF EVALUATION

- Multiple-choice exam
- Observed practical exercises

REQUIRED READING

1. Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822-23 (BIA 1990).

2. UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, available at: http://www.refworld.org/docid/50348afc2.html Legal Memorandum, Stephen H. Legomsky, USCIS Chief Counsel, General Guidance to the Field in Same-Sex Marriage Cases, (July 26, 2013).

3. USCIS Policy Memorandum on Adjudication of Immigration Benefits for Transgender Individuals, August 10, 2012, available at http://connect.uscis.dhs.gov/workingresources/immigrationpolicy/Documents/PM-602-0061.1.pdf.

   Memorandum from William R. Yates, Associate Director for Operations, USCIS, Adjudication of Petitions and Applications Filed by or On Behalf Of, or Document Requests by, Transsexual Individuals (April 16, 2004).

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. LGBTI-related Case Law

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Immigration Equality, Immigration Equality Asylum Manual, available at http://immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/.

3. Immigration Equality, Immigration Equality Draft Model LGBT Asylum Guidance, (2010), available at http://www.immigrationequality.org/wp-content/uploads/2011/07/ImEq-Draft-Model-LGBT-Asylum-Guidance-2004.pdf.

4. International Lesbian, Gay, Bisexual, Trans and Intersex Association-Europe, Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2015, May 2015, available at: http://www.ilga-europe.org/sites/default/files/Attachments/01_full_annual_review_updated.pdf.

5. Amnesty International, Making Love a Crime: Criminalization of Same-Sex Conduct in Sub-Saharan Africa, June 24, 2013, available at: http://www.amnestyusa.org/research/reports/making-love-a-crime-criminalization-of-same-sex-conduct-in-sub-saharan-africa?page=show.

6. International Gay and Lesbian Human Rights Commission, When Coming Out is a Death Sentence: Exposing Persecution of LGBT Individuals in Iraq, November 19, 2014, available at: http://iglhrc.org/content/exposing-persecution-lgbt-individuals-iraq.

7. Statement by the President on the UN Human Rights Council Resolution on Human Rights, Sexual Orientation, and Gender Identity. The White House, Office of the Press Secretary, June 17, 2011, available at http://www.whitehouse.gov/the-press-office/2011/06/17/statement-president-un-human-rights-council-resolution-human-rights-sexu.

8. Memorandum from David A. Martin, INS General Counsel, Seropositivity for HIV and Relief From Deportation, (Feb. 16, 1996).

9. International Gay and Lesbian Human Rights Commission (IGLHRC), Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa (2011), available at http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/484-1.pdf.

10. Aengus Carroll and Lucas Paoli Itaborahy, International Lesbian, Gay Bisexual, Trans and Intersex Association, State Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults, May 2015, available at: http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf.

    American Psychiatric Association, Therapies Focused on Attempts to Change Sexual Orientation: Reparative or Conversion Therapies Position Statement, March 2000, available at http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/

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PositionStatements/200001.aspx. [scroll down the page and click on the year-2000, then click on "Therapies focused on attempts to change sexual orientation."]

12. Victoria Neilson, Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims, 16 Stanford Law & Policy Review 417 (2005), available at http://www.immigrationequality.org/wp-content/uploads/2011/08/Neilson-Website-Version-Lesbian-article.pdf.

13. Ellen A. Jenkins, Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers, 40 Golden Gate U.L. Rev. (2009), available at http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=2008&context=ggulrev.

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

SOURCE: The Tasks listed below are from the Asylum Division's 2001 Revalidation. These tasks will need to be modified to reflect the results of the RAIO Directorate – Officer Training Validation study.

Task/ Skill #	Task Description
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ILR9	Knowledge of policies and procedures for processing lesbian, gay, bisexual, transgender, and intersex (LGBTI) claims (3)
ILR14	Knowledge of nexus to a protected characteristic (4)
ILR15	Knowledge of the elements of each protected characteristic (4)
ILR20	Knowledge of the criteria for refugee classification (4)
ILR21	Knowledge of the criteria for establishing a well-founded fear (WFF) (4)
ILR22	Knowledge of the criteria for establishing credibility (4)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
ITK5	Knowledge of strategies and techniques for communicating with survivors of torture and other severe trauma (4)
ITK6	Knowledge of principles of cross-cultural communication (e.g., obstacles, sensitivity, techniques for communication) (4)
ITK8	Knowledge of policies, procedures and guidelines for working with an interpreter (4)
RI1	Skill in identifying issues of claim (4)

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RI2	Skill in identifying the information required to establish eligibility (4)
RI3	Skill in conducting research (e.g. legal, background, country conditions) (4)
ITS3	Skill in framing interview questions and requests for information (4)
ITS4	Skill in asking appropriate follow-up questions (4)
ITS6	Skill in conducting non-adversarial interviews (4)
ITS8	Skill in confronting applicant with credibility issues (4)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
11/06/2015	Throughout document	Added some discussion of recent cases; fixed links	RAIO Training

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

It has been over 25 years since Fidel Armando Toboso Alfonso, a gay man from Cuba, was granted withholding of deportation in the United States based on his sexual orientation.[1] The Toboso-Alfonso decision paved the way for hundreds of lesbian, gay, bisexual, and transgender individuals as well as individuals with intersex conditions (LGBTI) to obtain refugee and asylum status in the United States. In 2011, the United Nations marked another "significant milestone in the long struggle for equality, and the beginning of a universal recognition that LGBT[I] persons are endowed with the same inalienable rights – and entitled to the same protections – as all human beings"[2] by passing a Resolution on Human Rights, Sexual Orientation, and Gender Identity.

In 2013, the Supreme Court held that section 3 of the Defense of Marriage Act, which had limited the terms "marriage" and "spouse" to opposite-sex marriage for purposes of federal law, was unconstitutional.[3] Then, in 2015, the Supreme Court struck down state laws denying marriage licenses to couples of the same sex, legalizing same-sex marriage throughout the United States.[4] Legally valid marriages between couples of the same sex are now treated the same as all other marriages under the Immigration and Nationality Act (INA) for all purposes, including the processing of derivative refugees and asylees under INA 207 and 208.[5]

[1] Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822-23 (BIA 1990).

[2] Statement by the President on the UN Human Rights Council Resolution on Human Rights, Sexual Orientation, and Gender Identity, The White House, Office of the Press Secretary, June 17, 2011.

[3] U.S. v. Windsor, 133 S. Ct. 2675 (2013).

[4] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[5] Matter of Zeleniak, 26 I&N Dec. 158 (BIA 2013), reversing a DOMA-based denial of a Petition for Alien Relative because the "Supreme Court's ruling in Windsor has therefore removed section 3 of the DOMA as an impediment to the recognition of lawful same-sex marriages and spouses of the marriage is valid under the laws of the State

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The increasing number of refugee and asylum (protection) claims related to LGBTI and HIV-positive status has resulted in the need for greater awareness of the issues involved in these claims and training on their adjudication.[6] Interviews with LGBTI or HIV-positive refugee and asylum applicants require the individual "to discuss some of the most sensitive and private aspects of human identity and behavior"[7] – sexual orientation, gender identity, and life-threatening illness. These topics may be particularly difficult for applicants to discuss with government officials, where the applicant may have previously had negative encounters with government officials and as a result have a fear of authority.[8]

All officers in the RAIO Directorate should be familiar with the contents of this training module as it constitutes primary field guidance for interviewing LGBTI applicants and analyzing their claims. This module seeks to: 1) increase awareness about the issues sexual minorities face; 2) foster discussion about LGBTI issues; and, 3) provide consistent legal and interview guidance regarding these issues.

The RAIO LGBTI Training Module is the result of a collaborative effort between USCIS and non-governmental organizations (NGOs).

The module first addresses the legal issues you, the interviewing officer, must consider when analyzing cases and making protection determinations. Second, because establishing eligibility for refugee and asylum status presents its own challenges, the module covers the factors you must take into account when interviewing LGBTI individuals. Third, the module addresses proper techniques for assessing credibility.

A Note about Terminology

The terminology involving LGBTI issues is still evolving. For purposes of this module, the term "sexual minorities" and the acronym "LGBTI" are used interchangeably as umbrella terms to refer to issues involving sexual orientation, gender identity, and intersex conditions. The following are some essential LGBTI definitions. For a more comprehensive set of definitions, please click the hyperlink to the LGBTI Glossary located in the "Other Materials" section of this module.

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where it was celebrated."; Legal Memorandum, Stephen H. Legomsky, USCIS Chief Counsel, General Guidance to the Field in Same-Sex Marriage Cases (July 26, 2013).

[6] UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, paragraph 1.

[7] Immigration Equality Draft Model LGBT Asylum Guidance, Immigration Equality 2010.

[8] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

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> The use of the term homosexual is limited in this module. It has a somewhat derogatory connotation within the LGBTI community as it has historically been used in a medical context to describe being gay or lesbian as an illness.[9]

Sexual orientation is the emotional, physical, and romantic attraction a person feels towards another person.[10] The term gay is used to mean men who are attracted to men. The term lesbian is used to mean women who are attracted to women, although homosexual women also sometimes use the term gay to describe themselves. The term gay people or gay community is often used to include both men and women who are attracted to members of the same sex. The term heterosexual or straight is used to mean men or women who are attracted to the opposite sex. The term bisexual is used to mean men or women who are attracted to both sexes.

Gender is what society values as the roles and identities of being male or female. Sex is the assignment of one's maleness or femaleness on the basis of anatomy and reproductive organs. Gender and sex are assigned to every individual at birth. Gender identity is an individual's internal sense of being male, female, or something else. Since gender identity is internal, one's gender identity is not necessarily visible to others. Gender expression is how a person expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice, or body characteristics.[11] Transgender is a term used for people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth. Some transgender people dress in the clothes of the opposite gender; others undergo medical treatment, which may include taking hormones and/or having surgery to alter their gender characteristics.

Intersex refers to a condition in which an individual is born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. The conditions that cause these variations are sometimes grouped under the terms "intersex" or "DSD" (Differences of Sex Development). Individuals with these conditions were previously referred to as "hermaphrodites," but this term is considered outmoded and should not be used unless the applicant uses it. These conditions may be apparent at birth, may appear at puberty, or may be discovered in a medical examination. Intersex is not the same as transgender, although an intersex person may identify themselves as transgender. Keep in mind that an intersex person may identify as male or female, and as lesbian, gay, bisexual, or heterosexual.[12]

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[9] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

[10] For more information about sexual orientation, see American Psychological Association (APA), Answers to Your Questions: A Better Understanding of Sexual Orientation and Homosexuality, (2008), available at http://www.apa.org/pubinfo/answers.html.

[11] For more information on transgender identity, see http://transequality.org/Resources/NCTE_TransTerminology.pdf and http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf (National Center for Transgender Equality.)

[12] For more information on intersex conditions, see the Advocates for Informed Choice website at www.aiclegal.org.

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> Transgender is a gender identity, not a sexual orientation. Therefore, a transgender person may have a heterosexual, bisexual, gay, or lesbian sexual orientation.

It is also important to be familiar with the issues and terminology related to the Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS). USCIS has encountered claims from applicants who fear persecution because they were incorrectly perceived as gay, based on the fact that they were HIV-positive. We have also encountered claims where the persecutor incorrectly assumed that the applicant was HIV-positive based on the fact that the applicant was gay or was perceived to be gay. Because such claims involve overlapping and related issues, they are being addressed within the same module.

A person who was exposed to HIV and developed anti-bodies to the virus is HIV-positive.[13] AIDS describes people with HIV who have either experienced certain infections or whose T-cells (infection fighting blood cells) have dropped below 200. Not everyone who is HIV-positive has AIDS, but everyone who has AIDS is HIV-positive.[14] HIV is not spread by casual contact. It is only spread through contact with bodily fluids primarily through sex or sharing intravenous needles.

> An applicant may prefer to use other terminology regarding their HIV status such as "person living with HIV." You should use the term most preferable to the applicant.

2 Legal Analysis – Overview

This module does not expand the statutory definition of a refugee. The legal criteria used to evaluate an LGBTI applicant's eligibility for asylum or refugee status are the same criteria used in all other protection adjudications. However, because LGBTI applicants' experiences are often different from those of others, it is useful to discuss how these experiences fit into the legal framework of established refugee and asylum law.

3 Legal Analysis – Nexus and the Five Protected Grounds

As explained in greater detail in the RAIO training module, Nexus and the Five Protected Grounds, to be eligible for asylum or refugee status, the applicant must establish that the

[13] For more information about HIV see http://www.gmhc.org/learn/hivaids-basics, (Gay Men's Health Crisis website).

[14] See Immigration Equality Draft Model LGBT Asylum Guidance, Immigration Equality 2004.

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persecution suffered or feared was or will be motivated "on account of" his or her actual or imputed possession of a protected characteristic. This is known as the nexus requirement and it applies equally to LGBTI applicants. The type of harm that may constitute persecution in the context of LGBTI claims will be discussed later in this module.

Depending on the facts of the case, claims relating to sexual orientation and gender identity are primarily recognized under membership in a particular social group but may overlap with other grounds, in particular religion and political opinion.[15]

The nexus analysis first requires consideration of whether the persecutor perceives the applicant as possessing a protected characteristic (either because the applicant does possess it or because the persecutor imputes it to the applicant); then whether the persecutor acted or would act against the applicant because of the persecutor's perception of that protected characteristic.

3.1 Membership in a Particular Social Group – Defining the Group

When deciding if the persecutor perceives in an applicant an actual or imputed characteristic that can define a cognizable particular social group (PSG), you must first identify the characteristics that define the group of which the applicant claims to be a member; then explain why that group does or does not form a PSG within the meaning of the refugee definition.

3.1.1 Possession or Imputed Possession of a Protected Characteristic

Particular social groups based on sexual minority status are well-recognized in case law as providing a valid basis for a protection claim. As mentioned previously, in 1990, the Board of Immigration Appeals (BIA) in Matter of Toboso-Alfonso, recognized persons identified as homosexuals by the Cuban Government as a cognizable particular social group.[16] Toboso-Alfonso was a gay man who was subjected to detention and forced labor by the Cuban government for being gay.

Four years later, the U.S. Attorney General designated Toboso-Alfonso "as precedent in all proceedings involving the same issue or issues."[17]

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[15] UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, paragraphs 42-43; 50.

[16] See Toboso-Alfonso.

[17] Attorney General, Order number 1895 (June 19, 1994).

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While the BIA has not specifically issued a precedential decision on claims by other sexual minorities, many U.S. Circuit Courts of Appeals have. Claims involving actual or imputed sexual minority status may qualify under the particular social group category and may involve applicants who:

- identify as gay or lesbian[18]
- are viewed as a sexual minority, regardless of whether the persecutor or society involved distinguishes between sexual orientation, gender, and sex.
- are transgender[19] (note that even if a transgender applicant identifies as heterosexual, he or she may be perceived as gay or lesbian)
- are "closeted" gays and lesbians
- test positive for HIV, regardless of their sexual orientation[20]
- are viewed as "effeminate" or "masculine" but identify as heterosexual
- are not actually gay but are thought to be gay by others[21]
- are from throughout the world, not just Cuba.[22]
- are not subject to the kind of government registration requirements that were involved in Toboso-Alfonso

For a comprehensive list of court cases involving LGBTI asylum and refugee issues, click LGBTI-Related Case Law found in the "Other Materials" section of this module.

3.1.2 Particular Social Group – Common Immutable Characteristic

To determine if an applicant is a member of a PSG, you must decide whether:

The applicant is a member of a group individuals who share a common, immutable characteristic, meaning it is one that members of the group either cannot change or should not be required to change because it is fundamental to the member's identity or conscience. The defining characteristic can be a shared innate characteristic or a shared past experience.[23]

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[18] See, e.g., Karouni v. Gonzales, 399 F.3d 1163 (9th Cir 2005); Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997); Nabulawala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007).

[19] Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000).

[20] Seropositivity for HIV and Relief From Deportation, Memorandum, David A. Martin, INS General Counsel. (Feb. 16, 1996).

[21] Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003).

[22] This will depend on country of origin information. LGBTI claims are put forward from all over the world.

[23] Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).

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Sexual orientation, gender identity, and having an intersex condition can be classified as immutable. They are characteristics that an individual cannot change about him or herself or should not be required to change.[24] Even if these traits can be changed, they are traits that are so fundamental to a person's identity that he or she should not be required to change them.

Harm imposed because an applicant was imputed to belong to a sexual minority may also qualify as "on account of" a protected ground, whether that imputation is correct or not.

3.1.3 Particular Social Group – Social Distinction

When analyzing whether or not the particular social group is cognizable, you must also determine whether the group is socially distinct, i.e., whether the actual or imputed characteristic is "easily recognizable and understood by others to constitute a social group."[25]

Some adjudicators mistakenly believe that social distinction requires that the applicant "look gay or act gay." See Section 7.1.1, Evidence Assessment, Credibility Considerations, Plausibility below. In Matter of M-E-V-G- and Matter of W-G-R-, a pair of precedent decisions issued in 2014, the BIA clarified that the "social distinction" requirement does not require literal or ocular visibility. Rather, it means that the society in question distinguishes individuals who share this trait from individuals who do not.[26] It is not necessary for the group to identify explicitly and outwardly in order for the social distinction requirement to be met. For example, the fact that the LGBTI community in a country exists mainly in hiding does not prevent such a group for establishing social distinction in the society.

For purposes of the "social distinction" analysis, you must examine the evidence, including country conditions. For social distinction, an examination of the relevant evidence is necessary to determine whether the society in question distinguishes sexual minorities from other individuals in a meaningful way. In Toboso-Alfonso, for example, the record established that the Cuban government registered and maintained files on homosexuals, the applicant suffered harm because of his homosexual status, and suspected homosexuals were subjected to physical examinations, interrogations, and beatings. As the BIA noted in Matter of M-E-V-G-, this evidence was sufficient to demonstrate that the group was distinct within Cuban society.[27] While government registration of individuals as "homosexuals" would, in general, establish social distinction, it is not required. Information about discriminatory attitudes or behavior toward sexual minorities would also be an example of evidence of social distinction.

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[24] See Matter of Toboso-Alfonso, 20 I&N Dec. at 822.

[25] Matter of C-A-, 23 I&N Dec. 951 (BIA 2006).

[26] Matter of M-E-V-G-, 26 I&N Dec. 227, 234 (BIA 2014); Matter of W-G-R-, 26 I&N Dec. 208, 216 (BIA 2014).

[27] M-E-V-G-, 26 I&N at 234.

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3.1.4 Particular Social Group – Particularity

Applicants seeking to establish membership in a particular social group must also establish that the group is defined with sufficient particularity. This requirement relates to the group's boundaries. The group must be discrete and have definable boundaries. The group should not be defined so broadly so as to make it difficult to distinguish group members from others in society and should not be outlined so narrowly so that it does not constitute a meaningful grouping. In Matter of M-E-V-G-, the BIA noted that the proposed group in Toboso-Alfonso, "homosexuals in Cuba," was sufficiently particular because it was a discrete group with well-defined boundaries.

Possible Social Group Formulations

It is important to remember that, in order to conduct an accurate assessment of nexus, a particular social group should not be formulated too broadly or too narrowly. Rather, it should refer to the trait that the persecutor perceives the applicant to possess.

Because LGBTI claims involve individuals with a variety of characteristics, and because the persecutors in given cases may perceive the applicants' traits in a variety of ways, the appropriate formulation will depend on the facts of the case, including evidence about how the persecutor and the society in question view the applicant and people like the applicant.

Consider the following as possible ways to formulate the group:

- Sexual minorities in Country X. This may be an appropriate particular social group in cases where the persecutor in question perceives any sexual minority as "outside the norm" but does not necessarily distinguish between orientation, gender, and sex. It might also be appropriate where there are a variety of traits involved in the claim, but the persecutor's animus toward those different traits stems from a more general animus toward all sexual minorities. This might be the case, for example, in a situation where an applicant has an intersex condition or has undergone Sex Reassignment Surgery (SRS) in the United States after having been harmed in the past for simply being perceived as gay. This prevents the need to analyze past and future harm for two separate groups when past and future harm are both based on the applicant's sexual minority status. (Example: "sexual minorities in Mexico" in lieu of "transgender Mexican women perceived as homosexual Mexican men cross-dressing as women.");

- Gay, lesbian, transgender, or HIV-positive (choose one) / men or women

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(choose one) / from Country X (choose one) (Example: "Lesbian women from Uganda."); or

- Men or women (choose one) / from Country X (choose one) / imputed to be gay, lesbian, transgender, or HIV-positive (choose one) (Example: "men from Ghana imputed to be gay.")

3.2 "On Account Of"/Nexus

3.2.1 The Persecutor's Motive and the Applicant's Experience

The "on account of" requirement focuses on the motivation of the persecutor. The persecutor in most LGBTI cases seeks to harm the individual based on the individual's perceived or actual sexual orientation, on the persecutor's belief that the applicant transgresses traditional gender boundaries, or on the persecutor's more general animus toward sexual minorities of any kind. In some situations, the persecutor may have been trying to "cure" the applicant of his or her sexual orientation or gender identity.[28] Most persecutors may not have been making the distinction between gay, lesbian, bisexual, transgender, intersex, or HIV-positive. They may simply have harmed or want to harm the applicant based on their perception that the applicant is gay or a sexual minority that is "outside the norm."

The applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to act against the applicant because he or she possesses or is believed to possess one or more of the protected characteristics in the refugee definition.[29] For example, in an LGBTI claim, you would consider evidence that the persecutor harmed or tried to change the applicant because the persecutor knows or believes the applicant belongs to a sexual minority.

This evidence may include the applicant's testimony regarding:

- what the persecutor said or did to the applicant
- what the persecutor said or did to others similar to the applicant
- the context of the act of persecution (for example, if the applicant was attacked in a gay bar or while holding hands with a same-sex partner)
- reliable Country of Origin Information (COI) that corroborates such testimony

[28] Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996); Pitcherskaia v. INS.

[29] Elias-Zacarias v. INS, 502 U.S. 478 (1992).

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> It is critical that you ask the applicant questions about what the persecutor may have said to him or her when the harm was inflicted or when the threats were made.

As with other types of refugee or asylum claims, there is no malignant intent required on the part of the persecutor, as long as the applicant experiences the abuse as harm.[30] State and non-state actors may inflict harm on LGBTI persons with the intention of curing or treating them, for example, through what is effectively medical abuse or forced marriage.[31] (See Types of Harm That May Befall Sexual Minorities, Forced Psychiatric or Other Efforts to "Cure" Homosexuality below.)

3.2.2 Prosecution vs. Persecution

The U.S. Supreme Court has made it clear that intimate sexual activity between consenting adults is a constitutionally protected activity.[32] This constitutional principle, while not directly applicable to the analysis of an asylum or refugee claim, is consistent with the recognition that punishing conduct or sexual activity between consenting adults of the same sex is tantamount to punishing a person simply for being gay. If a law exists in another country that prohibits intimate sexual activity between consenting adults, enforcement of the law itself may constitute persecution and not simply prosecution.[33]

4 LEGAL ANALYSIS – PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

In evaluating whether harm constitutes persecution in an LGBTI-related case, you should consider the same factors as in any other protection case. The relevant considerations are: 1) does the harm rise to the level of persecution; 2) is the harm inflicted on account of a protected ground; and 3) is the persecutor the government or an individual or entity from which the government is unable or unwilling to provide reasonable protection?

Because the amount of harm that rises to the level of persecution is discussed in detail in the RAIO Training module, Definition of Persecution and Eligibility Based on Past Persecution, this section focuses on the types of harm directed at sexual minorities.

4.1 Types of Harm That May Befall Sexual Minorities

[30] Kasinga.

[31] Pitcherskaia.

[32] Lawrence v. Texas, 539 U.S. 558 (2003).

[33] Karouni v. Gonzales, 399 F.3d 1163, 1173 (9th Cir. 2005).

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The types of harm directed at LGBTI applicants vary and include the same types of harm that are directed at other applicants. LGBTI individuals, however, may face unique harm or may be more vulnerable to specific types of harm than other applicants.[34]

When considering whether harm will amount to persecution, you must not only consider the objective degree of harm or whether the harm rises to the level of persecution, but also whether the applicant personally experienced or would experience the act(s) as serious harm.[35] You must evaluate the opinions and feelings of each applicant individually. Because each case is unique and each applicant has his or her own psychological makeup, interpretations of what amounts to persecution vary widely.[36]

While discrimination is often a fundamental part of claims made by LGBTI individuals, applicants also frequently reveal having experienced serious physical and sexual violence. These incidents of harm must be assessed in their totality. They must be analyzed in light of prevailing attitudes with regard to sexual orientation and gender identity in the country of origin.

Violation of Fundamental Rights

Being compelled to abandon or conceal one's sexual orientation or gender identity may cause significant psychological and other harms that may amount to persecution.[37] LGBTI persons who live in fear of being publicly identified often conceal their sexual orientation in order to avoid the severe consequences of such exposure - including the risk of incurring harsh criminal penalties, arbitrary arrests, physical and sexual violence, dismissal from employment, and societal disapproval.

Criminal Penalties

[34] See UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, paragraphs 20-25.-

[35] See RAIO Training odule, Definition of Persecution and Eligibility Based on Past Persecution, "Whether the Harm Experienced Amounts to Persecution, General Considerations, Individual Circumstances."

[36] Id and UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, paragraphs 40, 51, and 52, reedited Geneva, January 1992.

[37] UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, paragraph 33.

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In some countries, homosexuality is criminalized and, if discovered by the authorities, a lesbian or gay man may be arrested or imprisoned based on her or his sexual orientation.[38]

In some countries, individuals accused of consensual sex with a member of the same sex may be subject to prosecution and even death.[39] For example, in Mauritania any Muslim male who engages in a sexual act with another male is subject to death by stoning; in Kenya, the Penal Code explicitly states that engaging in a consensual sexual act between two men is a felony and punishable by up to imprisonment for five years.[40]

In other countries, there may not be laws that actually prohibit homosexuality, but authorities may still persecute people because of their sexual orientation.[41] Thus, applicants have been arrested, detained, beaten, sexually assaulted, and/or forced to pay bribes by police or army officials because of their sexual orientation, even if a non-discriminatory legal basis is used as a pretext for the action.[42]

Rape and Sexual Violence

Because LGBTI people are often perceived as undermining gender norms, they are at heightened risk for sexual violence in many countries.[43] Rape and sexual assault are types of harm that rise to the level of persecution.[44] Other types of sexual violence, for example being forced to perform sexual acts upon another, may also constitute persecution.[45] Some applicants may have been raped as a measure to "correct" their behavior or status or as a means of punishing them for being gay or "outside the norm."

Beatings, Torture, and Inhumane Treatment

Many LGBTI people are subjected to severe forms of physical violence. An applicant may have been the victim of repeated physical violence that the police never investigated

[38] Aengus Carroll and Lucas Paoli Itaborahy, International Lesbian, Gay Bisexual, Trans and Intersex Association, State Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults, May 2015, available at: http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf.

[39] Id.

[40] Id.

[41] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

[42] Maldonado v. Att'y Gen. of U.S., 188 F. App'x 101, 103 (3d Cir. 2006). See also Nowhere to Turn: Blackmail and Extortion Of LGBT People in Sub-Saharan Africa. International Gay and Lesbian Human Rights Commission IGLHRC.

[43] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

[44] See, e.g., Haider v. Holder, 595 F.3d 276, 287-288 (6th Cir. 2010); Ndonyi v. Mukasey, 541 F.3d 702, 710 (7th Cir. 2008); Boer-Sedano v. Gonzales, 418 F.3d 1082, 1088 (9th Cir. 2005).

[45] Ayala v. U.S. Atty Gen., 605 F.3d 941 (11th Cir. 2010).

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or that the police themselves perpetrated.[46] Many applicants have been seriously harmed by members of their own family.[47]

Claims made by LGBTI persons often reveal exposure to physical and sexual violence, extended periods of detention, medical abuse, the threat of execution, and honor killing. Generally, these are acts of harm that would rise to the level of persecution.

LGBTI individuals can also experience other forms of physical and psychological harm, including harassment, threats of harm, vilification, intimidation, and psychological violence that can rise to the level of persecution, depending on the individual circumstances of the case and the impact on the particular applicant.

Forced Medical Treatment

The case of an individual with an intersex condition may involve the applicant's fear or history of non-consensual surgery and other non-consensual medical treatment. In other cases, the applicant's fear may involve the lack of medical care in their home country.

Forced Psychiatric Treatment or Other Efforts to "Cure" Homosexuality

Many cultures see homosexuality as a disease, a mental illness, or a severe moral failing. Forced efforts to change an individual's fundamental sexual orientation or gender identity may rise to the level of persecution; for example, such "treatments" as forced institutionalization, electroshock therapy, and forced drug injections could cause harm serious enough to constitute persecution. It is important to remember that there is no requirement that harm be inflicted with the intent to harm the victim.[48] Rather, you should assess whether it is objectively serious harm and was experienced as serious harm by the applicant.

Discrimination, Harassment, and Economic Harm

Many LGBTI people are disowned by their families if their sexual orientation or transgender identity becomes known.[49] It is important to consider such mistreatment within the context of the applicant's culture. In many countries, it is virtually impossible for an unmarried person to find housing outside of his or her family home. Likewise, in many cultures, it would be impossible for a woman to find employment on her own. In such cultures, being disowned by one's family in and of itself could be found to rise to the level of persecution, since it would have such severe consequences.

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[46] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

[47] Gonzalez-Posadas v. Att'y Gen. of the U.S., 781 F.3d 677, 680 (3d Cir. 2015); Ixtlilco-Morales v. Keisler, 507 F.3d 651 (8th Cir. 2007).

[48] See Kasinga and Pitcherskaia.

[49] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

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Some applicants may have been threatened by neighbors or had their property vandalized. Others may have been repeatedly fired from jobs and found it impossible to engage in any form of employment once their sexual orientation became known. While being fired from a job generally is not considered persecution, if an individual can demonstrate that his or her LGBTI status would make it impossible to engage in any kind of gainful employment, this may constitute persecution. For example, in many countries transgender people face such severe discrimination that the only way they can survive is by engaging in prostitution.

Discrimination and harassment may amount to persecution if cumulatively they are sufficiently severe.[50] This may be the case, for example, where an LGBTI person is consistently denied access to normally available services in his or her private life or workplace, such as education, welfare, health, and access to the courts.

Forced Marriage

LGBTI persons may be unable to engage in meaningful relationships, be forced into arranged marriages, or experience extreme pressure to marry.[51] They may fear that failure to marry will reveal them to be LGBTI to their family and to the public at large. Societal and cultural restrictions that require them to marry individuals in contravention of their sexual orientation may violate their fundamental right to marry and may rise to the level of persecution.[52] For instance, a lesbian who has no physical or emotional attraction to men and is forced to marry a man may experience this as persecution. Likewise, a gay man who is in no way attracted to women who is forced to marry a woman may experience this as persecution.

Gender-Based Mistreatment

Any LGBTI individual may experience gender-based mistreatment. For instance, lesbians often experience harm as a result of their gender as well as their sexual orientation. The types of harm that a lesbian may suffer will frequently parallel the harms in claims filed by women in general more closely than the harms in gay male asylum claims.[53] Likewise, before "coming out," transgender men are generally raised as girls and may experience the same types of harm. In many parts of the world persecution faced by lesbians may be

[50] See Kadri v. Mukasey, 543 F.3d 16 (1st Cir. 2008); Matter of T-Z-, 24 I&N Dec. 163, 169-71 (BIA 2007) (adopting the standard applied in Matter of Laipenieks, 18 I&N Dec. 433 (BIA 1983), rev'd on other grounds, 750 F.2d 1427 (9th Cir. 1985);but see Lopez-Amador v. Holder, 649 F.3d 880, 885 (8th Cir. 2011) (officer's verbal harassment of alien [perceived to be a lesbian] was not persecution).

[51] UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, paragraph 23.

[52] Id.

[53] See Victoria Neilson, Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims, 16 Stanford Law & Policy Review 417 (2005).

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less visible than that encountered by gay men. Lesbians and transgender women may be particularly vulnerable to rape by attackers who wish to punish them for their sexual identity. This can include retaliation by former partners or husbands. In addition, gay men may experience harm as a result of their gender or sexual orientation.

Transgender individuals may be more visible and may be viewed as transgressing societal norms more than gay men or lesbians. Therefore, they may be subject to increased discrimination and persecution and may be vulnerable even in regions where lesbians and gay men may have greater protections.[54]

4.2 Agents of Persecution

The second step in the analysis of whether harm constitutes persecution is to determine if the agent of persecution is the government or a nongovernment actor. It is well established that an applicant can qualify for refugee or asylum status whether the persecutor is the government or an individual or entity from whom the government is unable or unwilling to provide reasonable protection. While the applicant must show a nexus between the harm and a protected ground, he or she is not required to show that the government was unwilling to control those actors because of the applicant's protected characteristic, such as being LGBTI.[55]

In LGBTI cases governmental agents of persecution may include the police, military, or militias. Family, relatives, neighbors, and other community members are examples of non-governmental agents of persecution.

In asylum processing, if the applicant establishes past persecution on account of one of the five protected grounds, he or she is presumed to have a well-founded fear of persecution in the future. The burden then shifts to USCIS to show that there has been a fundamental change in circumstances or that the applicant can reasonably relocate within the country of origin. If USCIS does not meet this burden, it must be concluded that the applicant's fear is well-founded.

To be eligible for resettlement as a refugee in the United States, an applicant must establish either past persecution or well-founded fear of persecution on account of a protected ground. Therefore, in general, a refugee applicant who is found to have suffered past persecution but who does not have a well-founded fear of future persecution is still able to establish that he or she meets the refugee definition. There is no rebuttable presumption or burden shifting as there is in asylum

[54] Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1082 (9th Cir. 2015); Ellen A. Jenkins, Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers, 40 Golden Gate U.L. Rev. (2009).

[55] Doe v. Holder, 736 F.3d 872 (9th Cir. 2013).

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processing.

4.3 Internal Relocation and Fundamental Change of Circumstances

The issue of internal relocation arises when determining whether an applicant has established a well-founded fear or, in the context of asylum, whether the presumption of a well-founded fear is rebutted by the reasonable possibility of internal relocation. In the asylum context, once an applicant has established past persecution, the burden then shifts to the Government to show that internal relocation is reasonable. In cases where the persecutor is a government or government sponsored, there is a presumption that internal relocation is not reasonable. In some cases there may be evidence to rebut that presumption, such as, for example, evidence that the government's authority is limited to certain parts of the country.[56] Homophobia, "whether expressed in laws or people's attitudes and behavior, often tends to exist nationwide."[57] A law of general applicability, such as a penal code that criminalizes homosexual conduct, which is enforceable in the place of persecution, would normally also be enforceable in other parts of the country of origin.[58]

Where a nongovernmental actor is the persecutor, the government's inability or unwillingness to protect the applicant in one part of the country may also be evidence that it is unwilling or unable to do so in other parts of the country.[59] He or she should not have to depend on anonymity to avoid the reach of the persecutor. While a major capital city "in some cases may offer a more tolerant and anonymous environment, the place of relocation must be more than a 'safe haven.'" The applicant must also be able to access a minimum level of political, civil, and socioeconomic rights.[60] Thus, he or she must be able to access the protection in a genuine and meaningful way. The existence of LGBTI-related nongovernmental organizations does not in itself provide protection from persecution.

In the asylum context, the presumption of a well-founded fear of future persecution also can be rebutted by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of

[56] Ellen A. Jenkins, Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers, 40 Golden Gate U.L. Rev. (2009).

[57] UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity at paragraph 33.

[58] Id.

[59] UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, paragraph 54.

[60] Id. at paragraph 56.

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persecution. In making this determination, you must weigh all available evidence, including current country conditions and the circumstances of the individual applicant. Country condition reports can be particularly useful in examining whether there has been a fundamental change after a long absence from a country. For example, in Neri-Garcia v. Holder, the Tenth Circuit affirmed an immigration judge's determination of a fundamental change in circumstances based on country reports for 2009 and 2010 of a "growing social acceptance in Mexico" toward sexual minorities, even with continued discrimination.[61] The court, in applying a deferential standard of review that was limited to the record evidence, took into account that the petitioner failed to introduce evidence to counter these country reports, other than his and a witness's assertions that conditions had not changed in nearly twenty years.[62] In contrast, with a different record of evidence, the Seventh Circuit in Rosiles-Camarena v. Holder, suggested that both case-specific facts and country-wide conditions should be taken into account in examining the risk of a sexual minority applicant returning to Mexico.[63] In that case, the court noted the petitioner's contention of greater risk of harm to him than "a statistical risk of death for homosexuals as a group," due to such factors as his planning to live openly with his same-sex partner if returned to Mexico, being HIV-positive, not benefiting from familial support in Mexico, and being unfamiliar with the country's contemporary customs as he had spent the bulk of his life in the United States.[64] Further, on a somewhat separate point, in Avendano-Hernandez v. Lynch, in examining country conditions information as it related to a fear of torture by a transgender woman from Mexico, the Ninth Circuit ruled that the Board "erred in assuming that recent anti-discrimination laws in Mexico have made life safer for transgender individuals while ignoring significant record evidence of violence targeting them."[65]

5 Legal Analysis – Well Founded Fear

LGBTI-specific issues may also arise in cases where the applicant has not experienced past persecution, but may nevertheless have a well-founded fear of persecution. Because well-founded fear is discussed in detail in the ADOTC and RDOTC Well-Founded Fear lessons, this section focuses on common well-founded fear issues raised in LGBTI claims.

5.1 Objective Elements

[61] Neri-Garcia v. Holder, 696 F.3d 1003, 1007 (10th Cir. 2012).

[62] See id. at 1008.

[63] Rosiles-Camarena v. Holder, 735 F.3d 534, 539 (7th Cir. 2013) (examining facts related to the likelihood of future persecution, rather than a fundamental change in circumstances).

[64] Id.

[65] Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1075 (9th Cir. 2015).

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An applicant may qualify for asylum or refugee status even if he or she was not persecuted in the past but has a well-founded fear of future persecution. To establish well-founded fear, the applicant must have a subjectively genuine fear and an objectively reasonable fear of return.

The existence of certain objective elements in a particular claim will not necessarily undermine the applicant's subjective fear or credibility. For example, just because a country permits an LGBTI organization to exist or allows an annual public LGBTI event does not mean that LGBTI people are free from ongoing violence and harm in that country.

Some countries with laws that state that their citizens and nationals are guaranteed religious, political, or other freedoms often do not enforce these protections. Similarly, some countries have anti-discrimination laws that seemingly protect LGBTI individuals, but in reality the laws are not enforced or are openly disregarded.

5.2 Fear of Future Persecution

An applicant should not be expected to suppress his or her sexual orientation or gender identity in order to avoid future persecution.[66] Conversely, LGBTI applicants who have concealed their sexual minority status in their home countries might not have experienced harm that rises to the level of persecution.[67] These applicants need not show that the persecutor knew about their sexual orientation before leaving, only that the persecutor may become aware of it if they return. In addition, it is not reasonable to expect an applicant to conceal his or her sexual minority status.

5.3 Refugees *Sur Place*

A sur place claim for refugee status may arise as a consequence of events that have occurred in the applicant's country of origin since his or her departure, or as a consequence of the applicant's activities since leaving his or her country of origin. This may also occur where he or she has been "outed" to members of his or her family back home or where his or her LGBTI status or views on sexual orientation have been publicly

[66] Karouni v. Gonzales, at 1173 (reasoning that to require the respondent to abstain from future homosexual acts if he wished to avoid persecution would effectively force him "to change a fundamental aspect of his human identity" …. and forsake the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that 'ha[ve] been accepted as an integral part of human freedom in many other counties."")

[67] UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, paragraphs 30, 57.

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expressed, for example by taking part in advocacy campaigns, demonstrations, or other human rights activism on behalf of LGBTI individuals.

Additionally, LGBTI applicants might have left the country of origin for a reason other than their sexual orientation, for example to pursue employment and educational opportunities in the United States and have "come out" after arrival in the country of asylum or first refuge. These applicants may qualify for refugee or asylum status if they can demonstrate a well-founded fear of future persecution.

You should carefully consider whether the applicant's sexual orientation or gender identity may come to the attention of the authorities or relatives in the country of origin and the ensuing risk of persecution. Keep in mind that in making this analysis, it is not appropriate to assume that an individual who is lesbian, gay, or bisexual could "go back in the closet" or that a transgender individual who is living in their "corrected gender" could go back to living in the gender he or she was assigned at birth.[68]

As with all claims based solely on a fear of future persecution, the claim must meet the four elements in the Mogharrabi test. See RAIO training module Well-Founded Fear.

In the asylum context, there are some one-year filing deadline issues that may arise specifically in the context of LGBTI sur place claims. See Asylum Supplement - One-Year Filing Deadline below.

6 Interview Considerations

It is important to create an interview environment that allows applicants to freely discuss the elements and details of their claims and to identify issues that may be related to sexual orientation or imputed sexual orientation. Like most gender-based claims, LGBTI claims involve very private topics that are difficult for applicants to talk about openly. LGBTI applicants may hesitate to talk about past experiences and may be afraid they will be harmed again because of their actual or perceived sexual orientation or gender identity. For many, it will be very difficult to talk about something as private as sexual orientation, gender identity, or HIV-positive status. Furthermore, discussing some of these issues may also be challenging for you. It is therefore especially important for you to create an interview environment that is open and non-judgmental so that the applicant feels comfortable explaining the details of his or her claim.[69]
This section should be considered along with the guidance contained in the RAIO Interviewing modules, which also address issues related to sexual minorities.

The following may help you interact more meaningfully with LGBTI applicants during an interview.

[68] Id; see also Karouni v. Gonzales, 399 F.3d at 1173.

[69] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

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6.1 Pre-Interview Considerations

6.1.1 File Review

Before the interview, when you review each file, be mindful of any LGBTI-related issues in the claim. Due to the delicate and personal issues that surround sexual abuse, sexual orientation, and gender identity, some applicants may have inhibitions about disclosing past experiences to an interviewer of a particular sex. Some LGBTI applicants may be more comfortable discussing their experiences with officers of a particular gender, particularly in cases involving rape, sexual abuse, or other sexual violence.

To the extent that personnel resources permit, an applicant's request for an interviewer of a particular sex should be honored. If a pre-interview review of the file indicates that the case may involve sensitive LGBTI-related issues, you may consult with your supervisor or team leader prior to the interview to evaluate whether it would be more appropriate for an officer of a particular sex to conduct the interview. You may also wish to confirm at the beginning of the interview that the applicant feels comfortable discussing all aspects of the claim with you.

6.1.2 How the Presence of Family and Relatives May Affect the Interview

For a variety of reasons, the presence of relatives may help or impede an applicant's willingness to discuss LGBTI-related persecutory acts or fears. For example:

- The applicant's relatives may not be aware of the harm he or she experienced. He or she may wish that the relative remain unaware of those experiences or may be ashamed to say what he or she has experienced or fears in front of a relative. In addition, the applicant's claim may be based, in part, on fear of the relative who is present.

- Or, the applicant may want a family member or significant other present during the interview. Sometimes having a loved one present can provide support to the applicant when recounting traumatic events.[70]

Therefore, to the extent possible, the choice of whether to be interviewed alone or with a relative present should be left to the applicant. The applicant should be asked his or her preference, when possible, in private, prior to the interview.

If the applicant elects for the relative to be present at the interview, you should exercise sound judgment during the interview, determining whether the presence of the relative is impeding communication. If it appears that relative's presence is interfering with open communication, the relative should be asked to wait in the waiting room.

[70] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

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In some cases, an applicant will bring a partner to the interview to testify as corroboration of the applicant's sexual orientation or gender identity. If you feel that this corroboration would be helpful, the partner should be permitted to testify. You may exercise discretion and request that the witness's testimony be submitted in writing.

6.1.3 How the Presence of Interpreters May Affect the Interview

Interpreters play a critical role in ensuring clear communication between you and an LGBTI applicant. The actions of an interpreter can affect the interview as much as those of the interviewing Officer. As in all interviews, you should confirm that the applicant and the interpreter fully understand each other.

As explained in greater detail in the RAIO training module Working with an Interpreter, an applicant's testimony on sensitive issues such as sexual abuse may be diluted when received through the filter of an interpreter. The applicant may not feel comfortable discussing such LGBTI issues with an interpreter of the same nationality, ethnicity, or clan, etc.

The same holds true for the interpreter; even if the applicant feels comfortable using a particular interpreter, the interpreter may be inhibited about discussing LGBTI-related issues or using certain terms. For example, the interpreter may substitute the word "harm" for "rape" because the interpreter is not comfortable discussing rape due to cultural taboos.[71]

6.1.4 Reviewing Biographical Information with the Applicant

For transgender applicants, it is best to ask at the beginning of the interview what pronoun the applicant feels more comfortable with and to ask if there is a name he or she prefers using. For example, if an individual with a female appearance who has described her claim as based on transgender identity, has filled in the biographical information of the application form with an obviously male name, you should ask if there is a name she would prefer that you use.

One of the biographical information questions on the forms is "gender." Since this issue may be sensitive and go to the heart of the applicant's claim, it may be better to come back to this question at the end of the interview after the applicant has described the steps he or she has taken to "transition," rather than at the beginning of the interview. The early part of the interview should be devoted, in part, to putting the applicant at ease. If you immediately question the legitimacy of the "gender" box that he or she has checked off, the applicant may be uncomfortable for the rest of the interview.

[71]See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

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USCIS has issued guidance explaining the process for issuing initial or amended documentation reflecting the applicant's post-transition gender.[72] It is important to note that proof of sex reassignment surgery is not required and USCIS will not ask for records relating to any such surgery.[73]

When going through the biographical information on the application form at the beginning of the interview, it is appropriate for you to inquire whether the applicant has legally changed his or her name. If yes, you can request the legal name change documents. If no, you should explain why it is necessary to use the legal name on the form, but that during the interview you will refer to the applicant by the name that the applicant feels most comfortable using.[74]

Note: If the applicant provides any new name or gender information, additional database systems may need to be updated and further security checks may be required. Please refer to USCIS and division procedures for updating name and gender information.

6.2 Suggested Techniques for Eliciting Testimony

6.2.1 Setting the Tone and Putting the Applicant at Ease

While you must conduct all of your interviews in a non-adversarial manner, it is crucial when interviewing LGBTI applicants that you set a tone that allows the applicant to testify comfortably and that promotes a full discussion of the applicant's past experiences. You must conduct the interview in an open and nonjudgmental atmosphere designed to elicit the most information from the applicant.

You should be mindful that for many people there is no topic more difficult to discuss with a stranger than matters relating to sexual orientation, gender identity, and serious illness.[75] Furthermore, many applicants have been physically and sexually abused, harassed, tormented, and humiliated over many years because of their actual or perceived sexual orientation or gender identity.

> Asking questions about difficult or private issues is a sensitive balancing act you face in all interviews. On the one hand, you need to obtain detailed testimony from the applicant. On the other hand, you do not want to badger or traumatize the applicant. The most important thing to understand is that this may be a difficult

[72] USCIS Policy Memorandum on Adjudication of Immigration Benefits for Transgender Individuals, August 10, 2012.

[73] Id.

[74] Id.

[75] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

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topic for the applicant to talk about and to be respectful in discussing sexual orientation, gender identity, and serious illness.[76]

You can help alleviate some of the applicant's reluctance to discuss some of these issues by incorporating the following suggestions into your interviews:

Remind the applicant that the interview is confidential. It can also help to ease the applicant's nervousness if you explain confidentiality to the interpreter in the presence of the applicant.

Be particularly sensitive when questioning the applicant about past sexual assault. Applicants may be reluctant to talk about actual or perceived sexual orientation or to disclose experiences of sexual violence. This may be especially true for LGBTI applicants who are not "out of the closet" or where the applicant was sexually assaulted. In many societies, sexual assault is seen as a violation of community or family morality for which the victim is held responsible. The combination of shame and feelings of responsibility and blame for having been victimized in this way can seriously limit an LGBTI applicant's ability to discuss or even to mention such experiences.[77]

Explore all relevant aspects of the claim, even if they may be difficult to discuss. While you must be sensitive as you interview an applicant regarding such delicate topics, at the same time you must not shy away from your duty to elicit sufficient testimony to make an informed adjudication. This may include instances involving sexual violence. It is critical that you ask all necessary and relevant follow-up questions to help the applicant develop his or her claim.[78]

It is important to remember that in the nexus analysis, the relevant inquiry is not whether the applicant actually possesses the protected trait. Rather, it is whether the persecutor believes the applicant possesses the trait (either because the applicant does possess it or because the persecutor imputes it to the applicant). Thus, the issue is not whether the applicant actually is LGBTI, but whether the persecutor believes that he or she is, either because the applicant possesses the characteristic or because the persecutor imputes it to the applicant.

It is not necessary to probe the details of the applicant's personal life beyond what is necessary to make this specific determination. So, once you have established that the persecutor perceives the applicant to have a protected trait, further inquiry into the specific nature of the applicant's LGBTI status is not necessary to establish

[76] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

[77] See RAIO Training Module, Gender Related Claims.

[78] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

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inclusion in a particular social group.

Try to use the same language that the applicant has used in his or her own application. If an applicant refers to himself as "gay," you should use this term, rather than "homosexual" and vice versa. The most important thing is to understand what a difficult topic this may be for the applicant to discuss and to be respectful.[79]

Do not assume that being a sexual minority is a lifestyle or a choice. This will help you avoid asking questions in a way that may put the applicant on the defensive and result in the applicant holding back information rather than imparting it.[80]

Become familiar with the legal issues, terminology, and questioning techniques specific to the LGBTI community. You can use this information to help the applicant tell his or her own story.

Be mindful that the applicant and the interpreter may not be familiar with many of these issues or terms. While many LGBTI individuals in the United States embrace their LGBTI identity and have a language to talk about these issues, for many LGBTI individuals who come from countries where topics of sexuality are taboo, the way that applicants express themselves may be different from what an interviewer would expect from an LGBTI person in the United States.[81]

The fact that an applicant may be uncomfortable with these terms may be a result of the fact that he or she comes from a culture where there is no word for homosexuality or transgender identity. It may be a result of his or her own ingrained homophobia from growing up in a culture where such terms were the equivalent of insults.[82]

Become well-versed in country of origin information. This allows you to ask relevant follow-up questions. The more you know about the applicant's country of origin, the less likely you will be to miss important facts. Additionally, awareness of country conditions may also assist you in conducting the interview with cultural sensitivity and may help you put the applicant at ease during the interview. If the applicant notices that you took the time to try to understand the situation he or she faces in the country of origin as an LGBTI individual, he or she may be more inclined to talk in detail about his or her experiences and fears.

6.2.2 Explore all possible grounds

[79] Id.

[80] Id.

[81] Id.

[82] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

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Many LGBTI applicants may not know that their sexual orientation, gender identity, HIV-positive status, or intersex condition is the basis for a protection claim and may be reluctant to talk about these topics because they are so private. This is especially true where applicants are not represented. They may only put forward the elements of their past experiences that their family or members of their communities recommend.

For example, an applicant from Colombia appears before you for an interview. The majority of claims you have adjudicated from Colombia involve fear of the FARC. The applicant tells you about all of the instances when he has had contact with the FARC. At the end of the interview you have already begun to analyze the case and despite being credible, your assessment is that the applicant has not established nexus, past persecution, or well-founded fear.

When you ask the applicant if there is any other reason he fears returning to Colombia, he appears to have something more to say, but hesitates. You suspect that there may be an issue that the applicant has not put forward. In this situation it would be appropriate to try to explain to the applicant that there is more than one ground for asylum or refugee status.

> "Refugee (or asylum) status is a case-by-case determination made based on an individual's unique circumstances and is not just for people fleeing because of political opinion. Individuals who are afraid to return because of their religion, sexual orientation, clan membership, or because of domestic violence may also be eligible. Are there any other circumstances affecting you that you would like to tell me about?"

It is important to remember that the applicant would still be required to provide credible testimony regarding past harm and/or fear of future harm on account of one of the five protected grounds.

6.2.3 Sample Questions

The following are appropriate types of questions to elicit testimony and assess credibility in LGBTI cases. Please note that these questions are intended as starting points and should not be used as a substitute for all necessary lines of inquiry and follow-up questions during your adjudication. In other words, it is good to have a general outline of questions you need to ask or questions you need the answers to, but not a script. Remember, credible testimony alone may be enough and, other than reliable country of origin information, is often the only other evidence the applicant submits to you.

Sexual Orientation

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Appropriate Lines of Inquiry

The most common LGBTI claims are based on sexual orientation and involve gay men, and to a lesser extent lesbian women. If the applicant was aware that he or she was lesbian, gay, or bisexual while in the country of origin, it is important to ask about his or her personal experience and his or her awareness of any similarly situated people.[83] The applicant should be able to describe what it was like identifying with his or her sexual orientation. Likewise, the applicant should be able to describe his or her first relationship, and the harm he or she suffered or fears in the home country. Keep in mind that this might only be true if the person is "out."

These questions focus on the possession or perceived possession of a protected characteristic. You must also ask about past harm and fear of future harm.

The following are some suggested questions when adjudicating claims that involve the applicant's sexual orientation:[84]

- When did you first realize you were gay (or lesbian or bisexual)?
- Did you tell anyone?
- Why/why not?
- If yes, when?
- How did they react?
- Did you know other gay people in your home country?
- If yes, how were they treated?
- Did you hear about other gay people in your home country?
- If yes, how were they treated?
- Have you met any other gay people?
- Where?
- Does your family know you're gay?
- If yes, what was their reaction when they found out?
- Have you ever been in a relationship?
- How did you and your partner meet?
- Are you still together/ in touch?
- How do lesbian [or gay, or bisexual] people meet one another in your

[83] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

[84] Id.

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country?

- Were you involved in any LGBTI organizations in your country?
- Are you involved in any LGBTI organizations here?
- When you say people in your country want to kill people like you, can you explain what you mean by "people like you?"

Inappropriate Lines of Inquiry

The applicant's specific sexual practices are not relevant to the claim for asylum or refugee status. Therefore, asking questions about "what he or she does in bed" is never appropriate.[85] If the applicant begins to volunteer such information, you should politely tell him or her that you do not need to hear these intimate details in order to fairly evaluate the claim.

Gender Identity[86]

Appropriate Lines of Inquiry

A transgender applicant may identify as straight, lesbian, gay, or bisexual, and that gender identity has to do with the person's inner feelings about his or her sexual identity.[87] Most transgender people consider themselves to be male or female. Therefore, do not think of "transgender" as a gender.

Male to female (M to F) transgender individuals were assigned the male gender at birth and consider themselves to be female. They are called transgender women.[88] Female to male (F to M) transgender individuals were assigned the female gender at birth and consider themselves to be male. They are called transgender men.[89]

Some individuals do not subscribe to the male/female gender binary. They may identify with neither gender, with a third gender, or with a combination of both genders. These individuals may or may not identify with the broader transgender community but may also face harm because of their gender identity.

When interviewing an applicant who is transgender or has another claim based on gender identity, start off with easy questions and gradually ease into asking the more sensitive ones; be cognizant not to put words in the applicant's mouth. It is important to remember

[85] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

[86] For further reading see Immigration Law and the Transgender Client, available at http://www.immigrationequality.org/issues/law-library/trans-manual/

[87] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

[88] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

[89] Id.

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that being transgender involves an overall dissatisfaction with the gender assigned at birth; it is not about having one particular surgery. In many cases it will be appropriate to ask the applicant about the steps he or she has taken to transition gender.[90] This question should be framed as one question among many that elicits the applicant's expression of his or her gender identity, such that it is perceived by the persecutor and the society in which the applicant lived.[91]

The most important thing to remember is to be respectful and nonjudgmental. If you feel that it is necessary to ask a question that the applicant may perceive as intrusive, you should explain why the answer to the question is legally necessary. If you are confused about the applicant's self-identification, you should respectfully admit to feeling confused and ask the applicant to explain in his or her own words.[92]

The following are some suggested questions that, depending on the facts, may be appropriate when adjudicating a claim that involves the applicant's gender identity:[93]

- When did you first realize you were transgender? Or: When did you first realize that although you were born as a male (female) you felt more like a female (male)?
- How did you realize this?
- Did you know other transgender people in your country? Or: Did you know other people who felt like you in your country?
- If yes, how were they treated?
- Did you hear about other transgender people in your country?
- If yes, how were they treated?
- When did you begin to transition from a man to a woman or woman to a man?
- What steps have you taken to transition?
- Do you now live full-time as a man (or woman?) When did you begin to live full-time as a man (or woman)?
- Does your family know you're transgender?
- If yes, how did they react when they found out?

Many transgender applicants will not have begun to live full-time in their corrected gender until they have come to the United States.[94] In many cases, a person may discuss past mistreatment in terms of perceived sexual orientation. In these cases, it is appropriate to ask questions that pertain to sexual orientation as well as gender identity.

[90] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

[91] Id.

[92] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

[93] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

[94] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

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Inappropriate Lines of Inquiry

If an applicant testifies that he or she was not accepted in his or her home country because "people think I look like a girl, but I'm a guy," do not follow up by asking "So, what are you?" Furthermore, do not put words in the applicant's mouth by asking such questions as: "You haven't had any surgery or anything like that, right? So you're a male who looks effeminate?"[95]

If the applicant has not indicated that he or she was harmed or fears being harmed for being gay, do not begin by asking the applicant if he or she is gay. It is important to remember that gender identity and sexual orientation are two different issues. A transgender applicant may also be gay, lesbian, or bisexual, but that is not necessarily the case. It is also important to remember that even if the applicant is heterosexual, he or she may be perceived as homosexual because he or she does not fit the societal norms for his or her gender. Instead, focus on the problems the applicant experienced in the country of origin and address the issue of sexual orientation later, if necessary.

This approach also ensures that your questioning is tailored to eliciting information that allows you to determine what trait the persecutor, and the society in question, perceives in the applicant. Since this is the evidence required to analyze the nexus requirement and the social distinction of the relevant social group, lines of questioning that focus on what the applicant experienced and how he or she was or would be viewed will likely be the most effective.

HIV Status

Appropriate Lines of Questioning

You should be mindful that HIV is a very serious illness and that many individuals, especially those from countries with fewer treatment options, see an HIV diagnosis as a death sentence. It is therefore imperative for you to be extremely sensitive in asking about the applicant's HIV status.[96]

If an applicant's case is based in whole or in part on his or her HIV-positive status, you will need to ask questions about this. It is appropriate to ask about the applicant's state of health, current treatment regimen, and the availability of treatment in the home country.[97]

In some cases, the applicant's HIV status may be directly related to the persecution, for example, where a lesbian was raped and believes this was her only possible risk for HIV exposure. If the applicant's HIV status is related to the harm the applicant suffered, it will be relevant for you to ask questions about this as well.

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[95] Id.

[96] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

[97] Id.

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Many cases involve an applicant's fear of harm based on the fact that his or her HIV-positive status may lead community members to assume, whether correctly or not, that he or she is gay.[98] If a claim is not based on the applicant's sexual orientation or gender identity and HIV status is not mentioned, it is not appropriate for you to ask the applicant if he or she is HIV-positive.

Some cases will involve an applicant's fear of violence, stigma, and extreme discrimination based on his or her HIV-positive status. In other instances, the applicant's primary fear may be the lack of medical care in his or her home country.

It is important to keep in mind that if an applicant's case is based on sexual orientation or gender identity and is not based on his or her HIV status, that you should not presume that he or she is HIV-positive.

Inappropriate Lines of Questioning

Generally, the risk factor for HIV infection is not relevant to the applicant's claim, so it is not appropriate to ask the applicant how he or she thinks that he or she contracted HIV.[99]

In some asylum cases, an applicant's HIV status may also be relevant to a one-year filing deadline exception, for example, if the applicant was extremely ill during his or her first year in the United States or the applicant may not have been diagnosed until several years after entering the United States. (See Asylum Supplement One-Year Filing Deadline, below).

Intersex Conditions

Appropriate Lines of Inquiry

When questioning applicants with intersex conditions, use the same type of sensitive questioning techniques suggested for sexual orientation, gender identity, and HIV-positive status claims.

Some intersex people will never have heard of anyone else like themselves, but others will. There are some intersex conditions that run in families or are more common in certain populations. Where the condition is known in a given culture, an applicant should be able to describe how people like them are treated. Where the condition is known to run in a family (but not throughout the culture), the entire family may face stigma, or family members may be on the lookout for signs of the condition in order to keep the family secret. For example, Androgen Insensitivity Syndrome (AIS) is an inherited condition. People with this condition will have a typical-looking female body, but will be infertile and will have only a shallow vaginal opening or none at all. Female relatives of an

[98] Id.

[99] Id.

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affected woman may be carriers and can pass it on to their children. Normally it is not discovered until puberty when the girl does not menstruate.

Many persons with intersex conditions may have difficulty understanding and articulating their own physical conditions and medical history. Therefore, some of these questions may be more appropriate for parents or families of young intersex children who face persecution.

The following are some suggested questions that, depending on the facts, may be appropriate when adjudicating a claim that involves the applicant's intersex condition:

- When did you first learn about your condition?
- How did you learn about it?
- Did you tell anyone?
- Why/why not?
- If yes, when?
- How did they react?
- Does your family know about your condition?
- If yes, how did they react when they found out?
- Did you go to a doctor or other medical professional?
- Have you ever received medical treatment for your condition?
- What were you told about your condition?
- How much do you understand about your condition?
- Did you know other people with similar conditions in your country? Or did you know other people like you in your country?
- If yes, how were they treated?

7 Evidence Assessment

As explained in greater detail in the RAIO training modules Eliciting Testimony and Evidence, while the burden of proof is on the applicant to establish eligibility, equally important is your duty to elicit all relevant testimony. Establishing eligibility means the applicant must establish past persecution or a well-founded fear of future persecution based on actual or imputed (perceived) sexual orientation or gender identity. Your duty includes always recognizing the non-adversarial nature of the adjudication, applying interviewing techniques that best allow you to elicit detailed testimony from an LGBTI applicant, and diligently conducting relevant country of origin information research.

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In addition to the applicant's testimony, reliable country of origin information may be the only other type of evidence available to you when you make your decision in a case involving LGBTI applicants. It is important to remember that reliable information regarding the treatment of LGBTI individuals may sometimes be difficult to obtain and that the absence of such information should not lead you to presume that LGBTI individuals are not at risk of mistreatment.

7.1 Credibility Considerations During the Interview

If an applicant is seeking refugee or asylum status based on his or her sexual orientation, gender identity, intersex condition, or HIV-positive status, he or she will be expected to establish that the persecutor views the applicant as a sexual minority or HIV-positive, either because the applicant actually has such status or because the persecutor imputes it to him or her. Under either basis, the critical point to establish is what trait the persecutor perceived in the applicant.

Credible testimony alone may be enough to satisfy the applicant's burden. Sexual minority or imputed sexual minority claims tend to rely heavily on the applicant's own testimony to establish all of the elements of the claim. Therefore, your job will be to fully and fairly elicit all testimony with regard to the harm the applicant suffered or fears based on his or her actual status as a sexual minority or perceived status as a sexual minority.

7.1.1 Plausibility

The fact that an applicant testifies about events that may appear unlikely or unreasonable does not mean it is implausible that the events actually occurred. You must take care not to rely on your views of what is plausible based on your own experiences, which are likely to be quite different from the applicant's.

What if the Applicant is Married or Has Children?

An applicant may have gotten married in his/her home country and/or have children.[100] This, by itself, does not mean that the applicant is not gay. "Many applicants describe enormous social pressure to marry and being forced into a marriage by their family or society. Other applicants, while grappling with their sexual identity, have tried to lead a heterosexual life and 'fit in' within their society."[101]

Even in the United States, it is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to societal norms.[102] While some lesbians and gay

[100] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

[101] Id.

[102] Id.

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men may feel that they have always known their sexual orientation, many others do not come to terms with their sexual identity until much later in life. [103]

If you have concerns about the credibility of an LGBTI applicant who is married, it may be appropriate to ask the applicant a few questions surrounding the reasons for marriage. If the applicant is able to provide a consistent and reasonable explanation of why he or she is married and/or has children, that portion of the testimony should be found credible.

What if the Applicant Does Not Appear to be Familiar With LGBTI Terminology?

While most Americans are accustomed to reading and hearing about LGBTI issues in the news, these terms may be unfamiliar to applicants from other cultures. "Some countries do not even have words for different sexual orientations other than homophobic slurs. The fact that an applicant may be uncomfortable with these terms may be a result of his or her own ingrained homophobia from growing up in a country where such terms were the equivalent of vile curses."[104] Therefore, you should not assume that it is implausible for an applicant to be gay, lesbian, or transgender if he or she is not familiar with LGBTI terms.

What if The Applicant Does Not "Look" or "Act" Gay?

Some applicants with LGBTI-related claims will not "look" or "act" gay.[105] If an applicant provides detailed testimony about his or her experiences in the country of origin,[106] it would be inappropriate to expect the applicant to fit a stereotypical notion for how LGBTI people should look or behave.

While there are some individuals who identify as gay who may also consider themselves effeminate and some individuals who identify as lesbian who may also consider themselves masculine, many men who identify as gay will not consider themselves effeminate and many women who identify as lesbians will not consider themselves masculine.

For some LGBTI people, the harm they suffer, especially in their youth before accepting their LGBTI identity, may be related to their feminine characteristics (for males) or their masculine characteristics (for females). Regardless of whether the applicant was "out" at

[103] Id.

[104] Id.

[105] Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007) (remanding case to new Immigration Judge in part because IJ had improperly relied on his own stereotypes and found an Albanian applicant's claim to be gay not credible because he did not exhibit gay "mannerisms," "dress" or "speech"); Razkane v. Holder, 562 F.3d 128 (10th Cir. 2008) (rejecting IJ's finding that applicant's appearance was not gay enough for persecution to be likely to occur). See also Ali v. Mukasey, 529 F.3d 478 (2d Cir. 2008) (rejecting IJ's conclusion that a "dangerous criminal" could not be identified as a "feminine . . .homosexual" in his native Guyana).

[106] (See Credibility-Detail below for appropriate credibility considerations).

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the time he or she was harmed, this harm may, in many cases, be considered related to his or her LGBTI status.[107]

In some cases, an applicant will testify that he or she was harmed or fears future harm because his or her appearance makes his or her LGBTI identity apparent, that is, he or she fits the accepted stereotype for LGBTI people in his or her culture. Cultural signals about a person's sexual orientation or gender identity may vary between individuals from other countries and your own. Thus, if an applicant tells you that he or she appears obviously LGBTI, it is necessary to ask the applicant appropriate follow-up questions to explore what the applicant means.

Whether or not an applicant claims that his or her LGBTI identity is apparent, it is appropriate for you to elicit testimony about why the applicant fears harm. For example, in many countries, the fact that a person is unmarried or childless after young adulthood may result in others questioning his or her sexual orientation. In other countries, the only way for LGBTI people to meet other LGBTI people is to go to gay clubs, or parks, which may put them at higher risk of being identified as a sexual minority. For transgender applicants, having identity documents that do not match their name or outward gender appearance may put them at risk. (See Interviewing Considerations above for appropriate lines of questioning to determine credibility.)

As discussed above, it is important to remember that gender identity and sexual orientation are distinct concepts. While it may be obvious from the appearance of some transgender individuals that they are transgender, other transgender individuals may "pass," or blend in quite well as their corrected gender. By way of contrast, transgender people who are at the beginning of their transition also may not "look transgender."[108] In these cases, as in other categories of protection cases, you should not base your decision on the applicant's outward appearance. Instead, you should elicit relevant testimony about the applicant's identity and, if appropriate, request corroborating evidence.

What if Country of Origin Information Does Not Address LGBTI Issues?

The fact that little or no corroboration of mistreatment against LGBTI individuals is included in reports that generally address human rights violations does not render the applicant's claim of past harm or fear of future harm implausible in light of or inconsistent with country of origin information.[109] The weight to be given to the fact that country conditions information fails to corroborate a claim will depend on the specific allegations, the country, and the context of the claim.

7.1.2 Consistency

[107] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

[108] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

[109] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

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Claims Not Initially Put Forth

An LGBTI individual may initially assert a claim based on another protected ground such as political opinion or religion and later reveal that he or she was harmed or fears harm based on his or her sexual orientation. This may be because the applicant was reluctant to talk about his or her sexual orientation or gender identity or because he or she was unable to articulate a connection to a particular protected ground.

There may be situations where the applicant does not initially put forward a claim based on sexual orientation or gender identity but does so later on. For example, a newly arrived applicant may not feel comfortable or safe revealing his or her sexual orientation or gender identity to an Immigration Officer during primary or secondary inspection or an Asylum Officer during a Credible Fear interview at the Port of Entry. Then, he or she may subsequently reveal this information on his or her asylum application.

In the case of Dominic Moab, a gay asylum seeker from Liberia, the IJ denied the case and the BIA affirmed, in part because Mr. Moab "failed to mention his homosexuality to the immigration officers at the airport or to the examining official during his credible fear interview."[110] The Seventh Circuit remanded the case, finding that the BIA had not considered the fact that, for several reasons, "airport interviews… are not always reliable indicators of credibility" including that "it is unclear, what if any follow-up questions were posed" and he may "not have wanted to mention his sexual orientation for fear that revealing this information could cause further persecution…."[111]

In overseas refugee processing, an applicant may not initially tell the referring agency, such as UNHCR or the Resettlement Support Center (RSC) about being gay or transgender, but then subsequently tell the USCIS Interviewing Officer about his or her LGBTI status. If you are confronted with such a scenario, do not automatically assume the applicant is not credible but follow the guidance above about what information the application should generally be able to relay.

It is important to take into account all of the factors mentioned in this module in assessing the applicant's ability to articulate his or her claim. When exploring these claims, remember that the applicant may have other grounds upon which he or she may qualify for refugee status or asylum. If a claim can clearly be established on another ground, that may form the basis for the decision.

As with all other credibility determinations, you must give the applicant the opportunity to explain any inconsistencies or omissions in his or her case. In a situation where an applicant does not initially mention his or her sexual orientation or gender identity and later does as a basis for protection, you would ask for an explanation:

[110] Moab v. Gonzales, 500 F. 3d 656, 657 (7th Cir. 2007).

[111] Id. at 660 (citing Dong v. Gonzales, 421 F.3d 573, 579 (7th Cir. 2005).

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"Help me understand. Why are you telling me this now, but did not mention it to the officer at the airport? Or to UNHCR or the RSC?"

Seemingly Inconsistent Use of LGBTI Terms

If the application form states in one place that the applicant is bisexual, but he or she testifies that he or she is homosexual, do not assume this is a contradiction. It is appropriate to provide the applicant with an opportunity to explain the apparent inconsistency, but do not pursue an adversarial line of questioning such as: "Homosexual? Your application says bisexual. Well, which is it – homosexual or bisexual?"

7.1.3 Detail

An essential component of an LGBTI claim is that the applicant must establish that the persecutor perceived him or her to be a sexual minority. This perception can be based on the applicant's actual status, or on a status imputed to the applicant. Where the persecutor's perception is based on a status that the applicant in fact has, appropriate details about the applicant's experience as LGBTI may help to substantiate the claim.

It is important to remember however, that the ultimate legal question is whether the persecutor targets the victim because the persecutor perceives a protected trait in the victim. Questions about the applicant's sexual orientation should be filtered through that lens. The purpose of establishing LGBTI status is to show why the persecutor perceived this trait in the individual. In a claim based on imputation of the protected trait, the reasons why the persecutor viewed the applicant as having that trait will be different, and it would be those different reasons that the applicant would have to establish.

As with any other type of refugee or asylum case, an applicant's detailed, consistent, credible testimony may be sufficient to prove his or her sexual orientation.

The applicant should be able to describe his or her experiences identifying as LGBTI. He or she should be able to explain when he or she first began to feel attracted to members of the same sex, if and when he or she first engaged in a romantic or sexual relationship with a member of the same sex, how this made him or her feel, whether he or she told other people or kept this aspect of his or her identity secret, etc.[112]

Acceptable lines of questioning to develop the applicant's claim and to test credibility are listed above in Sample Questions.

7.2 Country of Origin Information

[112] See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.

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Country of origin information on LGBTI issues can sometimes be more difficult to find than on other issues.[113] You should not conclude that if these issues are not mentioned that no problems exist. Many organizations that report on human rights issues lack sufficient contacts within local LGBTI communities to know what LGBTI individuals experience in their countries, or do not have the resources to investigate and/or monitor all types of human rights violations in a particular country.

Often the countries where homosexuality is most taboo have the least country conditions information available. In many countries, for example those with conservative, religious governments, there is little or no mention of the existence of LGBTI citizens in any media. This may also be true in countries with antidemocratic, authoritarian governments, where LGBTI groups may not be allowed to exist.

Where there is a lack of sufficiently specific country of origin information, you may have to rely on the applicant's testimony alone to make your decision.[114]

Useful resources in gathering information LGBTI claims include:

- The AsylumLaw.org Sexual Minorities and HIV status website at http://www.asylumlaw.org/legal_tools/index.cfm?category=116&countryID=233
- The International Gay and Lesbian Human Rights Commission at http://iglhrc.org/
- The Amnesty International Out Front program at www.amnestyusa.org/outfront
- The International Lesbian and Gay Association (http://ilga.org/) website, which contains a legal survey where you can search legal codes and country conditions.
- The Human Rights Watch LGBT division and HIV division at www.hrw.org/en/category/topic/lgbt-rights
- Refugee, Asylum, and International Operations Directorate (RAIO)Library at https://u95026.eos-intl.net/U95026/OPAC/Index.aspx
- Council on Global Equality at http://www.globalequality.org/
- UNHCR's Ref World at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain

7.3 Corroborating Evidence

[113] See Id.

[114] UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity.

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In some situations, where it is necessary to establish that the persecutor perceived a protected trait in the applicant, you may ask the applicant to provide evidence that corroborates his or her sexual orientation, gender identity, or HIV-positive status. Pursuant to amendments to INA section 208 made by the REAL ID Act of 2005, an applicant for asylum must provide this evidence unless he or she does not have the evidence and cannot reasonably obtain the evidence. The REAL ID Act amendments to INA section 208 do not apply to overseas refugee processing, which is governed by INA section 207.

> It is very important to remember that because of the different ways overseas refugee and asylum applicants obtain interviews with USCIS, the evidence that refugee applicants can reasonably obtain compared with the corroborating evidence some asylum seekers can reasonably obtain varies greatly.

Corroborating Sexual Orientation

You may ask the applicant to provide evidence that corroborates his or her sexual orientation as a means of establishing that the persecutor perceived or would perceive the protected trait in the applicant. The applicant's detailed, consistent, credible testimony may be sufficient to establish this status. For asylum cases, the applicant must provide this evidence unless he or she does not have the evidence and cannot reasonably obtain the evidence.[115] Again, it is important to remember that the evidence refugee applicants can reasonably obtain varies greatly compared with the evidence some asylum applicants can reasonably obtain. Examples include a letter from a current or ex-partner; a letter from a friend with whom the applicant has discussed his or her sexual orientation; a letter from a family member; proof that he or she is involved in an LGBTI political or social organization; or a psychological evaluation, etc.[116]

There may be situations where the applicant will not be able to provide any corroboration, for example, if he or she is no longer in contact with an ex-partner in his or her country, where his or her family has disowned him or her, and where he or she does not yet know any LGBTI people in the United States or the country of first asylum. As in any other case, the applicant should not automatically be denied for lack of corroboration. Rather, it is appropriate for you to question the applicant about why corroboration is unavailable, and factor this explanation into your decision-making process.

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[115] See Eke v. Mukasey, 512 F.3d 372 (7th Cir. 2008)(holding that the BIA did not err in requiring alien to corroborate his claim of persecution based on membership in social group of homosexual men.) In Eke v. Mukasey, the respondent argued that the Immigration Judge and the Board erred "by requiring him to corroborate his claim of persecution based on his membership in the social group of homosexual men." Id. at 381. The court rejected this argument, reasoning that there "is nothing in the nature of [applicant's] claims that would compel us to find that corroborating evidence was unavailable to him." Id.

[116] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

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Corroborating Transgender Identity

Again you may ask the applicant to provide evidence that corroborates his or her transgender identity as a means of establishing that the persecutor perceived or would perceive the protected trait in the applicant. The applicant's detailed, consistent, credible testimony may be sufficient to establish this status. The applicant should be able to describe his or her experience identifying as a transgender individual. That is he or she should be able to explain when he or she first started to feel "different" or uncomfortable with the gender he or she was assigned at birth; ways in which his or her behavior and feelings differed from gender norms; steps he or she has taken to express the gender that he or she feels comfortable with, etc.

It may be appropriate to elicit information about what steps the applicant has taken in his or her transition but remember how personal and difficult it will be for the applicant to talk about these issues.

A number of transgender individuals receive necessary medical treatment to help their outward appearance correspond with their internal identity. Bear in mind, however, that the treatment plan for every transgender person is different. There is not a single surgery which transforms a transsexual from one gender to another. If a transgender applicant is receiving treatment from a medical doctor or mental health professional (such as counseling, hormones, implants, or other surgeries), it is reasonable to expect corroboration of this treatment.[117]

Many transgender individuals do not receive ongoing treatment, however. Some transgender individuals self-administer hormones, while others identify with their chosen gender without undergoing any medical treatment as part of their transition. Many others would like to access transition-related medical care but cannot, because of immigration status or lack of financial resources. In any event, an applicant should be able to corroborate any treatment he or she has received from a medical professional or explain why such corroboration is not available.[118]

Corroborating HIV-Positive Status

An applicant who is requesting refugee or asylum status in whole or in part based on being HIV-positive, should generally be able to provide some external corroboration that he or she is HIV-positive, such as a letter from a doctor or the results of an HIV test. You may ask for such corroboration as a means of determining that the persecutor did or would perceive this trait in the applicant. Again, this expectation may vary in the context of overseas refugee processing.

[117] See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

[118] Id.

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8 CONCLUSION

Adjudicating LGBTI refugee and asylum claims presents certain unique challenges. It is important to remember to be sensitive to the issues, familiar with the terminology, and familiar with relevant country of origin information. By definition, these claims involve the most private of matters – sexual orientation, gender identity, and sometimes serious illness. Always remain respectful and nonjudgmental, and do not be afraid to acknowledge to yourself and to the applicant that these are sensitive topics that are difficult to discuss. Familiarize yourself with the legal nuances involved in these types of cases and do your best to elicit all relevant details without re-traumatizing the applicant or being insensitive.

9 SUMMARY

9.1 LGBTI and HIV Terminology

Becoming familiar with relevant terminology helps you become more aware of the nuances involved in adjudicating LGBTI claims. It is important to be familiar with the terminology but also to keep in mind that the applicant may come from a culture where sensitivity to these issues is not as high as in other countries and may not be familiar with the terms himself or herself. The terms "sexual minorities" and LGBTI are used in this module interchangeably to refer to both sexual orientation and gender identity.

9.2 Legal Analysis – Nexus and the Five Protected Characteristics

LGBTI refugee and asylum claims are primarily analyzed under the ground membership in a particular social group. Sexual orientation, gender identity (or the right to live in one's "corrected gender"), and having an intersex condition can be classified as a common immutable characteristic that the individual should not be required to change. Social distinction does not require that the trait be literally visible to the eye. Where there are clear benchmarks for delineating the group, the group is defined with sufficient particularity.

Ways to formulate the PSG have included "sexual minority from Russia," "gay man from Columbia," "lesbian from Iran," or "transgender female from Mexico." Ask questions about what the persecutor may have said to him or her and about the circumstances surrounding the harm inflicted on or threats made against the applicant.

9.3 Legal Analysis – Types of Persecution

The two questions you must ask yourself to determine whether the applicant suffered or fears persecution are: 1) did the harm rise to the level of persecution; and, 2) did the applicant experience the incident as harm? Examples of harm that LGBTI applicants may

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have faced or fear and that may rise to level of persecution include: physical and sexual violence; execution; imprisonment; forced marriage; long-term, systemic discrimination; threats of violence and to "out" the applicant; and forced psychiatric treatment.

Lesbians may have suffered the harms that befall many women in addition to harms that befall members of the LGBTI community. Transgender individuals may be more visible and may be more commonly viewed as transgressing societal norms than gay men or lesbians. They may be subjected to increased discrimination and persecution.

9.4 Legal Analysis – Well-Founded Fear

The fact that LGBTI organizations are permitted to hold a parade once a year or the mere existence of LGBTI organizations does not mean that LGBTI people are free from ongoing violence and harm in that country.

An applicant who was forced to conceal his or her sexual orientation or gender identity in the home country in order to avoid harm and did not suffer harm that rose to the level of persecution may still qualify for refugee or asylum status if he or she has a well-founded fear of future persecution. In some cases, the experience of having to conceal sexual orientation or gender identity may itself result in suffering severe enough to constitute persecution. Some LGBTI applicants come to the United States for work or study and subsequently “come out” to themselves and to others.

9.5 Legal Analysis – One-Year Filing Deadline (asylum only)

In many instances an individual does not “come out” as lesbian, gay, bisexual, or transgender until he or she is in the country where he or she sees that it is possible to live an open life as an LGBTI person. If an individual has recently ”come out,” this may qualify as an exception to the one-year filing deadline based on changed circumstances.

An individual may qualify for a one-year exception based upon serious illness, for example being diagnosed as HIV-positive.

LGBTI individuals who suffer from internalized homophobia and transphobia or who may have been subjected to coercive mental health treatment to “cure” them in their home countries may find it especially difficult to seek the mental health treatment they may need to proceed with their applications. Also, many LGBTI asylum-seekers in the United States live with extended family members or with members of the very community they fear.

9.6 Interviewing Considerations

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It is important to create an interview environment that allows applicants to freely discuss the elements and details of their claims. LGBTI claims involve very private topics that are difficult for the applicants to talk openly about and may be difficult to discuss.

You may help to set the applicant at ease by reminding him or her that the interview is confidential. You may also specifically remind the interpreter, in the presence of the applicant, that the interpreter must also keep all information confidential.

The early part of the interview should be devoted, in part, to putting the applicant at ease, while reviewing the biographical information on the application. For transgender applicants, it may be better to come back to the question about "gender" at the end of the interview as this issue may be sensitive and go to the heart of the claim.

It is important to conduct the interview in an open and nonjudgmental atmosphere. Try to use the same language that the applicant has used. For example if the applicant refers to himself as gay, you should use this term rather than homosexual and vice versa. Become familiar with the legal issues, terminology, and country of origin information to help the applicant to tell his or her own story.

Keep in mind that while you have familiarized yourself with LGBTI-related terms, neither the applicant nor the interpreter may be as familiar with them as you are. You may then have to adjust the formulation of your questions accordingly.

It is never appropriate to ask questions about the applicant's specific sexual practices or about "what he or she does in bed." If the applicant begins to testify graphically about sexual practices, you should politely tell him or her that you do not need to hear these intimate details in order to fairly evaluate the claim.

If the applicant was "out" as lesbian, gay, or bisexual in the home country, he or she should be able to provide details about his or her experiences there; what it was like coming to terms with his or her sexual orientation; and, if relevant, to describe his or her first relationship. The applicant may also be able to provide details as to his or her awareness of people who are similarly situated in the home country.

Keep in mind that sexual orientation and gender identity are two different concepts. A transgender applicant may identify as straight, lesbian, gay, or bisexual. Being transgender involves an overall dissatisfaction with the gender assigned at birth; it is not about having one particular surgery. If you were confused about an applicant's self-identification, you should respectfully admit to feeling confused and ask the applicant to explain in his or her own words.

When interviewing an applicant who is HIV-positive, be mindful that it may be appropriate to ask about the applicant's state of health, current treatment regimen, and the availability of treatment in the home country. DO NOT ask the applicant where he or she may have contracted HIV.

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9.7 Burden of Proof and Evidence – Credibility

An applicant's credible testimony may be the only evidence available for you to take into consideration when adjudicating LGBTI-related refugee and asylum claims. If the applicant is seeking refugee status or asylum based on his or her sexual orientation, gender identity, or HIV-positive status, he or she will be expected to establish that the persecutor perceived this protected trait in him or her. In some cases, the reason for the persecutor's perception is that the applicant is actually gay, lesbian, or bisexual, transgender, or HIV-positive. In other cases, where the applicant does not identify as LGBTI but is only imputed to be, he or she will need to establish the other reasons why he or she was perceived that way.

The fact that an applicant was married or has children does not mean that it is impossible that the applicant is gay. Even in the United States, it is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to societal norms.

Do not assume that an applicant must conform to a particular stereotype in order to be lesbian or gay. A man may identify as gay and not appear or consider himself effeminate. A woman may identify as lesbian and not appear or consider herself masculine. This does not mean that it is not plausible that he or she is gay or lesbian.

If an applicant does not initially tell the first official he or she comes into contact with about his or her sexual orientation or gender identity and subsequently reveals this in his or her claim, do not automatically assume that the applicant is not credible. Instead follow the guidance about what testimony such an applicant should reasonably be expected to provide and try to elicit that information.

9.8 Burden of Proof and Evidence – Country of Origin Information

For various reasons, detailed, reliable country of origin information may be difficult to obtain. This does not render the applicant's claim of past harm or fear future harm implausible in light of or inconsistent with country of origin information.

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PRACTICAL EXERCISES

NOTE: Practical Exercises will be added at a later date.

Practical Exercise # 1

- Title:
- Student Materials:

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OTHER MATERIALS

LGBTI Terminology/Glossary[119]

There are a number of terms that may be used by LGBTI applicants in their protection claims. Although not all LGBTI applicants will use these terms, it will be important for you to be familiar with these terms prior to conducting an interview. The glossary is divided into sections that distinguish between sexual orientation terms and gender identity terms, and also includes medical and legal terms. This glossary is comprised of terms generally used by the LGBTI community and others in the United States.

Please note: The definition of the term intersex sometimes overlaps with sexual orientation, gender identity, and medical issues and is therefore found in its own separate section.

Sexual Orientation Terms[120]

Bisexual – (noun or adjective) a man or woman who has an enduring emotional and/or physical attraction to both sexes. It is important to understand that although bisexual individuals may feel attraction to members of either sex, they cannot "choose" whom (or which gender) to feel attracted to any more so than a heterosexual or homosexual individual can.

"Closeted" – (adjective) describes a person who keeps his or her sexual orientation secret. Also, "living in the closet."

"Come Out" – (verb) the process by which an individual comes to terms with his or her sexual orientation. For most people this process first involves self-acceptance ("coming out" to one's self) and then may involve telling other people ("coming out" to others.) It is important to remember, however, that some people choose not to "come out" to others for fear of their safety. Some people realize as children that they are lesbian or gay, whereas others may not come out to themselves until they are adults. Many lesbian and gay people enter into opposite sex marriages before coming to terms with their sexual orientation.

Gay – (adjective) a man who has an enduring emotional and/or physical attraction to men. Some women who are attracted to women use the term gay to describe themselves as well.

[119] Immigration Equality and HIAS Refugee Trust of Kenya.

[120] For more general information about sexual orientation, see http://www.apa.org/pubinfo/answers.html on the American Psychological Association website.

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Heterosexual – see "Straight" below

Homosexual – (noun or adjective) an individual who has an enduring emotional or physical attraction to members of the same sex. This term is often considered clinical with a slightly derogatory connotation within the LGBTI community.

Homophobia – (noun) deeply ingrained feelings of prejudice toward lesbian, gay and bisexual people; the irrational fear, based upon myths and stereotypes, of homosexuals or those perceived to be homosexual.

Lesbian – (noun or adjective) a woman who has an enduring emotional or physical attraction to women; homosexual women also sometimes use the term "gay" to describe themselves.

"Outed" – (verb) the involuntary disclosure of a person's lesbian or gay sexual orientation. For example, an applicant may say, "My cousin saw me with my partner and then he 'outed' me to the whole community."

Sexual Orientation – (noun) an umbrella term that describes an individual's enduring romantic and/or physical attraction to those of a particular sex; an aspect of human identity developed in the early stages of a person's life that is highly resistant to change.

Straight – (noun) (also heterosexual) or an individual's enduring romantic and/or physical attraction to individuals of the opposite sex.

Gender Identity Terms[121]

Birth Sex – (noun) the gender that an individual was assigned at birth which is usually indicated on his or her original birth certificate.

"Corrected Gender" – (noun) the gender with which a transgender individual identifies. For example, for an MTF transgender woman, female would be her "corrected gender."

FTM – (noun) a female to male transsexual; that is, an individual assigned the female gender at birth who now identifies as male. Also referred to as a transgender man or transman.

Gender – (noun) the social construction of what society values as the roles and identities of being male or female; assigned at birth to every person; does not always align with gender identity.

[121] For more information about transition see the World Professional Association for Transgender Health website http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1352&pk_association_webpage=3947

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Gender Identity – (noun) a person's inner sense of being male or female, both, or neither, resulting from a combination of genetic and environmental influences.

Gender Roles – (noun) what a given society considers "masculine" or "feminine" behaviors and attitudes; how individuals express their assigned gender or the gender they identify with. For example, a traditional gender role for a man is to be competitive, athletic, and aggressive. A traditional gender role for a woman is to want to have and take care of children. Gender roles in many societies have expanded in recent years for both men and women.

Heterosexism – (noun) the assumption that everyone is or ought to be heterosexual and that a person's gender identity will be fixed at birth in accordance to his or her birth sex.

Hormone Therapy – (noun) one medical step that a transgender person may take to transition. For transgender men this involves taking testosterone. For transgender women this involves taking estrogen.

MTF – (noun) a male to female transsexual, that is an individual assigned the male gender at birth who now identifies as female. Also referred to as a transgender woman or transwoman.

"Passing" – (verb) a transgender person living in his or her corrected gender without it being readily apparent that he or she is transgender.

Sex (noun) – biological maleness or femaleness; the division of male and female on the basis of reproductive organs.

Sex Reassignment Surgery (SRS) – (noun) refers to any of more than two dozen potential surgeries that a transgender person may undergo. Not all transsexuals choose or can afford SRS. This is a preferred term to "sex change operation."

Transgender[122] – (adjective) an umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth or the stereotypes associated with that sex. The term may include transsexuals and others who do not conform to gender stereotypes. Many people who fit the definition of "transsexual" below, continue to refer to themselves as transgender. Transgender is a gender identity, not a sexual orientation. Thus, like any other man or woman, a transgender person may have a heterosexual, bisexual, or homosexual orientation.

Transition – (noun or verb) the process of changing a gender expression from one gender to another. This process may be very different for different people. It may involve

[122] National Center for Transgender Equality, Teaching Transgender, January 2009, available at http://transequality.org/Resources/NCTE_Teaching_Transgender.pdf.

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"coming out" as transgender to one's self and to others; living in one's chosen gender; changing legal documents; and/or accessing necessary medical treatment.

The medical treatment that transgender people receive is specific to each individual. There is no one specific procedure that changes a person's gender. Rather, medical transition is a process which may include any number of possible treatments such as: hormone therapy, electrolysis, and surgeries such as, hysterectomy, mastectomy, and genital reconstruction.

Transsexual – (adjective) is a term used for people who seek to live in a gender different from the one assigned to them at birth. They may seek medical treatment to "transition." It is important to note, however, that being "transsexual" does not necessarily mean that a person has undergone any particular surgery or treatment.

Transvestite or "Cross-Dresser" (noun) - means an individual who chooses to wear clothes generally associated with the opposite sex. Sometimes this is related to transgender identity, and sometimes it is not. Note, however, that Spanish language articles often refer to transgender people as "travestis" which translates to "transvestites." "Transvestite" is considered an outmoded term and should not be used by the interviewer unless the applicant himself or herself uses it.

Transphobia (noun) – deeply ingrained feelings of prejudice toward transgender people; the irrational fear, based on myths and stereotypes, of people who are transgender or are perceived to be a transgender person.

Intersex Terms

Intersex[123] (noun, adjective) – Intersex refers to a condition in which an individual is born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. The conditions that cause these variations are sometimes grouped under the terms "intersex" or "DSD" (Differences of Sex Development). These conditions include androgen insensitivity syndrome, some forms of congenital adrenal hyperplasia, Klinefelter's syndrome, Turner's syndrome, hypospadias, and many others. Individuals with this condition were previously referred to as "hermaphrodites," but this term is considered outmoded and should not be used unless the applicant uses it.

Legal Terms

Civil Union – formal recognition of committed same-sex relationships recognized by some states and foreign countries. Similar to but not the same as marriage. Civil unions confer many of the same rights, benefits, and privileges enjoyed by opposite sex marriages such as estate planning or medical decisions.

[123] For more information on intersex issues, see the Advocates for Informed Choice website, www.aiclegal.org

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Domestic Partnership – A civil or legal contract recognizing a partnership or a relationship between two people which confers limited benefits to them by their employer.

Sodomy Laws – laws that prohibit consensual, adult, private, noncommercial sex. Used mostly against gays and lesbians.

Medical Terms Related to HIV

AIDS or Acquired Immunodeficiency Syndrome - is the medical term used for people with the HIV virus who have either experienced certain opportunistic infections (such as PCP pneumonia or Kaposi's Sarcoma), or whose T-cells (infection fighting blood cells) have dropped below 200.

CD4 Count or T-Cell Count – this is a test used to measure the well-being of the immune system of an individual who is HIV-positive. People with healthy immune systems generally have between 800-1200 T-cells. If T-cells drop below 200, a person is considered to have AIDS.

HIV-Positive [124] – means that a person has been exposed to the Human Immunodeficiency Virus (HIV) and developed anti-bodies to the virus. Once a person has tested positive for HIV, he or she will always test positive for HIV, regardless of his or her health.

Not everyone who is HIV-positive has AIDS, but everyone who has AIDS is HIV-positive. HIV is transmitted through the transfer of bodily fluids from an infected individual to an uninfected individual. People are primarily infected with HIV through sexual contact which involves the exchange of bodily fluids; from sharing intravenous drug paraphernalia; during childbirth and breast-feeding; and from receiving contaminated blood transfusions. There is no risk of HIV transmission from casual contact, such as shaking hands or sharing a drinking glass.

[124] For more information about HIV see http://www.gmhc.org/ on the Gay Men's Health Crisis website.

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LGBTI-Related Case Law[125]

2015

Avendano-Hernandez v. Lynch, --- F.3d ----, (9th Cir. 2015) (transgender woman from Mexico)

Gonzalez-Posadas v. Att'y Gen. of the U.S., 781 F.3d 677 (3d Cir. 2015) (gay man from Honduras)

2014

Malu v. U.S. Att'y Gen., 764 F.3d 1282 (11th Cir. 2014) (lesbian from Democratic Republic of the Congo)

Konou v. Holder, 750 F.3d 1120 (9th Cir. 2014) (gay man from the Marshall Islands)

2013

Doe v. Holder, 736 F.3d 871 (9th Cir. 2013) (gay man from Russia)

Rosiles-Camarena v. Holder, 735 F.3d 534 (7th Cir. 2013) (HIV positive man from Mexico)

Vitug v. Holder, 723 F.3d 1056 (9th Cir. 2013) (gay man from Philippines)

2012

R.K.N. v. Holder, 701 F.3d 535 (8th Cir. 2012) (HIV positive man from Kenya)

Vrljicak v. Holder, 700 F.3d 1060 (7th Cir. 2012) (gay man from Serbia)

Matter of M-H-, 26 I&N Dec. 46 (BIA 2012) (gay man from Pakistan)

Neri-Garcia v. Holder, 696 F.3d 1003 (10th Cir. 2012) (gay man from Mexico)

Desai v. Attorney Gen. of U.S., 695 F.3d 267 (3rd Cir. 2012) (HIV positive man from India)

Omondi v. Holder, 674 F.3d 793 (8th Cir. 2012) (gay man from Kenya)

2011

[125] In descending order by year.

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Lopez-Amador v. Holder, 649 F.3d 880 (8th Cir. 2011) (lesbian from Venezuela)

Castro-Martinez v. Holder, 641 F.3d 1103 (9th Cir. 2011) (amended by Castro-Martinez v. Holder, WL 6016162, Dec. 5, 2011 (9th Cir. 2011) (gay man from Mexico)

2010

Todorovic v. Att'y Gen. of the U.S., 621 F.3d 1318 (11th Cir. 2010) (gay man from Serbia)

Ayala v. Att'y Gen. of the U.S., 605 F.3d 941 (11th Cir. 2010) (gay, HIV+ man from Venezuela)

Eneh v. Holder, 601 F.3d 943 (9th Cir. 2010) (man living with AIDS from Nigeria)

Aguilar-Mejia v. Holder, 616 F.3d 699 (7th Cir. August 6, 2010) (HIV+ man from Mex./Guatemala)

2009

N-A-M- v. Holder, 587 F.3d 1052 (10th Cir. 2009) (M to F transsexual woman from El Salvador)

Martinez v. Holder, 557 F.3d 1059 (9th Cir. 2009) (gay man from Guatemala)

Pangilinan v Holder, 568 F.3d 708 (9th Cir. 2009) (transsexual woman from the Philippines)

Manani v. Filip, 552 F.3d 894 (8th Cir. 2009) (HIV+ woman from Kenya)

2008

Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2008) (gay man from Morocco)

Bromfield v. Mukasey, 543 F.3d 1071 (9th Cir. 2008) (gay man from Jamaica)

Eke v. Mukasey, 512 F.3d 372 (7th Cir. 2008) (gay man from Nigeria)

Bosede v. Mukasey, 512 F.3d 946 (7th Cir. 2008) (HIV+ man from Nigeria)

Ali v. Mukasey, 529 F.3d 478 (2nd Cir. 2008) (gay man from Guyana)

Kadri v. Mukasey, 543 F.3d 16 (1st Cir. 2008) (gay man from Indonesia)

2007

Jean-Pierre v. Att'y Gen. of the U.S., 500 F.3d 1315 (11th Cir. 2007) (HIV+ man from Haiti)

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Morales v. Gonzales, 478 F.3d 972 (9th Cir. 2007) (transgender woman from Mexico)

Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (lesbian woman from Uganda)

Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007) (gay man from Albania)

Ixtlilco-Morales v. Keisler, 507 F.3d 651 (8th Cir. 2007) (gay man from Mexico)

Moab v. Gonzales, 500 F.3d 656 (7th Cir. 2007) (gay man from Liberia)

Lavira v. Att'y Gen. of the U.S., 478 F.3d 158 (3d. Cir. 2007) (HIV+ man from Haiti) overruled by Pierre v. Attorney Gen. of U.S., 528 F.3d 180 (3d Cir. 2008).

Joaquin-Porras v. Gonzales, 435 F.3d 172 (2d. Cir. 2006) (gay man from Costa Rica)

2006

Ornelas Chavez v. Gonzales, 458 F.3d 1052 (9th Cir. 2006) (transgender woman from Mexico)

2005

Salkeld v. Gonzales, 420 F.3d 804 (8th Cir. 2005) (gay man from Peru)

Boer-Sedano v. Gonzales, 418 F.3d 1082 (9th Cir. 2005) (gay man with AIDS from Mexico)

Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005) (gay, HIV+ man from Lebanon)

Kimumwe v. Gonzales, 431 F.3d 319 (8th Cir. 2005) (gay man from Zimbabwe)

Galicia v. Ashcroft, 396 F.3d 446 (1st Cir. 2005) (gay man from Guatemala)

2004

Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004) (gay man with female sexual identity from El Salvador)

Gebremaria v. Ashcroft, 378 F.3d 734 (8th Cir. 2004) (HIV+ woman from Ethiopia)

Molathwa v. Ashcroft, 390 F.3d 551 (8th Cir. 2004) (gay man Botswana)

2003

Amanfi v. Ashcroft, 328 F.3d 719 (3rd Cir. 2003) (man imputed to be gay from Ghana)

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1990-2000

Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000) (gay man with female sexual identity from Mexico) overruled by Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005)

Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (lesbian woman from Russia)

Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990) (gay man from Cuba)

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

Medical Examination of Aliens – Removal of Human Immunodeficiency Virus (HIV) Infection from Definition of Communicable Disease of Public Health Significance. Centers for Disease Control and Prevention (CDC) and U.S. Department of Health and Human Services (HHS). 74 FR 56547-62 (Nov. 2, 2009). Final rule, January 4, 2010, available at http://www.cdc.gov/immigrantrefugeehealth/laws-regs/hiv-ban-removal/final-rule.html.

ADDITIONAL RESOURCES

See Additional Resources listed at the beginning of this module.

SUPPLEMENTS

There are no RAD supplements for this training module.

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

See Required Reading listed at the beginning of this module.

ADDITIONAL RESOURCES

See Additional Resources listed at the beginning of this module.

SUPPLEMENTS

ASM Supplement – 1

Legal Analysis – One-Year Filing Deadline

This module does not alter the legal criteria used to evaluate the one-year filing deadline. There are, however, some factual scenarios that may arise specifically in the context of LGBTI claims that are useful to discuss within the legal framework of established guidance on the one-year filing deadline.

Changed Circumstances Specific to LGBTI Applicants

Changed Country Conditions

As with any other type of asylum claim, if conditions in the applicant's country of origin have changed substantially, the applicant may be able to establish a changed circumstances exception to the one year filing deadline.[126] For example, after the applicant came to the U.S., a fundamentalist government may have come to power and instituted criminal sanctions for consensual homosexual activity.

"Coming Out" as LGBTI

[126] See Victoria Neilson and Aaron Morris, The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal, 8 New York City Law Review 233 (Summer 2005), available at http://www.asylumlaw.org/docs/sexualminorities/GayBar091798.pdf.

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In many instances an individual does not feel comfortable accepting himself or herself as LGBTI until he or she is in a country where the applicant can see that it is possible to live an open life as an LGBTI person. If an individual has "come out" as lesbian, gay, bisexual, or transgender, the applicant may be able to establish a changed circumstances exception.

Recent Steps in Gender Transitioning

As noted above, transitioning from the gender assigned at birth to the gender with which the applicant identifies is a process which may involve many steps. At some point during this process, the applicant may realize that he or she could no longer "pass" as his or her birth gender and therefore may become more fearful of returning to his or her country of origin. For example, a transgender woman (MTF) may have recently had breast implants which would now make it impossible to "pass" as male.

Recent HIV Diagnosis

Some individuals will apply for asylum only after they have been diagnosed with HIV. For some applicants, the claim will be based wholly on his or her HIV status and the fear of persecution upon return to the country of origin. For other individuals who may also be LGBTI, the HIV diagnosis may materially affect their eligibility for asylum. Many countries do not have confidentiality laws protecting HIV status, so some LGBTI people fear that their HIV status could become widely known. In many countries, being HIV-positive is equated with being LGBTI, and so their LGBTI identity would become known.

In Manini v. Filip 552 F.3d 894, (8th Cir. 2009), a Kenyan woman entered the U.S. in October 2001, was diagnosed with HIV in January 2003, and filed affirmatively for asylum in May 2004. The Asylum Office accepted her recent HIV diagnosis as a "changed circumstance," but found that the 16 month delay in filing after the diagnosis fell outside the "reasonable period of time" required by law. The BIA upheld the decision and the Eight Circuit found that it lacked jurisdiction to review the one year issue. See also Ixtlilco-Morales v. Keisler, 507 F.3d 651 (8th Cir. 2007), where the Eight Circuit also accepted the applicant's recent HIV diagnosis as a changed circumstance but upheld the BIA and IJ decisions to deny the case on other grounds.

The following are some suggested lines of questioning when adjudicating a claim that involves the applicant's HIV status:[127]

- When did you learn that you are HIV-positive?
- How did you feel when you received your diagnosis?

[127] Id.

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- Does your family know that you're HIV-positive?
- How did they react?
- Have you experienced any HIV-related symptoms?
- Have you ever been hospitalized because of HIV?
- Are you taking any HIV-related medications?
- When did you begin taking them?
- Do you experience any side effects from the medications?
- Have you ever seen a mental health provider because of your diagnosis?

Extraordinary Circumstances Specific to LGBTI

HIV-Positive Status

Applicants who are HIV-positive may exhibit life-threatening symptoms and require hospitalization. An individual may be able to establish an extraordinary circumstances exception based upon serious illness, if the illness was present during the first year following arrival into the United States. Additionally, many individuals living with HIV experience extreme depression and other mental health issues as a result of their diagnosis which may affect the applicant's ability to timely file and/or may affect what period of time is "reasonable" to file after an HIV diagnosis.

PTSD or Other Mental Health Issues

As with any other asylum seekers, LGBTI applicants may suffer from Post Traumatic Stress Disorder (PTSD) or other mental health issues which make it difficult to file within a year of entry into the United States. LGBTI individuals who suffer from internalized homophobia and transphobia, or who have been subjected to coercive mental health treatment to "cure" them in their home countries, may find it especially difficult to access the mental health treatment that they may need to proceed with their applications.

Example: The applicant, a transgender male from Honduras, suffered severe and continuous sexual and other physical abuse for many years as well as familial and societal discrimination and ostracism on account of his sexual orientation. He last entered the US in 2003 but did not file for asylum until 2009. The applicant credibly explained that he felt isolated and was afraid to come forward sooner because he was ashamed and fearful of ostracism by friends and colleagues and society in general. According to medical reports he submitted, he suffered from PTSD as a result of the years of trauma he suffered in Honduras. His PTSD can be seen as an extraordinary circumstance related to the delay in filing during the year

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after he arrived; the 5-year delay afterwards may also be considered reasonable based on that medical condition.[128]

LGBTI individuals may have fled to the United States leaving behind a partner. This may result in emotional or psychological distress that could affect their ability to file in a timely manner. With the repeal of DOMA, if the applicant is legally married, he or she would be able to sponsor a same-sex partner for immigration benefits. Given, however, that many countries do not permit same sex marriage the applicant may also be dealing with the possible permanent separation from a partner by coming to the United States.[129]

Severe Family or Community Opposition or Isolation

LGBTI people who arrive in the United States may stay with extended family members or with other members of their community. Being surrounded by family or community members may make it impossible for the LGBTI applicant to timely file for fear that if the family member learns of the applicant's LGBTI identity, he or she will be thrown out of the home, the applicant's family at home will be told, and/or the applicant and his or her family will be disgraced.

Extreme isolation within a particular immigrant community may qualify as an exception. Foreign nationals who have newly arrived in the United States may be steered to immigration attorneys from within their own cultural community. While some applicants may be aware that they can seek asylum in the United States based on their political beliefs or religion, many foreign nationals are not aware that sexual orientation or transgender identity might form the basis of an asylum claim.[130] This problem may be compounded for LGBTI individuals who come to the U.S. and immediately take up residence in an immigrant community with people from their own country. An LGBTI applicant could be fearful of disclosing his or her LGBTI status to any community member, and might be informed by members of his community that his or her only option to legalize would be to marry.

For example, a gay Tunisian man who was admitted to the United States on a non-immigrant visa is helped by men from Egypt and other Arab immigrant communities to find housing and employment. These men are not aware that the applicant is gay and tell him that asylum is generally not a means for legalizing one's status in the United States. It is not until the applicant meets a gay man from

[128] See Asylum Division Officer Training Course Lesson Plan One-Year Filing Deadline lesson plan, Section VII, Credibility, Subsection B, Totality of the Circumstances, Subsection c, Extraordinary Circumstances.

[129] See: AAPM section III.E. "Dependents."

[130] See Explore All Possible Grounds in Section 6, Interview Considerations, and Claims Not Initially Put Forward in Section 7, Burden of Proof and Evidence above.

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the United States that he becomes aware that he may be a refugee under U.S. law.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

See Required Reading listed at the beginning of this module and Required Reading in the RAD Supplement.

ADDITIONAL RESOURCES

See Additional Resources listed at the beginning of this module.

SUPPLEMENTS

There are no IO supplements for this module.

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Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	Mandatory Bars to Asylum
Rev. Date	May 9, 2013
Lesson Description	This lesson describes prohibitions on applying for asylum, exceptions to those prohibitions, and the circumstances that require denial or referral of an asylum application, even when an applicant establishes that he or she is otherwise eligible for asylum.
Terminal Performance Objective	Given a request for asylum to adjudicate, the asylum officer will be able to determine when an applicant is ineligible to apply for asylum and when a refugee is ineligible for a grant of asylum.
Enabling Performance Objectives	1. Locate the sections of the INA and regulations that apply to grounds for mandatory denials of asylum. (ACRR3) (AAS6) (ACCR4) 2. Identify the grounds of ineligibility to apply for asylum, and the exceptions to those grounds. (AIL4) 3. Indicate who is subject to a mandatory denial or referral of asylum. (ACRR3) 4. Describe the factors to consider in determining whether an individual is firmly resettled. (ACRR3) 5. Identify policies and procedures for handling criminal issues. (ACRR3) (CD38)
Instructional Methods	Lecture; discussion; practical exercises
Student Materials/ References	Lesson Plans; INA; 8 C.F.R. §208; INS v. Aguirre-Aguirre, 526 U.S. 415 (1999)
Methods of Evaluation	Practical exercise; Written test
Background Reading	1. Agreement Between the Government of the United States of America and the Government of Canada for the Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (Dec. 5, 2002), 5 pp.; Final Rule on the Implementation of the Agreement, 69 FR 69480, November 29, 2004, 12 pp. 2. Walter D. Cadman. Investigations Branch, Office of Field Operations. Investigative Referral of Suspected Human Rights Abusers, Memorandum to District Directors, et al. (Washington, DC: Sept. 28, 2000), 2p.

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3. Joseph E. Langlois. Asylum Division, Office of International Affairs. Known or Suspected Human Rights Abusers, Memorandum to Asylum Office Directors, et al. (Washington, DC: Sept. 11, 2000), 5p.

4. Joseph E. Langlois. Asylum Division, Office of International Affairs. Procedures for Contacting HQASM on Terrorist Cases, Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 3, 2002), 2p.

5. Joseph E. Langlois. Asylum Division, Office of International Affairs. Procedures for Implementing the One-Year Filing Deadline and Processing Cases Previously Denied by EOIR, Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 4, 2002), 11 p.

6. Michael A. Pearson. Office of Field Operations. Human Rights Abuse Memorandum of Understanding, Memorandum to Regional Directors, et al. (Washington, DC: Sept. 29, 2000), 19p.

7. Chris Sale. Office of the Deputy Commissioner. AEDPA Implementation Instruction #3: The Effects of AEDPA on Various Forms of Immigration Relief, Memorandum to Management Team (Washington, DC: 6 August 1996), 9 p. plus attachments

8. Jeffrey Weiss. Office of International Affairs. Processing Claims Filed By Terrorists Or Possible Terrorists, Memorandum to Asylum Office Directors, HQASM Staff (Washington, DC: 1 October 1997), 2 p.

9. Johnny N. Williams. Office of Field Operations. Interagency Border Inspection System Records Check, Memorandum to Regional Directors, et al. (Washington, DC: 2 July 2002), 4 p. plus attachment.

10. James W. Ziglar. Office of the Commissioner. New Anti-Terrorism Legislation, Memorandum for Regional Directors and Regional Counsel (Washington, DC: 31 October 2001), 8p.

11. United Nations High Commissioner for Refugees, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees. HCR/GIP/03/05, 4 September 2003, 9 pp.

12. Joseph E. Langlois. USCIS Asylum Division. Updates to Asylum Officer Basic Training Course Lessons as a Result of Amendments to the INA Enacted by the REAL ID Act of May 11, 2005, Memorandum to Asylum Office Directors, et al. (Washington, DC: 11 May 2006), 8 pp.

13. Matter of A-G-G-, 25 I. & N. Dec. 486 (BIA 2011).

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CRITICAL TASKS

1. Knowledge of mandatory bars and inadmissibilities to asylum eligibility (ACRR3)
2. Knowledge of policies and procedures for one year filing deadline (ACRR4)
3. Knowledge of criteria for refugee classification. (CD20)
4. Knowledge of policies and procedures for handling criminal issues (CD38)
5. Skill in analyzing complex issues to identify appropriate responses or decisions (CD127)

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I. INTRODUCTION

This lesson describes prohibitions on applying for asylum, exceptions to those prohibitions, and the circumstances that require denial or referral of an asylum application, even when an applicant establishes that he or she is otherwise eligible for asylum. Prohibitions on applying for asylum and circumstances that require denial or referral of otherwise eligible applicants are known collectively as "bars." There are bars to applying for asylum and bars to eligibility for asylum.
This lesson only introduces the bar to applying for asylum more than one year after the date of last arrival (the one-year filing deadline), and the bar to applying based on availability of a safe third country. Both of these subjects are covered in greater detail in the asylum lessons, One-Year Filing Deadline and Safe Third Country Threshold Screening. This lesson will provide more detailed information on the bar to applying for asylum based on a Previous Denial of an Asylum Claim.

This lesson will also provide a brief review of the bars to eligibility that are covered in RAIO training modules Analyzing The Persecutor Bar, National Security, and Firm Resettlement.

This lesson will provide a more detailed discussion of bars to eligibility based on criminal activity.

You are not required to memorize all of the specific crimes listed as bars to asylum. Rather, you should become familiar with the broad category of crimes that preclude a grant of asylum, and the issues that must be considered when adjudicating the claim of an applicant who may have been involved in criminal activity.

In general, the process for interview of an asylum-seeker does not change when examining the possibility that a mandatory bar applies. However, there are certain instances when the asylum officer must switch to Question-and-Answer, Sworn Statement style interview notes. This is discussed in greater detail in the RAIO training module Interviewing - Note-Taking.

II. OVERVIEW OF BARS

1951 Convention relating to the Status of Refugees, Art. 1.F; UNHCR Handbook, paras. 140, 147-63

The 1951 Convention relating to the Status of Refugees gives State signatories the authority to deny protection to certain refugees who are determined to be "persons who are not considered to be deserving of international protection," and persons deemed "not in need of

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international protection." Specifically, the Convention does not apply to any person with respect to whom there are serious reasons for considering that he or she committed certain crimes (crime against peace, war crime, crime against humanity, or serious nonpolitical crime outside the country of refuge), or has been guilty of acts contrary to the purposes and principles of the United Nations.

In accordance with these provisions, United States law contains provisions that prohibit the granting of asylum (and/or withholding of removal) to certain individuals based on criminal activities and national security reasons. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) on September 30, 1996, Congress significantly revised the law relating to eligibility to apply for and to be granted asylum. Prior to the IIRIRA, the only bar to applying for asylum was conviction of an aggravated felony. A change occurred with enactment of IIRIRA so that a conviction of an aggravated felony is a bar to being granted asylum. Other circumstances discussed below are bars to applying for asylum. Consequently, an asylum applicant who applies for asylum on or after April 1, 1997 must first demonstrate eligibility to apply for asylum before the merits of the claim will be adjudicated.

INA § 208(b)(2)(B)(i). This is discussed in section IV.B below.

In addition, Congress identified new mandatory bars to eligibility for asylum and codified in statute grounds for ineligibility that previously were found only in regulation.

Because the IIRIRA amendments to section 208 of the INA apply only to asylum applications filed on or after April 1, 1997, three new prohibitions on applying for asylum and the new substantive ineligibility grounds apply only to applications filed on or after April 1, 1997.

A. Overview of Bars to Applying for Asylum

Pursuant to regulation, only the BIA, an immigration judge or asylum officer may make the determination as to whether an applicant is prohibited from applying for asylum. Therefore, the Service Centers will continue to accept asylum applications in affirmative cases, regardless of whether it appears that an applicant is barred from applying. The applicant will be scheduled for an asylum interview, and an asylum officer will interview the applicant to determine whether a prohibition on filing is applicable, and if so, whether an exception exists.

8 C.F.R. § 208.4(a)(1)

Generally, an asylum seeker cannot apply for asylum on or after April 1, 1997, if any of the following three circumstances apply:

INA § 208(a)(2); 8 C.F.R. § 208.4(a)

- The asylum seeker could be returned to a "safe" third country, pursuant to a bilateral or multilateral agreement.

As will be discussed below, the first bar only

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- The asylum seeker submitted an application more than one year after arrival in the United States or after April 1, 1998, whichever is most recent in time.

applies to certain applicants arriving from Canada, who are seeking credible or reasonable fear interview, and there are exceptions for all three bars.

- The asylum seeker previously has been denied asylum by an immigration judge or the BIA.

Conviction of an aggravated felony is a prohibition on filing for asylum applications submitted between November 20, 1990 and April 1, 1997.

B. Overview of Mandatory Bars to a Grant of Asylum

There are six statutory grounds (mandatory bars) that render an applicant ineligible for asylum, even if the applicant may be a "refugee" within the meaning of section 101(a)(42)(A) of the Act.

INA §§ 208(b)(2)(A); Note that the statute provides that the Attorney General may establish by regulation additional limitations on a grant of asylum. INA § 208(b)(2)(C).

Each bar is outlined below, and will be discussed in more detail in the rest of the lesson plan.

- Persecution of others on account of one of the protected characteristics in the refugee definition

By definition, a persecutor cannot be a "refugee." The second sentence of INA § 101(a)(42) specifically excludes persecutors from the refugee definition.

- Conviction of a particularly serious crime, including an aggravated felony
- Commission of a serious nonpolitical crime outside the United States prior to arrival in the U.S.
- Reasonable grounds exist for regarding the applicant a danger to the security of the United States
- Participation in terrorist activities or status as a representative of certain terrorist organizations
- Firm resettlement

III. BARS TO APPLYING FOR ASYLUM

Only applicants who submit applications for asylum on or after April 1, 1997, are subject to the following bars to applying for asylum.

A. Safe Third Country

INA § 208(a)(2)(A).

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If it is determined that the asylum seeker can be removed to a "safe third country," he or she cannot apply for asylum, unless the Attorney General finds it in the public interest for the applicant to remain in the United States.

Each of the following requirements must be met before this bar can be applied:

1. There must be a bilateral or multilateral agreement for removal with the third country;

2. The applicant's life or freedom would not be threatened on account of a protected ground in the third country; and

3. The applicant must have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection in the third country.

Please refer to Asylum Lesson Plan, Safe Third Country Threshold Screening, for a detailed discussion of the applicability and exceptions related to this bar to filing for asylum.

B. One-Year Filing Deadline

INA § 208(a)(2)(B); 8 C.F.R. § 208.4(a)(2)(ii). The Asylum Division provided a 2-week grace period when this provision was implemented and thus does not refer as untimely any I-589 applications filed before April 16, 1998.

An asylum seeker cannot apply for asylum more than one year after the date of arrival in the United States. The one-year period is calculated from the date of the applicant's last arrival in the United States or April 1, 1997, whichever is most recent in time. Please refer to Asylum Lesson Plan, One-Year Filing Deadline, for a detailed discussion of the applicability and exceptions related to this bar to filing for asylum.

C. Previous Denial of Asylum

INA §§ 208(a)(2)(C) and (D); 8 C.F.R. § 208.4(a)(3).

See Joseph E. Langlois, Asylum Division, Office of International Affairs. Procedures for Implementing the One-Year Filing Deadline and Processing Cases Previously Denied by EOIR, Memorandum to Asylum Office Directors, et al. (Washington, DC:

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Jan. 4, 2002).

1. Jurisdiction

In most cases in which an applicant has been denied asylum by an IJ or the BIA, the Asylum Division does not have jurisdiction over a subsequently filed Form I-589, Application for Asylum and for Withholding of Removal, because a charging document has been served on the applicant and filed with EOIR. Therefore, unless the applicant left the United States after the denial, the application would fall under EOIR's exclusive jurisdiction under 8 C.F.R. § 208.2(b) and 8 C.F.R. § 208.2(b).

Note: The "Previous Denial of Asylum" procedures do not apply to an individual who entered the US illegally after having been removed, deported, or excluded, or after having left the US under an order of removal, deportation, or exclusion, and is therefore subject to reinstatement of the prior order. For procedures involving reinstatements of prior orders, see Affirmative Asylum Procedures Manual, section III.S, Reinstatement of Prior Order.

There are five circumstances in which the Asylum Program has jurisdiction over an I-589 filed after an IJ or BIA has denied the applicant asylum. In the first three circumstances, the applicant must have left the United States after having been denied asylum by an IJ or the BIA, returned to the United States, and then submitted the I-589 with USCIS. The last two circumstances relate only to Unaccompanied Alien Children (UACs) and are a result of the Trafficking Victims Protection Reauthorization Act.

Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Staff, Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (HQRAIO 120/12a) (25 March 2009).

a. The applicant was removed from or departed the United States under an order of removal, deportation, or exclusion, and subsequently made a legal entry.

Because the final order was executed, EOIR no longer has jurisdiction and, because the subsequent entry was legal, the applicant is not subject to reinstatement of the final order under INA § 241(a)(5).

b. The applicant departed the United States after the expiration of a voluntary departure period, thus becoming subject to a removal order and subsequently

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made a legal entry; or

c. The applicant departed the United States before the expiration of a voluntary departure period, and subsequently made a legal or illegal entry.

USCIS has jurisdiction because no final order was entered (therefore reinstatement is not an issue), and there has been a departure and re-entry since the applicant was placed in proceedings (therefore, EOIR no longer has exclusive jurisdiction under 8 C.F.R § 208.2).

d. A UAC in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has never submitted a Form I-589, may file for asylum with USCIS.

e. For an individual in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has previously submitted a Form I-589 while a UAC, USCIS may have initial jurisdiction.

Please see the RAIO Module Children's Claims and the Asylum lesson One-Year Filing Deadline for a more detailed explanation of cases involving Unaccompanied Alien Children.

2. Determination of changed circumstances

a. Definition

The definition of "changed circumstances" applied in the one-year filing deadline analysis is the same as the definition of "changed circumstances" as applied when analyzing whether the applicant may be permitted to apply for asylum after being denied asylum by an IJ or the BIA. The changed circumstances must materially affect the applicant's eligibility for asylum and may include changes in the country of persecution or changes relating to the applicant in the United States, including changes in U.S. law.

INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a)(4); and see Asylum lesson, One-Year Filing Deadline, section Changed Circumstances

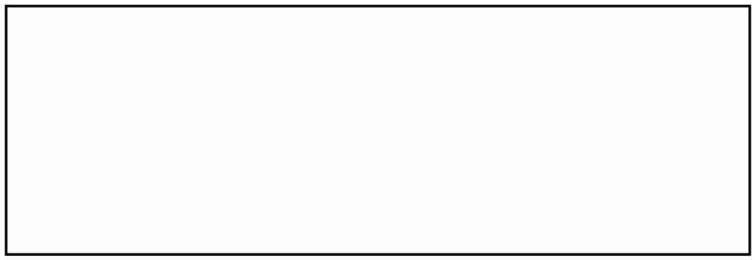
The difference in the analysis is that to overcome the previous denial bar the changed circumstance must have occurred since the applicant was denied asylum by the IJ or BIA.

Note: The one-year filing deadline analysis requires that the changed circumstance have occurred after April 1, 1997.

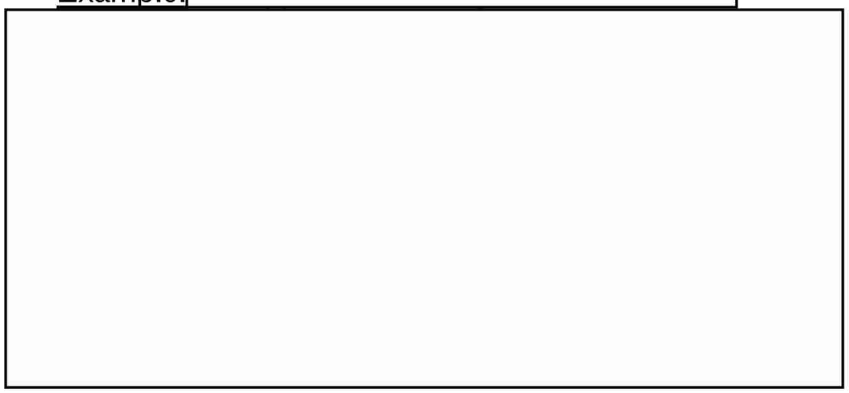
(b)(7)(e)

Example:

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Example: (b)(7)(e)



b. Standard of proof

The standard of proof for demonstrating this exception is "to the satisfaction of" the adjudicator.

See RAIO module, Evidence.

3. Review of previous decision

The entire file, including the prior application, supporting documentation, and the previous assessment or decision, must be reviewed prior to making a determination on whether the applicant is eligible to apply for and be granted asylum. Whenever possible, the case should be assigned to the officer who made the original decision.

a. Prior denial by asylum officer

As indicated above, a prior denial by an asylum officer is not a bar to applying for asylum. Changed circumstances need not be established for the asylum claim to be considered on its merits. Nevertheless, in such cases, substantial deference should be accorded to prior determinations as to previously established facts, including credibility findings, unless a clear error is present.

b. Prior denial by EOIR

Findings of fact made by EOIR, including credibility determinations, must be upheld and cannot be

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reconsidered. The application of law to the applicant's original case also must be upheld, unless the applicant establishes changed law materially affecting his or her eligibility for asylum. The applicant has already had an opportunity to appeal the IJ's decision, and the asylum officer is not in a position to give a new hearing on issues that were or should have been raised on appeal.

4. Interview

In order to determine whether there are changed circumstances that materially affect the applicant's eligibility for asylum, the asylum officer interviews the applicant and reviews the record regarding the previous application for a thorough understanding of the basis for the applicant's claim. The asylum officer need not re-visit the details of the original asylum claim, unless it is necessary to the determination of asylum eligibility once the applicant has established changed circumstances. Therefore, the asylum interview focuses on whether any changed circumstances have occurred after the applicant was denied asylum by EOIR that may materially affect the applicant's eligibility for asylum, and any information needed to make an asylum eligibility determination if changed circumstances are established.

5. Written analysis

Where a changed circumstance exception is found, the analysis, whether in a NOID or an assessment to refer or grant, must include a statement as to why the applicant was previously denied asylum, an explanation of the changed circumstances and their materiality to the applicant's eligibility for asylum, and an analysis of the merits of the claim to asylum in light of the changed circumstances.

If a changed circumstance exception is not found, the analysis in the assessment to refer or NOID requires a description of any changed circumstances that might have been claimed by the applicant, a description of and citation to country conditions (if applicable), and an explanation of why those circumstances are not changed circumstances or why they do not materially affect the applicant's asylum eligibility. In this case, the analysis does not require a full account of all material facts or an analysis of the applicant's claim.

6. One-Year Filing Deadline

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Applicants who file an application for asylum on or after April 1, 1997, are subject to the one-year filing deadline rule, including those who were previously denied asylum by an IJ or the BIA. However, please note that the one year filing deadline does not apply to UACs.

INA § 208(a)(2)(B); 8 C.F.R. § 208.4(a).

See RAIO Module: Children's Claims, Asylum Supplement.

The analysis of the one-year filing deadline for those who were previously denied asylum will be identical to that for all other applicants.

See generally Asylum lesson, One-Year Filing Deadline.

a. Filing timely

As explained above, for the Asylum Division to have jurisdiction over an asylum application filed by an individual who was previously denied asylum by an IJ or the BIA, the individual must have left the United States and made a re-entry subsequent to the denial of asylum.

Section III.C.1., Jurisdiction, above, lists the situations when the Asylum Division has jurisdiction over an applicant previously denied asylum.

To determine whether the applicant timely filed, the officer compares the date of the applicant's entry subsequent to the denial of asylum to the date the second asylum application was filed to determine whether the individual filed the application within one year after the date of last arrival.

See Asylum Lesson, One-Year Filing Deadline, section IV.

Example:

(b)(7)(e)

b. Exceptions to the one-year filing deadline

An applicant previously denied asylum who files an application for asylum more than one year after his or her last arrival may still be eligible for asylum if he or

See Asylum lesson, One-Year Filing Deadline, section Exceptions to the One-

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she can establish eligibility for an exception to the one-year filing deadline.

Year Rule

(i) Changed circumstances

If an applicant establishes a changed circumstance that excuses a prior denial of asylum, that same circumstance may qualify as an exception to the one-year filing deadline as well, provided that the changed circumstance occurred on or after April 1, 1997 and the application was filed within a reasonable period of time given the circumstances.

See Asylum lesson, One-Year Filing Deadline, section Changed Circumstances.

Example: [redacted]

(b)(7)(e)

Example: [redacted]

(b)(7)(e)

See Asylum lesson, One-Year Filing Deadline, section Changed Circumstances, General Considerations.

(ii) extraordinary circumstances

Extraordinary circumstances do not provide an exception to the bar to applying for asylum after a

See Asylum lesson, One-Year Filing

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prior denial. However, if the changed circumstance that overcomes the previous denial bar does not apply as a changed circumstance exception to the one-year filing deadline, the asylum officer must consider whether there are extraordinary circumstances that are material to the filing deadline.

Deadline, section Extraordinary Circumstances

Example: (b)(7)(e)

c. Filing within a reasonable period of time

Once an applicant who applied untimely has established the requisite changed or extraordinary circumstances, a determination must be made as to whether the application was filed within a reasonable period of time given those circumstances. This requirement applies equally to applicants previously denied asylum who file more than one year after the date of last entry.

8 C.F.R. §§ 208.4(a)(4)(ii) and (5); See Asylum lesson, One-Year Filing Deadline, section Filing within a Reasonable Period of Time, Overview.

Example: (b)(7)(e)

7. Dependents

A denial of the principal applicant's asylum application does not prohibit an included dependent from filing a subsequent, separate asylum application.

8 C.F.R. § 208.14(f).

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IV. BARS TO ELIGIBILITY FOR ASYLUM

A. Persecution of Others

"The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." In addition, the statute specifically prohibits the Attorney General from granting asylum to such a person.

INA § 101(a)(42); § 208(b)(2)(A)(i).

The statutory exclusion of persecutors from the refugee definition means that even if an applicant has been persecuted in the past, or has a well-founded fear of future persecution on account of one of the protected grounds, he or she cannot be said to have "met the definition of a refugee" if he or she is also found to be a persecutor.

It had long been held that the persecutor bar applies even if the alien's assistance in persecution was coerced or otherwise the product of duress. However, the Supreme Court in Negusie v. Holder requested that such an understanding be revisited. Specifically, the Supreme Court held that the BIA misapplied the Supreme Court's prior decision in Fedorenko (based on a reading of similar language in the Displaced Persons Act) as mandating that whether an alien is compelled to assist in persecution is immaterial for persecutor-bar purposes and remanded the case for agency interpretation of the statute in the first instance. The BIA has yet to issue a decision in the Negusie remand. However, DHS and DOJ are jointly developing regulations addressing possible exceptions to the persecutor bar based on duress and other factors. Until the BIA publishes a decision on the issue, or relevant regulatory guidance is issued, cases involving the persecution of others under coercion or duress should be held.

Matter of Rodriguez-Majano, 19 I. & N. Dec. 811 (1988) citing, Fedorenko v. United States, 449 U. S. 490 (1981).

Negusie v. Holder, 555 U.S. 511 (2009).

See the RAIO Module, Analyzing The Persecutor Bar for an in-depth discussion on the definition and application of the persecutor bar.

B. Conviction of Particularly Serious Crime

Asylum may not be granted to an applicant who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community.

INA § 208(b)(2)(A)(ii).

1. Filing date

This bar applies regardless of the filing date of the asylum application; however, the filing date determines the type of crimes included in this category.

8 C.F.R. §§ 208.13(c)(1) and (2)(A).

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If the application was filed before November 29, 1990, then an aggravated felony is not automatically considered a particularly serious crime.

See Section IV.B.6.a., Aggravated Felonies, below.

If the application was filed before April 1, 1997, then the conviction must have occurred in the United States. If the application was filed on or after April 1, 1997, then the conviction may have occurred either inside or outside of the United States.

2. Basic elements

   a. convicted by a final judgment

   b. crime is "particularly serious"

   c. the applicant constitutes a danger to the community

3. Definition of "conviction"

For immigration purposes, a conviction exists if each of the following requirements are met:

INA § 101(a)(48)(A).

   a. a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and

   b. the court has ordered some form of punishment, penalty, or restraint on a person's liberty; and

   c. the conviction must be final. A conviction is final, for immigration purposes, if direct appellate review has either been waived or exhausted

Matter of Polanco, 20 I&N Dec. 894 (BIA 1994).

If in doubt about the finality of a conviction, a Supervisory Asylum Officer should contact the USCIS Office of Chief Counsel or ICE OPLA, as appropriate.

4. Juvenile convictions

Conviction as a juvenile will not constitute a conviction for a particularly serious crime under the INA, if the applicant is

Matter of Ramirez-Rivero, 18 I&N Dec.

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under 16 years of age or was tried as a juvenile (while 16 to18 years of age). However, commission of the crime may be a basis to exercise discretion to deny or refer the asylum request.

135, 137-39 (BIA 1981); see RAIO Module, Discretion.

5. What constitutes a particularly serious crime

a. aggravated felonies

INA § 208(b)(2)(B)(i). See Section b, "Other Crimes – general" below. Note: The particularly serious crime discussion contained herein is applicable only to asylum decision-making and is inapplicable to withholding of removal, a topic outside the scope of this lesson.

By statute, all aggravated felonies are considered particularly serious crimes for purposes of evaluating asylum eligibility.

Given that the bar to asylum is for a conviction of a "particularly serious crime," the key inquiry for asylum officers is not whether the offense meets the definition of an aggravated felony, but whether the offense can be considered "particularly serious." As a practical matter, most particularly serious crimes encountered in asylum interviews will be aggravated felonies.

In order to determine if the particularly serious crime bar is applicable, the asylum officer should first consider whether the conviction is of a crime specifically identified by statute or precedent case law as an aggravated felony or otherwise as a particularly serious crime. If no such identification is available, officers must consider whether the conviction meets the defining characteristics of a "particularly serious crime." In general, when cases where the issue of a possible bar arises, guidance should be sought from supervisors, headquarters quality assurance and the USCIS Office of the Chief Counsel or ICE Office of the Principal Legal Advisor, as appropriate.

Prior to IIRIRA, the commission and conviction dates of the crime determined which definition of aggravated felony applied. As a result of IIRIRA, the current definition of aggravated felony at INA § 101(a)(43) applies regardless of commission or conviction date.

The list of crimes statutorily designated to be aggravated felonies is contained in section 101(a)(43) of the INA. Some are specific crimes, while others are more general (e.g., murder vs. crime of violence). Some crimes are not aggravated felonies unless a sentence of particular length or a certain amount of money is involved. Therefore, it is necessary to consider the sentence in such cases.

Note that it is not important to memorize statutory provisions defining and describing aggravated felonies. Instead, given information that the applicant was arrested, it is critical to acquire as much information as possible about whether there was a conviction, upon what charge or charges that conviction rested and what the sentence was. You should also gather information concerning the

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circumstances underlying the facts of the crime, but be aware that the aggravated felony determination may, depending on the circumstances, rest solely on the record of conviction (regardless of the underlying facts).

A term of imprisonment for purposes of the INA is defined as including "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." Therefore, someone who has been sentenced to a term of imprisonment for a certain term, but whose sentence is deferred if a period of probation is successfully completed, is still considered "sentenced" to that term of imprisonment.

INA § 101(a)(48)(B).

The aggravated felony definition applies to convictions for violations of either state or federal law. It also applies to convictions in violation of a foreign law, so long as the term of imprisonment was completed within the previous 15 years.

INA § 101(a)(43).

(i) Drug related offenses

In assessing whether a state drug related conviction constitutes an aggravated felony under 18 USC § 924(c)(2) the U.S. Supreme Court held that conduct made a felony under state law but a misdemeanor under the Controlled Substances Act (CSA) is not a "felony punishable under the Controlled Substances Act" for INA purposes. A state offense comes within the quoted phrase only if it prohibits conduct punishable as a felony under the CSA.

Lopez v. Gonzales, 549 U.S. 47 (2006). Finding that a South Dakota misdemeanor conviction for aiding and abetting another person's possession of cocaine is not a felony punishable under the CSA and is therefore not a drug trafficking crime within the meaning of 18 U.S.C. § 924(c)(2).

But, the reverse is not true. A state misdemeanor conviction cannot be elevated to an aggravated felony conviction just because the same facts would support felony charges under the CSA. The Supreme Court rejected an attempt to extend Lopez where the government argued that "conduct punishable as a felony should be treated as the equivalent of a felony conviction when the underlying conduct could have been a felony under federal law." The court ruled that even though federal law provides for enhanced sentencing for a simple possession drug offense where there is a prior conviction, a simple possession misdemeanor conviction under state law, where there was no mention of any prior conviction included in the charges, could not be considered an aggravated felony just because the alien

Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010).

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could have been charged as a felon in federal court. The court reasoned that the statute "limits the Attorney General's cancellation authority only when the noncitizen has actually been convicted of a[n] aggravated felony - not when he merely could have been convicted of a felony but was not." (internal quotation marks omitted).

(ii) "Crime of violence"

Leocal v. Ashcroft, 543 U.S. 1 (2004) holding that a Florida conviction for DUI causing serious bodily injury does not have a mens rea requirement, and therefore is not a "crime of violence" under the Act.

In determining whether an offense is a "crime of violence" under 18 USC §16, the Supreme Court held that a statute which punishes negligent or accidental conduct cannot be said to involve the "use" of physical force against the person or property of another, and therefore is not an aggravated felony.

In order to determine whether the conviction of a particular offense amounts to a "crime of violence" the officer must look to the requirements of the criminal statute and evaluate whether it includes a mens rea requirement. Mens Rea is the legal term used for the mental state required for culpability under a statute.

EXCEPTION: If an application was filed prior to November 29, 1990, the conviction of an aggravated felony does not constitute a mandatory bar to asylum. Consequently, the asylum officer must analyze the circumstances of the conviction in such cases to determine whether it constitutes a particularly serious crime.

Matter of A-A-, 20 I&N Dec. 492 (BIA 1992).

b. other crimes – general

The INA designates that all aggravated felonies are, per se, particularly serious crimes, but does not limit the consideration of what is a particularly serious crime to aggravated felonies. It is important to remember that even after a determination is made that a conviction is for a crime that is not an aggravated felony, the officer must still determine whether the conviction is for a particularly serious crime.

INA § 208(b)(2)(B)(i). Delgado v. Mukasey, 546 F.3d 1017 (9th Cir. 2008); Matter of N-A-M-, 24 I&N Dec. 336 (BIA 2007).

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The determination as to whether a crime (other than an aggravated felony) is "particularly serious" is most often made on a case-by-case basis. The factors to consider are the following:

Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982); Matter of B-, 20 I&N Dec. 427, 430 (BIA 1991); Matter of L-S-J-, 21 I&N Dec. 973, 974-75 (BIA 1997); Mahini v. INS, 779 F.2d 1419, 1421 (9th Cir. 1986); Yousefi v. INS, 260 F.3d 318 (4th Cir. 2001)(criteria valid but not properly applied).

(i) the nature of the conviction;

(ii) the sentence imposed;

(iii) the circumstances and underlying facts of the conviction; and

(iv) whether the type and circumstances of the crime indicate that the alien will be a danger to the community.

See Section IV.B.7., Danger to the Community, below, and note that this element involves somewhat circular reasoning, since conviction of a PSC necessarily leads to a finding that the alien is a danger to the community.

A single conviction of a misdemeanor normally is not a particularly serious crime.

Matter of Juarez, 19 I&N Dec. 664 (BIA 1988).

Crimes of violence are normally particularly serious crimes. The term "crime of violence" means--
(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (definition).

Note that a crime does not have to be a crime of violence to constitute a particularly serious crime. In Matter of R-A-M-, 25I&N Dec. 657 (BIA 2012), the BIA found that possession of child pornography constituted a particularly serious crime.

6. Danger to the community

As a matter of law, an individual who has been convicted in the United States of a particularly serious crime constitutes a danger to the community.

Matter of U-M-, 20 I&N Dec. 327 (BIA 1991) (affirmed, Urbina-Mauricio v. INS, 989 F.2d 1085 (9th Cir. 1993)); Choeum v. INS, 129 F.3d 29 (1st Cir. 1997).

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7. Examples

Note: Many of these examples are taken from cases decided before IRIIRA broadened the list of crimes considered aggravated felonies. They remain valid examples of particularly serious crimes but for the most part are also aggravated felonies under IRIIRA.

a. assault with a dangerous weapon

Matter of D-, 20 I&N Dec. 827 (BIA 1994); Matter of Juarez, 19 I&N Dec. 664 (BIA 1988).

Note, however, that assault with a deadly weapon was found not to be a particularly serious crime in a case involving a single, misdemeanor offense.

b. drug trafficking

INA § 101(a)(43)(B); see Matter of Y-L-, A-G- & R-S-R-, 23 I&N 270 (AG 2002) drug trafficking is also presumptively a particularly serious crime for purposes of withholding of removal. The Attorney General ruled that the presumption would only be overcome in "the most extenuating circumstances" that were "both extraordinary and compelling."

Generally a drug trafficking conviction constitutes an aggravated felony and therefore a particularly serious crime as a matter of law for asylum purposes. Even if there is some question as to whether a particular drug offense constitutes an aggravated felony, it is likely to meet the criteria for a particularly serious crime described above and thus bar the applicant from asylum eligibility.

c. battery with a dangerous weapon, or aggravated battery

Matter of D-, 20 I&N Dec. 827 (BIA 1994); Matter of B-, 20 I&N Dec. 427 (BIA 1991).

d. rape

INA § 101(a)(43)(A); see Matter of B-, 20 I&N Dec. 427 (BIA 1991).

e. sexual abuse of a minor

INA § 101(a)(43)(A); U.S. v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993); Matter of Small, 23 I&N Dec. 448 (BIA 2002).

Sexual abuse or attempted sexual abuse of a minor constitutes an aggravated felony and therefore a particularly serious crime for asylum purposes. Misdemeanor sexual abuse of a minor also has been found to constitute an aggravated felony (and a particularly serious crime for asylum purposes).

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f. armed robbery

Matter of D-, 20 I&N Dec. 827 (BIA 1994); Matter of L-S-J-, 21 I&N Dec. 973 (BIA 1997).

g. theft offenses (including receipt of stolen property) or burglary offenses

Theft offenses (including receipt of stolen property) or burglary offenses for which the term of imprisonment is at least one year constitute aggravated felonies and therefore particularly serious crimes for asylum purposes. A theft offense, for which alien may be removed, includes the crime of "aiding and abetting" a theft offense. Note that burglary may also constitute a particularly serious crime if it involves a threat to an individual.

INA § 101(a)(43)(G); Matter of Garcia-Garrocho, 19 I&N Dec. 423 (BIA 1986); Matter of Frentescu, 18 I&N Dec. 244; Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990).

Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007) (holding that a conviction under a California statute prohibiting taking a vehicle without consent was a "theft offense," for which alien could be removed)

h. kidnapping (aggravated)

Groza v. INS, 30 F.3d 814 (7th Cir. 1994).

i. murder and manslaughter

Murder constitutes an aggravated felony and therefore a particularly serious crime for asylum purposes. Manslaughter (including involuntary) has also been found to be a particularly serious crime.

Dor v. Dist. Dir., INS, 697 F.Supp. 694 (S.D.N.Y. 1988); Matter of C-, 20 I&N Dec. 529 (BIA 1992); Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994); Ahmetovic v. INS, 62 F.3d 48 (2d Cir. 1995).

8. Dependents

8 C.F.R. § 208.21(a).

This bar also applies independently to a spouse or child who is included in an asylum applicant's request for asylum and who was convicted of a particularly serious crime. In some cases, a principal applicant may be granted asylum, and a dependent referred or denied because he or she was convicted of a particularly serious crime.

C. Commission of Serious Nonpolitical Crime

INA § 208(b)(2)(A)(iii).

Asylum may not be granted if there are serious reasons to believe that the applicant committed a serious nonpolitical crime outside the United States before arriving in the United States.

1. Filing Date

Previously, this was a mandatory bar to

This mandatory bar to asylum was added by the IIRIRA and therefore applies only to applications filed on or after April 1,

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1997. However, when adjudicating a request for asylum filed before April 1, 1997, the commission of a serious nonpolitical crime may be considered as a serious adverse factor in the exercise of discretion.

withholding of deportation, but not asylum.

See RAIO Module, Discretion.

2. Definition

a. A "serious nonpolitical crime" has been defined as a crime that:

(i) was not committed out of genuine political motives,

McMullen v. INS, 788 F.2d 591, 595 (9th Cir. 1986), citing Guy Goodwin-Gill, The Refugee in International Law, 60-61 (1983).

(ii) was not directed toward the modification of the political organization or structure of the state, and

(iii) in which there is no direct, causal link between the crime committed and its alleged political purposes and object.

b. A "serious nonpolitical crime" need not be as serious as a "particularly serious crime."

Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982)

c. Even if the crime was committed out of genuine political motives, it should be considered a serious nonpolitical crime if the act is grossly out of proportion to the political objective or if it is of an atrocious or barbarous nature.

Matter of E-A-, 26 I&N Dec. 1, 3, 5 (BIA 2012) (although the applicant and his group never caused any physical injury to anyone, they placed innocent people at substantial risk); McMullen v. INS, 788 F.2d 591, 595 (9th Cir. 1986); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999); Chay-Velasquez v. Ashcroft, 367 F.3d 751 (8th Cir. 2004).

3. Requirements

a. There is no requirement that the serious nonpolitical crime resulted in a conviction. The lack of conviction means that this bar can really only be discovered through the interview process, as there will probably not be any documentation. However, the adjudicator needs to find probable cause to believe that the crime was committed.

McMullen v. INS, 788 F.2d 591, 599 (9th Cir. 1986); Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980).

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Probable cause means that there is a reasonable basis to believe that the crime was committed.

Example: While a Coptic Christian from Egypt was on a flight en route from Egypt to United States, the Egyptian authorities notified the Department of State that the individual was wanted in Egypt allegedly for having committed a murder there just hours before his departure. The Second Circuit upheld the immigration judge's determination that there were serious reasons to believe that the applicant had committed a serious non-political crime. The immigration judge supported his finding with documentation of the charges against the applicant, including: a warrant for the applicant's arrest; a police report indicating that the applicant's fingerprints were found at the murder scene and that the applicant was seen soon after the murder with an injured hand and a bloody shirt; and a report that the blood on the recovered shirt was found to match that of the victim. Evidence presented by the applicant that there were some irregularities in the Egyptian police reports and that Coptic Christians have been wrongfully accused of crimes was insufficient to compel a finding that he was framed by the Egyptian authorities, and thus the Second Circuit found that the immigration judge supported the determination that the applicant was barred from asylum.

Khouzam v. Ashcroft, 361 F.3d 161, 164 (2d Cir. 2004).

b. The crime must have been committed outside the United States.

c. The applicant need not have personally carried out the act of harm ("pulled the trigger"). For example, providing logistical and physical support that enables others to carry out terrorist acts against ordinary citizens suffices.

McMullen v. INS, 788 F.2d 591, 599 (9th Cir. 1986); Matter of E-A-, 26 I&N Dec. 1, 7 (BIA 2012) (noting that the applicant was not a "mere bystander" and that his involvement and participation "materially contributed" to the groups destructive behavior).

4. Recruitment of Child Soldiers

The Child Soldiers Accountability Act of 2008 (CSAA), effective as of October 3, 2008, creates both criminal and immigration prohibitions on the recruitment or use of child soldiers. Specifically, the CSAA establishes a ground of inadmissibility at section 212(a)(3)(G) of the INA and a ground of removability at section 237(a)(4)(F) of the INA.

Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). See also Lori Scialabba and Donald Neufeld, USCIS, Initial Information Concerning

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These parallel grounds set forth that "[a]ny alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code" is inadmissible and is removable.

the Child Soldiers Accountability Act, Public Law No. 110-340, Memorandum to Field Leadership (Washington, DC: 31 December 2008). CSAA, sec. 2(b)-(c).

The statute also requires that DHS and DOJ promulgate regulations establishing that an alien who is subject to these grounds of inadmissibility or removability "shall be considered an alien with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime," and is therefore ineligible for asylum pursuant to INA section 208(b)(2)(A)(iii). The regulations remain in the process of being developed and promulgated. In the interim, the Congressional intent in enacting the CSAA, as well as the nature of the serious crime of the use of child soldiers, should be considered in determining whether an applicant is subject to the serious nonpolitical crime bar. Note that the statute does not exempt children from the applicability of this ground, even where they were recruited as children themselves.

CSAA, sec. 2(d)(1). See Asylum lesson, Guidelines for Children's Asylum Claims, VI.E.4. Note: this is accurate at this time of posting; however, this lesson will be superseded by the RAIO training module Guidelines for Children's Claims.

5. Dependents

This bar also applies independently to a spouse or child who is included in an asylum applicant's request for asylum and who has committed a serious nonpolitical crime outside the United States before arriving in the United States. In some cases, a principal applicant may be granted asylum, while his or her dependent (who committed a serious nonpolitical crime) is denied or referred because he or she is subject to a mandatory bar.

8 C.F.R. § 208.21(a).

D. Security Risk

Asylum may not be granted if there are reasonable grounds to believe that the applicant is a danger to the security of the United States.

INA § 208(b)(2)(A)(iv).

See the RAIO module National Security for an in-depth discussion on the definition and application of the security risk bar.

E. Terrorists

1. Background on terrorist legislation, as applied to asylum adjudication

See Jeffery Weiss, Asylum Division. Processing Claims Filed by Terrorists or Possible Terrorists, Memorandum to Asylum Office Directors (Washington, DC: 1 October 1997), 2 p.

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The Anti-terrorist and Effective Death Penalty Act of 1996 (AEDPA), which came into effect on April 24, 1996, provided that any individual who falls within certain terrorist provisions in the INA is ineligible for asylum, unless it is determined that there are not reasonable grounds to believe that the individual is a danger to the security of the United States.

See Chris Sale. Office of the Deputy Commissioner. AEDPA Implementation Instruction #3: The Effects of AEDPA on Various Forms of Immigration Relief, Memorandum to Management Team (Washington, DC: 6 August 1996), 13 p.

The IIRIRA re-designated the sub-clauses of INA § 212(a)(3)(B) and expanded the terrorist grounds for ineligibility for asylum.

The PATRIOT Act of 2001 expanded grounds of inadmissibility based on terrorism, broadened the definition of "terrorist activity," added two definitions of "terrorist organization," and added a separate ground of inadmissibility for those who have associated with a terrorist organization. The Act retained the exception to the ineligibility for those individuals who fall under sub-clause (IV) of 212(a)(3)(B)(i).

See Ziglar, James W. Office of the Commissioner. New Anti-Terrorism Legislation, Memorandum for Regional Directors and Regional Counsel (Washington, DC: 31 October 2001), pp. 2-3.

The Intelligence Reform and Terrorism Prevention Act of 2004 amended the provisions in INA § 219 for the designation of foreign terrorist organizations by the Department of State.

Intelligence Reform and Terrorism Prevention Act of 2004 § 7119, PL 108-458, 118 Stat. 3638.

The REAL ID Act of 2005 further broadened the categories of individuals who are inadmissible for terrorist activities by including those who have received military-type training from or on behalf of a terrorist organization and broadening the inadmissibility ground regarding espousing terrorist activity to no longer require that the individual hold a "position of prominence." The statute also limited the affirmative defense to the inadmissibility for "engaging in terrorist activity" through soliciting things of value, soliciting individuals for membership in, or for providing material support for an undesignated terrorist organization to require the alien to "demonstrate by clear and convincing evidence that he did not know, and reasonably could not have known, that the organization was a terrorist organization."

REAL ID Act of 2005 §103(a); see RAIO module National Security

The statute also revised the Patriot Act's inadmissibility provision for material support to a terrorist organization and added INA § 212(d) to create an inapplicability provision for the material support ground, as well as for individuals or

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representatives of terrorist organizations who endorse or espouse terrorist activity.

2. Grounds of ineligibility

INA § 208(b), as amended by the REAL ID Act, prohibits the granting of asylum to anyone who: — INA § 208(b)(2)(A)(v).

a. has engaged in terrorist activity; — INA § 212(a)(3)(B)(i)(I).

b. a consular officer or the Attorney General knows, or has reasonable grounds to believe, is engaged in or is likely to engage after entry in any terrorist activity; — INA § 212(a)(3)(B)(i)(II).

Note: An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered to be engaged in a terrorist activity. INA § 212(a)(3)(B)(i)(V).

c. has, under any circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity; — INA § 212(a)(3)(B)(i)(III).

d. is a representative of — INA § 212(a)(3)(B)(i)(IV).

(i) a foreign terrorist organization, as defined in section 212(a)(3)(B)(vi) or — INA § 212(a)(3)(B)(i)(IV)(aa).

(ii) a political, social, or other group that endorses or espouses terrorist activity; — INA § 212(a)(3)(B)(i)(IV)(bb).

e. is a member of a terrorist organization designated under Section 219 of the INA or otherwise designated through publication in the Federal Register under INA Section 212(a)(3)(B)(vi)(II); — INA § 212(a)(3)(B)(i)(V).

e. is a member of a terrorist organization described in INA section 212(a)(3)(B)(vi)(III) (undesignated terrorist organization), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

g. endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization; — INA § 212(a)(3)(B)(i)(VII); INA §237(a)(4)(B). Note that this ground does not require that the

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statements be made under circumstances indicating an intention to cause death or serious bodily harm.

h. has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization

INA § 212(a)(3)(B)(i)(VIII); INA § 237(a)(4)(B); "military-type training is defined in 18 U.S.C. § 2339D(c)(1). Note that an exemption to the terrorist bar exists for those who received military type training under duress.

i. is the spouse or child of an alien who is inadmissible under INA § 212(a)(3)(B), if the activity causing the alien to be found inadmissible occurred within the past five years unless the spouse or child:

INA § 212(a)(3)(B)(ii).

(i) did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(ii) the consular officer or the Attorney General has reasonable grounds to believe the spouse or child has renounced the activity causing the alien to be found inadmissible under this section; or

j. who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States.

INA § 212(a)(3)(F); INA § 237(a)(4)(B).

See the RAIO lesson National Security for an in-depth discussion on the definitions of the terms relating to terrorism and the application of the terrorist bar.

F. Firm Resettlement

An applicant who was firmly resettled in another country prior to arriving in the United States may not be granted asylum.

INA § 208(b)(2)(A)(vi)

Note: This bar does not

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apply to derivatives. See 8 C.F.R. § 208.21(a).

1. History

The firm resettlement bar is founded on two of the cessation clauses of the United Nations Convention Relating to the Status of Refugees. The Refugee Convention states that the convention ceases to apply to an individual who "has acquired a new nationality, and enjoys the protection of the country of his new nationality", or to an individual "who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

United Nations Convention Relating to the Status of Refugees, art. 1, §§ C(3), E, adopted July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

The firm resettlement bar has been part of United States refugee law from its inception, as a mandatory bar in The Displaced Persons Act of 1948. In a 1957 revision of the INA, the firm resettlement bar was dropped from the Act, but US courts continued to apply it as a discretionary factor. After passage of the Refugee Act of 1980, interim regulations were enacted that made firm resettlement a regulatory bar in affirmative asylum cases. When the final asylum regulations were adopted in 1990, firm resettlement was made a regulatory bar for all adjudicators. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress codified firm resettlement as a statutory bar.

A very detailed history of the firm resettlement bar can be found in Matter of A-G-G-, 25 I&N Dec. 486 (BIA 2011).

2. Definition

An applicant "is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." Note that, in order for the bar to apply, the entry into another nation must be after the events that caused the applicant to be a refugee.

8 C.F.R. § 208.15.

Please refer to RAIO Module, Firm Resettlement, for a detailed discussion of the applicability and exceptions related to this bar to eligibility for asylum.

a. Finally, if the applicant is found to have received an offer of permanent resettlement, the burden shifts to the

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applicant to establish, by a preponderance of the evidence, that an exception to firm resettlement applies, pursuant to 8 C.F.R. §§ 208.15(a) and (b). If the applicant is able to meet his or her burden of proof that an exception applies, the applicant may be granted asylum.

3. Special Issues

There are a number of issues concerning the application of the firm resettlement bar that have arisen over the years. Some issues that may arise are:

a. Length of time spent in the third country

The length of time an applicant spends in a third country does not by itself establish firm resettlement. Firm resettlement occurs only after the applicant has been offered some form of enduring lawful status in that country. However, length of time is a factor to consider, particularly in determining whether the applicant cannot be considered firmly resettled because entry into the third country was a necessary consequence of flight. Refer to section 2.a above.

b. Offer of firm resettlement

The Ninth Circuit has held that to meet its burden of proving that an offer of firm resettlement exists the USCIS must present either direct evidence of an offer of permanent resettlement or, if such evidence cannot be obtained, indirect evidence of such an offer. Indirect factors may include the applicant's length of stay in the third country, intent to remain in the country and the social and economic ties developed during such stay. Relying on Abdille v. Ashcroft, 242 477 (3d Cir. 2001), the Court indicated that the indirect evidence used to establish firm resettlement must "rise to a sufficient level of clarity and force."

The Third Circuit, in Abdille v. Ashcroft, indicated in dicta that non-offer based factors, such as the length of the applicant's residence in a third country or the extent of the applicant's social and economic ties to the country, provide circumstantial evidence of a formal offer of some type of permanent resettlement and can serve as a surrogate for direct evidence of an offer.

The BIA further addressed evidence of firm resettlement in the holding of Matter of D-X- & Y-Z-, 25 I&N Dec. 664 (BIA

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2012). In this decision, the BIA provides a straightforward approach with a strong presumption of firm resettlement when the applicant provides facially valid documentation of permission to reside and work indefinitely in a country. The decision makes clear that the mere fact that the document was obtained fraudulently does not invalidate the presumption. A number of circuit court cases support that "facially valid" documentation of residence status is enough to establish a presumption of firm resettlement, where there is no evidence that such status would be invalidated by the country of firm resettlement. In D-X- & Y-Z-, the female applicant had left and reentered the country where she had fraudulently obtained residence status, using the fraudulently obtained documents. While the Board does not in this decision explicitly discuss the importance of any evidence about whether the irregularities in the document render it vulnerable to invalidation, this case in fact involved evidence that the fraudulently obtained document was not invalidated, as the applicant was able to reenter the country using the documents.

4. Entry into the third country

While the focus of the analysis is on the existence of an offer of permanent residence, the plain language of the regulation makes clear that, in order for the offer to be effective, the applicant must have entered into the country at some point while the offer was available. The offer will be considered effective if, for example, the applicant entered into the country after the offer was made, and while it was still active, or, for example, the offer was made after the applicant initially entered the country, but while the applicant was still there, unless the applicant's entry into that country was a necessary consequence of his or her flight from persecution and he or she remained in that country only as long as necessary to arrange onward travel without establishing significant ties in that country.

Again, please refer to RAIO Module, Firm Resettlement, for a detailed discussion of such special issues as they relate to the firm resettlement bar.

V. BURDEN AND STANDARD OF PROOF

A. Mandatory Bars to Applying for Asylum

INA §§ 208(a)(2)(B) and (D); 8 C.F.R. § 208.4(a)(2)(i).

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1. One-year filing deadline

The applicant must demonstrate by clear and convincing evidence that the application has been filed within 1 year after the date the applicant arrived in the United States,

or

demonstrate to the satisfaction of the Attorney General (the asylum officer or immigration judge) the existence of changed circumstances that materially affect eligibility for asylum or extraordinary circumstances that resulted in the delay.

Reminder: The one-year filing period is calculated from 4/1/97 or arrival in U.S., whichever is more recent in time. See Asylum Lesson, One-Year Filing Deadline, section Calculating the One-Year Period.

2. Previous denials

If an applicant has previously been denied asylum by an IJ or the BIA, the applicant must demonstrate to the satisfaction of the Attorney General (asylum officer or immigration judge) the existence of changed circumstances that materially affect eligibility for asylum.

INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a).

3. Explanation

The "clear and convincing" standard has been defined as a degree of proof that will produce "a firm belief or conviction as to allegations sought to be established." It is higher than the preponderance standard used in civil cases, but lower than the "beyond a reasonable doubt" standard in criminal cases.

To demonstrate "to the satisfaction of the Attorney General" that an exception applies, means that it must be reasonable for the asylum officer to conclude that the exception applies.

See Black's Law Dictionary, 5th Ed.; see RAIO Module, Evidence.

B. Mandatory Bars to Asylum

If the evidence indicates that a ground for mandatory denial or referral exists, then the applicant has the burden of proving by a preponderance of the evidence that the ground does not apply.

8 C.F.R. § 208.13(c); See also Cheo v. INS, 162 F.3d 1227 (9th Cir. 1998) (where evidence indicates applicant was firmly resettled, burden is on applicant to establish the contrary); Maharaj v. Gonzales, 450 F. 3d 961 (9th Cir. 2006) (the burden shifts to the applicant only when USCIS has presented sufficient evidence that the statutory bar applies).

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A fact is established by a preponderance of the evidence, if the adjudicator finds, upon consideration of all the evidence, that it is more likely than not that the fact is true (in other words, there is more than a 50% chance that the fact is true).

See RAIO Module, Evidence.

VI. MANDATORY NATURE OF BARS

If it is determined that a mandatory bar applies, the asylum officer has no discretion to grant asylum to the applicant, even though the applicant may otherwise be eligible. As the term itself indicates, denial in such cases is mandatory. Therefore, the asylum request must be referred or denied, as appropriate.

When a mandatory bar to asylum applies, the asylum officer does NOT weigh that adverse factor against the risk of future persecution as with the exercise of discretion.

VII. DEPENDENTS

When a principal alien is granted asylum, his or her spouse and/or children, as defined in the Act, also may be granted asylum if accompanying, or following to join, unless it is determined that the spouse or child is ineligible for asylum under section 208(b)(2)(A)(i), (ii), (iii), (iv) or (v) of the Act for applications filed on or after April 1, 1997, or under 8 C.F.R. § 208.13(c)(2)(i)(A), (C), (D), (E), or (F) for applications filed before April 1, 1997.

8 C.F.R. § 208.21(a).

In other words, with the exception of firm resettlement, all the bars to granting asylum that apply to principal applicants apply equally to dependents. For example, if a dependent was convicted of an aggravated felony, the dependent is barred from a grant of asylum, even if the principal is granted. However, if the dependent was firmly resettled in a third country, the dependent is not barred from receiving a derivative grant of asylum if the principal is granted.

VIII. SUMMARY

A. Bars to Applying for Asylum

The following bars to applying for asylum are applicable only to applications filed on or after April 1, 1997. Only asylum officers, immigration judges, and the Board of Immigration Appeals can determine whether a prohibition on filing applies.

1. The asylum seeker could be returned to a "safe" third country.

There is an agreement between the United States and Canada,

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but the agreement only applies to aliens at land border ports of entry and those transiting through one country when being removed by the other country. It does not apply to affirmative asylum adjudications.

2. The asylum seeker waited more than one year after arrival in the United States to apply.

   The filing date is calculated from April 1, 1997 or the date of last arrival, whichever is most recent in time. This bar does not apply to UACs nor does it apply if the applicant establishes changed circumstances that materially affect eligibility, or extraordinary circumstances relating to the delay.

3. The asylum seeker previously has been denied asylum by an immigration judge or the BIA.

   This bar does not apply if the applicant demonstrates changed circumstances that materially affect asylum eligibility.

B. Mandatory Bars to Eligibility for Asylum

The following are mandatory bars to a grant of asylum:

1. Persecution of others on account of one of the protected characteristics in the refugee definition

2. Conviction of a particularly serious crime, including an aggravated felony

   If the application was filed on or after April 1, 1997, the conviction may have occurred either inside or outside the United States.

3. Commission of a serious nonpolitical crime outside the United States prior to arrival in the United States

   This bar does not apply to asylum applications filed prior to April 1, 1997, but may be a basis for a discretionary denial or referral.

4. Risk to the security of the United States

   Any case in which the asylum officer believes the applicant may present a risk to the security of the United States must be sent to Asylum Headquarters for review.

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5. Engaging in terrorist activities or status as a representative of certain terrorist organizations

An applicant cannot be granted asylum if he or she has engaged, is engaging, or is likely to engage in terrorist activity; has incited terrorist activity indicating an intention to cause death or serious bodily harm; is a representative of either a designated terrorist organization or a group whose endorsement of acts of terrorist activity undermines the efforts of the United States to reduce or eliminate terrorist activities; or has used his or her position of prominence in an country to endorse or espouse terrorist activity.

6. Firm resettlement

An applicant is considered firmly resettled if the applicant, after becoming a refugee, entered into another country with, or while there received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement when in that country.

An applicant was not firmly resettled if entry was necessary to flight, the applicant remained only to arrange onward travel, and the applicant developed no significant ties; or the conditions of residence were substantially restricted.

C. Burden of Proof

1. Prohibition on Filing

The applicant must establish by clear and convincing evidence that he or she applied for asylum within one year after arrival in the U.S., unless an exception applies.

If a bar to filing applies, the applicant must demonstrate to the satisfaction of the adjudicator that an exception applies.

2. Bars to asylum

If the evidence indicates that a ground for mandatory denial of asylum applies, the applicant must prove by a preponderance of the evidence that a mandatory bar does not apply.

D. Mandatory Nature of Bars

If it is determined that a mandatory bar applies, the asylum officer has no discretion to grant asylum to the applicant, even though the applicant may otherwise be eligible.

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E. Dependents

The spouse or child of an asylum applicant cannot be granted derivative asylum status if a mandatory bar, other than firm resettlement, applies to the spouse or child.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

NATIONAL SECURITY, PART 1

TRAINING MODULE

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RAIO Directorate – Officer Training / *RAIO Combined Training Program*

NATIONAL SECURITY, PART 1

TRAINING MODULE

MODULE DESCRIPTION:

This module provides guidance on the proper analysis, adjudication, and processing of cases with national security issues. Although the term "national security" includes cases involving terrorism-related inadmissibility grounds (TRIG) as set forth in INA § 212(a)(3)(B), the adjudication and processing of cases with TRIG issues is discussed in a separate module. This module addresses non-TRIG national security issues and details the agency's Controlled Application Review and Resolution Program (CARRP). For complete guidance on national security issues, please refer to both this module and the National Security, Part 2 (TRIG) module.

TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing, you (the officer) will conduct appropriate pre-interview preparation to identify national security (NS) indicators and concerns and elicit all relevant information from an applicant with regard to NS indicators and concerns. You will recognize when an applicant's activities or associations render him or her an NS concern, including when NS indicators may establish an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in certain security-related inadmissibility grounds or bars, and properly adjudicate such a case. You will be able to understand the CARRP process.

ENABLING PERFORMANCE OBJECTIVE(S)

1. Identify the appropriate security-related INA grounds under which an alien may be inadmissible/barred from the immigration benefit sought.
2. Explain the purpose of the CARRP process.
3. Explain the steps involved in processing national security cases.

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4. Analyze fact patterns to identify national security indicators and determine if an articulable link to a national security-related inadmissibility ground or bar exists.

5. Analyze the facts and relevant law and policy to make a legally sufficient decision on a case involving a national security issue.

INSTRUCTIONAL METHODS

- Interactive presentation
- Discussion
- Practical exercises

METHOD(S) OF EVALUATION

- Multiple-choice exam
- Observed practical exercises

REQUIRED READING

1. INA §§ 212(a)(3)(A), (B), and (F).
2. INA §§ 237(a)(4)(A) and (B).
3. Memorandum, Policy for Vetting and Adjudicating Cases with National Security Concerns, Jonathan R. Scharfen, Deputy Director (April 11, 2008).
4. Memorandum, Additional Guidance on Issues Concerning the Vetting and Adjudication of Cases Involving National Security Concerns, Michael Aytes, Acting Deputy Director (February 6, 2009).
5. Policy Memorandum, Revision of Responsibilities for CARRP Cases Involving Known or Suspected Terrorists (PM-602-0042) (July 26, 2011) and associated Supplemental Guidance.
6. Memorandum, Testimony-Based National Security Indicators and Concerns, Jennifer Higgins, Associate Director, Refugee, Asylum and Interntional Operations Directorate (September 9, 2019).

Division-Specific Required Reading – Refugee Affairs Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

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ADDITIONAL RESOURCES

1. See USCIS TRIG ECN site for memos, legal guidance, legislation and other adjudicative resources.

2. Operational Guidance for Vetting and Adjudicating Cases with National Security Concerns, signed by Domestic Operations Acting Associate Director Donald Neufeld, Attachment A - Guidance for Identifying National Security Concerns (April 24, 2008).

3. Memorandum, Handling Potential National Security Concerns with No Identifiable Records, Steve Bucher, Associate Director of Refugee, Asylum and International Operations (August 29, 2012).

4. Memorandum, Updated Instructions for Handling TECS B10 Records, Office of the Director (May 23, 2012).

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

Task/ Skill #	Task Description
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR13	Knowledge of inadmissibilities (4)
ILR23	Knowledge of bars to immigration benefits (4)
ILR26	Knowledge of the Controlled Application Review and Resolution Program (CARRP) procedures (4)
IRK2	Knowledge of the sources of relevant country conditions information (4)
IRK11	Knowledge of the policies and procedures for reporting national security concerns and/or risks (3)
IRK13	Knowledge of internal and external resources for conducting research (4)
TIS3	Knowledge of Customs and Border Protection TECS database (3)
TIS11	Knowledge of the national security-related resources on the ECN (4)
AK14	Knowledge of policies and procedures for preparing summary documents (e.g., fraud or national security leads, research, assessments) (3)

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RI3	Skill in conducting research (e.g., legal, background, country conditions) (4)
RI6	Skill in identifying information trends and patterns (4)
RI9	Skill in identifying inadmissibilities and bars (4)
RI11	Skill in handling, protecting, and disseminating information (e.g., sensitive and confidential information) (4)
RI10	Skill in identifying national security issues (4)
DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5)
T2	Skill in accessing and navigating national security-related resources on the ECN (4)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
OK9	Knowledge of Fraud Detection and National Security (FDNS) functions and responsibilities (2)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
10/26/15	Throughout document	Updated broken links and citations; added new TRIG exemptions; minor formatting changes; added new case law	RAIO Training, RAIO TRIG Program
10/22/18	Throughout document	Removed material specific to TRIG; updated links; where appropriate and practical, edited language to parallel TRIG lesson plan changes; Reorganized structure; revised/edited materials for accuracy, clarity, and consistency	RAIO Training, RAIO FDNS, RAIO TRIG
9/11/19	Required Reading	Added 9/9/19 NS memo to required readings	RAIO Training

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Throughout this training module you will come across references to the National Security, Part 2 (TRIG) Lesson Plan, division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in National Security, Part 2 (TRIG) Lesson Plan and the referenced material that pertains to your division. Officers who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

This lesson plan covers the relevant law regarding national security and introduces USCIS's Controlled Application Review and Resolution Program (CARRP), which is the agency's policy for vetting and adjudicating cases with national security concerns (a term of art that will be explained below). This lesson plan will delve into some of the most common national security (NS) indicators (also a term of art). In doing so, this lesson plan will give you the information you need to understand the CARRP process and, within that process, how to identify cases with NS issues so that they may be properly adjudicated and processed.

2 NATIONAL SECURITY OVERVIEW

Protecting national security is woven into both the mission and vision of the agency and the RAIO Directorate. In the context of the RAIO mission and overall USCIS values, we are mandated to adjudicate immigration benefits in an accurate, timely manner, always with attention to and emphasis on preserving the integrity of our immigration system and minimizing national security risks and vulnerabilities.

RAIO Mission

RAIO leverages its domestic and overseas presence to provide protection, humanitarian, and other immigrant benefits and services throughout the world, while combating fraud and protecting national security.

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RAIO Vision

With a highly dedicated and flexible workforce deployed worldwide, the Refugee, Asylum and International Operations Directorate will excel in advancing U.S. national security and humanitarian interests by providing immigration benefits and services with integrity and vigilance and by leading effective responses to humanitarian and protection needs throughout the world.

The INA contains provisions that prohibit granting most immigration benefits (through either an inadmissibility ground [as adjudicated by Refugee and International Adjudications Officers] or a security/terrorism bar]as adjudicated by Asylum Officers]) to individuals based on national security reasons.

National Security Bars to Asylum

Under INA § 208(b)(2)(A) (bars to asylum), asylum may not be granted if, among other things, there are reasonable grounds to believe that the applicant is a danger to the security of the United States or if the applicant would be found inadmissible or deportable under any of the security and related grounds of removability.[1]

National security issues are a primary consideration in USCIS adjudications, because a central mission of USCIS is to protect the integrity of the U.S. immigration system. As part of the determination of statutory eligibility for an immigration benefit, you must examine each case for NS concerns and determine whether a bar or inadmissibility applies.

2.1 National Security Authorities

The INA contains various security-related grounds of inadmissibility, grounds of deportability, and mandatory bars to asylum. These provisions form the basis of the national security authorities discussed in this lesson plan.

2.1.1 Security-Related Inadmissibility Grounds

- 212(a)(3)(A)(i) Espionage, Sabotage, Export of Goods, Technology or Sensitive Information from the U.S.
- 212(a)(3)(A)(ii) Unlawful Activity
- 212(a)(3)(A)(iii) Overthrow of U.S. Government

[1] INA §§ 208(b)(2)(A)(iv), (v); *see Matter of R-S-H-*, 23 I&N Dec. 629, 640 (BIA 2003) (holding that substantial evidence supported the immigration judge's determination that an applicant who co-founded an organization later named as a "Specially Designated Global Terrorist" organization pursuant to Executive Order 13224 was barred from asylum as a security risk).

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- 212(a)(3)(B) Terrorist Activity
- 212(a)(3)(C) Adverse Foreign Policy Consequences
- 212(a)(3)(D) Affiliation with Communist or Totalitarian Party
- 212(a)(3)(E) Nazi Persecution, Genocide, Torture, Extrajudicial Killing
- 212(a)(3)(F) Association with Terrorist Organizations
- 212(a)(3)(G) Recruitment or Use of Child Soldiers

2.1.2 Security-Related Deportability Grounds

- 237(a)(4)(A)(i) Espionage, Sabotage, Export of Goods, Technology or Sensitive Information from the U.S.
- 237(a)(4)(A)(ii) Criminal Activity which Endangers Public Safety or National Security
- 237(a)(4)(A)(iii) Overthrow of U.S. Government
- 237(a)(4)(B) Terrorist Activity
- 237(a)(4)(C) Adverse Foreign Policy Consequences
- 237(a)(4)(D) Nazi Persecution, Genocide, Torture, Extrajudicial Killing
- 237(a)(4)(E) Severe Violations of Religious Freedom
- 237(a)(4)(F) Recruitment or Use of Child Soldiers

This lesson plan will focus on the security-related provisions found at INA §§ 212(a)(3)(A), (B), and (F) (inadmissibility grounds) and 237(a)(4)(A) and (B) (deportability grounds). Note that INA §§ 212(a)(3)(B) and (F) and § 237(a)(4)(B) are terrorism-related inadmissibility and deportability grounds. For additional information on these grounds, refer to the National Security, Part 2 (TRIG) Lesson Plan.

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2.1.3 Mandatory Bars to Asylum

Although inadmissibilities do not apply to asylum adjudications, INA § 208(b)(2)(A) incorporates the security-related inadmissibilities into the analysis of the security-related bars to asylum:

- INA 208(b)(2)(A)(iv) Danger to the Security of the United States
- INA 208(b)(2)(A)(v) Terrorist Activity

2.1.4 Burden and Standard of Proof

The applicant has the burden of proof to establish that he or she is not subject to a security-related bar or inadmissibility. You must evaluate the evidence indicating a security-related bar or inadmissibility by the relevant standard of proof as appropriate for your division's adjudications. A refugee applicant must prove that he or she is "clearly and beyond a doubt entitled to be admitted."[2] In the asylum context, if the evidence indicates that a ground for a mandatory denial or referral exists, then the applicant has the burden of proving by a preponderance of the evidence that the ground does not apply. (See section below: ASM Supplement – 5).

2.1.5 Dependents/Derivatives

Inadmissibilities and bars related to national security also apply independently to any relative who is included in an applicant's request for an immigration benefit. In some instances, though not required, a principal applicant *may* be granted and his or her dependent/derivative denied or referred because the dependent/derivative is inadmissible or barred for a national security-related reason.[3] Generally, if a principal applicant is denied because he or she is inadmissible or subject to a bar, his or her derivatives or dependents are also denied.

2.2 National Security Terminology

2.2.1 Controlled Application Review and Resolution Program (CARRP)

CARRP is the USCIS policy for identifying, evaluating, and processing cases with NS concerns to mitigate threats.

2.2.2 National Security (NS) Concern

An *NS concern* exists when an individual or organization has been determined to have an *articulable link* to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in INA §§ 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or

[2] *See* INA § 235(b)(2)(A); *Matter of Jean*, 23 I&N Dec. 373, 381 (AG 2002).

[3] 8 C.F.R. § 208.21(a); INA § 207(c)(2)(A).

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(B). This includes, but is not limited to, terrorist activity; espionage; sabotage; and the illegal transfer of goods, technology, or sensitive information. The officer should consider the *activities, individuals, and organizations* described in INA §§ 212(a)(3)(A), (B), and (F), and 237(a)(4)(A) and (B) as examples of *indicators* of an NS concern and for determining whether an NS concern exists.[4] This determination requires that the case be handled in accordance with CARRP policy outlined in the memorandum issued April 11, 2008.

2.2.3 National Security Indicator

A national security indicator is preliminary evidence that suggests an activity, characteristic, or association requires further review to evaluate if an NS concern exists in the totality of the circumstances.[5]

2.2.4 Articulable Link

An articulable link exists when you can express, in a few sentences, a *clear connection* between the individual[6] and an activity, individual, or organization described in the relevant INA national security ground of inadmissibility or deportability. [7]

2.2.5 Known or Suspected Terrorist (KST)

KST is a category of individuals who have been nominated and accepted for placement in the ***Terrorist Screening Database (TSDB)***, are on the Terrorist Watch List, and have a specially coded lookout posted in ***TECS***, and/or ***CLASS***.[8] A KST in TECS has a record number beginning with a "P" for person and ending in a "B10," and should indicate that the individual is a "Known Terrorist" or "Suspected Terrorist." [9]

- **TECS**: TECS is a Customs and Border Protection (CBP) computer system containing lookout and wants and warrants from various law enforcement and intelligence agencies.[10]

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[4] Operational Guidance for Vetting and Adjudicating Cases with National Security Concerns, signed by Domestic Operations Acting Associate Director Donald Neufeld, Attachment A - Guidance for Identifying National Security Concerns (April 24, 2008).

[5] *See* Memorandum, Policy for Vetting and Adjudicating Cases with National Security Concerns, Jonathan R. Scharfen, Deputy Director (April 11, 2008).

[6] In this context, "individual" means an applicant, petitioner, beneficiary, or derivative family member. *Id.*

[7] *See id.*

[8] You may also find indications that an individual is a KST in other background, identity, and security check systems.

[9] National Background, Identity, and Security Check Operating Procedures, FDNS, Appendix E: Glossary of Terms - Recently Updated (April 2018) (emphasis added). Note that a B10 hit is not always a KST. B10s with exclusion codes 99 and 50 are non-KSTs.

[10] *Id.*

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- **Consular Lookout and Support System (CLASS)**: CLASS is a system the Department of State uses to initiate biographic checks of all refugee applicants when they are being prescreened by a Resettlement Support Center.

- **Terrorist Screening Database (TSDB)**: An unclassified database that includes many subset watch lists, such as the No-Fly List (individuals who are prohibited from boarding an aircraft) and Selectee List (individuals who must undergo additional security screening before being permitted to board an aircraft).[11]

    - The TSDB houses the consolidated terrorist watch list which is maintained by the **Terrorist Screening Center (TSC).** The TSC was created in September 2003 to consolidate terrorist watch lists and to provide 24/7 operational support for thousands of federal screeners across the country and around the world. The TSC is administered by the FBI.[12]

    - The information in the TSDB is extracted from the classified database, **Terrorist Identities Database Environment (TIDE).** TIDE contains highly classified information provided by members of the Intelligence Community such as the CIA, DIA, FBI, and NSA as well as Law Enforcement Agencies. From this classified database, an unclassified extract is provided to the TSC. This information is then used to compile various watch lists such as the No-Fly list, the State Department's Visa & Passport Database, and the FBI's National Crime Information Center (NCIC) for state and local law enforcement.

        - The **National Counterterrorism Center (NCTC)** evaluates the nominations for the TSDB and enters them into TIDE. The NCTC was established in August 2004 by the President to serve as the primary organization in the United States Government for integrating and analyzing all intelligence pertaining to terrorism and counterterrorism and to conduct strategic operational planning by integrating all instruments of national power. NCTC is a multi-agency organization.

- **National Targeting Center (NTC):** Administered by CBP and performs risk analyses and tactical support for the field in identifying individuals who may pose national security threats at ports of entry and other CBP border checkpoints. The NTC coordinates with many other federal agencies in coordinating anti-terrorism efforts.[13]

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[11] Operational Guidance for Vetting and Adjudicating Cases with National Security Concerns, Donald Neufeld, Acting Associate Director Of Domestic Operations (April 24, 2008).

[12] National Background, Identity, and Security Check Operating Procedures, FDNS, Appendix E: Glossary of Terms - Recently Updated (April 2018).

[13] Operational Guidance for Vetting and Adjudicating Cases with National Security Concerns, Donald Neufeld, Acting Associate Director Of Domestic Operations (April 24, 2008).

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2.2.6 Non-Known or Suspected Terrorist (Non-KST)

Non-KST encompasses all other NS concerns, regardless of source, including but not limited to: associates of KST(s), unindicted co-conspirators, terrorist organization members, persons involved with providing material support to terrorists or terrorist organizations, and agents of foreign governments.[14] Subjects of TECS record numbers beginning with a "P" for person and ending in a "B10" with exclusion codes T50 and T99 are also handled as Non-KSTs.[15]

2.2.7 Fraud Detection and National Security (FDNS) Terminology

- **FDNS Directorate**: fulfills the USCIS mission of enhancing both national security and the integrity of the legal immigration system by: (1) Identifying threats to national security and public safety posed by those seeking immigration benefits; (2) detecting, pursuing, and deterring immigration benefit fraud; (3) identifying and removing systemic vulnerabilities in the process of the legal immigration system; and (4) acting as USCIS's primary conduit for information sharing and collaboration with other governmental agencies.

- **Headquarters FDNS (HQFDNS):** develops and maintains policies and procedures that govern the detection of fraud and threats to national security or public safety in requests for immigration benefits.

- **RAIO FDNS:** program branch at RAIO Headquarters level that works collaboratively with HQFDNS to support the development of RAIO-specific priorities, policies, procedures, and training for RAIO's FDNS operations and help coordinate the work of RAIO's operational divisions and FDNS personnel.

- **Refugee Affairs Division's Security Vetting and Program Integrity (SVPI) Unit:** comprised of blended teams of Refugee and FDNS officers and analysts that assist with vetting operations related to fraud and national security concerns.

- **Asylum FDNS:** comprised of FDNS teams in each of the Asylum Offices and the Asylum Vetting Center, which perform vetting of fraud and national security concerns, and the Asylum FDNS Branch at Asylum Division Headquarters (Asylum HQ) that develops operational guidance and provides technical support to the field.

- **International Operations Division's Programs and Integrity Branch (PIB):** provides policy and operational support and oversight related to fraud detection and national security issues. FDNS officers are assigned to PIB at the headquarters level and to International Operations locations abroad.

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[14] *Id.*

[15] Additional information about how to handle a B10 hit with a T50 or T99 exclusion code is available at Memorandum, Updated Instructions for Handling TECS B10 Records, USCIS Office of the Director (May 23, 2012).

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- **Fraud Detection and National Security Data System (FDNS-DS):** Central repository that permits specially-trained FDNS employees to record, track, and manage the background check and adjudicative processes related to immigration applications and petitions with suspected or confirmed fraud, criminal activity, egregious public safety, and/or national security concerns.[16]

- **Background Check and Adjudicative Assessment (BCAA):** Worksheet generated from FDNS-DS to document the actions taken by FDNS and SVPI officers while conducting the eligibility assessment, internal vetting, external vetting, and deconfliction. The BCAA is used to document national security concerns and track actions taken on applications or petitions where such concerns exist.[17]

- **Request for Assistance (RFA):** Formal request for assistance from the field to HQFDNS in vetting cases with NS concerns. These are tracked in FDNS-DS.

- **Statement of Findings (SOF):** Provided to the field by FDNS officers upon completion of vetting to communicate the results of the investigation to USCIS adjudications.

- **Case Analysis and Threat Summary (CATS)**: A document generated by HQFDNS to notify the field of the results of their classified vetting.

- **Letterhead Memorandum (LHM)**: A written summary of derogatory and/or pertinent information on an individual, prepared by the FBI, as a result of a positive response to the FBI Name Check request. The LHM may be classified or unclassified, and may contain a reference to a third agency which is in possession of pertinent information on the individual.

- **Vetting**: A review of all the information uncovered about an individual. Sources of information can include: systems checks, interviews, open source information, conversations with record owners, and all materials in the A-file.

- **Deconfliction**: The coordination between USCIS and other governmental agencies who own NS information (record owners) to ensure that planned adjudicative activities do not compromise or impede an ongoing investigation or other record owner interest.[18]

[16] *Id.*

[17] *Id.*

[18] Memorandum, Policy for Vetting and Adjudicating Cases with National Security Concerns, Deputy Director Jonathan R. Scharfen (April 11, 2008).

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3 CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM (CARRP)

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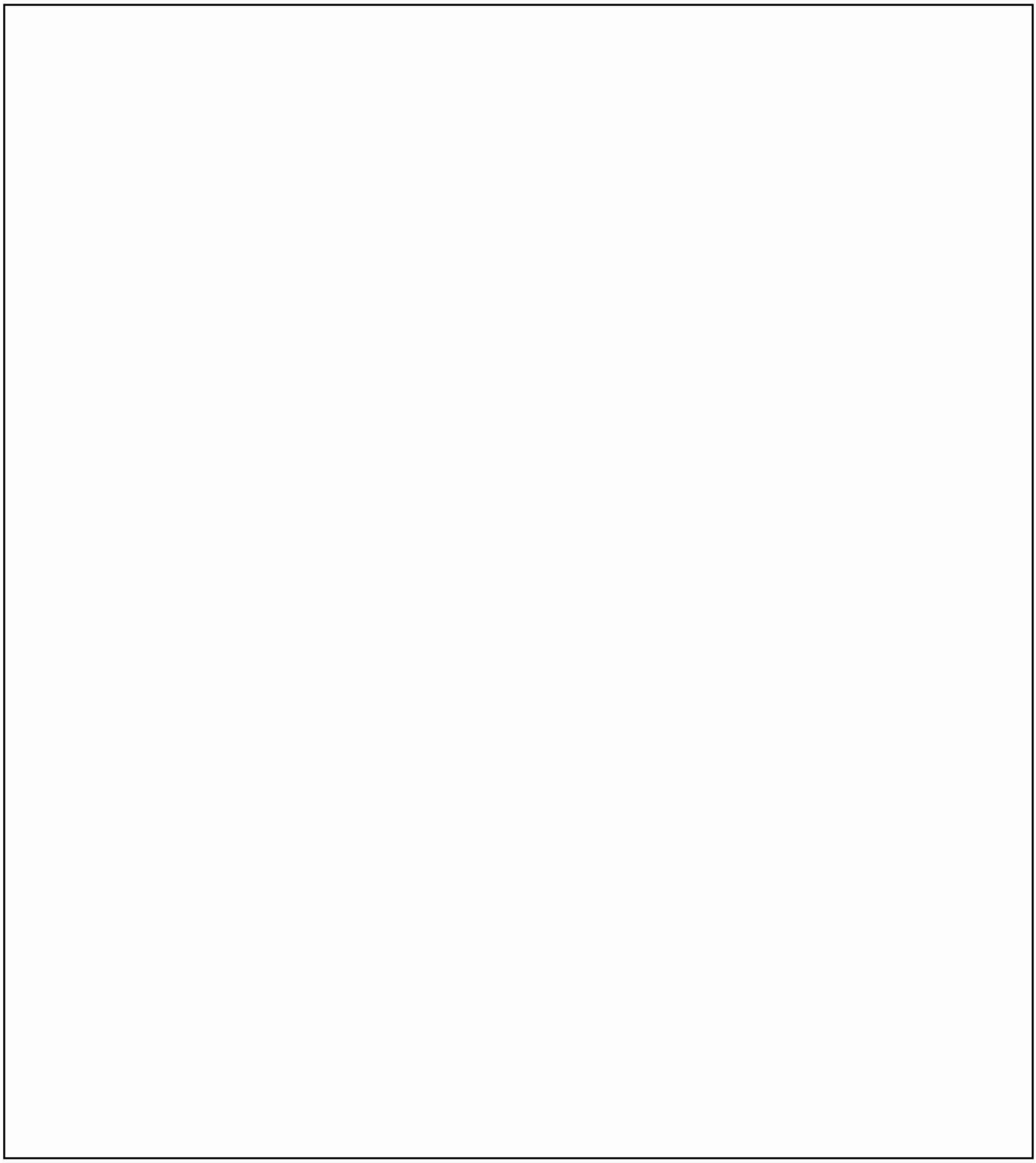
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OTHER MATERIALS

6 RESOURCES

At various points in your interview preparation, red flags may indicate you need to do additional research to make sure you can conduct an informed, thorough interview of a case with potential NS issues. The following resources provide useful information that you should take into consideration when adjudicating cases in which the applicant or a dependent may be barred/inadmissible as an NS concern.

6.1 USCIS Refugee, Asylum and International Operations Research Unit (Research Unit)

The Research Unit's Country of Origin Information (COI) research documents are a primary source of information for officers at RAIO. Research Unit products include specific COI that could be helpful when adjudicating cases involving national security matters. Research Unit products may be accessed through the RAIO Research Unit ECN Page.

In accordance with each Division's established procedures, you may submit queries to the Research Unit (email to RAIOResearch@uscis.dhs.gov) when additional country conditions information is required to reach a decision in a case. Query responses are posted to the RAIO Research Unit ECN page.

6.2 USCIS TRIG ECN

The RAIO TRIG Branch maintains a comprehensive, one-stop shop for resources on TRIG issues on the USCIS TRIG ECN. It includes adjudicator tools, FAQs, exemption resources, guidance documents, research, and more.

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6.3 USCIS Fraud Detection and National Security Directorate

In support of the overall USCIS mission, the Fraud Detection and National Security Directorate (FDNS) was created to enhance the integrity of the legal immigration system, detect and deter benefit fraud, and strengthen national security.

FDNS coordinates the sharing of information and development of policy on the national level regarding fraud and national security. FDNS-IOs assist in the field with internal and external vetting; FDNS HQ is responsible for vetting certain kinds of NS concerns.

FDNS has established a website on the USCIS intranet that includes in the "Department Resources" section links to information on various databases as well as several websites maintained by other organizations. See also RAIO FDNS's ECN.

6.4 Homeland Security Investigations Forensic Laboratory (HSIFL)

The mission of the HSIFL is to provide a wide variety of forensic document analysis and law enforcement support services for DHS.[39]

The HSIFL Forensic Section conducts scientific examinations of documentary evidence and its representatives testify to their findings as expert witnesses in judicial proceedings.

Under the "Alerts" section of the HSIFL site, the HSIFL posts documents alerting officers to specific trends in the use of fraudulent documents including exemplars to assist in determining the authenticity of documents received in the adjudication process. USCIS has a designated liaison located at the HSIFL to facilitate communications between USCIS and HSI.

6.5 Liaison with Other DHS Entities

Other entities within USCIS and DHS provide legal guidance and investigative support for these national security cases. Much of this interaction occurs at the headquarters level, though local offices also engage their ICE counterparts to coordinate action on cases as needed.

[39] Mission Statement, Homeland Security Investigations Forensic Laboratory, ICE Office of Intelligence, *available at* http://www.ice.gov/hsi-fl/.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. Standard Operating Procedure for National Security Concerns in Refugee Cases ("RAD CARRP SOP"), RAD Policy (March 2018).

2. Adjudicative Aid for Cases Involving National Security Indicators and National Security Concerns ("RAD CARRP Lines of Inquiry"), RAD Policy (March 2018).

3. Memorandum, Refugee Affairs Division and International Operations Division Roles and Responsibilities with Respect to Refugee Processing, Barabara Strack (Chief, RAD) and Joanna Ruppel (Chief, IO) (January 6, 2015).

ADDITIONAL RESOURCES

SUPPLEMENTS

RAD Supplement

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. Updated Instructions for Handling TECS B10 Hits, Ted H. Kim, Acting Chief, Asylum Division (June 19, 2012).

2. Asylum Division Identity and Security Checks Procedures Manual (ISCPM), especially Section VIII of the ISCPM regarding Cases Involving Terrorism or Threats to National Security.

3. Asylum Division Affirmative Asylum Procedures Manual (AAPM).

4. Memorandum, Issuance of Revised Section of the Identity and Security Checks Procedures Manual Regarding Vetting and Adjudicating Cases with National Security Concerns (ISCPM) (HQRAIO 120/9.3a), Joseph Langlois, Chief, Asylum Division (May 14, 2008).

ADDITIONAL RESOURCES

1. *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003).

SUPPLEMENTS

ASM Supplement – 1

Use of Discretion when a Bar Does Not Apply

There may be some cases involving a national security matter in which facts fall short of a mandatory bar to asylum but nonetheless warrant the denial or referral of the

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asylum application as a matter of discretion, even if the applicant has established refugee status.[40]

Asylum officers must bear in mind that the sound exercise of discretion requires a balancing of the fact that the applicant qualifies as a refugee, along with any other positive factors, against any negative factors presented in the case.[41] This should be reflected in the assessment.

The likelihood of future persecution is an important factor in the exercise of discretion. A reasonable possibility of future persecution weighs heavily in favor of exercising discretion to grant asylum. The BIA has held that "the danger of persecution should generally outweigh all but the most egregious of adverse factors."[42] All discretionary denials and referrals are submitted to Asylum HQ for review. Please see RAIO Discretion Lesson Plan for further guidance.

ASM Supplement – 2

Note Taking – National Security

Asylum Division procedures require that officers take notes in a sworn statement format when:

- There are serious reasons for considering the applicant a threat to national security

The use of the sworn statement is crucial because an applicant's admission may be used as a basis to institute deportation or removal proceedings against him or her, or as a basis for DHS to detain the applicant.

[40] *See* 8 C.F.R. § 208.14(b); *Matter of H-*, 21 I&N Dec. 337, 347 (BIA 1996); *Matter of A-H-*, 23 I&N Dec. 774, 780 (AG 2005) [discretionary denial upheld where applicant had evaded U.S. taxes and had connections to FIS in Algeria and Islamic groups that committed human rights violations]; *Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir. 2004) [holding that all relevant favorable and adverse factors must be considered and weighed, and that "a factor that falls short of the ground of mandatory denial is not for that reason alone excluded from consideration as an adverse factor for the discretionary, entitlement prong."].

[41] *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987); *Matter of H-*, 21 I&N Dec. at 347-48.

[42] *Matter of Pula*, 19 I&N Dec. at 474; *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996).

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For further explanation and requirements, see RAIO Module, *Interviewing - Note-Taking*, including the Asylum Supplement and see the Affirmative Asylum Procedures Manual (AAPM).

ASM Supplement – 3

KST Handling Requirements

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ASM Supplement – 4

Cases Requiring HQASM Review

ASM Supplement – 5

Burden and Standard of Proof

If the evidence indicates that a ground for a mandatory denial or referral exists, then the applicant has the burden of proving by a preponderance of the evidence that the ground does not apply. A fact is established by a preponderance of the evidence, if the adjudicator finds, upon consideration of all of the evidence, that it is more likely than not that the fact is true (in other words, there is more than a 50% chance that the fact is

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true). For further guidance on mandatory bars, see the Mandatory Bars to Asylum lesson plan.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. Memorandum, Guidance for International Operations Division on the Vetting, Deconfliction, and Adjudication of Cases with National Security Concerns, Alanna Ow, Acting Chief, International Operations (April 28, 2008) and Attachment A – Guidance for Identifying National Security Concerns.

2. Memorandum, Processing of Refugee Cases with National Security Concerns, Barbara Strack (Chief, RAD) and Joanna Ruppel (Chief, IO) (November 19, 2008).

3. Memorandum, Refugee Affairs Division and International Operations Division Roles and Responsibilities with Respect to Refugee Processing, Barabara Strack (Chief, RAD) and Joanna Ruppel (Chief, IO) (January 6, 2015).

ADDITIONAL RESOURCES

1. Memorandum, Updated Background Identity and Security Check Requirements for Refugee/Asylee Following-to Join Processing, Joanna Ruppel, Chief, International Operations (March 29, 2011).

SUPPLEMENTS

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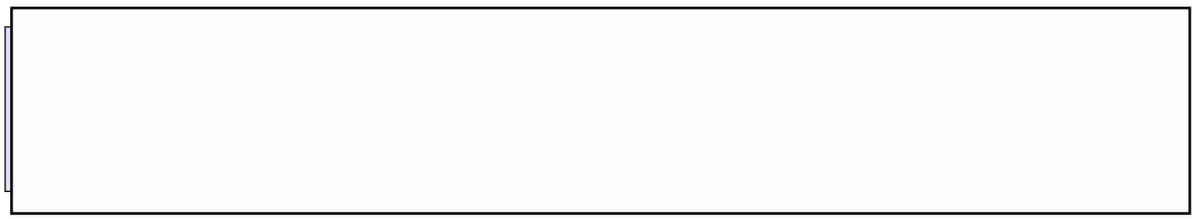
IO Supplement -1

13.1 The CARRP Process

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

NATIONAL SECURITY, PART 2: TERRORISM-RELATED INADMISSBILITY GROUNDS (TRIG)

TRAINING MODULE

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RAIO Directorate – Officer Training / *RAIO Combined Training Program*

NATIONAL SECURITY, PART 2: TERRORISM-RELATED INADMISSBILITY GROUNDS (TRIG)

TRAINING MODULE

MODULE DESCRIPTION:

This module provides an overview of the terrorism-related inadmissibility grounds (TRIG) and their impact on RAIO adjudications.

TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing and adjudicating cases, you (the officer) will identify terrorism-related inadmissibility grounds (TRIG) indicators, elicit all relevant information from an applicant to correctly determine if the applicant is subject to a TRIG or mandatory bars, where appropriate determine whether an exemption is available, document your findings in the file appropriately, and make a legally sufficient final decision.

ENABLING PERFORMANCE OBJECTIVE(S)

1. Properly identify designated terrorist organizations ("Tier I" and "Tier II"), and analyze whether a group meets the definition of an undesignated terrorist organization ("Tier III").
2. Apply the INA § 212(a)(3)(B) TRIG inadmissibility grounds/bars.
3. Apply statutory exceptions to TRIG.
4. Explain the exemptions available for TRIG.
5. Analyze the facts and relevant law to make a legally sufficient decision in a case involving TRIG.

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INSTRUCTIONAL METHODS

- Interactive presentation
- Discussion
- Practical exercises

METHOD(S) OF EVALUATION

- Multiple-choice exam
- Observed practical exercises

REQUIRED READING

1. INA § 212(a)(3)(B).

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. See USCIS TRIG ECN site for memos, legal guidance, legislation and other adjudicative resources.
2. Memorandum, Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds, Michael L. Aytes, Acting Deputy Director (July 28, 2008).
3. See USCIS TRIG ECN Home Page for TRIG Exemption Worksheet.
4. Memorandum, Collecting Funds from Others to Pay Ransom to a Terrorist Organization, Dea Carpenter, Deputy Chief Counsel (February 6, 2008).
5. *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006).
6. Nicholas J. Perry, *The Breadth and Impact of the Terrorism-Related Grounds of Inadmissibility of the INA*, 06-10 Immigr. Briefings 1, Oct. 2006.

Division-Specific Additional Resources - Refugee Division

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Division-Specific Additional Resources - Asylum Division

CRITICAL TASKS

Task/ Skill #	Task Description
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR13	Knowledge of inadmissibilities (4)
ILR23	Knowledge of bars to immigration benefits (4)
ILR27	Knowledge of policies and procedures for terrorism-related grounds of inadmissibility (TRIG) (4)
IRK2	Knowledge of the sources of relevant country conditions information (4)
IRK13	Knowledge of internal and external resources for conducting research (4)
TIS2	Knowledge of the USCIS TRIG ECN (4)
RI3	Skill in conducting research (e.g., legal, background, country conditions) (4)
RI9	Skill in identifying inadmissibilities and bars (4)
RI10	Skill in identifying national security issues (4)
DM2	Skill in applying legal, policy, and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
RI6	Skill in identifying information trends and patterns (4)
RI11 OK9	Skill in handling, protecting, and disseminating information (e.g., sensitive and confidential information)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
10/26/2015	Throughout document	Updated broken links and citations; added new TRIG exemptions; minor formatting changes; added new case law	RAIO Training, RAIO TRIG Program
10/22/2018	Throughout document	Separated TRIG and National Security Lesson Plans; streamlined TRIG sections; added updated case law and policy guidance; fixed links.	RAIO Training; RAIO TRIG Branch
07/22/2019	Throughout document	Corrected minor typos and formatting issues.	RAIO Training

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION 73

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

This lesson plan covers the relevant law regarding the terrorism-related inadmissibility grounds (TRIG) as they pertain to RAIO adjudications. In doing so, this lesson plan provides the information you need to understand TRIG, identify cases with TRIG issues, and properly adjudicate and process them.

2 TRIG OVERVIEW

The INA prohibits granting most immigration benefits to individuals with certain associations with terrorist organizations or who have engaged in certain types of activities. Refugee Officers and International Adjudications Officers encounter these prohibitions directly through the terrorism-related inadmissibility grounds codified at section 212(a)(3)(B) of the Immigration and Nationality Act (INA). Depending upon how an asylum applicant entered the United States, an asylum applicant may be subject to either the section 212 inadmissibility provisions or the section 237 deportability provisions, which incorporate the TRIG provisions by reference. Although an asylum applicant is generally not required to be found admissible to establish eligibility for a grant of asylee status, the mandatory bar to asylum found at INA § 208(b)(2)(A)(v) also incorporates the TRIG provisions by reference, making all of the section 212(a)(3)(B) terrorism-related inadmissibility grounds mandatory bars to asylum. Therefore, this lesson plan focuses on the TRIG provisions codified at INA § 212(a)(3)(B).

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USCIS's mission includes protecting the integrity of the U.S. immigration system, which requires careful consideration of TRIG matters. As part of the determination of statutory eligibility for an immigration benefit, you must examine each case for TRIG issues and determine whether a TRIG bar or inadmissibility applies.

3 IDENTIFYING TRIG ISSUES

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4 INTERVIEWING CONSIDERATIONS AND PREPARATION (b)(7)(e)

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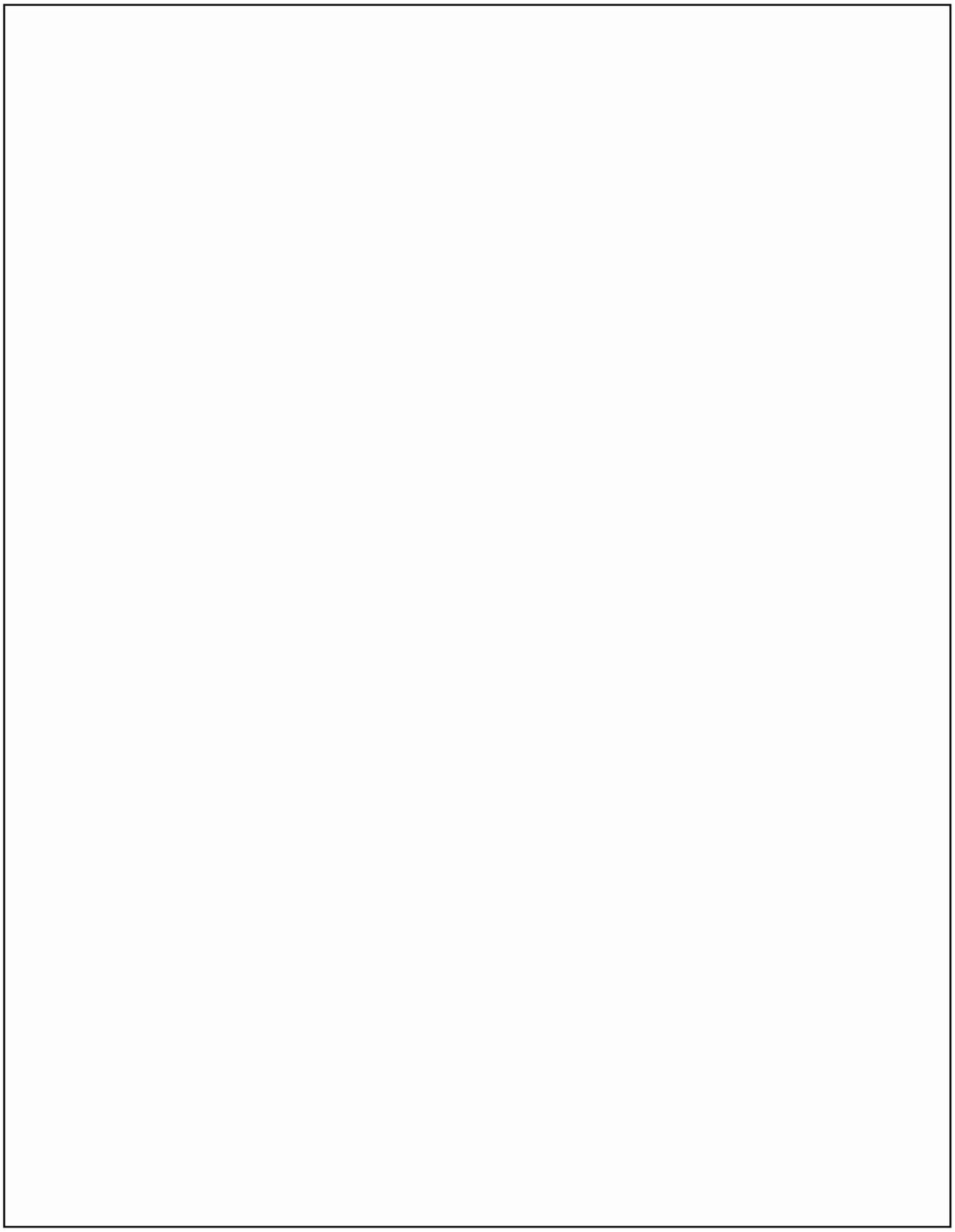
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5 THE TERRORISM-RELATED INADMISSIBILITY GROUNDS (TRIG)

As previously noted, the terrorism-related inadmissibility grounds are found at INA § 212(a)(3)(B). This section has a long and complex history, and is the subject of various policy memoranda and determinations by executive branch agencies, as well as decisions by the courts. Because of this complexity, and because TRIG touches upon issues of national security, foreign relations, and interagency cooperation, it is vital for you to properly identify and adjudicate TRIG issues. The purpose of this section is to familiarize you with TRIG generally, so that you can identify TRIG issues in the context of RAIO adjudications. After having done so, you will know how to fully develop the factual record and to properly analyze and adjudicate any applicable TRIG issues.

This lesson plan will first explore the INA definition of a "terrorist organization."

6 TRIG – "TERRORIST ORGANIZATION" DEFINED

Many of the general terrorism-related inadmissibility grounds refer to "terrorist organizations." There are three categories, or "tiers," of terrorist organizations defined in the INA.[6] These three tiers are explained below.

[6] INA § 212(a)(3)(B)(vi).

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6.1 Categories or "Tiers" of Terrorist Organizations

- **Tier I (Foreign Terrorist Organizations (FTO)):**[7] a foreign organization designated by the Secretary of State under INA § 219 after a finding that the organization engages in terrorist activities or terrorism. In addition, pursuant to legislation, the Taliban is considered to be a Tier I organization for purposes of INA § 212(a)(3)(B);[8]

- **Tier II (Terrorist Exclusion List (TEL)):**[9] an organization otherwise designated by the Secretary of State as a terrorist organization, after finding that the organization engages in terrorist activities; or

- **Tier III ("Undesignated" Terrorist Organizations):**[10] a group of two or more individuals, whether organized or not, that engages in, or has a subgroup[11] that engages in terrorist activities. (The definition of "engage in terrorist activity" is found at INA § 212(a)(3)(B)(iv) and is discussed below.)

The first two categories of terrorist organizations are straightforward, and easily referenced on State Department websites (noted below). The third category is the most commonly encountered in USCIS adjudications, and it is not listed anywhere, as it is the activities of a group that bring it within the definition of a Tier III terrorist organization.

6.2 Foreign Terrorist Organization Designation under INA § 219 (Tier I)

6.2.1 Authority

Under INA § 219, the Secretary of State is authorized to designate an organization as a foreign terrorist organization. The Secretary of State is required to notify congressional leaders in advance of making such a designation.[12]

The designation does not become effective until its publication in the *Federal Register*, and the designation will remain effective until revoked by an act of Congress or by the Secretary of State.

---

[7] INA § 212(a)(3)(B)(vi)(I). For more information, see Section 6.2, below: Foreign Terrorist Organization Designation under INA § 219 (Tier I).

[8] Consolidated Appropriations Act, 2008 (CAA), Pub. L. 110-161, 121 Stat. 1844, Division J, Title VI, § 691(d) (Dec. 26, 2007).

[9] INA § 212(a)(3)(B)(vi)(II). For more information, see Section 6.3, below: Terrorist Exclusion List (Tier II).

[10] INA § 212(a)(3)(B)(vi)(III). For more information, see Section 6.4, below: Undesignated Terrorist Organizations.

[11] *See* Department of State guidance on what constitutes a subgroup, 9 FAM 302.6-2(B)(3)(h).

[12] INA § 219(a)(2)(A)(i).

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6.2.2 Definition

The Secretary of State is authorized to designate an organization as a terrorist organization if the Secretary finds that:

- The organization is a foreign organization;
- The organization engages in terrorist activity (as defined in INA § 212(a)(3)(B)) or terrorism (as defined in 22 U.S.C. § 2656f(d)(2)), or retains the capability and intent to engage in terrorist activity or terrorism[13]; and
- The terrorist activity or terrorism of the organization threatens the security of U.S. nationals or the national security of the United States.[14]

6.2.3 Organizations Currently Designated as Foreign Terrorist Organizations (FTOs)[15]

On October 8, 1997, the Secretary of State published the first list of Tier I terrorist organizations in the *Federal Register*. Most of the organizations were re-designated in October 1999 and October 2001. The Secretary of State has also designated groups as terrorist organizations in separate *Federal Register* Notices each year since 1999.

Foreign terrorist organizations designated by the Secretary of State include, among others, al-Qa'ida, Boko Haram, Communist Party of the Philippines/New People's Army (CPP/NPA), Basque Homeland and Freedom (ETA), Hamas, Hizballah, the Islamic State of Iraq and the Levant (ISIL, ISIS, or IS), Liberation Tigers of Tamil Eelam (LTTE), Revolutionary Armed Forces of Colombia (FARC), and Shining Path.

The current FTO list can be found on the Department of State Bureau of Counterterrorism's homepage at https://www.state.gov/j/ct/list/index.htm. You should check this site on a regular basis for the most current version of the list as additional organizations may be designated at any time.

The Taliban is not listed as an FTO on the State Department's website because it was not designated by the State Department under INA § 219. Rather, under § 691(b) of the

[13] *See* *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1243-1244 (D.C. Cir. 2003) (finding that an organization's admission to participation in attacks on government buildings and assassinations was sufficient to support a finding that the group was engaged in "terrorist activity.")

[14] INA § 219(a)(1).

[15] *See* U.S. Department of State, Office of Counterterrorism, Fact Sheet: Foreign Terrorist Organization Designation (Washington, DC, September 1, 2010).

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Consolidated Appropriations Act, 2008, Congress provided that the Taliban shall be considered to be a Tier I terrorist organization.[16]

6.3 Terrorist Exclusion List (Tier II)

6.3.1 Authority

The USA PATRIOT Act added, and the REAL ID Act amended, two additional categories of "terrorist organizations" to INA § 212.[17] The Secretary of State, in consultation with or upon the request of the Secretary of Homeland Security or the Attorney General, may designate as a terrorist organization an organization that "engages in terrorist activity" as described in INA § 212(a)(3)(B)(iv)(I-VI). Unlike Tier I organizations, there is no requirement that the organization endanger U.S. nationals or U.S. national security.

The Terrorist Exclusion List (TEL) designation is effective upon publication in the *Federal Register*. The organizations that have been designated through this process are referred to collectively as the "Terrorist Exclusion List."

6.3.2 Organizations Currently Designated on the Terrorist Exclusion List (Tier II)

There are 58 organizations currently designated as terrorist organizations under INA § 212(a)(3)(B)(vi)(II).

The Department of State maintains the Terrorist Exclusion List at: https://www.state.gov/j/ct/rls/other/des/123086.htm. However, while organizations may be removed from the list, the Department of State is no longer adding organizations to this list.

6.4 Undesignated Terrorist Organizations (Tier III)

Any group of two or more individuals may constitute a "terrorist organization" under the INA even if not designated as such under INA § 219 or listed on the TEL, if they meet the requirements below.

6.4.1 Definition

Under INA § 212(a)(3)(B)(vi)(III), a group of two or more individuals, whether organized or not, meets the definition of a "terrorist organization" if the group engages in terrorist activity, or has a subgroup that engages in terrorist activity.

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[16] Consolidated Appropriations Act, 2008, *supra*, note 8. The Taliban is the only group to date that Congress has stated shall be considered as a Tier I terrorist organization and the only one that does not appear on the FTO list.

[17] INA § 212(a)(3)(B)(vi)(II) (created by § 411(a)(1)(G) of the USA PATRIOT Act of 2001, and amended by § 103(c) of the REAL ID Act).

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For example, looking to the definitions contained in the INA of "engaging in terrorist activity" and "terrorist activity," an organization meets the definition of a terrorist organization if it illegally uses explosives, firearms, or other weapons (other than for mere personal monetary gain), with intent to endanger the safety of individuals or to cause substantial damage to property. This broad definition covers most armed resistance groups and makes no exceptions for groups aligned with U.S. interests.[18] Note that there is no exception for groups using "justifiable" force. In *Matter of S-K-*, the BIA rejected the applicant's argument that there is an exception to the "terrorist organization" definition for groups that use justifiable force to repel attacks by forces of an illegitimate regime. The BIA's review of the statutory language led it to conclude "that Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters,' and it did not intend to give [the BIA] discretion to create exceptions for members of organizations to which our Government might be sympathetic."[19] Similarly, in *Khan v. Holder*, the U.S. Court of Appeals for the Ninth Circuit considered and rejected the applicant's argument that the statute contains an exception for organizations that use force against military targets that is permitted under the international law of armed conflict.[20]

On the other hand, organizations whose violent activities include the use of weapons or dangerous devices solely for mere personal monetary gain fall within the statutory exception at INA § 212(a)(3)(B)(iii)(V)(b).

According to guidance from the Department of State, a group is a "subgroup" of another organization if there are reasonable grounds to believe that either the group as a whole or its members are affiliated with the larger group, and the group relies upon the larger group, in whole or in part, for support or to maintain its operations. If there is such a relationship, and the subgroup engages in terrorist activity, then both groups are terrorist organizations.[21]

However, the U.S. Court of Appeals for the Third Circuit has held that an entity may not be deemed a Tier III terrorist organization unless its leaders authorized terrorist activity commited by its members.[22] Evidence of authorization may be direct or circumstantial,

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[18] INA §§ 212(a)(3)(B)(iii) and (iv); *see Matter of S-K-*, 23 I&N Dec. 936, 940 (BIA 2006) (declining to adopt a "totality of circumstances" test to the question of whether a group is engaged in "terrorist activity."); *see also* Sections 7.2 and 7.3, below: "Terrorist Activity" Defined and "Engaging in Terrorist Activity" Defined.

[19] *Matter of S-K-*, 23 I&N Dec. at 941 (upholding the IJ's determination that the Chin National Front, an armed organization that uses land mines in fighting against the Burmese government, met the INA definition of an undesignated terrorist organization).

[20] *Khan v. Holder*, 584 F.3d 774, 784-785 (9th Cir. 2009).

[21] *See* 9 FAM 302.6-2(B)(3)(h).

[22] *Uddin v. Attorney General*, 870 F.3d 282, 289-90 (3rd Cir. 2017). The ruling in *Uddin* involved a group which is a major political party in the country at issue, and which does not have an armed wing. However, significant political violence in the country at issue is common, and multiple political parties in that country are implicated in violent

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and authorization may be reasonably inferred from, among other things, the fact that most of an organization's members commit terrorist activity or from a failure of a group's leadership to condemn or curtail its members' terrorist acts.[23] Similarly, the U.S. Court of Appeals for the Seventh Circuit has noted that an organization is not a terrorist organization simply because some of its members have engaged in terrorist activity "without direct or indirect authorization."[24] The activity must be "authorized, ratified, or otherwise approved or condoned by the organization" in order for the organization to be considered to have engaged in terrorist activity.[25]

6.5 Groups Excluded from the Tier III Definition by Statute

As a result of the broad reach of the statute and its application to groups that are sympathetic to the United States or that have previously assisted the United States, Congress enacted section 691(b) of the Consolidated Appropriations Act, 2008 (CAA). The CAA stated that the following groups *shall not be considered to be terrorist organizations* on the basis of any act or event occurring *before* December 26, 2007:[26]

- Karen National Union/Karen National Liberation Army (KNU/KNLA)
- Chin National Front/Chin National Army (CNF/CNA)
- Chin National League for Democracy (CNLD)
- Kayan New Land Party (KNLP)
- Arakan Liberation Party (ALP)
- Tibetan Mustangs
- Cuban Alzados (groups opposed to the Communist government of Cuba)
- Karenni National Progressive Party (KNPP)

activity carried out by members. The nature of the group at issue in *Uddin* likely influenced the court's ruling. The issue of authorization will be less problematic with a group whose aims clearly included the use of violence, such as a group which was largely made up of individuals who engaged in combat, or a group which had an armed wing.

[23] *Uddin*, 870 F.3d at 292. The court noted that conclusive proof that the leaders of a group explicitly sign off on each individual terrorist act at issue is not required.

[24] *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008).

[25] *Id.*

[26] Consolidated Appropriations Act, 2008, *supra*, note 8, § 691(b).

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- appropriate groups affiliated with the Hmong[27]
- appropriate groups affiliated with the Montagnards (includes the Front Unifié de Lutte des Races Opprimées (FULRO))[28]
- African National Congress (ANC)[29]

(Hereinafter, this list will be referred to as the "CAA groups" in this lesson plan.)

In December 2014, Congress enacted section 1264 of the National Defense Authorization Act (NDAA) for Fiscal Year 2015, which provides that two major Kurdish political parties in Iraq are excluded from the definition of "terrorist organization":[30]

- Kurdish Democratic Party (KDP)
- Patriotic Union of Kurdistan (PUK)

The NDAA provision is not time-limited. As a result, unlike the CAA groups, the KDP and the PUK are not considered to be terrorist organizations for activities occurring *at any time*.

In August 2018, Congress enacted the John S. McCain National Defense Authorization Act for Fiscal Year 2019.[31] Pursuant to the 2019 NDAA, the Rwandan Patriotic Front (RPF)/Rwandan Patriotic Army (RPA) are excluded from the definition of an undesignated (Tier III) terrorist organization for any period before August 1, 1994, and INA § 212(a)(3)(B) shall not apply to an alien with respect to any activity by the alien in association with the RPF/RPA before August 1, 1994. Thus, there is no time period during which RPF/RPA is considered a Tier III organization.

6.5.1 Discretionary Exemption Provision for Terrorist Organizations

The INA provides the Secretaries of State and Homeland Security, in consultation with the Attorney General and each other, the authority to conclude, in their sole and unreviewable discretion, that an organization will not be considered a terrorist organization under INA § 212(d)(3)(B)(i). However, the Secretary of Homeland Security

[27] Appropriate groups may be established through country condition reports to show that a subgroup is affiliated with the Hmong or Montagnards. *See also* Exercises of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, October 5, 2007 (FULRO and Hmong).

[28] Consolidated Appropriations Act, 2008, *supra*, note 8, § 691(b).

[29] On July 1, 2008, Congress amended the CAA to add the African National Congress. Pub. L. no. 110-257.

[30] National Defense Authorization Act for Fiscal Year 2015, Pub. L. no. 113-291, 128 Stat. 3292, § 1264(a)(1) (2014).

[31] John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. no. 115-232, 132 Stat. 1636 (Aug. 13, 2018).

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may not exempt a group from the definition of an undesignated terrorist organization if the group:

- engaged in terrorist activity against the United States;
- engaged in terrorist activity against another democratic country; or
- has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians.

To date, this authority *has not* been exercised. However, as explained in Section 9 below, TRIG Exemption Authority, the Secretary of Homeland Security *has* exercised the authority not to apply certain *provisions* of INA § 212(a)(3)(B) to individual aliens based on specific activities or associations with certain groups.

6.5.2 Recognized Foreign Governments Not Considered Tier III Organizations

As a general matter, INA § 212(a)(3)(B) does not apply to activity of a recognized and duly constituted foreign government within the definition of "terrorist activity" or "engaging in terrorist activity." Political parties that participate in or have representation in a government are not considered synonymous with the government of a country for purposes of this determination.

Also, entities in *de facto* control of an area are not recognized as the government of that area for the purposes of TRIG.

If you have questions as to whether an entity should be considered the government for purposes of this determination or other questions related to this issue, please contact your supervisor for referral of the issue to the TRIG point of contact (POC) for your Division.

7 TERRORISM-RELATED INADMISSIBILITY GROUNDS

7.1 Statute – INA §212(a)(3)(B)(i) – The Inadmissibility Grounds

The terrorism-related inadmissibility grounds (TRIG) are found at INA § 212(a)(3)(B)(i) and are described in detail below. The terrorism related deportability ground at INA § 237(a)(4)(B), as amended by the REAL ID Act of 2005, incorporates all of the terrorism-related inadmissibility grounds at INA § 212(a)(3)(B) and INA § 212(a)(3)(F) (related to association with terrorist organizations and an intent while in the United States to engage

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in activities that could endanger the welfare, safety or security of the United States).[32] Therefore, these grounds of inadmissibility are also grounds of deportability.[33]

The terrorism-related grounds of inadmissibility under INA § 212(a)(3)(B) apply to an alien who:

I. Has engaged in terrorist activity – INA § 212(a)(3)(B)(i)(I);[34]

II. A consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity – INA § 212(a)(3)(B)(i)(II);

III. Has, under any circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity – INA § 212(a)(3)(B)(i)(III);[35]

IV. Is a [current] representative[36] of – INA § 212(a)(3)(B)(i)(IV):

(aa) A terrorist organization (as defined in INA §212(a)(3)(B)(vi)) – INA § 212(a)(3)(B)(i)(IV)(aa);[37] or

(bb) A political, social, or other group that endorses or espouses terrorist activity – INA § 212(a)(3)(B)(i)(IV)(bb);[38]

V. Is a [current] member of a Tier I or II terrorist organization – INA § 212(a)(3)(B)(i)(V);[39]

VI. Is a [current] member of a Tier III terrorist organization, unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and

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[32] INA § 212(a)(3)(F) requires consultation between DHS (given this authority under the Homeland Security Act of 2002) and the Department of State. Therefore USCIS rarely applies this ground of inadmissibility.

[33] INA § 237(a)(4)(B) ("Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.") (codified at 8 U.S.C. § 1227(a)(4)(B)).

[34] *See* Sections 7.2 and 7.3, below: "Terrorist Activity" Defined and "Engaging in Terrorist Activity" Defined.

[35] *See* 9 FAM 302.6-2(B)(3)(f).

[36] For purposes of the terrorist provisions in the INA, "representative" is defined as "an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity." INA § 212(a)(3)(B)(v).

[37] *See* Section 6, above: "Terrorist Organization" Defined.

[38] Note that this ground of inadmissibility is written in the present tense but that prior representation raises the possibility that this ground, or other grounds of inadmissibility, may apply.

[39] INA § 237(a)(4)(B); *see* Section 6, above: "Terrorist Organization" Defined. Note: The Taliban should be considered a Tier I terrorist organization pursuant to Section 691(d) of the Consolidated Appropriations Act, 2008.

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should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(i)(VI).[40]

NOTE: Several factors may be considered in determining whether an applicant is a member of a terrorist organization. Facts that would support a determination that an applicant is a member would include, but are not limited to:

- Acknowledgment of membership by applicant;
- Frequent association with other members;
- Participation in the organization's activities, even if lawful;
- Actively working to further the organization's aims and methods in a way that suggests close affiliation constituting membership;
- Occupying a position of trust in the organization, past or present;
- Receiving financial support from the organization, e.g., scholarships, pensions, salary;
- Contributing money to the organization;
- Determination of membership by a competent court;
- Voluntarily displaying symbols of the organization; or
- Receiving honors and awards given by the organization.[41]

An applicant is not required to have been formally inducted into an organization to be considered a member. While only current membership is a basis for inadmissibility under this provision, an alien's past links to an organization, such as those listed above, may help determine the alien's current status. If you can conclude that the alien was a member in the past, and there is no evidence that the membership has been terminated, you should explore current membership.

Termination of membership usually will be shown by changes in the person's attitudes, actions, associations, and activities over time and can be established by credible testimony alone.[42]

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[40] *See* Section 6, above: "Terrorist Organization" Defined.

[41] 9 FAM 302.6-2(B)(3)(e).

[42] *Id.*; *see also* *Viegas v. Holder*, 699 F.3d 798, 804 (4th Cir. 2012).

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It is important to keep in mind that an applicant whose membership has been terminated may still be inadmissible for having provided material support to the organization or having solicited funds or members for the organization.[43]

For additional guidance, please refer to the Lines of Inquiry adjudicator tool, available on the USCIS TRIG ECN.

VII. Endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization – INA § 212(a)(3)(B)(i)(VII);[44]

VIII. Has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization – INA § 212(a)(3)(B)(i)(VIII);

- "Military-type training" is defined at 18 U.S.C. § 2339D(c)(1) to include: "training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction . . . "[45]

- **NOTE**: On January 7, 2011, the Secretary exercised her discretionary authority under INA § 212(d)(3)(B)(i) to exempt individuals who have received military-type training ***under duress*** from the application of this ground of inadmissibility.[46]

IX. Is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years – INA § 212(a)(3)(B)(i)(IX)[47];

To qualify as a "child," the individual must be unmarried and under 21 years of age.

NOTE: This ground only applies to current spouses and does not apply if the applicant is divorced from the TRIG actor or if the TRIG actor is deceased.

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[44] See Section 7.3, below: "Engage in Terrorist Activity" Defined.

[44] Note that this ground, unlike INA § 212(a)(3)(B)(i)(III), *does not* require that the statements be made under circumstances indicating an intention to cause death or serious bodily harm.

[45] 18 U.S.C. § 2339D(c)(1).

[46] *See* 76 Fed. Reg. 14418-01 (March 16, 2011) and Section 9.4.1, below: Situational Exemptions – Duress-Based.

[47] In addition, under this provision, an alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization (PLO) is considered to be *engaged in terrorist activity.*

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EXCEPTION: The provision above does not apply to a spouse or child – INA § 212(a)(3)(B)(ii):

- who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or
- whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

7.2 "Terrorist Activity" Defined

Many of the terrorism-related inadmissibility grounds under INA § 212(a)(3)(B)(i) refer to "terrorist activity" or "engaging in terrorist activity." Terrorist activity and engaging in terrorist activity are separately defined at INA §§ 212(a)(3)(B)(iii) and (iv), respectively.

"Terrorist activity" is defined as any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

- The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle) – INA § 212(a)(3)(B)(iii)(I);
- The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained – INA § 212(a)(3)(B)(iii)(II);
- A violent attack on an internationally protected person or upon the liberty of such person– INA § 212(a)(3)(B)(iii)(III);

  An "internationally protected person" is defined by statute as:

  - a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or
  - any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization, who at the time and place concerned is entitled pursuant to international law to special protection against attack on his person, freedom, or dignity, and any member of his family then forming part of his household;[48]

[48] 18 U.S.C. § 1116(b)(4).

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- An assassination – INA § 212(a)(3)(B)(iii)(IV);
- The use of any – INA § 212(a)(3)(B)(iii)(V):
  - Biological, chemical, or nuclear weapon – INA § 212(a)(3)(B)(iii)(V)(a); or
  - Explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain) – INA § 212(a)(3)(B)(iii)(V)(b);

  With intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property;
- A threat, attempt, or conspiracy to do any of the above – INA § 212(a)(3)(B)(iii)(VI).

7.3 "Engage in Terrorist Activity" Defined

"Engaging in terrorist activity" means, in an individual capacity or as a member of an organization:

- To commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity – INA § 212(a)(3)(B)(iv)(I);
- To prepare or plan a terrorist activity – INA § 212(a)(3)(B)(iv)(II);
- To gather information on potential targets for terrorist activity – INA § 212(a)(3)(B)(iv)(III);
- To solicit funds or other things of value for – INA § 212(a)(3)(B)(iv)(IV):
  - a terrorist activity – INA § 212(a)(3)(B)(iv)(IV)(aa);
  - a Tier I or Tier II terrorist organization – INA § 212(a)(3)(B)(iv)(IV)(bb);[49] or
  - a Tier III (undesignated) terrorist organization, unless the solicitor can demonstrate by clear and convincing evidence that he or she did not know, and should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(iv)(IV)(cc);[50]

    NOTE: *Collecting* funds or other items of value from others in order to pay ransom to a terrorist or a terrorist organization, in order to obtain the release of a third person, does not constitute solicitation of funds for a terrorist activity or for

[49] Referring to terrorist organizations described in INA § 212(a)(3)(B)(vi)(I) and (II).

[50] Referring to terrorist organizations described in INA § 212(a)(3)(B)(vi)(III).

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an organization. However, payment of ransom to a terrorist organization generally has been considered to fall under the material support ground of inadmissibility (discussed below).[51]

- To solicit any individual:
  - To engage in conduct otherwise described as engaging in terrorist activity – INA § 212(a)(3)(B)(iv)(V)(aa);
  - for membership in a Tier I or Tier II terrorist organization – INA § 212(a)(3)(B)(iv)(V)(bb); or
  - for membership in a Tier III (undesignated) terrorist organization, unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(iv)(V)(cc); or
- To commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds, or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training – INA § 212(a)(3)(B)(iv)(VI):
  - For the commission of a terrorist activity – INA § 212(a)(3)(B)(iv)(VI)(aa);
  - To any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity – INA § 212(a)(3)(B)(iv)(VI)(bb);
  - To a Tier I or Tier II terrorist organization – INA § 212(a)(3)(B)(iv)(VI)(cc);
  - To a Tier III (undesignated) terrorist organization (a group of two or more individuals which engages in or has a subgroup that engages in terrorist activity), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(iv)(VI)(dd).

Guidance on Self-Defense: USCIS interprets INA § 212(a)(3)(B) not to include **lawful** actions taken in self-defense under threat of imminent harm, provided the action was considered lawful under the law of the country where it occurred, **and** under U.S. federal and state laws. The analysis is complicated and requires research of foreign laws. If you

[51] Memorandum, Collecting Funds from Others to Pay Ransom to a Terrorist Organization, Dea Carpenter, USCIS Deputy Chief Counsel, to Lori Scialabba, RAIO Associate Director (Feb. 6, 2008).

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have a case in which the self-defense exception may apply, please contact your Division POC for TRIG-related issues. If this issue arises during your interview, you should elicit as much detail as possible about the incident in question, including what kind of force the applicant used, why he or she believed such force was necessary, and other relevant circumstances of the incident. You should include this information in your query to your Division POC, who will provide further guidance.

8 TRIG - MATERIAL SUPPORT

Providing material support is not in and of itself a ground of inadmissibility – it is one of the ways in which an individual may "engage in terrorist activity" under INA § 212(a)(3)(B)(iv) (specifically, INA § 212 (a)(3)(B)(iv)(VI)). That is, an individual who has provided material support to a terrorist organization is inadmissible under INA § 212(a)(3)(B)(i)(I) as an alien who "has engaged in a terrorist activity," as described in INA § 212(a)(3)(B)(iv)(VI).

8.1 Statutory Examples of Material Support

The INA provides the following non-exhaustive list of examples which would constitute "material support":[52]

- Safe house
- Transportation
- Communications
- Funds
- Transfer of funds or other material financial benefit
- False documentation or identification
- Weapons (including chemical, biological, or radiological weapons)
- Explosives
- Training

Beyond these examples, the INA does not define the meaning of "affords material support."

The statutory list is not an exhaustive list of what constitutes material support.[53]

[52] INA § 212(a)(3)(B)(iv)(VI).

[53] *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298 (3d Cir. 2004) ("Use of the term 'including' suggests that Congress intended to illustrate a broad concept rather than narrowly circumscribe a term with exclusive categories.").

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8.2 Factors Relating to "Material Support"

8.2.1 Amount of Support

The amount of support provided need not be large or significant. For example, in *Singh-Kaur v. Ashcroft,* the U.S. Court of Appeals for the Third Circuit upheld the BIA's determination that a Sikh applicant who gave food to and helped to set up tents for a Tier III terrorist organization had provided "material support" under INA § 212(a)(3)(B)(iv)(VI).[54]

The court looked to the plain meaning of the terms "material" ("[h]aving some logical connection with the consequential facts" or "significant" or "essential") and "support" ("[s]ustenance or maintenance; esp., articles such as food and clothing that allow one to live in the degree of comfort to which one is accustomed") when evaluating the BIA's interpretation of the statute. Based on the plain language of the terms and the non-exhaustive nature of the list of examples provided in the statute, the court found that the BIA's interpretation that the definition of "material support" included the provision of food and setting up tents was not manifestly contrary to the statute.[55]

The U.S. Court of Appeals for the Fourth Circuit in *Viegas v. Holder* found that "there is no question that the type of activity in which Viegas engaged comes within the statutory definition of material support. The issue was whether Viegas's activities qualified as "material."[56] The court went on to hold that the petitioner's support (paying dues monthly for four years and hanging posters) was sufficiently substantial standing alone to have some effect on the ability of the Front for the Liberation of the Enclave of Cabinda, an undesignated terrorist organization, to accomplish its goals.[57]

In *Alturo v. U.S. Att'y Gen.*, the U.S. Court of Appeals for the Eleventh Circuit upheld the BIA's determination that an applicant who had given annual payments of $300 to the United Self-Defense Forces of Colombia (AUC), a Tier I terrorist organization at the time of the payments, had provided material support. The Court explained, "The BIA's legal determination[] that the funds provided by Alturo constitute 'material support' [is a] permissible construction[] of the INA to which we must defer. The INA broadly defines 'material support' to include the provision of 'a safe house, transportation, communications, *funds*, transfer of funds, or other material financial benefit, false documentation or identification, weapons…explosives, or training,' and the BIA

[54] Singh-Kaur, 385 F.3d at 300-301.

[55] *Id*. at 298 (quoting *Black's Law Dictionary* (7th ed. 1999)). In reaching this conclusion, the court noted that the BIA reasonably interpreted the terrorist grounds of inadmissibility to cover a wider range of actions than do the criminal provisions regarding material support to a terrorist organization codified at 18 U.S.C. § 2339A. *See id.*

[56] Viegas, 699 F.3d at 803.

[57] *Id*.

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reasonably concluded that annual payments of $300 over a period of six years was not so insignificant as to fall outside that definition."[58]

Although the courts that have considered the issue have generally agreed with the government's position that there is no exception for minor or "de minimis" material support implicit in the statute, certain applicants who have provided "limited" or "insignificant" material support to a Tier III organization may be eligible for an exemption. *See* Section 9.4.5, below: Situational Exemptions – Certain Limited Material Support and Insignificant Material Support.

[redacted]

[58] *Alturo v. U.S. Att'y Gen.*, 716 F.3d 1310, 1314 (11th Cir. 2013).

(b)(7)(e)

[redacted]

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9 TRIG EXEMPTION AUTHORITY (b)(7)(e)

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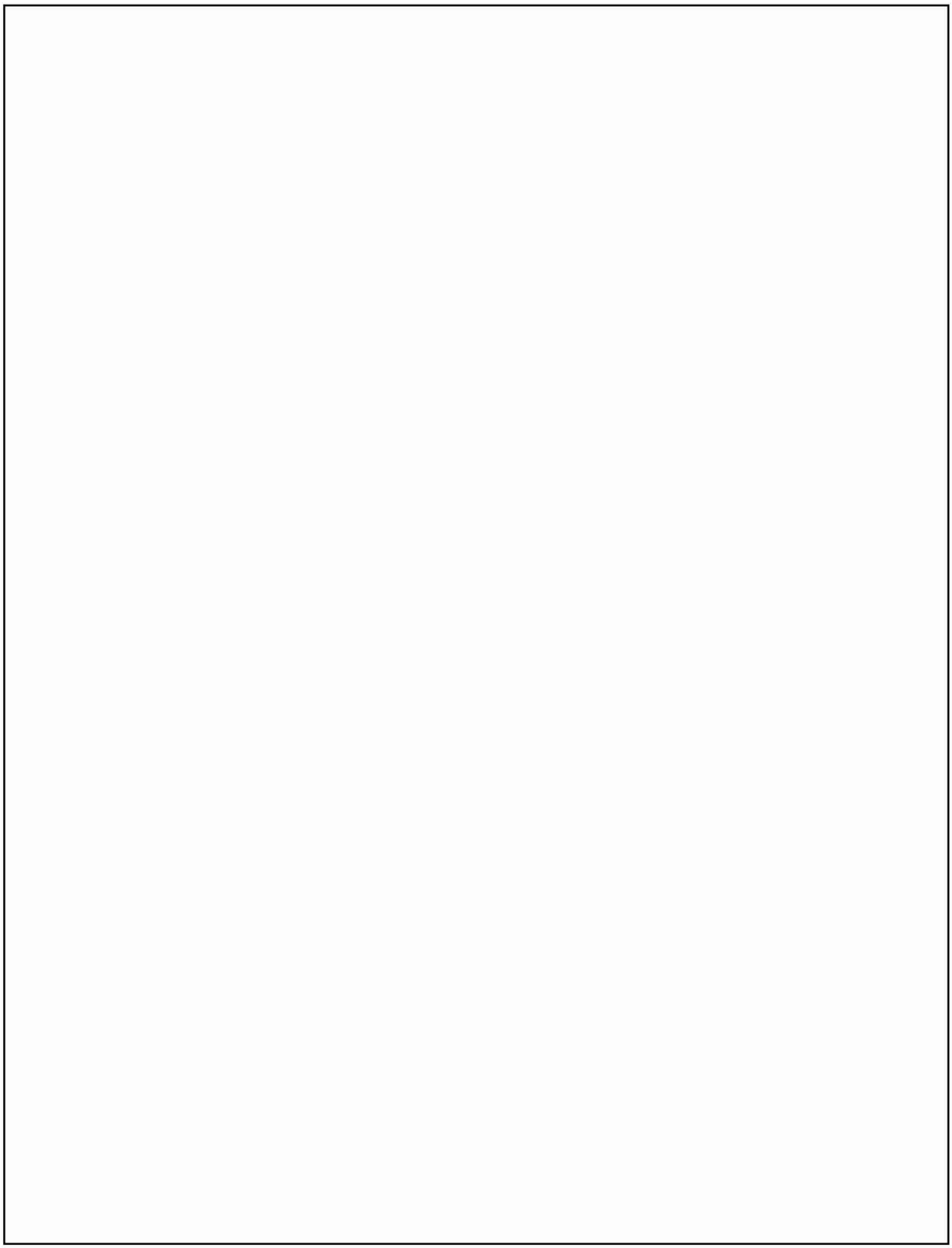
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10 LEGAL ANALYSIS

10.1 Burden and Standard of Proof

When there is evidence, testimonial or otherwise, indicating that an applicant is subject to TRIG, the burden is on the applicant to establish eligibility by the standard of proof required for the benefit he or she is seeking. The burden of proof refers to the duty of one party to prove a fact, while the standard of proof refers to the amount of evidence required to prove that fact.

In asylum cases, an applicant must establish by a preponderance of the evidence that he or she is not subject to any bars.[118]

In refugee adjudications, where evidence indicates an applicant may be subject to a ground of inadmissibility, including TRIG, the applicant must establish clearly and beyond doubt that the inadmissibility ground does not apply in order to be eligible for refugee status (see RAD Supplement – 1).[119]

10.2 Documentation Relating to TRIG Issues

You must properly document all TRIG-related issues in a case, in line with your division's policy and guidance (see ASM Supplement – 2; RAD Supplement – 2).

10.3 Dependents/Derivatives

TRIG inadmissibilities and bars also apply independently to any relative who is included in an applicant's request for an immigration benefit. In some instances, a principal applicant may be granted the benefit sought and his or her dependent/derivative may be denied the benefit sought or referred to immigration court because the dependent/derivative is subject to TRIG.[120]

11 CONCLUSION

As the United States continues to face national security threats, RAIO plays a critical role in defending the homeland by maintaining the integrity of our immigration benefit programs. In this regard, it is critical for you to properly assess each case in consideration of possible TRIG issues and to follow your division's procedures for processing these cases.

[118] INA § 208(b)(1)(B)(i); 8 C.F.R. §§ 208.13(a) and (c)(2)(ii).

[119] INA § 235(b)(2)(A).

[120] 8 C.F.R. § 208.21(a); INA § 207(c)(2)(A).

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12 SUMMARY

U.S. immigration laws contain provisions to prevent individuals who may be involved in terrorist activities from receiving immigration benefits. As an adjudicator, you will identify potential TRIG issues and process those cases in accordance with these laws.

12.1 Interviewing TRIG Cases

When preparing to interview an applicant, you must be mindful of TRIG issues, which might include an applicant's connection to areas known for terrorist activities or association with questionable individuals or groups.

Applicants who may be involved in terrorist activities may be motivated to apply for an immigration benefit through fraudulent means.

12.2 Terrorism-Related Inadmissibility Issues

An applicant is ineligible to receive most immigration benefits if the individual is described in any of the terrorism-related inadmissibility grounds unless an exemption is available and granted by USCIS. In addition to rendering inadmissible those seeking admission to the United States, the terrorism-related inadmissibility grounds are bars to asylum.

12.2.1 Terrorist Organizations

Under the INA, there are three catergories of terrorist organization, sometimes referred to as "tiers." Tier I designated terrorist organizations appear on the Foreign Terrorist Organizations (FTO) list while Tier II designated terrorist organizations are on the Terrorist Exclusion List (TEL). A Tier III undesignated terrorist organization is any group of two or more individuals that, whether organized or not, engages in terrorist activity, or has a subgroup that engages in terrorist activity. Depending on whether the organization is a designated terrorist organization or an undesignated terrorist organization, there are distinct immigration consequences.

12.2.2 Terrorism-Related Inadmissibility Grounds

The terrorism-related inadmissibility grounds are listed at INA § 212(a)(3)(B)(i)(I)-(IX).

12.2.3 Material Support

The terrorism-related inadmissibility ground you will encounter most often in your adjudications is engaging in terrorist activity (INA § 212(a)(3)(B)(i)) through the provision of material support (INA § 212(a)(3)(B)(iv)(VI)) to an individual who has committed or will commit a terrorist activity, or to a terrorist organization.

- Material support can be small in amount.

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- Whether the material support actually benefitted the recipient is irrelevant in determining whether an applicant has provided material support.
- Even one instance of material support will result in inadmissibility.

12.2.4 TRIG Exemption Authority

INA § 212(d)(3)(B)(i), as revised by the 2005 REAL ID Act and the Consolidated Appropriations Act, 2008, includes a discretionary exemption provision for certain terrorism-related inadmissibility grounds under INA § 212(a)(3)(B). This exemption authority can be exercised by the Secretary of Homeland Security or the Secretary of State after consultation with each other and the Attorney General.[121]

13 RESOURCES

At various points during your interview preparation, you may encounter indicators that require additional research to make sure you can conduct an informed, thorough interview of a case with potential TRIG issues. For example, in order to determine if a group of two or more individuals meets the definition of a Tier III organization, you should research the group and assess the group's activities. The following resources provide useful information that you should take into consideration when adjudicating cases in which the applicant or a dependent may be barred/inadmissible for TRIG.

13.1 USCIS TRIG ECN

The RAIO TRIG Branch maintains a comprehensive, one-stop shop for resources on TRIG issues. This resource is available through the USCIS TRIG ECN.

13.2 USCIS Refugee, Asylum and International Operations Research Unit (RAIO Research Unit)

The RAIO Research Unit's Country of Origin Information (COI) research papers are a good starting point for officers. RAIO Research Unit (RRU) products include specific COI that may be helpful when adjudicating cases involving TRIG. The RRU products may be accessed through the RAIO Research Unit ECN page.

In accordance with each Division's established procedures, you may submit queries to the RRU (email to RAIOResearch@uscis.dhs.gov) when additional country conditions information is required to reach a decision in a case.

[121] INA § 212(d)(3)(B)(i). For some specific examples of the Secretary's exercise of discretion under this provision, *see* USCIS Fact Sheets.

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13.3 USCIS Fraud Detection and National Security Directorate

In support of the overall USCIS mission, the Fraud Detection and National Security Directorate (FDNS) was created to enhance the integrity of the legal immigration system, detect and deter benefit fraud, and strengthen national security.

The RAIO FDNS ECN provides a repository of open source intelligence and publications relating to national security in the "Country Specific Resources" and "News & Bulletins" sections.

13.4 Department of State

The Department of State's Office of Counterterrorism maintains a body of resource information on its website, which includes country reports on terrorism.

13.5 RAIO COI Tool

The RAIO COI Tool is a practical, data-driven tool designed to assist officers interviewing Syrian refugee applicants by providing reliable, specific, localized country of origin information. The tool itself is a Microsoft Word plug-in that integrates the Syria event database into the interviewing Officer's assessment.

Use of the COI Tool allows officers to access information regarding locations and events in Syria relevant to the applicant's refugee claim, places of residence, and travel patterns. This applicant-specific COI Tool enhances the Officer's ability to develop tailored lines of questioning, assess applicant credibility, and identify potential national security concerns and TRIG.

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PRACTICAL EXERCISES

Practical Exercise # 1

Title: Has the applicant engaged in terrorist activity?

Student Materials: None

The moderator will present a fact pattern and the students will assess (either in groups or individually) if the applicant has engaged in terrorist activity under the INA. The moderator will then present the explanation of the case.

Scenario 1:

- Facts of the Case:

  Applicant is a young girl who was kidnapped and held captive by members of an armed group at their camp in the bush. While suffering extreme abuse, including rape, she was forced to gather firewood, cook, and clean.

Scenario 2:

- Facts of the Case:

  Applicant is a subsistence farmer. One day, uniformed rebel soldiers passed by and asked him for water. He gave them each one glass of water.

Scenario 3:

- Facts of the Case:

  Applicant is a doctor who provided medical care to anyone who sought treatment his clinic. During the revolution in his country, he stitched and dressed the wounds of some rebel soldiers.

Scenario 4:

- Facts of the Case:

  Applicant is a small boy who was kidnapped by a rebel group and forced to undergo combat training and fight for the group before he managed to escape.

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Practical Exercise # 2

Title: Exemption Writing

- **Student Materials:** Scenario, TRIG exemption sheet

  Based on the fact patterns above, students will work individually to complete a TRIG worksheet. Then the presenter will show the students a properly filled-out worksheet and will talk through the correct version.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division (RAD). Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

ADDITIONAL RESOURCES

2.

SUPPLEMENTS

RAD Supplement – 1

Burden and Standard of Proof for TRIG Inadmissibility Grounds

If the evidence indicates that the refugee applicant may be inadmissible to the United States pursuant to INA § 212(a)(3)(B), then the refugee applicant must establish clearly and beyond doubt that the inadmissibility ground does not apply in order to be eligible for refugee[122] status.[123]

For example, if evidence indicates that the refugee applicant may have engaged in a terrorist activity, the officer would not have to establish that the applicant committed the act; instead, the applicant would have to establish clearly and beyond doubt that he or she did not commit that act.

[122] Refugee cases include both Form I-590 and Form I-730 follow-to-join refugee (FTJ-R) adjudications.

[123] INA § 235(b)(2)(A).

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. Asylum Division Identity and Security Checks Procedures Manual (ISCPM), especially Section VIII of the ISCPM regarding Cases Involving Terrorism or Threats to National Security.
2. Asylum Division Affirmative Asylum Procedures Manual (AAPM).
3. ABC/NACARA Procedures Manual.

ADDITIONAL RESOURCES

1. *Matter of A-H-*, 23 I&N Dec. 774 (AG 2005).
2. *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004).
3. *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003).
4. *Barahona v. Holder*, 691 F. 3d (4th Cir. 2012).

SUPPLEMENTS

ASM Supplement – 1

Use of Discretion when a Bar Does Not Apply

In rare circumstances, there may be applicants with activities or associations that fall short of creating a mandatory bar to asylum for TRIG but nonetheless warrant the denial or referral of their asylum application as a matter of discretion in the totality of the

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circumstances, even if the applicant has established refugee status.[124] For further guidance, see RAIO Training module, *Discretion*.

ASM Supplement – 2

Note Taking – National Security

Asylum Division procedures require that officers take notes in a sworn statement format when:

- The applicant admits, or there are serious reasons to believe, he or she is associated with an organization included on either the Foreign Terrorist Organizations (FTO) List or the Terrorist Exclusion List (TEL), both of which are compiled by the Department of State and are available at http://www.state.gov/s/ct/.
- The applicant admits, or there are serious reasons to believe, she or he is involved in terrorist activities.
- There are serious reasons for considering the applicant a threat to national security.

The use of the sworn statement is crucial because an applicant's admission may be used as a basis to institute deportation or removal proceedings against him or her, or as a basis for DHS to detain the applicant.

For further explanation and requirements, see RAIO Training module, *Interviewing - Note-Taking*, including the Asylum Supplement. See, also the Affirmative Asylum Procedures Manual (AAPM), the ABC/NACARA Procedures Manual and the Suspension of Deportation and Special Rule Cancellation of Removal under NACARA Lesson Plan.

[124] *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987) (adopting a "totality of the circumstances" test to determine a discretionary denial); *Matter of A-H-*, 23 I&N Dec. 774, 780 (AG 2005) (discretionary denial upheld where applicant had evaded U.S. taxes and had connections to FIS in Algeria and Islamic groups that committed human rights violations); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir. 2004) (holding that all relevant favorable and adverse factors must be considered and weighed, and that ". . . [A] factor that falls short of the grounds of mandatory denial is not for that reason alone excluded from consideration as an adverse factor for the discretionary, entitlement prong.").

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2. 1.2

SUPPLEMENTS

IO Supplement - 1

Follow-to-Join Refugees and Asylees

Please see RAD Supplement – 1 for information relating to burden and standard of proof for follow-to-join refugee (FTJ-R) adjudications.

While the grounds of inadmissibility do not apply to Form I-730 follow-to-join asylee (FTJ-A) beneficiaries, all TRIG listed in INA §212(a)(3)(B) and (F) apply by virtue of INA §237(a)(4)(B), referenced in INA §208(b)(2)(A)(v). When applying the asylum bars in FTJ-A cases, adjudicators should follow the burden and standard of proof guidance for asylum cases.

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Required preface to RAIO Nexus – PSG Lesson Plan. Note that this guidance supersedes certain elements of the Lesson Plan, as discussed below.

Interim Guidance on *Matter of A-B-* and *Grace v. Whitaker*

From: Lafferty, John L <John.L.Lafferty@uscis.dhs.gov>
Sent: Wednesday, December 19, 2018 11:12 PM
To: RAIO - Asylum HQ <RAIO-Asylum@uscis.dhs.gov>; RAIO - Asylum Field Office Managers <RAIO-AsylumFieldOfficeManagers@uscis.dhs.gov>; RAIO - Asylum Field Office Staff <RAIO-Test@uscis.dhs.gov>
Cc: RAIO - Executive Leadership <RAIO-ExecutiveLeadership@uscis.dhs.gov>; Zengotitabengoa, Colleen R <Colleen.R.Zengotitabengoa@uscis.dhs.gov>; Groom, Molly M <Molly.M.Groom@uscis.dhs.gov>; Symons, Craig M <Craig.M.Symons@uscis.dhs.gov>
Subject: Today's US DC District Court decision in Grace v. Whitaker and impact on CF processing

Asylum Division staff,

On December 17, 2018, the U.S. District Court for the District of Columbia, issued an opinion in *Grace v. Sessions*, No. 18-cv-01853, that impacts the Attorney General's opinion in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) and the USCIS Policy Memorandum entitled, "Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*."

While some aspects of *Matter of A-B-* remain binding precedent, certain changes to USCIS policy must immediately take effect as a result of the Court's decision. As such, and as described below, please see the attached USCIS Policy Memorandum with the provisions enjoined by the court redacted.

Effective immediately, with regard to credible fear processing:

1) There is no general rule against claims involving domestic violence and gang-related violence as a basis for membership in a particular social group. Each claim must be evaluated on its own merits.
2) Asylum officers must determine whether the government in the country of feared persecution is "unable or unwilling to control a persecutor," and cannot use the "condoned" or "complete helplessness" formulation as suggested in *Matter of A-B-*.
3) There is no general rule that proposed particular social groups whose definitions involve an inability to leave a domestic relationship are circular and therefore not cognizable. While a particular social group cannot be defined exclusively by the claimed persecution, each particular social group should be evaluated on its own merits. *See Matter of M-E-V-G-,* 26 I. & N. Dec. 227, 242 (BIA 2014). If the proposed social group definition contains characteristics independent from the feared persecution, the group may be valid. Analysis as to whether a proposed particular social group is cognizable should take into account the independent characteristics presented in each case.

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4) In evaluating whether the applicant has established a credible fear of persecution, asylum officers cannot require an applicant to formulate or delineate particular social groups. Asylum officers must consider and evaluate possible formulations of particular social groups.
5) Asylum officers may not disregard contrary circuit law, and may not limit their analysis to the law of the circuit where the alien is located during the credible fear process.

Attached is the court's Order, which was issued today, December 19, 2018. In addition to the above, the Order prevents defendants from removing any plaintiffs currently in the U.S. without first providing each of them a new credible fear process consistent with the court's Order. The Order also requires DHS to bring back to the U.S. any plaintiff removed pursuant to an ER order and provide each such plaintiff with a new credible fear process consistent with the court's Order. We will need to coordinate with ICE to make sure that all such plaintiffs receive a new CF process. The Order also orders defendants to provide a status report detailing any steps we have taken to comply with this injunction.

Any questions should be directed through your chain of command to Asylum HQ.

Thank you for your continued hard work and dedication to the mission.

John

From: Lafferty, John L <John.L.Lafferty@uscis.dhs.gov>
Sent: Wednesday, June 13, 2018 5:20 PM
To: RAIO - Asylum Field Office Managers <RAIO-AsylumFieldOfficeManagers@uscis.dhs.gov>; RAIO - Asylum Field Office Staff <RAIO-Test@uscis.dhs.gov>; RAIO - Asylum HQ <RAIO-Asylum@uscis.dhs.gov>
Cc: RAIO - Executive Leadership <RAIO-ExecutiveLeadership@uscis.dhs.gov>; Zengotitabengoa, Colleen R <Colleen.R.Zengotitabengoa@uscis.dhs.gov>
Subject: Asylum Division Interim Guidance - Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018)

Asylum Division colleagues:

I'm sure that most of you have heard and/or read about the decision issued by Attorney General Sessions on Monday in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

Below is our Office of Chief Counsel's summary of the AG's decision, which is followed by Asylum's summaries of two 2014 BIA decisions - *Matter of M-E-V-G-* and *Matter of W-G-R-* - that were cited by the AG in support of his decision. While we continue to work with our OCC colleagues on final guidance for the field, we are issuing the following interim guidance on how to proceed with decision-making on asylum cases and CF/RF screening determinations:

- *Matter of A-R-C-G-* has been overruled and can no longer be cited to or relied upon as supporting your decision-making on an asylum case or in a CF/RF determination.

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- Effective upon issuance of this guidance, no affirmative grant of asylum or positive CF/RF screening determination should be signed off on by a supervisor as legally sufficient, or issued as a final decision/determination, that specifically cites to or relies upon *Matter of A-R-C-G-* as justification for the result. Instead, it should be returned to the officer for reconsideration consistent with the next bullet.
- All pending and future asylum decisions and CF/RF screening determinations finding that the individual has shown persecution or a well-founded fear of persecution on account of membership in a particular social group must require that the applicant meet the relevant standard by producing evidence that establishes ALL of the following:
    - o A cognizable particular social group that is 1) composed of members who share a common immutable characteristic, 2) defined with particularity, and 3) socially distinct within the society in question;
    - o Membership in that PSG;
    - o That membership in the PSG was or is a central reason for the past and/or future persecution; and
    - o The harm was and/or will be inflicted by the government or by non-governmental actors that the government is unable or unwilling to control.
        - § When the harm is at the hands of a non-governmental actor, the applicant must show that the government condoned the behavior or demonstrated a complete helplessness to protect the victim. This new decision stresses that, in applying this standard, "[t]he fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States. There may be many reasons why a particular crime is not successfully investigated and prosecuted. Applicants must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." A-B- at 337-338. (see RAIO Lesson Plan - Definition of Persecution and Eligibility Based on Past Persecution, Section 4.2 "Entity the Government Is Unable or Unwilling to Control", for further guidance).
        - § The mere fact that a country may have problems effectively policing certain crimes or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.
- Every asylum decision and CF/RF screening determination must consider and analyze whether internal relocation would be reasonable, as provided for at 8 CFR 208.13 (b).

If you have any questions on this interim guidance, please raise them up your local chain of command so that they can be brought to the attention of HQ Asylum QA Branch.

Thank you!!

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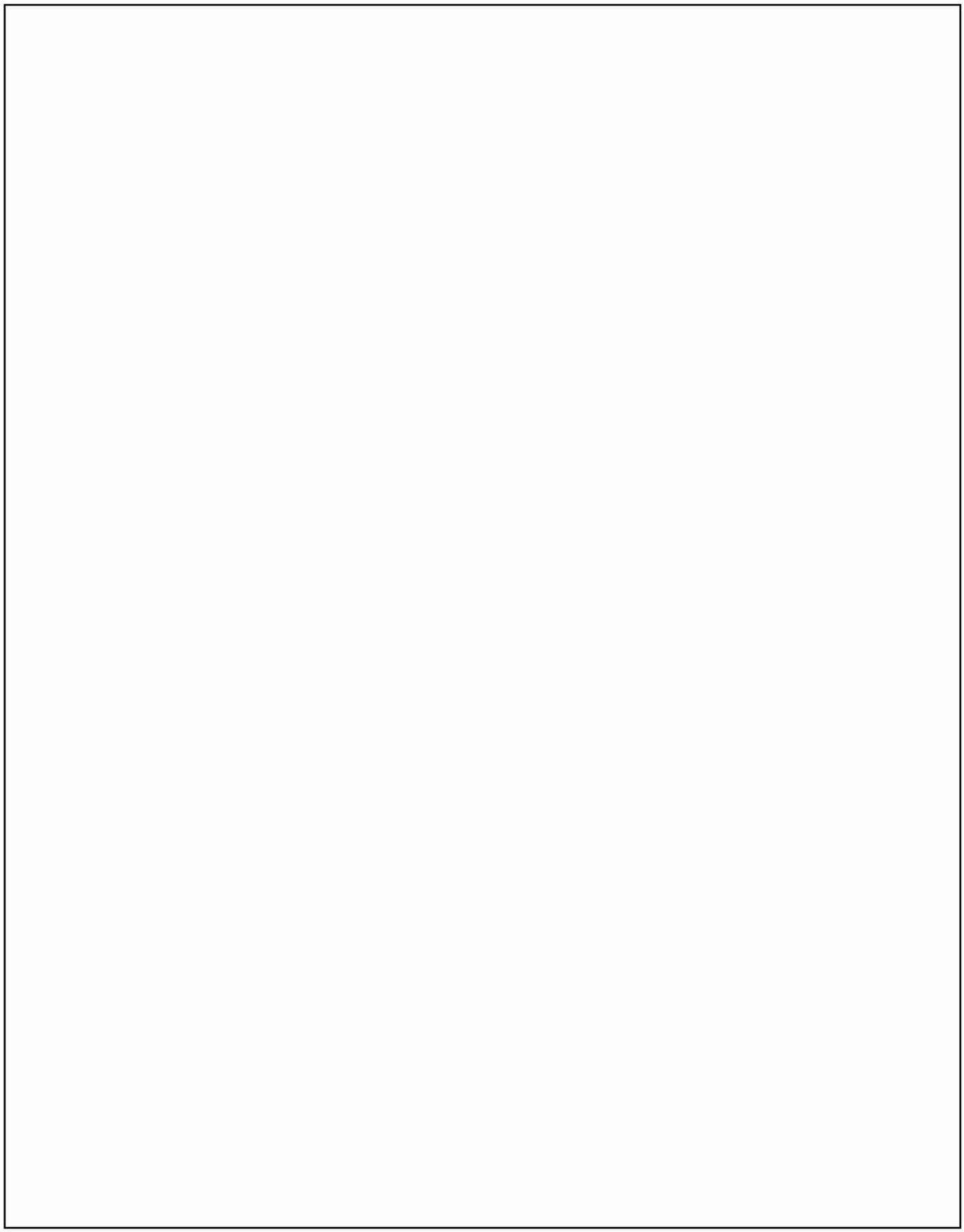
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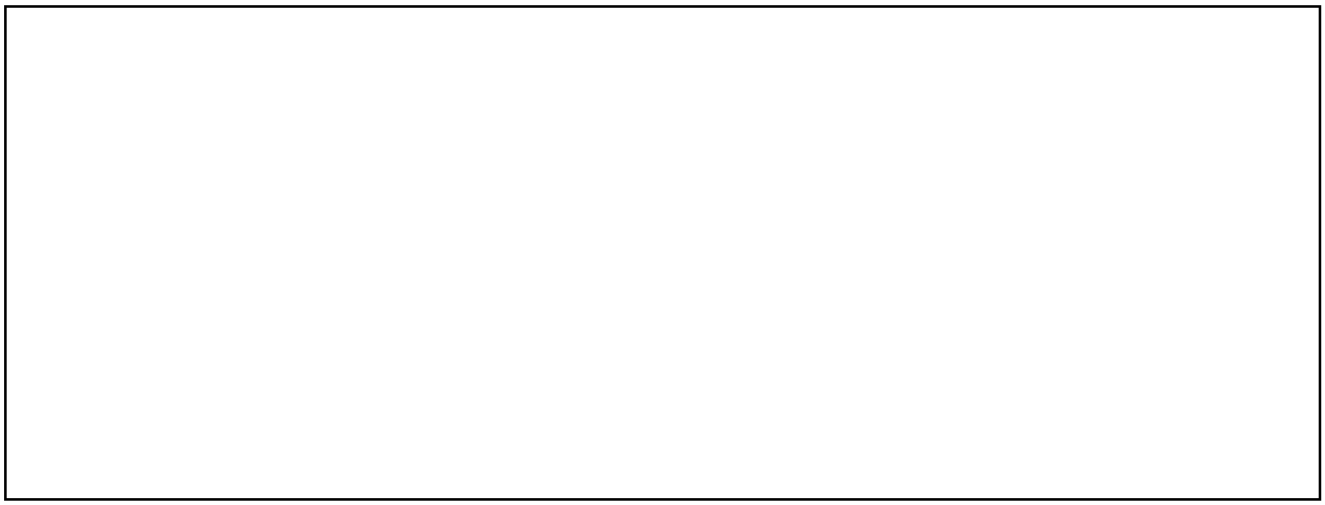
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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

NEXUS –

PARTICULAR SOCIAL GROUP

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

NEXUS – PARTICULAR SOCIAL GROUP

Training Module

MODULE DESCRIPTION:

This module discusses membership in a particular social group (PSG), one of the protected grounds in the refugee definition codified in the Immigration and Nationality Act. The discussion describes membership in a particular social group (PSG) and examines its interpretation in administrative and judicial case law. The primary focus of this module is the determination as to whether an applicant has established that past harm suffered or future harm feared is on account of membership in a particular social group.

TERMINAL PERFORMANCE OBJECTIVE(S)

Given a request to adjudicate either a request for asylum or a request for refugee status, the officer will be able to apply the law (statutes, regulations and case law) to determine whether an applicant is eligible for the requested relief.

ENABLING PERFORMANCE OBJECTIVES

1. Explain factors to consider in determining whether persecution or feared persecution is on account of membership in a particular social group.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Practical Exercises

METHOD(S) OF EVALUATION

REQUIRED READING

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1. Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014).
2. Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014).
3. Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014)

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. Matter of C-A-, 23 I&N Dec. 951 (BIA 2006).
2. Matter of Acosta, 19 I&N Dec. 211, 233-34 (BIA 1985)
3. Lynden D. Melmed, USCIS Chief Counsel. Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).
4. United Nations High Commissioner for Refugees, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. HCR/GIP/02/02, 7 May 2002, 5 pp.
5. Phyllis Coven. INS Office of International Affairs. Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Gender Guidelines), Memorandum to all INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p. See also RAIO Training Module, Gender-Related Claims.
6. Rosemary Melville. INS Office of International Affairs. Follow Up on Gender Guidelines Training, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 7 July 1995), 8 p.
7. Paul W. Virtue. INS Office of General Counsel. Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA, Memorandum to Kathleen Thompson, INS Office of International Affairs (Washington, DC: 9 December 1993), 7 p.

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ILR9	Knowledge of policies and procedures for processing lesbian, gay, bisexual and transgender (LGBT) claims (3)
ILR10	Knowledge of policies and procedures for processing gender-related claims (3)
ILR14	Knowledge of nexus to a protected characteristic (4)
ILR15	Knowledge of the elements of each protected characteristic (4)
DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence) (5)
RI1	Skill in identifying issues of claim (4)
RI2	Skill in identifying the information required to establish eligibility (4)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
11/06/2013	Summary (of 4/30/2013 edition)	Revised last sentence of paragraph 1 of Summary and corrected corresponding footnote # 114; added an additional sentence as clarification.	J.Kochman
2/4/2014	Additional Resources	Removed Dea Carpenter memo (not yet accepted)	L. Gollub (incorporated by V. Conley and Joyce)
7/27/15	Throughout LP	Substantial revision of LP for updated case law and new guidance:	ASM QA, ASM Training, RAD TAQA, RAIO Training

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1. INTRODUCTION

The refugee definition at INA §101(a)(42) states that an individual is a refugee if he or she establishes past persecution or a well-founded fear of future persecution on account of one or more of the five protected grounds. All of the elements of the refugee definition are reviewed in the RAIO Training Module, Refugee Definition. The requirements for an applicant to establish eligibility based on past persecution are discussed in the module, Persecution. The elements necessary to establish a well-founded fear of future persecution are discussed in the module, Well-Founded Fear. The analysis of the persecutor's motive and the requirements needed to establish that persecution or feared persecution is "on account of" race, religion, nationality, or political opinion are discussed in the module, Nexus and the Protected Grounds (minus PSG).

This module provides you with an understanding of the requirements needed to establish whether persecution or feared persecution is "on account of" membership in a particular social group (PSG).

The nexus analysis for particular social group claims is fundamentally the same as it is for cases involving the other protected characteristics; you must determine:

1. whether the applicant possesses or is perceived to possess a protected characteristic;

   and

2. whether the persecution or feared persecution is on account of that protected characteristic.

2. DOES THE APPLICANT POSSESS A PROTECTED CHARACTERISTIC?

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The first question is the starting point for all protected grounds – whether the applicant possesses, or is perceived to possess, a protected characteristic: membership in a particular social group. Membership in a particular social group may overlap with other protected grounds, such as political opinion, and you should also consider whether the applicant can establish eligibility based on a different protected ground.

For cases based on membership in a particular social group, the analysis is expanded, requiring you to identify the characteristics that form the particular social group and explain why persons with those characteristics form a particular social group within the meaning of the refugee definition.

Determining whether a specific group constitutes a particular social group can be a complicated task. Recognizing this complexity, the Board of Immigration Appeals has set forth a three-part test for evaluating whether a group meets the definition of a particular social group.[1] While looking to precedential decisions from the Board and the circuit courts of appeals may help inform your decision, you must apply the analysis discussed below to the facts of each individual case.

2.1 Is the Applicant a Member of a Particular Social Group?

An applicant who is seeking asylum based on membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity.[2] All three elements must be established.

It is important to remember that membership in a particular social group may be imputed to an applicant who is not, in fact, a member of a particular social group.

Step One: Common Immutable Characteristic

The group must comprise individuals who share a common, immutable characteristic, meaning it is one that the members of the group either cannot change, or should not be required to change because it is fundamental to each member's identity or conscience.[3] The defining characteristic can be a shared innate characteristic, a shared past experience, or a social or other status.[4]

Unchangeable Characteristics

[1] Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014); Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014).

[2] Matter of M-E-V-G-, 26 I&N Dec. at 237; Matter of W-G-R-, 26 I&N Dec. at 212-218; see also Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014)(applying to a domestic violence scenario the three-part test put forth in Matter of M-E-V-G- and Matter of W-G-R-.)

[3] Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985).

[4] Id. at 233-34; W-G-R-, 26 I&N Dec. at 212-13; A-R-C-G-, 26 I&N Dec. at 392-393.

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Unchangeable characteristics are traits that cannot be changed. Some examples of characteristics that cannot be changed include innate ones, like gender, race, ethnicity, skin color, and family relationships.[5] Some of these characteristics are biological traits of a person. Others might be shared past experiences that cannot be changed because a person is unable to change the past.

Fundamental Characteristics

Fundamental characteristics are traits, beliefs, or statuses that a person should not be required to change because they are essential to the individual's identity or conscience. In analyzing this type of claim, you should consider both how the applicant experiences the trait as part of his or her identity and whether the trait is fundamental from an objective point of view. With regard to the latter, you may consider whether human rights norms suggest the characteristic is fundamental. An example of a shared trait that is fundamental to an individual's identity or conscience is having intact genitalia in the female genital mutilation (FGM) context. In contrast, even though an applicant may consider being a member of a terrorist or criminal organization as being fundamental to his or her identity or conscience, there is no basic human right to pursue such an association, and it would not be considered fundamental from an objective point of view.[6]

In Matter of Acosta, 19 I&N Dec. 211, 234 (BIA 1988), the Board explained that the unchangeable characteristic or fundamental characteristic is part of the definition of a particular social group because each of the other four protected grounds describe persecution aimed at an immutable characteristic.[7] Therefore, the Board interpreted the term "particular social group" consistently with the other grounds of persecution in the INA, explaining that "the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution."[8]

Assumption of Risk Considerations

In some cases, the applicant's voluntary assumption of an extraordinary risk of serious harm in taking on the trait that defines the group may be evidence of fundamentality.[9] An applicant's decision to assume significant risks can, in some cases, provide evidence that the belief or trait is fundamental to the applicant's identity or conscience.[10] The relevance

[5] See Fatin v. INS, 12 F.3d 1233, 1239 (3d Cir. 1993); Matter of Kasinga, 21 I&N Dec. 357, 366 (BIA 1996).

[6] See Arteaga v. Mukasey, 511 F.3d 940, 946 (9th Cir. 2007) (the court noted, "we would be hard-pressed to agree with the suggestion that one who voluntarily associates with a vicious street gang that participates in violent criminal activity does so for reasons so fundamental to 'human dignity' that he should not be forced to forsake the association").

[7] Matter of Acosta, 19 I&N Dec. at 233-34.

[8] Id.

[9] See Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[10] Id. at 3.

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of an applicant's voluntary assumption of risk must be considered on a case-by-case basis. Not all individuals assume the risk of a particular activity because the activity is fundamental to their identity.[11] For example, an individual may assume the risk of a particular activity for monetary gain, and in such a case that assumption of risk may undercut fundamentality.[12]

Step Two: Social Distinction

A group's shared characteristic must be perceived as distinct by the relevant society.[13] This element has sometimes been referred to as "social visibility." However, in its rulings in Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014) and Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014), the Board renamed "social visibility" as "social distinction" to avoid confusion.[14] The Board emphasized that "social distinction" does not require the shared characteristic to be seen by society (i.e., visible); instead the group characteristic must be perceived as distinct by society.[15] There must be evidence indicating "that a society in general perceives, considers, or recognizes persons" as a group.[16] This requirement can be met by showing that the society in question sets apart or differentiates between people who possess the shared belief or trait and people who do not, even if individual group members are not visibly recognized as group members. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.[17] The Board's interpretation of "social distinction" is consistent with USCIS's longstanding interpretation of the term.[18]

In some circumstances, members of a group may be visibly recognizable, but society may also consider persons to be a group without being able to identify the members by sight. Board cases have recognized groups that were not ocularly visible. For instance, in Matter of Kasinga, 21 I&N Dec. 357, 365-66 (BIA 1996), the Board determined that young women from a certain ethnic group in Togo who have not been previously subjected to FGM but are opposed to it constitute a particular social group. In Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822-23 (BIA 1990) the Board held that "homosexuals" in Cuba were a particular social group. In Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988), the Board concluded that former national police members could be

[11] Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[12] Id.

[13] Matter of W-G-R-, 26 I&N Dec. at 216.

[14] Matter of M-E-V-G-, 26 I&N Dec. at 240; W-G-R-, 26 I&N Dec. at 216.

[15] M-E-V-G-, 26 I&N Dec. at 240; W-G-R-, 26 I&N Dec. at 216.

[16] W-G-R-, 26 I&N Dec. at 217.

[17] M-E-V-G-, 26 I&N Dec. at 238.

[18] See, e.g., Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

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a particular social group in some circumstances. These cases illustrate the point that ocular visibility is not required. In such cases, it may not be easy or possible to identify who has not been subjected to or is opposed to FGM, who is gay, or who is a former member of the national police.[19]

Social distinction must be evaluated on a case-by-case basis and society-by-society basis

As previously noted, for social distinction, there must be evidence showing that society in general perceives or considers people who share a particular characteristic as distinct.[20] Evidence such as country conditions, witness testimony, and press accounts may establish that a group is distinct.[21] The Board has emphasized that the social distinction determination must be made on a case-by-case basis.[22] Laws, policies, or cultural practices of a society, as well as governmental or non-governmental programs targeting certain groups, may also establish social distinction. For instance, in evaluating whether Guatemalan widows are socially distinct, you could research whether the Guatemalan government has laws and policies addressing the needs of widows, and whether NGOs have assistance programs helping widows. In Matter of A-R-C-G-, the Board explained that evidence that a certain group is protected within a society could establish social distinction.[23] The Board and the courts have not limited the types of society-specific evidence upon which you can rely. In another context, a society might have songs or poetry about witnesses who testify in court against members of criminal groups, and this could serve as some evidence that such witnesses might be distinct in that society. The individual group member's treatment may be relevant to whether such a group is socially distinct. The relevant society may include the entire country or a particular region or community within the country. Accordingly, you should consider all evidence before you to determine whether or not the proposed group is socially distinct.

Examining the Board's holdings in M-E-V-G-and W-G-R-, the Ninth Circuit also has emphasized that the analysis must be case-specific and society-specific.[24] The Ninth Circuit noted that "[i]t is an error…to assume that if a social group related to the same international gang…has been found non-cognizable in one society, it will not be cognizable in any society. Honduras, El Salvador, Guatemala, Nicaragua, and Panama have used different strategies for combating gang violence…[and] these different local responses to gangs in nations with distinct histories…may well result in a different social

[19] M-E-V-G-, 26 I&N Dec. at 240.

[20] W-G-R-, 26 I&N Dec. at 217 (BIA 2014).

[21] M-E-V-G-, 26 I&N Dec. at 244 (BIA 2014); see also Matter of A-R-C-G-, 26 I&N Dec. 388, 394 (BIA 2014) (discussing the types of evidence that may show social distinction in domestic violence-related particular social groups, including evidence that the society recognizes the need to offer protection to victims of domestic violence and other sociopolitical factors).

[22] M-E-V-G-, 26 I&N Dec. at 242.

[23] A-R-C-G-, 26 I&N Dec. at 394.

[24] Pirir-Boc v. Holder, 750 F.3d 1077 (9th Cir. 2014).

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recognition of social groups opposed to gang violence…." The Ninth Circuit concluded that "the agency must make a case-by-case determination as to whether the group is recognized by the particular society in question . . . [and] may not reject a group solely because it had previously found a similar group in a different society to lack social distinction."[25] The Second Circuit also has examined the Board's holdings in M-E-V-G- and W-G-R- and remanded a case for the Board to conduct additional case-specific analysis.[26]

This case-specific approach is not new. In Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69 (BIA 2007), the Board indicated that determining whether a group has a socially distinct shared characteristic must be "considered in the context of the country of concern and the persecution feared."[27] In A-M-E- & J-G-U-, the Board reviewed country conditions to evaluate whether, in context, the proposed particular social group members shared socially distinct characteristics. The Board found that the applicants did not establish the existence of a particular social group because the proposed particular social group – "affluent Guatemalans" – did not share a common trait that was socially distinct in Guatemalan society.[28] In that case, the country of origin information before the Board demonstrated that "affluent Guatemalans" were not at greater risk of criminality or extortion than the general population. Instead the country of origin information demonstrated that criminality is pervasive in all Guatemalan socio-economic groups. The report indicated that impoverished Indians were also subjected to both crimes. For the same reason, the Board also rejected the following possible formulations of the group: "wealth," "upper income level," "socio-economic level," "the monied class," and "the upper class." The Board specifically noted, however, that wealth- or class-based social groups must be analyzed in context, and that, under some circumstances, such groups might qualify as particular social groups.[29] For example, should a government institute a policy of imprisoning and mistreating persons with assets or income above a fixed level, there could be a basis for a societal perception that the class of wealthy persons, as defined by the government, would constitute a particular social group.[30]

Because case-specific analysis is required, it is critical for you to look at all relevant information, including the applicant's individual circumstances, the circumstances surrounding the events of persecution, and country of origin information, before making a

[25] Id. at 1084 n.7.

[26] Paloka v. Holder, 762 F.3d 191, 198 (2d Cir. 2014) (instructing the Board to determine whether the proposed groups of "young Albanian women" or "young Albanian women between the ages of 15 and 25" qualified as cognizable social group).

[27] Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 74 (BIA 2007); cf.Tapiero de Orejuela v. Gonzales, 423 F.3d 666, 672 (7th Cir. 2005).

[28] See also Donchev v. Mukasey, 553 F.3d 1206, 1218-1219 (9th Cir. 2009) ("friends of Roma individuals or of the Roma people" not a socially distinct group, in part, because country conditions did not show that members of the group, such as the applicant's family members, were viewed or treated by Bulgarian society in a uniform manner).

[29] A-M-E- & J-G-U-, 24 I&N Dec. at 75,n.6.

[30] Id.; see also Tapiero de Orejuela, 423 F.3d at 672 (finding that a particular social group of educated, wealthy, landowning, cattle-farming Colombians, was a cognizable group because the group was not defined merely by wealth).

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social distinction determination. Country of origin information indicating that the immutable characteristic reflects societal distinctions is relevant when analyzing whether a group constitutes a particular social group. [31]

The group does not have to self-identify as a group and members may hide their membership

It is not necessary for a group to identify itself explicitly as a group in order for the social distinction requirement to be met. In addition, the fact that a member of a particular social group may make efforts to hide his or her membership to avoid persecution does not prevent such a group from constituting a cognizable particular social group.[32] Accordingly, a group may not appear cohesive and may not display the traditional hallmarks of a group that shows its existence openly. If the society in question distinguishes people who possess the immutable trait from others because of their shared belief or characteristic, then the group is socially distinct. [33]

Step 3: Particularity

Applicants seeking to establish membership in a particular social group must also establish that the group is defined with sufficient particularity. The particularity requirement relates to the group's boundaries or the need to put outer limits on the definition of a particular social group.[34] The term "particular[ity]" is included in the plain language of "particular" social group and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined.[35] The characteristics defining the group must provide a clear benchmark for determining who falls within the group and who does not.[36] The group must be discrete and have definable boundaries.[37]

The Board has made clear that this particularity inquiry must take into account the perspectives of the society in question.[38] Thus, the Board noted in W-G-R- that

[31] See Castellano-Chacon v. INS, 341 F.3d 533, 548 (6th Cir. 2003) (noting that a society's reaction to a group may provide evidence that a particular social group exists, so long as the persecutors' reaction to the members of the group is not the central characteristic of the group); see also Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) ("A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor – or in the eyes of the outside world in general.").

[32] Matter of W-G-R-, 26 I&N Dec. 208, 217 (BIA 2014).

[33] Id.

[34] Matter of M-E-V-G-, 26 I&N Dec. 227, 238 (BIA 2014) (citing Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003)).

[35] Id. at 239.

[36] Id. (citing Matter of A-M-E- & J-G-U-, 24 I&N Dec. at 76).

[37] Id. (citing Ochoa v. Gonzales, 406 F.3d 1166, 1170-71 (9th Cir. 2005)); see also Matter of A-R-C-G-, 26 I&N Dec. 388, 393 (BIA 2014) (noting that "married," "women," and "unable to leave the relationship" have commonly accepted definitions within Guatemalan society, and that these terms may be combined to create a group with discrete and definable boundaries).

[38] W-G-R-, 26 I&N Dec. at 214.

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"landowners" might be able to meet the particularity requirement in an undeveloped, oligarchical society but would be considered too ill-defined in the United States or Canada.[39]

The Board has upheld the principle that "major segments of the population will rarely, if ever, constitute a distinct social group."[40] This principle, however, does not preclude the possibility that a large segment of society could constitute a particular social group in some situations. The "particularity" requirement means that the group must be identifiable and have clearly defined boundaries, and major segments of a society frequently are not sufficiently "particular."

You should avoid an overly broad or overly narrow characterization of a group. Courts have held that a particular social group should not be defined so broadly as to make it difficult to distinguish group members from others in the society in which they live, or so narrowly that what is defined does not constitute a meaningful grouping.[41] Moreover, even when such groups are cognizable, claims based on groups that are defined too broadly or too narrowly may fail the nexus requirement.

It also is important to remember that you should not analyze each characteristic of a group separately and reject one piece at a time. In a case involving a proposed social group of Tanzanians who exhibit erratic behavior and suffer from bipolar disorder, the Fourth Circuit concluded that the Board "erred because it broke down [the petitioner's] group into pieces and rejected each piece, rather than analyzing his group as a whole."[42] The court noted that "erratic behavior," by itself, might lack particularity, but when combined with bipolar disorder, the group would satisfy the particularity requirement.[43] The Fourth Circuit cautioned not to "miss the forest for the trees."[44]

2.2 General Principles for Formulating Particular Social Groups

A social group cannot be defined by terrorist, criminal, or persecutory activity or association, past or present

[39] Id. at 214-15.

[40] M-E-V-G-, 26 I&N Dec. at 239 (citing Ochoa v. Gonzales, 406 F.3d 1166, 1171 (9th Cir. 2005) (holding a group of business persons were not particular)).

[41] See Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575-1577 (9th Cir. 1986); Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991); Lukwago v. Ashcroft, 329 F.3d 157, 172 (3d Cir. 2003); Raffington v. INS, 340 F.3d 720, 723 (8th Cir. 2003).

[42] Temu v. Holder, 740 F.3d 887, 895 (4th Cir. 2014).

[43] Id.

[44] Id.

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Under general principles of refugee protection, the shared characteristic of terrorist, criminal, or persecutory activity or association, past or present, cannot form the basis of a particular social group.[45]

Three federal courts have found that groups consisting of former gang members may constitute particular social groups in some circumstances. For asylum cases arising within the jurisdiction of the Fourth, Sixth, and Seventh Circuits, former membership in a gang may form a particular social group if the former membership is immutable and the group of former gang members is socially distinct and particular.[46] It is important to note, though, that these court decisions were issued before the BIA's rulings in M-E-V-G- and W-G-R- and did not analyze whether these groups met the "social distinction" and "particularity" criteria as articulated in those cases. Asylum officers in these circuits must analyze whether proposed groups meet these criteria on a case-by-case basis.[47] See Asylum Supplement – Former Gang Membership as a Particular Social Group.

Current gang membership, however, may not be the basis for a particular social group even in these circuits. For example, the Fourth Circuit noted:

> We agree that current gang membership does not qualify as an immutable characteristic of a particular social group….It is not the case that current gang members "cannot change" their status as gang members, as they can leave the gang. Nor do we think that they "should not be required to change because [gang membership] is fundamental to their individual identities or consciences." To so hold would "pervert the manifest humanitarian purpose of the statute."[48]

[45] Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007). See, e.g., Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992) ("Whatever its precise scope, the term 'particular social groups' surely was not intended for the protection of members of the criminal class in this country…."); Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007) (holding that current or former gang membership does not give rise to a particular social group due to gang members' criminal activities); Cantarero v. Holder, 734 F.3d 82, 85-88 (upholding the BIA's conclusion that recognizing former members of a gang as members of a particular social group would undermine the legislative purpose of the INA).

[46] Urbina-Mejia v. Holder, 597 F.3d 360, 365–67 (6th Cir.2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of a "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); Benitez Ramos v. Holder, 589 F.3d 426, 431 (7th Cir. 2009); Martinez v. Holder, 740 F.3d 902, 911-13 (4th Cir. 2014) (holding that the petitioner's membership in a group of former MS-13 members was immutable, and remanding the case to the Board to analyze the other particular social group criteria); see also USCIS Asylum Division Memorandum, Notification of Ramos v. Holder: Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit (Mar. 2, 2010).

[47] See also Matter of W-G-R-, 26 I&N Dec. 208, 220-222 (BIA 2014) (holding that an applicant's proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not sufficiently particular, because it could include people of any age, sex, and background and their participation in the gang could vary widely in terms of strength and duration, or socially distinct, because there was not enough evidence in the record about the treatment or status of former Mara 18 members in Salvadoran society).

[48] Martinez, 740 F.3d at 912 (citations omitted).

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The Fourth Circuit's position on gang membership not being a fundamental trait is consistent with USCIS's position that a particular social group may not be based on present criminal activity.[49]

Avoid Circular Reasoning

A group cannot be defined solely by the fact that its members are subject to the harm that the applicant claims to have suffered or to fear as persecution. The shared characteristic of persecution by itself, however, does not disqualify an otherwise valid social group.[50] An otherwise valid group may be defined in part by the fact that its members are subject to persecution if the group is defined by other viable immutable characteristics separate from the feared persecution, or the fact of past persecution itself a basis for additional persecution.[51]

In some cases, the fact that an individual has been harmed in the past can create an independent reason why that individual would be targeted for additional harm in the future. In some societies, a shared past experience of having been harmed in the past may give rise to a socially distinct, particularly defined group. For example, in some circumstances, survivors of rape, if the rape is or were known to others, may be treated differently from other individuals by the surrounding society and/or may face social ostracism, or be more vulnerable to further harm as a result of their past harm. In such a case, the fact that the initial rape was not on account of a protected trait does not preclude a finding that subsequent harm, whether it is in the form of repeated rape or of some other kind of harm, may be on account of a shared characteristic that the applicant obtained by virtue of the initial rape.[52] In such scenarios, the inclusion of the initial incident of past harm as part of the particular social group definition does not violate the rule against circularity. Such a group formulation, however, could not provide the required nexus for the initial incident of mistreatment for purposes of any past persecution analysis.

Another example of past harm forming the basis of a valid particular social group is the Lukwago v. Ashcroft case, involving a Ugandan man who was forcibly recruited by the Lord's Resistance Army (LRA) as a child.[53] He claimed past persecution based on his membership in the particular social group of "children from Northern Uganda who are

[49] See also W-G-R-, 26 I.&N. Dec. at 215 n. 5.

[50] Matter of M-E-V-G-, 26 I&N Dec. 227, 243 (BIA 2014) (citing Cece v. Holder, 733 F.3d 662, 671 (7th Cir. 2013)); see also Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 74 (BIA 2007) (noting that the fact that members of a group have been harmed may be a relevant factor in considering the group's social distinction within society).

[51] Cece, 733 F.3d at 671-72.

[52] Cf. Gomez v. INS, 947 F.2d 660, 663-4 (2d Cir. 1991) (rejecting an applicant's claim that she would be harmed in the future as a member of a particular social group "women previously battered and raped by Salvadoran guerrillas" because there was no evidence that the applicant would be targeted for future harm on that basis).

[53] Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003) (remanding to the BIA to consider an applicant's claim of well-founded fear on account of being a former child soldier).

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abducted and enslaved by the LRA."[54] The Third Circuit rejected the past persecution claim, holding that the LRA was motivated to recruit the applicant by a desire to grow its ranks, and not by his membership in the proposed particular social group.[55] The applicant was not a member of the group at the time he was recruited. However, the court held that the applicant might be able to present a claim based on his well-founded fear of future persecution on account of a similar particular social group. [56] There may be a valid particular social group since the experience of having been a child soldier for the LRA is immutable, and assuming former child soldiers are socially distinct and well-defined in Ugandan society, it could form a valid particular social group with regard to well-founded fear.

While evidence that members of a group are harmed by either the government or private actors can be evidence that they share a distinct trait, you should be careful to avoid defining a particular social group solely or primarily by the harm the applicants suffer.

No size limitation

There are no maximum or minimum limits to the size of a particular social group. While the Board has cautioned that major segments of the population will rarely constitute distinct social groups, particular social groups may contain only a few individuals or a large number of people.[57]

The perception of the society in question, rather than the perception of the persecutor, is most relevant to social distinction.

The Board has held that defining a particular social group from the perspective of the persecutor is inconsistent with prior holdings that a social group cannot be defined "exclusively" by the fact that a member has been subjected to harm.[58] The perception of the applicant's persecutors may be relevant, as it can be indicative of whether society views the group as distinct.[59] The persecutors' perception by itself, however, is insufficient to make a group socially distinct.[60]

No voluntary associational relationship needed

[54] Id. at 167.

[55] Id. at 170.

[56] Id. at 178-79.

[57] Matter of M-E-V-G-, 26 I&N Dec. 227, 239 (BIA 2014); Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010) (reasoning "that the size and breadth of a group alone does not preclude a group from qualifying as such a social group").

[58] M-E-V-G-, 26 I&N Dec. at 242 (disagreeing with the Ninth Circuit's suggestion, in Henriquez-Rivas v. Holder, 707 F.3d 1081,1089 (9th Cir. 2013), that the perception of the persecutor may matter the most).

[59] Id.

[60] Id.

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A voluntary association is not a required component of a particular social group, but can be a shared trait that defines a particular social group.[61] Thus, a voluntary association should be analyzed as any other trait asserted to define a particular social group.

Cohesiveness or homogeneity not required

Cohesiveness or homogeneity of group members is not a required component of a particular social group.[62] It is not necessary that group members be similar in all or many aspects and it is not required that the group members know each other or associate with each other. The relevant inquiry is whether there is a shared characteristic or belief that members share.

3. Is the Persecution or Feared Persecution "on Account of" the Applicant's Particular Social Group Membership?

Even if an applicant establishes that he or she is a member of a particular social group, the applicant must still establish that he or she was persecuted, or has a well-founded fear of persecution, on account of his or her membership in the group. To determine whether an applicant has established a nexus, you must elicit and consider all evidence, direct and circumstantial, relevant to the motive of the persecutor.

You must keep this step in the analysis distinct from your determinations of 1) whether a particular social group exists, and 2) whether the applicant is a member of the group. This step in the process is the same analysis that you must conduct with any of the four other protected grounds.

4. Precedent Decisions (Specific Groups)

Below are summaries of precedent decisions that have identified certain groups that are particular social groups and other groups that were found not to be particular social groups based on the specific facts of the case. These examples are not an exhaustive list. Since this area of law is evolving rapidly, it is important to be informed about current cases and regulatory changes. It also is important to emphasize that these decisions were limited to the records before the Board and courts. Unlike the appellate context where the record is already developed, you have a duty to develop the record, eliciting testimony

[61] Matter of C-A, 23 I&N Dec. 951,956 (BIA 2006); see Henriquez-Rivas v. Holder, 707 F.3d 1081, 1097 (9th Cir. 2013) (acknowledging that the Board does not require members of a particular social group to share a voluntary associational relationship); Hernandez-Montiel v. INS, 225 F.3d 1084, 1092-93 (9th Cir. 2000) (holding that a particular social group "is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members).

[62] C-A-, 23 I&N Dec. at 957. See also Henriquez-Rivas v. Holder, 707 F.3d 1081, 1097 (9th Cir. 2013); UNHCR Guidelines On International Protection: "Membership of a Particular Social Group', para. 15.

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and researching country conditions, news reports, laws, policies, and other evidence, to determine whether a group is cognizable in the relevant society.[63]

4.1 Family Membership

When analyzed on a case-by-case basis under the framework set out in this lesson plan, in many cases a family may constitute a particular social group. This approach is consistent with existing case law recognizing family as a "particular social group." For instance, the First Circuit has held that a family constitutes the "prototypical example" of a particular social group. The court found a link between the harm the applicant experienced and his family membership, and concluded that the harm experienced was persecution on account of the applicant's membership in a particular social group (his nuclear family).[64] The Seventh Circuit has found that parents of Burmese student dissidents share a common, immutable characteristic sufficient to constitute a particular social group.[65] The Fourth Circuit has found that "family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses" is a viable particular social group where evidence showed that street gang members often intimidate their enemies by attacking those enemies' families. The court found that "[t]he family unit – centered around the relationship between an uncle and his nephew – possesses boundaries that are at least as 'particular and well-defined' as other groups whose members have qualified for asylum," thus meeting the particularity requirement.[66]

In analyzing whether a specific family group qualifies as a particular social group, the shared familial relationship should be analyzed as the common trait that defines the group. The immutability criterion can easily be satisfied. The right to have a relationship with one's family is fundamental, as it is protected by international human rights norms. Also, familial relationships for the most part cannot be changed. Often, the determinative question is whether the familial relationship also reflects social distinctions. That would depend on the circumstances, including the degree and nature of the relationship asserted

[63] See Pirir-Boc v. Holder, 750 F.3d 1077 (9th Cir. 2014) (reiterating that "[i]t is an error . . . to assume that if a social group . . . has been found non-cognizable in one society, it will not be cognizable in any society"); Matter of S-M-J-, 21 I&N Dec. 722, 729 (BIA 1997) (noting that the adjudicator has the duty to develop the record). As refugee officers have limited ability to research country conditions when interviewing applicants abroad, RAD generally provides guidance at pre-departure briefings regarding particular social groups that have been recognized in certain regions. See RAD Supplement. In addition, RAD adjudicates applications abroad and outside of the jurisdiction of any federal circuit court of appeals. Consequently, while case law on particular social groups may be informative, refugee officers must ensure that they have elicited sufficient testimony consistent with specific, relevant country conditions to support a social group-based claim regardless of whether or not the particular social group has been recognized in circuit court case law.

[64] Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993).

[65] See Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998); see also Iliev v. INS, 127 F.3d 638, 642 (7th Cir. 1997) (recognizing that family could constitute a particular social group).

[66] Crespin-Valladares v. Holder, 632 F.3d 117, 125-26 (4th Cir. 2011) (reversing BIA's rejection of particular social group comprised of family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses).

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to define the group and the cultural context that would inform how that type of relationship is viewed by the society in question. The question here is not generally whether a specific family is well-known in the society. Rather, the question is whether the society perceives the degree of relationship shared by group members as so significant that the society distinguishes groups of people based on that type of relationship.

In most societies, for example, the nuclear family would qualify as a particular social group, while those in more distant relationships, such as second or third cousins, may not. In other societies, however, extended family groupings may have greater social significance, such that they could meet the "social distinction" element.[67] You should carefully analyze this issue in light of the nature and degree of relationship within the family group and pay close attention to country of origin information about social attitudes toward family relationships.

It is important to keep in mind that it is the family membership itself that forms the basis for the particular social group. A case that at first glance may appear to be a personal dispute may satisfy the nexus requirement with regard to family members; it is not necessary that the persecutor have initially targeted the family on account of a different protected characteristic. For example, the persecutor may target the applicant to seek revenge on a family member with whom the persecutor has a personal dispute. Where the persecutor is motivated to harm the victim because of the victim's family membership, the targeting is not in fact because of a personal dispute with the applicant or for revenge against the applicant.[68]

In many cases, multiple members of a family may have been threatened or targeted by the same persecutor, and there may be evidence that the persecutor may have been motivated both by the applicant's family membership and by other factors. You must determine whether the applicant's family membership was a sufficient part of the persecutor's motive to meet the nexus standard.

In Aldana-Ramos v. Holder, for example, the First Circuit considered a case in which two brothers applied for asylum after their father, a successful business owner, was kidnapped for ransom by members of a criminal gang in Guatemala. Although the brothers paid the

[67] Matter of H-, 21 I&N Dec. 337, 342-43 (BIA 1996) (indicating that a Somali clan or subclan represents a familial-type relationship that is socially distinct).

[68] See, e.g., Hernandez-Avalos v. Lynch, 784 F.3d 944, 950 (4th Cir. 2015) ("Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities. The BIA's conclusion that these threats were directed at her not because she is his mother but because she exercises control over her son's activities draws a meaningless distinction under these facts. It is therefore unreasonable to assert that the fact that Hernandez is her son's mother is not at least one central reason for her persecution."); Cordova v.Holder, 759 F.3d 332, 339 (4th Cir. 2014) ("The BIA certainly did not err in holding that Aquino [Cordova]'s cousin and uncle were targeted because of their membership in a rival gang and not because of their kinship ties. But that holding does not provide a basis for concluding that MS–13 did not target Aquino on account of his kinship ties to his cousin and uncle.").

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ransom, their father was killed, and they continued to receive threats from the gang. The First Circuit reversed the Board's conclusion that the brothers had been threatened solely on the basis of wealth and held that the Board had erred by failing to consider the applicants' contention that they had been targeted on account of their membership in their immediate family.[69] It remanded the case to the Board for further consideration of whether the applicants' family membership was "one central reason" they had been targeted as required for them to be eligible for asylum.[70] In Perlera-Sola v. Holder, by contrast, the First Circuit upheld the Board's determination that a Guatemalan applicant had not met his burden to show that his family membership was a central reason for the harm he suffered where the applicant had, along with several members of his family, been attacked and threatened by unknown criminals because of their perceived wealth.[71]

4.2 Clan Membership

A clan is an extended family group that has been found to be a particular social group. The BIA has held that membership in a Somali sub-clan may form the basis of a particular social group.[72] In 1993, the Immigration and Naturalization Service (INS) Office of the General Counsel issued a legal opinion that a Somali clan may constitute a particular social group.[73] Although extended family groups may not always be recognized as particular social groups, in the Somali context, a clan is a discrete group, whose members are linked by custom and culture.[74] Clan members also are usually identifiable within their countries of origin as members of their clan.

4.3 Age

The Board noted in Matter of S-E-G- that a particular social group may be valid where the age of the members is one of the shared characteristics. The Board stated that although age is not strictly immutable, it may give rise to a particular social group since "the mutability of age is not within one's control and … if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a

[69] Aldana-Ramos v. Holder, 757 F.3d 9, 18-19 (1st Cir. 2014).

[70] Id. at 19.

[71] Perlera-Sola v. Holder, 699 F.3d 572, 576-577 (1st Cir. 2012).

[72] Matter of H-, 21 I&N Dec. at 338 (BIA 1996).

[73] Paul W. Virtue, INS Office of General Counsel, Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA, Memorandum to Kathleen Thompson, Director, Refugee Branch, OIA (Washington, DC: 9 December 1993).

[74] Matter of H-, 21 I&N Dec. 337, 342-43 (BIA 1996); Malonga v. Mukasey, 546 F.3d 546 (8th Cir. 2008) (concluding that Lari ethnic group of the Kongo tribe is a particular social group for purposes of withholding of removal; members of the tribe share a common dialect and accent, which is recognizable to others in Congo, and members are identifiable by their surnames and by their concentration in southern Congo's Pool region).

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claim for asylum may still be cognizable."[75] In other words, in the context of age-based particular social groups, you should consider the immutability of age at the time of the events of past persecution or at the time the applicant expresses a fear of future persecution.

Several Board and circuit court cases have addressed the validity of using age, in conjunction with other characteristics, as the basis for a particular social group. The Board and some courts have rejected social groups composed of young, urban males who feared either conscription by the military or forcible recruitment by guerrillas.[76] In those cases, the persecutors targeted the young men because they were desirable combatants. It appears that the courts rejected the claims because of the applicants' failure to establish the requisite motive ("on account of"), and not because of their failure to establish membership in a valid particular social group.

The Third Circuit, in Lukwago v. Ashcroft, noted that age changes over time, "possibly lessening its role in personal identity." The court further noted that children as a class represent a large and diverse group, suggesting that the class is not particular enough. Nevertheless, age did make up an important component in the particular social group based on the applicant's shared past experience in Lukwago. The court held that "former child soldiers who escaped [Lord's Resistance Army] enslavement" were a particular social group at risk of persecution by the LRA and the Ugandan government because they could not undo the shared past experience of being child soldiers.[77]

The immutability of age was also taken into account by the Seventh Circuit in considering a case involving an Albanian woman who feared being trafficked in the future due to her youth, gender, and living alone. The court stated, "the Petitioner is part of a group of young Albanian women who live alone. Neither their age, gender, nationality, or living situation are alterable."[78] Without considering the Board's requirements of social distinction and particularity, the Seventh Circuit held, "These characteristics qualify Cece's proposed group as a protectable social group under asylum law."[79]

4.4 Gender

[75] Matter of S-E-G-, 24 I&N Dec. 579, 583-84 (BIA 2008).

[76] Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); Matter of Sanchez and Escobar, 19 I&N Dec. 276 (BIA 1985). See also Civil v. INS, 140 F.3d 52 (1st Cir. 1998); Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008); Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008).

[77] Lukwago v. Ashcroft, 329 F.3d 157, 178 (3d Cir. 2003).

[78] Cece v. Holder, 733 F.3d 662, 673 (7th Cir. 2013) (en banc).

[79] Id.

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Gender is an immutable trait and has been recognized as such by the BIA and some federal courts.[80] Courts have not yet addressed whether broad social groups based solely on an applicant's gender may meet the "particularity" and "social distinction" requirements as outlined in M-E-V-G- and W-G-R-,[81] but some earlier circuit court decisions have indicated that gender may form the basis of a particular social group in combination with the applicant's nationality or ethnicity and that there may be a nexus between an applicant's membership in that group and the harm he or she fears.[82]

In most cases, though, an applicant's status as a man or woman is not, by itself, a central reason motivating the persecutor to harm him or her. Rather, the persecutor is motivated to harm him or her based on membership in a group defined by gender in combination with some other characteristic he or she possesses, such as a person's social status in a domestic relationship.[83] In general, you will formulate gender-related particular social groups based on gender, nationality and/or ethnicity, and at least one other relevant trait or characteristic. The following sections discuss some of the common gender-related particular social groups.

4.4.1 Female Genital Mutilation (FGM)[84]

FGM cases also raise gender-related issues. In Matter of Kasinga, the BIA held that gender, in conjunction with other characteristics, formed the basis of a particular social group. The BIA granted asylum to the applicant, who feared persecution on account of her membership in the particular social group defined as "young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice."[85]

Case law has taken a variety of approaches to defining a particular social group in cases involving FGM. As stated in the Attorney General's decision on certification in Matter of

[80] See, e.g., Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985) (listing "sex" as a paradigmatic example of an immutable characteristic); Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993); Matter of Kasinga, 21 I&N Dec. 357, 365-66 (BIA 1996).

[81] See Paloka v. Holder, 762 F.3d 191 (2d Cir. 2014) (remanding to the BIA for consideration of whether the proposed social groups of "young Albanian women" or "young Albanian women between 15 and 25" are proposed social groups under the M-E-V-G- framework).

[82] See Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005) (finding that "gender plus tribal membership" may identify a social group); Mohammed v. Gonzales, 400 F.3d 785, 797 ("the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law"); Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007). See also Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993); Bah v. Mukasey, 528 F.3d 99, 112 (2d Cir. 2008); Perdomo v. Holder, 611 F.3d 662, 668 (9th Cir. 2010).

[83] See, e.g., Cece v. Holder, 733 F.3d 662, 676 (7th Cir. 2013) (en banc) (finding that the petitioner had a well-founded fear of persecution on account of her membership in a particular social group of "young Albanian women living alone" and noting that "the social group is defined by gender plus one or more narrowing characteristics.").

[84] Sometimes referred to as female genital cutting.

[85] Matter of Kasinga, 21 I&N Dec. 357, 367 (BIA 1996).

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A-T-, the framework for analyzing such cases depends in critical ways on how the group is formulated.[86]

In FGM cases, you should consider whether the relevant social group should be defined as females of a certain nationality or ethnicity who are subject to gender-related cultural traditions. For additional guidance on FGM cases in the asylum context, see RAIO Training Module, Well-Founded Fear.

Eligibility Based on Feared FGM of Applicant's Children

In Matter of A-K-, the BIA made clear that an applicant cannot establish eligibility for asylum based solely on a fear that his or her child would be subject to FGM if returned to the country of nationality. The persecution an applicant fears must be on account of the applicant's protected characteristic (or protected characteristic imputed to the applicant). When a child is subjected to FGM, it is generally not because of a parent's protected characteristic. Rather, the FGM is generally imposed on the child because of the child's characteristic of being a female who has not yet undergone FGM as practiced by her culture.[87]

If the child of an applicant were specifically targeted for FGM in order to harm the parent because of the parent's opposition to FGM, it might be possible to establish a nexus to the parent's membership in a particular social group defined as parents who oppose FGM, if that group, viewed in the applicant's society, meets the requirements to be considered a particular social group.[88] More simply, however, in most cases involving parent(s) who oppose FGM, the claim would fit better within a political opinion analysis. Accordingly, you should first explore any evidence that supports whether the persecutor may seek to harm the parent on account of his or her political opinion.

4.4.2 Widows

A group consisting of widows from a country is another potential gender-related particular social group. The Eighth Circuit has held that a group consisting of Cameroonian widows is a cognizable particular social group.[89] The court reasoned that widows share the past experience of losing a husband—an experience that cannot be changed. The court also found that Cameroonian society perceives widows as a distinct

[86] Matter of A-T-, 24 I&N Dec. 617 (AG 2008).

[87] Matter of A-K-, 24 I&N Dec. 275 (BIA 2007).

[88] Gatimi v. Holder, 578 F.3d 611, 617 (7th Cir. 2009).

[89] Ngengwe v. Mukasey, 543 F.3d 1029, 1034-35 (8th Cir. 2008); see also Sibanda v. Holder, 778 F.3d 676, 681 (7th Cir. 2015) (noting, in a case involving a widowed applicant who was expected to marry her deceased husband's brother, that her "proposed social group – married women subject to the bride-price custom – appears to fall easily within this court's established definition of particular social group").

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group, noting the pervasiveness of discrimination against widows.[90] In cases involving widows, social distinction also may be demonstrated by laws providing benefits to widows, government or non-governmental programs specifically targeted to widows, testimony, or any other relevant evidence. Although the Eighth Circuit did not analyze particularity, a group comprised of widows seems to be defined with precision, such that it is clear who falls within the group: widowhood does not contain various permutations, as one is either widowed or not widowed.

4.4.3 Gender-Specific Dress Codes

Where refusal to abide by gender-specific dress codes could result in serious punishment or consequences, an applicant may establish that treatment resulting from his or her noncompliance amounts to persecution on account of membership in a particular social group.

Both the Third Circuit, in Fatin v. INS, and the Eighth Circuit, in Safaie v. INS, stated that Iranian women who would refuse to conform to the country's gender-specific laws may constitute a particular social group. However, neither applicant in the cases before those courts established that she was a member of such a group, because each applicant failed to demonstrate that she would refuse to comply with the gender-specific laws.[91]

In Fatin, the Third Circuit found the applicant to be a member of the particular social group of "Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them."[92] The court examined whether, for this applicant, compliance with the laws would be so abhorrent to her that wearing the chador would itself be tantamount to persecution. Because the applicant testified that she would only try to avoid compliance and did not testify that wearing the chador would be abhorrent to her, the court concluded that the applicant had not established that her compliance with the gender-specific laws was so abhorrent to her such that it could be considered persecution.

Similarly, the Seventh Circuit in Yadegar-Sargis v. INS considered whether an applicant who established her membership in the particular social group of "Christian women in Iran who do not wish to adhere to the Islamic female dress code" would suffer persecution by her compliance with the dress code. Looking to Fatin for guidance, the court found that because the applicant did not testify that compliance with the dress code violated a tenet of her Christian faith and testified that she was not prevented from attending church or practicing her faith when she complied with the dress code, the evidence could be interpreted such that the dress requirements were "not abhorrent to [the

[90] Id.

[91] Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994).

[92] Fatin, 12 F.3d at 1241-42.

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applicant's] deepest beliefs."[93] The issue in this case did not turn on whether the group constituted a particular social group, but rather on whether forced compliance with dress codes constituted persecution.

4.5 Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI)

Persecution on account of sexual orientation constitutes persecution on account of membership in a particular social group. The Board found that a gay male in Cuba who was harmed on account of his homosexuality was persecuted on account of his membership in a particular social group.[94] In that case, where the applicant was registered as "homosexual" by the Cuban government, the Board found that the applicant was being targeted because of his status as a gay man, and that this status defined a particular social group.[95] A persecutor's perception of an applicant as a sexual minority can be established by a variety of types of evidence. For example, harm an applicant experiences because he or she engages in intimate sexual activity with a consenting adult of the same sex may constitute persecution on account of membership in a particular social group defined by its members' actual or imputed sexual minority status.[96]

The Ninth Circuit has held that gay men with female sexual identities in Mexico constitute a particular social group.[97] The court held that the applicant's female identity was immutable because it was an inherent characteristic. In Matter of M-E-V-G-, the Board emphasized that a gay male applicant does not need to be literally visible to society; instead the question is the extent to which the group is understood to exist as a recognized component of society.[98]

The Third Circuit, in Amanfi v. Ashcroft, recognized that harm suffered or feared on account of an applicant's perceived homosexuality, even where the applicant is not gay, could be sufficient to establish past or future persecution on account of an imputed membership in a particular social group.[99]

For more information, see RAIO Training Module, Guidance for Adjudicating LGBTI Refugee and Asylum Claims.

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[93] Yadegar-Sargis v. INS, 297 F.3d 596, 604-605 (7th Cir. 2002).

[94] Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822-23 (BIA 1990) (designated by the Attorney General as a precedent decision on June 16, 1994); see also Boer-Sedano v. Gonzales, 418 F.3d 1082, 1089 (9th Cir. 2005).

[95] Toboso-Alfonso, 20 I&N Dec. at 821.

[96] See Karouni v. Gonzales, 399 F.3d 1163, 1173 (finding "no appreciable difference between an individual…being persecuted for being a homosexual and being persecuted for engaging in homosexual acts").

[97] Hernandez-Montiel v. INS, 225 F.3d 1084, 1094-95 (9th Cir. 2000).

[98] Matter of M-E-V-G-, 26 I&N Dec. 227, 238-39 (BIA 2014).

[99] Amanfi v. Ashcroft, 328 F.3d 719, 730 (3d Cir. 2003).

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4.6 Domestic Violence

4.6.1 Women Who Are Unable to Leave a Domestic Relationship or Women Who Are Viewed as Property by Virtue of their Position within a Domestic Relationship

The Board has addressed the issue of "whether domestic violence can, in some instances, form the basis for a claim of asylum."[100] In Matter of A-R-C-G-, the applicant married at the age of 17 and suffered physical and sexual abuse by her husband. The respondent repeatedly attempted to leave the relationship by staying with relatives, but her husband continued to find her and threaten her.[101] Based on these facts, the group before the Board was articulated as "married women in Guatemala who are unable to leave their relationship." The Board found that the proposed group satisfied the three necessary criteria. It was immutable because it involved gender and a marital status that the applicant could not change.[102] The Board also found that the group was defined with particularity, as the terms "married," "women," and "unable to leave the relationship" have commonly accepted definitions within Guatemalan society. The Board noted that evidence of social distinction for women in marriages they cannot leave would include "whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors."[103]

Although the specific facts in A-R-C-G- involved a married woman, the absence of a formal marriage does not defeat the cognizability of the group if the domestic relationship (or imputed relationship) that gives rise to a group meets all three criteria. As the Board stated, the group "must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question."[104] For instance, even in the absence of a formal marriage, there may be a valid particular social group. DHS's brief to the Board in Matter of L-R-, another case that involved domestic violence, noted that the groups of women unable to leave a domestic relationship or women who are viewed as property by virtue of their positions within a domestic relationship could be cognizable particular social groups.[105] L-R- involved a woman who, although not married, was in a domestic relationship for two decades. This brief, which continues to represent the DHS position, argued that under these two social group formulations, an applicant's status within a domestic relationship is immutable where the applicant is economically,

[100] Matter of A-R-C-G-, 26 I&N Dec. 388, 390 (BIA 2014).

[101] Id. at 389.

[102] Id. at 392-93.

[103] Id. at 394.

[104] Id. at 392.

[105] DHS's Supplemental Brief in Matter of L-R- , April 13, 2009.

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socially, or physically unable to leave the abusive relationship, or where "the abuser would not recognize a divorce or separation as ending the abuser's right to abuse the victim."[106]

The particularity requirement for either of these groups can be established by a showing that the domestic relationship has a clear definition.[107] The L-R-brief also emphasized that the term domestic relationship could be "tailored to the unique situation" in the applicant's society.

4.6.2 Other Types of Domestic Relationships

Of course, abuse serious enough to amount to persecution can also occur within other domestic relationships. Where claims are based on assertions of harm within a relationship that is not spousal or spouse-like, the adjudicator must identify the relationship, and determine whether such a relationship is a domestic relationship. Once the relationship is determined to be a domestic relationship, you can assess whether the applicant is a member of a cognizable particular social group similar to the ones discussed in the previous section. If you determine that the applicant is a member of a cognizable group, of course, the applicant must also establish a nexus and the other requirements for asylum or refugee status.

In Ming Li Hui v. Holder, for example, the Eighth Circuit addressed an asylum applicant's claim for asylum based on physical and emotional abuse by her mother.[108] In that case, the applicant asserted that "her mother severely abused her as a child 'because she hated girl[s].' The abuse included the mother burning her hand with a cigarette butt, withholding food, calling her 'trash, garbage,' and telling her she 'wish[ed] you'd die soon.'[109] The applicant also testified that at the age of 20, she got a job that paid well enough for her to be able to leave the home and escape the abuse. She was able to live away from her mother for five years, and although her mother threatened her during this period, she did not harm the applicant.[110] The Eighth Circuit, without specific analysis, accepted the applicant's proposed particular social group of "Chinese daughters [who are] viewed as property by virtue of their position within a domestic relationship."[111] The court concluded, however, that a fundamental change in circumstances rebutted the

[106] Id. at n.12.

[107] See id. at 19 (citing section 237(a)(2)(E)(1), which defines "crimes of domestic violence" to include offenses "against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws."

[108] Ming Li Hui v. Holder, 769 F.3d 984 (8th Cir. 2014).

[109] Id. at 985.

[110] Id.

[111] Id. at 985-86.

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presumption of a well-founded fear on account of her membership in that group because the applicant testified that she had only been abused when she lived with her mother, and not after she was able to leave her mother's household.[112]

4.6.3 Children in Domestic Relationships

As reflected in the decision in Ming Li Hui, claims involving child abuse can involve some of the same dynamics of power and impunity as claims involving other kinds of domestic violence. In some cases, a child's vulnerable status and lack of protection within the family and society may make a persecutor believe that he or she can harm the child with impunity and is entitled to do so, which in combination may form a significant part of the persecutor's motivation. In analyzing a child abuse case, you, following the proposed group before the court in Ming Li Hui and one of the groups analyzed in DHS's brief in Matter of L-R-, could formulate the particular social group as [nationality] children who are viewed as property by virtue of their position within a domestic relationship.

All claims require case-by-case analysis, but it is generally established in precedent that when persecution is suffered or feared on account of a characteristic that includes being a child, that characteristic is immutable within the meaning of Acosta. This is because a child cannot change his or her age at the time of persecution.[113] Similarly, a child is typically unable to leave the family or other domestic relationship in which the child is situated, due to the inherent dependency of minors as well as the established legal and cultural expectations in most societies that children are subordinate to the authority of their parents or other adults acting in the role of parents. [114] A child is not expected to leave his or her family.

In child abuse cases, social distinction could be established by evidence such as the existence of laws that are designed to protect children from domestic abuse, programs to assist such children, reports about the prevalence of domestic violence and prosecution of domestic violence or lack of prosecution, or other evidence that members of this group are distinguished from others in the society in which they live.[115] Additionally, although

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[112] Id. at 986. Note that the fundamental change in circumstances analysis would not apply to refugee resettlement cases, as the past persecution, by itself, would be sufficient to establish a claim. For asylum cases, the assessment of what would constitute a fundamental change in circumstances under such an analysis would be specific to the facts of each case.

[113] See Matter of S-E-G-, 24 I&N Dec. 579, 583-84 (BIA 2008).

[114] Cf. Matter of A-R-C-G-, 26 I&N Dec. 388, 393 (BIA 2014) (In the separate context of intimate partner domestic violence, discussing the definable boundaries of a group involving married women unable to leave the relationship, noting "that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation").

[115] See id. at 394 (for a particular social group of married Guatemalan women who are unable to leave the relationship, noting that evidence of social distinction "would include whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors.")

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past persecution by itself cannot be used to define a particular social group, a group's being subjected to harm is a good indication that it is socially distinct.[116] At the same time, social distinctions do not have to be discriminatory or punitive. Many of the ways in which society distinguishes children are benign or are intended to protect them.

The group of children who are viewed as property by virtue of their position within a domestic relationship also can be described with sufficient particularity because it is possible to determine who falls within the group: they are (1) minors[117] (2) who fall within the boundaries of a domestic relationship, and (3) are treated and perceived as property because of their subordinate status within that relationship.[118] As noted by the Board in examining the particularity of a group involving violence within the domestic relationship, "the terms can combine to create a group with discrete and definable boundaries."[119]

Even where an applicant whose claim is based on child abuse can establish membership in a cognizable particular social group, all the other eligibility requirements must also be met. The dynamics of domestic relationships between children and their parents or other parental figures are different from the dynamics of domestic relationships between adults. In claims involving child abuse, nexus must be analyzed in the context of a parent's role (or that of another person acting in a parental capacity) in raising a child. The relevance of power and authority of an adult over a child is assessed differently than in the context of adult domestic partnerships. Strong deference is generally shown to parents in determining the child's best interests. Where a parent or person acting in a parental capacity is motivated by legitimate disciplinary or child-rearing goals and the discipline is reasonable in degree, the punishment is not on account of a protected ground. Only where harm is clearly inflicted for purposes other than discipline or other legitimate child-rearing goals or is clearly disproportionate to such goals could it objectively constitute persecution on account of a protected ground. Factors that may indicate that the harm is not legitimately related to discipline or other child-rearing goals (and hence there may be persecution and a nexus to a protected ground) could be: (1) where the harm inflicted is clearly disproportionate or unrelated to any child-rearing goal; (2) where the abuse is coupled with repeated remarks devaluing the child; or (3) where the abuser tries to cover up the abuse. Rape is an example of harm that would never further a legitimate child-rearing goal.

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[116] Matter of C-A-, 23 I&N Dec. 951 (BIA 2006); see also Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 74 (BIA 2007) ("the fact that its members have been subjected to harm...may be a relevant factor in considering the group's visibility in society").

[117] The Convention on the Rights of the Child defines children as individuals under the age of 18, and provides a benchmark for determining who is a minor.

[118] Cf. A-R-C-G-, 26 I&N Dec. at 393 (In the separate context of intimate partner domestic violence, discussing the definable boundaries of a group involving married women unable to leave the relationship, noting "that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation").

[119] Id.

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In the asylum context, in cases where the applicant has been found to have suffered past persecution based on his or her membership in a particular social group related to domestic violence, it is necessary to assess whether there is a fundamental change in circumstances or a reasonable possibility of internal relocation to rebut the presumption of well-founded fear. When an applicant is a child at the time of the asylum interview, the applicant remains dependent on caregivers, potentially including former abusers, and there is no obvious fundamental change in circumstances that rebuts the presumption of a well-founded fear, and children are not expected to relocate outside of the family. In such cases, you will generally find that the applicant is a member of a particular social group consisting of children who are viewed as property because of their position within a domestic relationship. If the applicant suffered past persecution within a domestic relationship and the applicant is no longer a child at the time of the asylum interview, you should examine whether the applicant continues to be viewed as property because of his or her position within a domestic relationship, such as due to being a daughter or son in the domestic relationship or a female or male in the domestic relationship.

In such cases, you will need to thoroughly analyze whether there has been a fundamental change in circumstances due to the applicant no longer being a child or whether the applicant could safely and reasonably relocate outside of the domestic relationship. Once an applicant is an adult, the conditions that created his or her subordinate and vulnerable status at the time the applicant was harmed may have fundamentally changed.[120] You must elicit testimony and review country conditions to determine whether there are specific facts showing that the dynamics of power and control within the relationship had fundamentally changed. Among other things, you must analyze whether the applicant can live independently and safely outside of the domestic relationship considering the applicant's age, economic resources, marriage, or other reasons.[121] In some circumstances, the harm to the applicant may have begun when he or she was a child and continued into adulthood, and the applicant continued to be in a subordinate and vulnerable status. In such circumstances, there would generally not be a fundamental change in circumstances.

4.7 Ancestry

The Board has found that "Filipinos with Chinese ancestry" could define a particular social group, because of the immutability of the characteristic.[122] Note that this protected characteristic can also be appropriately analyzed under the nationality or race protected grounds.

[120] Cf. Ming Li Hui v. Holder, 769 F.3d 984 (8th Cir. 2014) (finding, in examining another proposed group involving the parent-child relationship, that there had been a fundamental change in circumstances because Hui, as an adult, could control whether she lived with her mother).

[121] If the presumption of well-founded fear is rebutted, you must complete a Chen analysis to determine whether an exercise of discretion to grant asylum may be warranted. Similarly, you must consider whether there is a reasonable possibility of other serious harm.

[122] Matter of V-T-S, 21 I&N Dec. 792, 797 (BIA 1997).

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4.8 Individuals with Physical or Mental Disabilities

In an opinion later vacated and remanded by the Supreme Court, the Ninth Circuit held in Tchoukhrova v. Gonzales that Russian children with serious disabilities that are long-lasting or permanent constitute a particular social group. The court reserved the question of whether individuals with disabilities from any country would constitute a particular social group, but found that in Russia, children with disabilities constitute a specific and identifiable group, as evidenced by their "permanent and stigmatizing labeling, lifetime institutional[ization], denial of education and medical care, and constant, serious, and often violent harassment."[123]

The Supreme Court vacated the Ninth Circuit's opinion in Tchoukhrova v. Gonzales, so this opinion is no longer precedent. However, the concerns with the case that were raised on appeal were unrelated to the formulation of the particular social group. The particular social group formulation in the Ninth Circuit's opinion is consistent with USCIS's interpretation. The Asylum Division has granted asylum to people with disabilities when the applicant established that he or she was persecuted in the past or would be persecuted in the future on account of his or her membership in a particular social group, defined as individuals who share those disabilities. The proper analysis is whether 1) the disability is immutable; 2) persons who share that disability are socially distinct in the applicant's society; and 3) the group is particularly defined.

More recently, in Temu v. Holder, the Fourth Circuit held that individuals with bipolar disorder, who exhibit erratic behavior, can constitute a viable particular social group.[124] The applicant credibly testified that he was persecuted by nurses and prison guards because of his illness. The court concluded that the Board's decision, finding no particular social group, was "manifestly contrary to the law and an abuse of discretion."[125] Using the term "social visibility," but essentially applying the social distinction test, the court found that the petitioner "appears to have a strong case for social visibility," as Tanzanians with severe mental illnesses are singled out for abuse in hospitals and prisons and are labeled "mwenda wazimu."[126] The court also rejected the Board's reasoning that if a persecutor targets an entire population ("the persecutor's net is too large"), "social visibility" must be lacking. The court highlighted that the "folly of this legal conclusion can be demonstrated with a hypothetical," specifically to assume "that an anti-Semitic government decides to massacre any Jewish citizens [and] imagine that in putting its policy into practice, the government collects a list of surnames of individuals who are

[123] Tchoukhrova v. Gonzales, 404 F.3d 1181, 1189 (9th Cir. 2005), reh'g and reh'g en banc denied, 430 F.3d 1222 (9th Cir. 2005), vacated, 127 S.Ct. 57 (U.S. 2006).

[124] Temu v. Holder, 740 F.3d 887, 892-96 (4th Cir. 2014).

[125] Id. at 892.

[126] Id. at 893.

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known to be Jewish and then kills anyone with the same surname. Jews and Gentiles alike might be murdered, but this does not change the fact that Jews have social visibility as a group."[127]

The court in Temu also rejected the Board's analysis related to particularity, noting that the Board "missed the forest for the trees."[128] Specifically, the Board "erred because it broke down [the petitioner's] group into pieces and rejected each piece, rather than analyzing his group as a whole." The court recognized that a group characterized as people with "mental illnesses" without additional defining characteristics might lack particularity, as the group would cover "a huge swath of illness that range from life-ending to innocuous."[129] Similarly, the court recognized that "erratic behavior," by itself, would likely lack particularity. The petitioner's group, however, did not "suffer from the same shortcoming" because his group was defined by people who exhibit erratic behavior and who suffer from bipolar disorder.[130] The court emphasized that the group as a whole must be analyzed for particularity. Finally, the court found that the proposed group "easily satisfies" the immutability requirement, as there is no cure for bipolar disorder and the petitioner would be unable to access medication to control his disorder.[131]

The Seventh Circuit also has held that mental illness can form the basis of a valid particular social group, disagreeing with the BIA's finding that mental illness is not a basis for a particular social group in that case because it is not immutable.[132]

4.9 Unions

In Matter of Acosta, a case that involved a member of a Salvadoran taxi cooperative, the BIA considered a social group with the defining characteristics of "being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages."[133] The BIA found that neither characteristic was immutable, because the members of the group could either change jobs or cooperate in work stoppages. However, the BIA did not address whether being a member of a cooperative or union is a characteristic an individual should not be required to change.

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[127] Id. at 894.

[128] Id. at 895.

[129] Id.

[130] Id.

[131] Id. at 896-97.

[132] Kholyavskiy v. Mukasey, 540 F.3d 555, 572-73 (7th Cir. 2008). While the Eighth Circuit found that the groups of "mentally ill Jamaicans" or "mentally ill female Jamaicans" do not constitute a particular social group because the members of the group are not "a collection of people closely affiliated with each other, who are actuated by some common impulse or purpose," Raffington v. INS, 340 F.3d 720, 723 (8th Cir. 2003), the Board rejected the need for cohesiveness or a voluntary associational relationship in its decision in Matter of C-A-, 23 I&N Dec. 951, 956-57 (BIA 2006).

[133] Matter of Acosta, 19 I&N Dec. 211, 234 (BIA 1985).

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The Fifth Circuit, in Zamora-Morel v. INS, assumed without deciding that a trade union may constitute a particular social group. The court held that the applicant was not persecuted and did not have a well-founded fear on account of his membership in the union, analyzing the case as if the union was a particular social group.[134]

Depending on the facts, cases involving union membership, labor disputes, or union organizing also may be analyzed under political opinion.

4.10 Students and Professionals

Courts have held that particular social groups of students are either not cognizable particular social groups,[135] or that the harm applicants suffered was not on account of their membership in student groups.[136] These holdings do not preclude a finding that a specific, identifiable group of students could constitute a particular social group.

The First Circuit has recognized that persons who are associated with a former government, members of a tribe, and educated or professional individuals could be members of a social group.[137] On the other hand, the Board has rejected a particular social group where the applicant, who was a former government soldier, testified that guerrillas targeted him due to his expertise as an artillery specialist.[138] The Second Circuit has determined that a particular social group of experts in computer science "was not cognizable because its members possess only 'broadly-based characteristics.'"[139]

4.11 Small-Business Owners Indebted to Private Creditors

The Tenth Circuit held in Cruz-Funez v. Gonzales that being indebted to the same creditor is not the kind of group characteristic that a person either cannot change or should not be required to change.[140] Therefore, the court concluded that the applicants in that case could not establish that they were members of a cognizable particular social group.

4.12 Landowners

[134] Zamora-Morel v. INS, 905 F.2d 833, 838 (5th Cir. 1990).

[135] Civil v. INS, 140 F.3d 52, 56 (1st Cir. 1998) (social group of pro-Aristide young students is not cognizable because it is overbroad).

[136] Matter of Martinez-Romero, 18 I&N Dec. 75, 79 (BIA 1981).

[137] Ananeh-Firempong v. INS, 766 F.2d 621, 626-27 (1st Cir. 1985).

[138] Matter of C-A-L-, 21 I&N Dec. 754, 756-57 (BIA 1997).

[139] Delgado v. Mukasey, 508 F.3d 702, 704-05 (2d Cir. 2007).

[140] Cruz-Funez v. Gonzales, 406 F.3d 1187, 1191 (10th Cir. 2005).

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The Seventh Circuit has found that the "educated, landowning class" in Colombia who had been targeted by the Revolutionary Armed Forces of Colombia (FARC) constituted a particular social group for asylum purposes. The court distinguished the situation in Colombia from other situations where the risk of harm flowing from civil unrest affects "the population in a relatively undifferentiated way" and found that members of this group were the "preferred victims" of the FARC.[141]

The court further distinguished this group from groups based solely on wealth, a characteristic that had been rejected as the basis of a particular social group when considered alone by the BIA in Matter of V-T-S, because it included the members' social position as cattle farmers, their level of education, and their land ownership. These shared past experiences were of a particular type that set them apart in society such that the FARC would likely continue to target the group members, even if they gave up their land, cattle farming, and educational opportunities.[142]

In a separate case, the Seventh Circuit found that Colombian landowners who refuse to cooperate with the FARC constituted a particular social group.[143] The Seventh Circuit emphasized that "there can be no rational reason for the Board to reject a category of 'land owners' when the Board in Acosta specifically used land owning as an example of a social group."[144]

The Board opined in Matter of M-E-V-G- that "in an underdeveloped, oligarchical society," a group of landowners may meet the particularity and social distinction criteria.[145] If analyzing a claim involving landowners, the Board instructed adjudicators to "make findings whether 'landowners' share a common immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers 'landowners' as a significantly distinct group within the society."[146]

Additionally, the Ninth Circuit has held that landownership may form the basis of a particular social group.[147] The court emphasized that "landownership [is] an illustrative example of a characteristic that might form the basis of a particular social group."[148] The

[141] Tapiero de Orejuela v. Gonzales, 423 F.3d 666, 672 (7th Cir. 2005), citing Ahmed v. Ashcroft, 348 F.3d 611, 619 (7th Cir. 2003).

[142] Id., citing Matter of V-T-S, 21 I&N Dec. 792, 799 (BIA 1997); cf. Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 75 (BIA 2007) (finding that the group of "affluent Guatemalans" was not sufficiently distinct in society to constitute a particular social group. Country conditions indicated that "affluent Guatemalans" were not at greater risk of criminality or extortion in particular.) See section on "Wealth or Affluence," below for further discussion and comparison to the "landowner" particular social group.

[143] N.L.A. v. Holder, 744 F.3d 425, 439 (7th Cir. 2014).

[144] Id.

[145] 26 I&N Dec. 227, 241 (BIA 2014).

[146] Id.

[147] Cordoba v. Holder, 726 F.3d 1106, 1114 (9th Cir. 2013).

[148] Id.

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court also pointed out that both petitioners offered evidence suggesting that landowners in their respective countries (Colombia and Mexico) are targets of persecution. One petitioner offered country conditions showing that the FARC specifically targets "wealthy landowners." The other petitioner relied on testimony of a professor specializing in Latin American politics to show that the applicant's family had been established landowners in Mexico for generations and this was a significant factor in why the applicant had been targeted by drug cartels.[149]

4.13 Groups Based on "Wealth" or "Affluence"

In Matter of A-M-E- & J-G-U-, the BIA found that groups defined by wealth or socio-economic levels alone often will not be able to establish that they possess an immutable characteristic, because wealth is not immutable.[150] Wealth is, however, a characteristic that an individual should not be required to change, and therefore could be considered fundamental within the meaning of Acosta. In evaluating groups defined in terms of wealth, affluence, class, or socio-economic level, you must closely examine whether the proposed group can be defined with enough particularity and whether it is socially distinct. In A-M-E- & J-G-U-, the BIA concluded that the proposed group failed the particularity requirement, noting that the terms "wealthy" and "affluent" standing alone fail to provide an adequate benchmark for determining group membership. To support its particularity conclusion, the BIA stated that the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more.[151]

In the context of the facts established in A-M-E & J-G-U-, the BIA rejected various particular social group formulations involving wealth and socio-economic status for failure to establish social visibility (or social distinction). The BIA stressed that this analysis must take into account relevant country of origin information. Considering Guatemalan country conditions, the BIA found a variety of groups failed as particular social groups, including groups defined by "wealth," "affluence," "upper income level," "socio-economic level," "the monied class," and "the upper class."[152]

The BIA, however, did not reject altogether the possibility that a group defined by wealth could constitute a particular social group. The court noted that these types of social groups must be assessed in the context of the claim as a whole. For example, the Board opined that such a group might be valid in a case where persecutors target individuals within certain economic levels.[153]

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[149] Id. at 1114-15.

[150] Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 76 (BIA 2007).

[151] Id.

[152] Id.

[153] Id.

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The BIA's emphasis on social context is consistent with the Seventh Circuit's approach in Tapiero de Orejuela v. Gonzales, where members of the "educated, landowning class" in Colombia were recognized as members of a particular social group. Although affluence was a shared trait for this group, group members also shared a distinctive social status (albeit one derived in significant part from affluence and the attributes of affluence) that made them preferred targets of the FARC.[154] The significance of this social status was evident when the claim was viewed in the context of the country conditions that showed that the FARC is a "leftist guerilla group that was originally established to serve as the military wing of the Colombian Communist Party" and that membership in an economic class, not merely "wealth," was an important motivating factor for them.[155]

When encountering claims involving particular social groups based in whole or in part on wealth, you must assess the viability of the particular social group asserted in each case and carefully consider relevant country of origin information and other relevant evidence to determine if the group constitutes a particular social group as defined by the BIA and other courts. As the Seventh Circuit pointed out, "[t]here may be categories so ill-defined that they cannot be regarded as groups-the 'middle class,' for example. But this problem is taken care of by the external criterion-if a Stalin or a Pol Pot decides to exterminate the bourgeoisie of their country, this makes the bourgeoisie 'a particular social group,' which it would not be in a society that didn't think of middle-class people as having distinctive characteristics; it would be odd to describe the American middle class as 'a particular social group.'"[156]

4.14 Present or Former Employment in Either Law Enforcement or the Military

When an applicant asserts membership in a particular social group that involves either past or present service as a police officer or soldier, you must first determine whether, in the context of the applicant's society, persons employed, or formerly employed, as police officers or soldiers form a particular social group.

Note, however, that often claims by persons employed, or formerly employed, as police officers or soldiers may also be analyzed under another protected ground, such as actual or imputed political opinion, depending on the facts of the case.

4.14.1 Former Military/Police Membership

[154] Tapiero de Orejuela v. Gonzales, 423 F.3d 666, 672 (7th Cir. 2006).

[155] Id. at 668.

[156] Benitez Ramos v. Holder, 589 F.3d 426, 431 (7th Cir. 2009).

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The BIA recognized in both Matter of C-A- and Matter of Fuentes that former military leadership is an immutable characteristic that may form the basis for a particular social group under some circumstances. Similarly, while holding that the dangers arising solely from the nature of employment as a policeman in an area of domestic unrest do not support a claim, the Board indicated in Fuentes that former service in the national police is an immutable characteristic that, in some circumstances, could form the basis for a particular social group. In order to satisfy the definition of a particular social group, the applicant also must demonstrate that the purported social group has a distinct identity in society to meet the "social distinction" test.[157]

The USCIS interpretive memo on C-A- clarifies that "harm inflicted on a former police officer or soldier in order to seek revenge for actions he or she took in the past is not on account of the victim's status as a former police officer or soldier."[158] In other words, if the former officer is being targeted for his or her "status" as a former officer, he or she could establish an asylum claim, but not if he or she is being targeted only for his or her actions as a former police officer. It is important to note, however, that many of these cases will involve mixed motives, and it is possible that a former officer is being targeted on account of both status and former acts. An applicant would satisfy the "status" requirement where (1) there is a cognizable particular social group, (2) he or she is a member of the group, and (3) he or she is being targeted because of his or her membership, regardless of whether there may be evidence that he is also being targeted on account of past acts. As long as the membership in a cognizable particular social group is a sufficient reason to meet the requisite nexus standard, evidence that he is also targeted on account of past acts should not undermine the claim.

The Ninth Circuit, in Madrigal v. Holder, reviewed a case where the petitioner based his past persecution claim partially on the mistreatment he suffered while serving in the military and partially on events that occurred after he left the military.[159] The Ninth Circuit analyzed the petitioner's proposed particular social group of "former Mexican army soldiers who participated in anti-drug activity," and noted that case law distinguishes between current versus former military or police service when determining whether a particular social group is cognizable.[160] The Ninth Circuit concluded that the petitioner's proposed particular social group was valid and remanded the case to the

[157] Lynden D. Melmed, USCIS Chief Counsel. Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007); Matter of C-A-, 23 I&N Dec. 951, 959 (BIA 2006); see also Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988); Estrada-Escobar v. Ashcroft, 376 F.3d 1042, 1047 (10th Cir. 2004) (finding that the rationale of Fuentes applies to threats from terrorist organizations resulting from an applicant's work as a law enforcement official targeting terrorist groups because the threat was received as a result of the employment, not the applicant's political opinion).

[158] Lynden D. Melmed, USCIS Chief Counsel. Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[159] Madrigal v. Holder, 716 F.3d 499, 503-04 (9th Cir. 2013).

[160] Id. at 504.

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Board.[161] Specifically, the Ninth Circuit noted, "Although mistreatment motivated purely by personal retribution will not give rise to a valid asylum claim, if a retributory motive exists alongside a protected motive, an applicant need show only that a protected ground is 'one central reason' for his persecution…. In Tapia Madrigal's case, even if revenge partially motivated Los Zetas' mistreatment of him, the record makes clear that their desire to intimidate members of his social group was another central reason for the persecution."[162]

The Seventh Circuit has indicated that "former law-enforcement agents in Mexico" can be a viable particular social group.[163] In that case, drug organizations initially offered the applicant, an investigator, bribes to cooperate with them; however, when he refused, they tried to kill him under their "plata o plomo" policy— "money or bullets." Afraid of being killed, the applicant resigned from his position and opened an office supply business, trying to conceal his former position. The Seventh Circuit concluded that being a former law enforcement agent is an immutable characteristic, as the applicant cannot erase his employment history.[164] The record also contained evidence supporting that the feared persecution was because the applicant was a former agent. The record contained evidence that drug organizations have tried to kill other officers who resigned from the police. The Seventh Circuit noted that "[p]unishing people after they are no longer threats is a rational way to achieve deterrence . . . [and] there's nothing implausible about [the applicant's] testimony that drug organizations in Mexico share this view of deterrence."[165]

4.14.2 Current Military/Police Membership

Current service as a soldier or police officer, under some circumstances, could define a particular social group if that service is so fundamental to the applicant's identity or conscience that he or she should not be required to change it. The applicant would also have to demonstrate that the purported social group has a distinct identity in the society, and that the group is particular. If these requirements are met, it is possible that an applicant could establish a cognizable social group in such circumstances.[166]

Even if membership in a particular social group is established in such a case, however, the determination that the persecution was or will be "on account" of the particular social group is especially difficult. The determination requires special scrutiny.

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[161] Id. at 505.

[162] Id. at 506 (internal citations omitted).

[163] R.R.D. v. Holder, 746 F.3d 807, 810 (7th Cir. 2014).

[164] Id.

[165] Id.

[166] See Lynden D. Melmed, USCIS Chief Counsel. Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

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Harm inflicted on a police officer or soldier because of his role as a public servant carrying out his official government duties in an ongoing armed struggle or civil war is not on account of the applicant's membership in a group of police officers or soldiers.[167] Such a claim would therefore fail on the "on account of" element, even if the applicant has established membership in a group that constitutes a particular social group.

Under a different set of circumstances, if the evidence showed that the applicant was targeted because he or she was a police officer or soldier, the nexus requirement may be met. It is only where the harm is inflicted because of the applicant's membership in a group, rather than to interfere with his or her performance of specific duties, that the nexus requirement may be met. This is a particularly difficult factual inquiry. One factor that may assist in making this determination is whether the harm inflicted on the applicant or threats occur while the applicant is on official duty, as opposed to once the applicant has been taken out of combat or is no longer on duty.

The Ninth Circuit also has held that the general risk associated with military or police service does not, in itself, provide a basis of eligibility. The Ninth Circuit, like the BIA, recognizes a distinction between current service and former service when determining the scope of a cognizable social group.[168]

It is important to note that the fact of current service does not preclude eligibility. A police officer or soldier may establish eligibility if he or she can show that the persecutor is motivated to harm the applicant because the applicant possesses, or is perceived to possess, a protected characteristic. The following passage from Cruz-Navarro v. INS, is instructive:

> Fuentes, therefore, does not flatly preclude "police officers and soldiers from establishing claims of persecution or fear of persecution." [citing Velarde at 1311] Rather, Fuentes suggests that persecution resulting from membership in the police or military is insufficient, by itself, to establish persecution on account of membership in a particular social group or political opinion.[169]

The Seventh Circuit has not adopted the distinction between current and former police officers set forth in Fuentes. In dicta, the Court expressed disapproval of any reading of Fuentes that would create a per se rule that dangers encountered by police officers or military personnel during service could never amount to persecution. However, in the case before it, the Court upheld the BIA's determination that the dangers the applicant

[167] Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988).

[168] Cruz-Navarro v. INS, 232 F.3d 1024, 1029 (9th Cir. 2000); Velarde v. INS, 140 F.3d 1305 (9th Cir.1998) (former bodyguard of daughters of Peruvian President threatened by Shining Path with reference to the applicant's specific duties); see also Duarte de Guinac v. INS, 179 F.3d 1156 (9th Cir. 1999) (suffering while in military on account of applicant's race, not participation in military).

[169] Cruz-Navarro v. INS, 232 F.3d at 1029.

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experienced while serving as a military and police officer arose from the nature of his employment and were not on account of a protected characteristic.[170]

4.15 Drug Traffickers

Under general principles of refugee protection, the shared characteristic of terrorist, criminal, or persecutory activity or association, past or present, cannot form the basis of a particular social group.[171] In Bastanipour v. INS, an applicant was convicted of trafficking in drugs in the United States and faced removal to Iran. He claimed a well-founded fear, asserting that the Iranian government executes individuals who traffic in illegal drugs. The Seventh Circuit held that:

> [w]hatever its precise scope, the term "particular social groups" surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do. A contrary conclusion would collapse the fundamental distinction between persecution on the one hand and the prosecution of nonpolitical crimes on the other. We suppose there might be an exception for some class of minor or technical offenders in the U.S. who were singled out for savage punishment in their native land, but a drug felon sentenced to thirty years in this country (though Bastanipour's sentence was later reduced to fifteen years) cannot be viewed in that light.[172]

4.16 Criminal Deportees

Similarly, the USCIS position that criminal activity or association may not form the basis of a particular social group is consistent with courts' views of criminal deportees as an invalid particular social group. In Elien v. Ashcroft, the First Circuit upheld a finding by the BIA that a group defined as "deported Haitian nationals with criminal records in the United States" does not qualify as a particular social group for the purposes of asylum. The First Circuit agreed with the BIA that it would be unsound policy to recognize criminal deportees as a particular social group, noting that the BIA had not extended particular social group to include persons who "voluntarily engaged in illicit activities."[173]

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[170] Ahmed v. Ashcroft, 348 F.3d 611, 616 (7th Cir. 2003).

[171] Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[172] Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992) (citations omitted).

[173] Elien v. Ashcroft, 364 F.3d 392, 397 (1st Cir. 2004); see also Toussaint v. Attorney General of U.S., 455 F.3d 409, 417 (3d Cir. 2006) (adopting the reasoning of the First Circuit in ruling that criminal deportees to Haiti do not constitute a particular social group).

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4.17 Persons Returning from the United States

The Ninth Circuit has held that "returning Mexicans from the United States" does not constitute a valid particular social group.[174] The applicant in that case pointed to reports of crime against Americans on vacation, as well as Mexicans who had returned to Mexico after living in the United States, to support the fear of harm based on membership in the proposed social group.[175]

The First Circuit has also upheld the BIA's conclusion that a group defined as "Guatemalan nationals repatriated from the United States" did not constitute a particular social group. In that case, the court reasoned that the applicant was essentially arguing that he would be targeted by criminals for perceived wealth, and "being a target for thieves on account of perceived wealth, whether the perception is temporary or permanent, is merely a condition of living where crime is rampant and poorly controlled."[176]

4.18 Tattooed Youth

The Sixth Circuit has found that a group of "tattooed youth" does not constitute a particular social group under the INA. The court found that having a tattoo is not an innate characteristic and that "tattooed youth" are not closely affiliated with one another. Further, the court stated that "the concept of a refugee simply cannot guarantee an individual the right to have a tattoo."[177]

4.19 Individuals Resisting and Fearing Gang Recruitment, and Opposition to Gang Authority

In Matter of S-E-G-, the BIA rejected a proposed particular social group defined as "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities," because it lacked "well-defined boundaries" that make a group particular and, therefore, lacked social visibility.[178] Similarly, in Matter of E-A-G-, the BIA held that the applicant, a young Honduran male, failed to establish that he was a member of a particular social group of "persons resistant to gang membership," as the evidence failed to establish that members of Honduran

[174] Delgado-Ortiz v. Holder, 600 F.3d 1148, 1151-1152 (9th Cir. 2010).

[175] Id. at 1151-52.

[176] Escobar v. Holder, 698 F.3d 36, 39 (1st Cir. 2012).

[177] Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003).

[178] Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008).

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society, or even gang members themselves, would perceive those opposed to gang membership as members of a social group.[179]

In Matter of M-E-V-G-, a Honduran gang threatened to kill the applicant if he refused to join the gang.[180] The applicant claimed that he was persecuted on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs. Citing S-E-G-, the BIA recognized that it is often difficult to conclude that such a group is much narrower than the general population, and noted that it might be difficult to satisfy the social distinction and particularity requirements.[181] The BIA, however, remanded the case for the immigration judge to analyze updated country conditions and arguments regarding the applicant's particular social group claim.[182] The BIA reasoned that its holdings in S-E-G- and E-A-G- should not be read as a blanket rejection of all factual scenarios involving gangs; the applicant's proposed particular social group had evolved during the pendency of his appeal; and the BIA's guidance on particular social group claims had been clarified since the case was last before the immigration judge.[183]

After the BIA's decision in M-E-V-G-, the Ninth Circuit, in Pirir-Boc v. Holder, held that a group characterized as individuals "taking concrete steps to oppose gang membership and gang authority" may be cognizable.[184] Prior to the Board's decision in M-E-V-G-, the Board had rejected the proposed group that Ninth Circuit analyzed in Pirir-Boc.[185] In Pirir-Boc, the petitioner's younger brother had joined the Mara Salvatrucha gang in Guatemala. Gang members overheard the petitioner instructing his brother to leave the gang. After his brother left the gang, gang members severely beat the petitioner and threatened to kill him. Without conducting case-specific analysis, the Board rejected the petitioner's proposed particular social group, citing to S-E-G-. On petition for review, the Ninth Circuit remanded the case to the Board to determine whether Guatemalan society recognizes the petitioner's proposed social group.[186]

In Rodas-Orellana v. Holder, the Tenth Circuit, applying M-E-V-G- and W-G-R-, upheld the BIA's determination that a social group characterized as "El Salvadoran males threatened and actively recruited by gangs, who resist joining because they opposed the gangs" was not socially distinct.[187] The Court found that the petitioner, a Salvadoran who

[179] Matter of E-A-G-, 24 I&N Dec. 591, 594-95 (BIA 2008).

[180] Matter of M-E-V-G-, 26 I&N Dec. 227, 228 (BIA 2014).

[181] Id. at 249-50.

[182] Id. at 253.

[183] Id. at 251-52.

[184] Pirir-Boc v. Holder, 750 F.3d 1077, 1084 (9th Cir. 2014).

[185] Id.

[186] Id. at 1084.

[187] Rodas-Orellana v. Holder, 780 F.3d 982, 992 (10th Cir. 2015).

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was threatened and beaten for refusing to join the Mara Salvatrucha, had not presented evidence suggesting that Salvadoran society perceived individuals who resisted gang recruitment as a distinct group; rather, the record in that case showed that "Salvadoran gangs indiscriminately threaten people for monetary gain or for opposing them."[188] The Court rejected the petitioner's argument that the case needed to be remanded for additional analysis in light of M-E-V-G and W-G-R-, finding that, unlike in Pirir-Boc, the Board had properly considered the record before it.

4.20 Non-Criminal Informants, Civilian Witnesses, and Assistance to Law Enforcement

The question of whether and when serving as a witness or providing other law enforcement assistance may form the basis of a particular social group is an evolving area of the law. In Matter of C-A-, the Board concluded that a group composed of confidential non-criminal informants did not constitute a particular social group.[189] The Board pointed out that "social visibility" is "limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members."[190]

Circuit courts have subsequently recognized select circumstances where serving as a witness or cooperating with law enforcement may form the basis of a particular social group. In Garcia v. Att'y Gen. of U.S., involving an individual placed in witness protection and relocated by the Guatemalan Public Ministry outside of her country, the Third Circuit recognized that "[c]ivilian witnesses who have the 'shared past experience' of assisting law enforcement against violent gangs that threaten communities in Guatemala" share an immutable characteristic.[191] In Gashi v. Holder, involving an individual who observed alleged military crimes by a leader of the Kosovo Liberation Army and cooperated with international investigators by being placed on a list of potential witnesses though ultimately not testifying in court, the Second Circuit held that a group of cooperating witnesses could constitute a particular social group.[192] The Ninth Circuit held in Henriquez-Rivas v. Holder that witnesses "who testified in court against gang members" in El Salvador may be a cognizable particular social group.[193] The

[188] Id. at 993.

[189] Matter of C-A-, 23 I&N Dec. 951 (BIA 2006).

[190] Id. at 960 (emphasis added).

[191] Garcia v. Att'y Gen. of U.S., 665 F.3d 496, 504 n.5 (3d Cir. 2011) (distinguishing case from C-A- because the applicant's identity was "known to her alleged persecutors," whereas in C-A- the assistance to law enforcement was confidential).

[192] Gashi v. Holder, 702 F.3d 130, 137 (2d Cir. 2012) (holding that the group was immutable due to the shared past experience, was socially visible due to Gashi being labeled as a traitor for meeting with international investigators, and particular due to the finite number of people who have cooperated with official war crimes investigators).

[193] Henriquez-Rivas v. Holder, 707 F.3d 1081, 1092 (9th Cir. 2013) (finding that the BIA erred in applying its own precedents in deciding whether Henriquez-Rivas was a member of a particular social group, citing to language in C-A- that those who testify against cartel members are socially visible); see also Madrigal v. Holder, 716 F.3d 499, 506 (9th Cir. 2013) (citing Henriquez-Rivas for the principle that a retributive motive may exist alongside a protected motive, noting, "Gang persecution of adverse witnesses would certainly have revenge as one motive, but group-based intimidation would be another.").

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Henriquez-Rivas court concluded that "for those who have publicly testified against gang members, their 'social visibility' is apparent," as it involves "a distinct group of persons."[194] In addition, Henriquez-Rivas met the particularity criterion, as her "group can be easily verified – and thus delimited – through court records documenting group members' testimony."[195]

While the public nature of the past experience in Garcia[196] and Henriquez-Rivas[197] helped establish social distinction, the Ninth Circuit has emphasized that it "by no means intend[s] to suggest that the public nature of [the applicant's] testimony is essential" for a viable particular social group.[198] Further, in Garcia, the Third Circuit case, the assistance was not completely public in that the applicant testified while wearing a disguise.[199] The Board, in Matter of M-E-V-G-[200] and Matter of W-G-R-,[201] has since made clear that literal visibility in the public or elsewhere is not a requirement to show social distinction.

Some courts have rejected particular social groups where gangs were targeting and harming the petitioners, and then the petitioners reported the gangs to the police. For instance, in Zelaya v. Holder, the Fourth Circuit rejected a group consisting of young Honduran males who (1) refuse to join a gang, (2) have notified authorities of gang harassment, and (3) have an identifiable tormentor within the gang.[202] In Garcia v. Holder, the Eighth Circuit rejected a particular social group consisting of "young Guatemalan men who have opposed the MS–13, have been beaten and extorted by that gang, reported those gangs to the police[,] and faced increased persecution as a result" because the group was insufficiently particular and the petitioner failed to produce sufficient evidence of social distinction.[203]

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[194] Id. at 1093.

[195] Id.

[196] Garcia, 665 F.3d at 504.

[197] Henriquez-Rivas, 707 F.3d at 1092.

[198] Id. n.14.

[199] Garcia, 665 F.3d at 500.

[200] Matter of M-E-V-G-, 26 I&N Dec. 227, 240 (BIA 2014).

[201] Matter of W-G-R-, 26 I&N Dec. 208, 216 (BIA 2014).

[202] Zelaya v. Holder, 668 F.3d 159, 162 (4th Cir. 2012). While the Fourth Circuit rejected the proposed group in Zelaya due to lack of particularity, the court subsequently held in another case that "[e]ach component of the group…might not have particular boundaries[;]…[o]ur case law is clear, however, that the group as a whole qualifies." Temu v. Holder, 740 F.3d 887, 896 (4th Cir. 2014) (citing Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011) (recognizing a particular social group of family members of those who actively oppose gangs by agreeing to be prosecutorial witnesses, even if on its own, "'[p]rosecutorial witnesses' might reach too broad a swath of individuals" and "'those who actively oppose gangs' might be too fuzzy a label for a group.")).

[203] Garcia v. Holder, 746 F.3d 869, 872-73 (8th Cir. 2014).

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In Carvalho-Frois v. Holder, the First Circuit rejected a group of "witnesses to a serious crime whom the government is unable or unwilling to protect" as not socially visible.[204] The applicant in that case heard two gunshots at a neighbor's home, and was warned by two men leaving the home that she was in danger and not to reveal anything about what she saw. She subsequently learned that a murder had occurred. The applicant relocated after receiving a phone call that the callers knew where she lived and they would kill her if she said anything to the police. This decision was based on lack of social visibility, and was reached before the BIA's decisions in M-E-V-G- and W-G-R- on social distinction and particularity.

In addition, in Bathula v. Holder, the Seventh Circuit upheld the BIA's determination that an Indian applicant who was threatened after testifying in court against a land mafia had not established nexus to a protected ground because he "was the victim of intimidation and then retaliation for his specific testimony in a specific case against the land mafia" rather than on account of his membership in a particular social group, which he had defined as "those willing to participate, despite personal risk, in the orderly administration of justice against criminal elements."[205] The court only considered the nexus issue and did not address the validity of the group.

Several circuit courts have upheld decisions that applicants who served as informants in the U.S. did not establish persecution on account of a protected ground.[206] In Costa v. Holder, the First Circuit considered the case of a Brazilian applicant who had worked as an ICE informant in the United States and received indirect threats from the family of a man named Lelito who had been arrested because of the applicant's work. It upheld the BIA's conclusion that she had not established that the threats were on account of her membership in the particular social group of "former ICE informants."[207] The Court reasoned, "Although Costa participated in multiple sting operations, the record indicates that only Lelito's arrest triggered the threats that form the basis of her application....There is little to suggest that the scope of persecution extends beyond a 'personal vendetta.'."[208] Similarly, in Martinez-Galarza v. Holder, the applicant proposed two groups: people who have provided information to ICE to enable that organization to remove individuals residing illegally in the United States, and witnesses for ICE. The Eighth Circuit rejected

[204] Carvalho-Frois v. Holder, 667 F.3d 69, 73 (1st Cir. 2012) ("[t]he fact that the petitioner was known by a select few to have witnessed a crime tells us nothing about whether the putative social group was recognizable to any extent by the community… Because we discern no feature of the group that would enable the community readily to differentiate witnesses to a serious crime from the Brazilian populace as a whole, the claimed group is simply too amorphous to satisfy the requirements for social visibility.").

[205] Bathula v. Holder, 723 F.3d 889, 900-01 (7th Cir. 2013).

[206] See, e.g., Jonaitiene v. Holder, 660 F.3d 267 (7th Cir. 2011); Wang v. Gonzales, 445 F.3d 993 (7th Cir. 2006); U.S. v. Aranda-Hernandez, 95 F.3d 977 (10th Cir. 1996).

[207] Costa v. Holder, 733 F.3d 13, 17 (1st Cir. 2013).

[208] Id. See also Scatambuli v. Holder, 558 F.3d 53 (1st Cir. 2009); Amilcar-Orellana v. Mukasey, 551 F.3d 86, 91 (1st Cir. 2008) (involving a Salvadoran man who provided information to the police and testified before a grand jury concerning arson committed in the U.S. by two gang members, the First Circuit held, "Amilcar-Orellana's fear of persecution stems from a personal dispute with X and Y, not his membership in a particular social group.").

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a nexus to these proposed groups, stating, "Sanchez's alleged reason for wanting to harm Martinez–Galarza—because Martinez–Galarza ended Sanchez's American dream—is motivated by purely personal retribution, and thus not a valid basis for an asylum claim."[209] The court acknowledged, "There may be asylum protections for an applicant who shows the threatened persecution is motivated by both personal retaliation and a protected motive, but Martinez–Galarza presents no evidence to suggest this is the situation here. He does not allege that Sanchez has threatened or attacked other ICE informants."[210] Based on the specific facts of the case, it may nonetheless be possible that an informant to U.S. law enforcement officials may be able to establish eligibility.

When you encounter potential particular social groups related to testifying against criminals or cooperating with law enforcement against criminals, there is no bright-line rule about what type of testimony or law enforcement assistance will establish a cognizable particular social group. As the Board held in M-E-V-G- and W-G-R-, the viability of a particular social group must be analyzed on a society-by-society and case-by-case basis. You should analyze country reports, news articles, testimony, and other evidence to determine whether someone who assists law enforcement through courtroom testimony or other means is perceived by society as distinct. Depending on the evidence, a certain type of law enforcement assistance or witness testimony might be socially distinct in one society, but not in another society. You also would need to articulate how the proposed group has definable boundaries, so it is clear who fits within the group and who does not.

The nexus inquiry may be difficult in cases where an applicant claims to have been targeted for having assisted law enforcement. Even where such a social group is cognizable and the applicant is a member of the group, you should examine the evidence to determine whether the applicant was targeted on account of his or her membership in a group defined by past assistance to law enforcement.

It is possible that an applicant who appears to have been targeted out of revenge for having cooperated with law enforcement may also be able to establish nexus to a particular social group defined by this shared past experience. You must carefully consider any direct evidence in the record of the persecutor's motive and indirect evidence such as the timing and circumstances of the harm or threats the applicant claims to have experienced, the applicant's testimony about the experiences of similarly situated individuals in the society, and country conditions reports or news articles relating to the treatment of other members of the group to make this determination. You should generally first examine whether there exists a group that meets the requirements of a particular social group, and then should analyze whether the applicant was or will be persecuted on account of any cognizable particular social group.

[209] Martinez-Galarza v. Holder, 782 F.3d 990, 993 (8th Cir. 2015).

[210] Id. at 994 (internal citation omitted).

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4.21 Gang Members

The Ninth Circuit has found that "tattooed gang members" is not a particular social group, because the group is not defined with particularity. The court also found that neither former nor current gang membership constitutes a valid particular social group.[211]

A group defined as "gang members" is not a particular social group, despite having the shared immutable trait of past experience and arguably being able to establish the social distinction prong, because the group's shared experience stems from criminal activity.[212] Groups based upon criminality do not form the basis for protection, because the shared trait is "materially at war with those [characteristics] we have concluded are innate for purposes of membership in a social group."[213] To find otherwise, said the court, would pervert the humanitarian purpose of refugee protection by giving "sanctuary to universal outlaws." The court also found that "participation in criminal activity is not fundamental to gang members' individual identities or consciences."[214]

The court also analyzed whether current gang membership gives rise to a particular social group using the Ninth Circuit's alternate "voluntary association" test. The court found that current gang membership does not constitute a particular social group, because the gang association is for the purpose of criminal activity. Thus, it is not an association that is fundamental to human dignity; i.e., it is not the kind of association that a person should not be required to forsake. Therefore, current gang members are not members of a particular social group on the basis of their gang membership.[215]

The applicant also failed to establish a particular social group of "former" gang members. Disassociation from a gang does not automatically result in the creation of a new social group. Citing to Matter of A-M-E- & J-G-U-, the court found that "non-association" and "disaffiliation" are unspecific and amorphous terms, even if qualified with the word "tattooed," as in "former tattooed gang members."[216]

4.22 Former Gang Members

Some circuit courts have found that "former gang members" may be a particular social group. This finding is not consistent with USCIS's and RAIO's legal interpretation, according to which a particular social group may not be based on criminal activity or

[211] Arteaga v. Mukasey, 511 F.3d 940, 945 (9th Cir. 2007).

[212] Id. at 945-46.

[213] Id. at 945.

[214] Id. at 946.

[215] Id.; see also Henriquez-Rivas v. Holder, 707 F.3d 1081, 1097 (9th Cir. 2013) (acknowledging that the Board does not require members of a particular social group to share a voluntary associational relationship).

[216] Id.

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associations, past or present.[217] However, for cases arising within the jurisdiction of those circuits, asylum officers must follow these rulings[218] as well as the analytical framework laid out by the BIA in Matter of W-G-R- and Matter of M-E-V-G.[219] See Asylum Supplement – Former Gang Membership as a Particular Social Group. Because refugee applications are adjudicated outside of the jurisdiction of any circuit court of appeals, refugee officers are not bound by these circuit court decisions and should follow USCIS, RAIO and RAD guidance.

5. SUMMARY

An applicant who is seeking asylum based on membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity. A common, immutable characteristic is one that the members of the group either cannot change, or should not be required to change because it is fundamental to the member's identity or conscience. For social distinction, a group's shared characteristic must be perceived as distinct by the relevant society. Social distinction does not require the shared characteristic to be seen by society (i.e., literally visible). To satisfy the particularity requirement, there must be a benchmark and definable boundaries for determining who falls within the group and who does not. All three elements are required, and the elements must be analyzed on a case-by-case basis and society-by-society basis. In analyzing particular social groups, it also is important to consider the other general principles discussed in this lesson plan, including: to avoid circular reasoning; to avoid defining a group by terrorist, criminal, or persecutory activity; and to recognize that voluntary association, cohesiveness, or homogeneity are not required.

You should also avoid conflating nexus with the validity of a particular social group. Even if an applicant establishes that he or she is a member of a particular social group, the applicant must still establish that he or she was persecuted, or has a well-founded fear of persecution, on account of his or her membership in the group. Membership in a particular social group also may be imputed to an applicant who, in fact, is not a member of a particular social group. Finally, membership in a particular social group may overlap

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[217] See Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[218] Urbina–Mejia v. Holder, 597 F.3d 360, 365–67 (6th Cir. 2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); Benitez Ramos v. Holder, 589 F.3d 426, 431 (7th Cir. 2009); Martinez v. Holder, 740 F.3d 902, 911-13 (4th Cir. 2014) (concluding that Martinez's membership in a group that constitutes former MS-13 members is immutable, but did not address the social distinction and particularity criteria. The court remanded the case to consider other criteria).

[219] Matter of W-G-R-, 26 I&N Dec. 208, 215 n.5 (BIA 2014) (opining that "[g]ang members willingly involved in violent, antisocial behavior are more akin to persecutors and criminals, who are barred from establishing eligibility for asylum and withholding of removal, than to refugees, whom the Act is intended to protect"); Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014).

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with other protected grounds, such as political opinion, and you should also consider whether the applicant can establish eligibility based on a different protected ground.

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PRACTICAL EXERCISES

Practical exercises will be added at a later time.

Practical Exercise # 1

- Title:
- Student Materials:

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OTHER MATERIALS

There are no "Other Materials" for this module.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

RAD Supplement

Given the nature of access to the U.S. Refugee Admissions Program (USRAP), many refugee applicants abroad are able to establish eligibility through nexus to one of the four protected grounds apart from membership in a particular social group (PSG). For that reason, a nexus to the other protected grounds should always be analyzed first. At pre-departure briefings, refugee officers will usually be informed of PSGs that have previously been recognized in populations they will be interviewing in that region. New PSGs are generally reviewed by the RAD Policy Branch to ensure consistency in RAD adjudications throughout all regions.

In the past, RAD has recognized PSGs of, for example, sexual minorities in certain countries as well as women from certain countries who have been subjected to sexual and gender-based violence (SGBV) who face familial and social ostracism, and other stigmatization or harm as a result. Before applying any of these PSGs to other populations, refugee officers must first ensure that the PSG meets the requisite three-part test and that country conditions support all elements of the PSG. For example, for women from a certain country who have been subjected to SGBV, country conditions should indicate that such women are socially distinct as

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stigmatized, ostracized or facing other harm as a result of the violence before any such PSG claim is recognized to avoid circularity in the PSG definition.

For gender based PSG claims, it is also important to distinguish between UNHCR's designation of "women at risk" from any possible PSG to which such women may belong. "Women at risk" refers to one of UNHCR's seven categories for submission of refugees for resettlement and is one way in which a refugee may be granted access to the USRAP through a Priority 1 referral. However, UNHCR's identification of a refugee applicant as a "woman at risk" cannot be conflated with her eligibility for refugee status. Any gender-based PSG to which the applicant may belong must be fully analyzed and supported by the record and relevant evidence of country conditions where appropriate.

For further guidance, see RAIO Training Module, Gender-Related Claims; RAD Policy Branch, Responses to Queries: PSGs within the context of Afghan Women at Risk and PSGs within the context of sexual and gender based violence against Congolese women. Please note that these RAD documents were issued prior to the Board's articulation of the three-part test in 2014. Nonetheless, the documents contain other relevant guidance and suggested lines of inquiry.

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

ASM Supplement - Former Gang Membership as a Particular Social Group in the Fourth, Sixth, and Seventh Circuits

Prior to the Board of Immigration Appeals' decisions in Matter of M-E-V-G- and Matter of W-G-R, the Sixth and Seventh Circuits issued decisions holding that former gang membership can form the basis of a particular social group.[220] The Fourth Circuit has also held that former members of the MS-13 gang in El Salvador shared an immutable characteristic and rejected the argument that a particular social group may not be defined by former criminal associations, though it did not decide whether the group met the "particularity" or "social distinction" criteria and remanded for the Board to consider whether the proposed group met those criteria.[221] On the other hand, the First and Ninth Circuits have held that former gang membership does not give rise to a particular social group.[222]

[220] Urbina–Mejia v. Holder, 597 F.3d 360, 365–67 (6th Cir.2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

[221] Martinez v. Holder, 740 F.3d 902, 911-13 (4th Cir. 2014).

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In W-G-R-, the Board considered the case of an applicant who claimed that he had been targeted by the Mara 18 gang in El Salvador for retribution because he had left the gang.[223] The Board held that the applicant's proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not sufficiently particular, because it could include people of any age, sex, and background and their participation in the gang could vary widely in terms of strength and duration, or socially distinct, because there was not enough evidence in the record about the treatment or status of former Mara 18 members in Salvadoran society.[224] In addition, the Board opined that "[g]ang members willingly involved in violent, antisocial behavior are more akin to persecutors and criminals, who are barred from establishing eligibility for asylum and withholding of removal, than to refugees, whom the Act is intended to protect."[225] The Board quoted from its decision in Matter of E-A-G-, stating, "Treating affiliation with a criminal organization as being protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior."[226]

As the Fourth, Sixth, and Seventh Circuits have issued decisions that conflict with USCIS's interpretation of the term "particular social group" not to include groups based on past or present criminal, persecutory, or terrorist activity or association, and the Board has not expressly held that these decisions have been superseded, asylum officers adjudicating cases in those circuits may not rely on this principle. No circuit court, however, has yet considered whether social groups based on former membership in a criminal gang may be cognizable according to the three-part test set forth in M-E-V-G- and W-G-R-. Asylum Officers in the Fourth, Sixth, and Seventh Circuits must consider whether groups based on former criminal activities or associations are valid by applying all three criteria as articulated in the Board decisions.

[222] See Cantarero v. Holder, 734 F.3d 82, 86 (1st Cir. 2013) ("The shared past experiences of former members of the 18th Street gang include violence and crime. The BIA's decision that this type of experience precludes recognition of the proposed social group is sound."); Arteaga v. Mukasey, 511 F.3d 940, 945-46 (9th Cir. 2007) ("We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft."); cf. Elien v. Ashcroft (1st Cir. 2004) (in rejecting repatriated Haitian criminals as a particular social group, stating, "the BIA has never extended the term 'social group' to encompass persons who voluntarily engaged in illicit activities"); Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992) (rejecting drug traffickers as a particular social group).

[223] Matter of W-G-R-, 26 I&N Dec. 208, 209 (BIA 2014).

[224] Id. at 221.

[225] Id. at 215 n. 5.

[226] Id. (quoting Matter of E-A-G-, 24 I&N Dec. 591, 596 (BIA 2008)).

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

NEXUS AND THE PROTECTED GROUNDS*

TRAINING MODULE

*Note: There are five protected grounds in the refugee definition. "Particular social group" (PSG) is one of these grounds but is not discussed in this module. PSG is covered in a separate module, Nexus – Particular Social Group.

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RAIO Directorate – Officer Training / RAIO Combined Training Course

NEXUS AND THE PROTECTED GROUNDS

Training Module

MODULE DESCRIPTION:

This module discusses the definition of a refugee as codified in the Immigration and Nationality Act (INA), including the five protected grounds and their interpretation in administrative and judicial case law. The primary focus of this module is the determination as to whether an applicant has established that past harm suffered or future harm feared is on account of one of the five protected grounds. Only four of the grounds are discussed in this module; the fifth ground, "particular social group" is the topic of another module: Nexus – Particular Social Group.

TERMINAL PERFORMANCE OBJECTIVE(S)

Given a request to adjudicate either a request for asylum or a request for refugee status, the officer will be able to apply the law (statutes, regulations and case law) to determine whether an applicant is eligible for the requested relief.

ENABLING PERFORMANCE OBJECTIVES

1. Summarize factors to consider in evaluating the motive of the persecutor.
2. Explain factors to consider in determining whether persecution or feared persecution is on account of one or more of the protected grounds, i.e., race, religion, nationality, (membership in a particular social group), or political opinion.
3. Analyze factors to consider in determining whether an applicant possesses, or is imputed to possess, a protected belief or characteristic.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Practical Exercises

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METHOD(S) OF EVALUATION

REQUIRED READING

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. INS v. Elias-Zacarias, 502 U.S. 478 (1992).

2. United Nations High Commissioner for Refugees, Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (Aug. 2005)

3. United Nations High Commissioner for Refugees, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. HCR/GIP/04/06, 28 April 2004, 12 pp. See RAIO Training Module, The International Religious Freedom Act (IRFA) and Religious Persecution Claims.

4. David A. Martin. INS Office of General Counsel. Asylum Based on Coercive Family Planning Policies -- Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Memorandum to Management Team (Washington, DC: 21 October 1996), 6 p. See RAIO Training Module, Refugee Definition.

5. Phyllis Coven. INS Office of International Affairs. Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Gender Guidelines), Memorandum to all INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p. See also RAIO Training Module, Gender-Related Claims.

6. Grover Joseph Rees III. INS Office of General Counsel. Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion -- Addendum, Memorandum to John Cummings, INS Office of International Affairs (Washington, DC: 4 March 1993), 3 p.

7. Grover Joseph Rees III. INS Office of General Counsel. Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion, Memorandum to Jan Ting, INS Office of International Affairs (Washington, DC: 19 January 1993), 12 p.

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Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ILR9	Knowledge of policies and procedures for processing lesbian, gay, bisexual and transgender (LGBT) claims (3)
ILR10	Knowledge of policies and procedures for processing gender-related claims (3)
ILR14	Knowledge of nexus to a protected characteristic (4)
ILR15	Knowledge of the elements of each protected characteristic (4)
DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence) (5)
RI1	Skill in identifying issues of claim (4)
RI2	Skill in identifying the information required to establish eligibility (4)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
12/12/12	Entire Lesson Plan	Lesson Plan published	RAIO Trainng
4/29/13	2.1 Establishing Motive: (Mixed Motive section); Asylum Supplement	Language modified; ASM Supplement section "At Least One Central Reason" added and linked from section 2.1	JKochman, RAIO Trng
1/21/16	Throughout document	Fixed links, added some new case citations	RAIO Trng

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

The refugee definition at INA § 101(a)(42) states that an individual is a refugee if he or she establishes past persecution or a well-founded fear of future persecution on account of one or more of the five protected grounds. All of the elements of the refugee definition are reviewed in the RAIO Training Module on Refugee Definition. The requirements for an applicant to establish eligibility based on past persecution are discussed in the module on Past Persecution. The elements necessary to establish a well-founded fear of future persecution are discussed in the Well-Founded Fear module.

This module provides you with an understanding of the requirements needed to establish that persecution or feared persecution is "on account of" one or more of the five protected grounds in the refugee definition: race, religion, nationality, membership in a particular social group, or political opinion. Note: "particular social group" is not being discussed in this module; it is covered in a separate module, Nexus – Particular Social Group.

To properly determine whether persecution is on account of a protected ground, you must identify: 1) the persecutor; 2) the harm suffered or feared; 3) the applicant's characteristic or belief (actual or imputed); and 4) the motivation of the persecutor.

2 "ON ACCOUNT OF" (NEXUS) – ANALYZING MOTIVE

The persecution the applicant suffered in the past, or fears in the future, must be "on account of" at least one of the five protected grounds. This means the applicant must establish that the persecutor was, or will be, motivated to harm the applicant because of his or her race, religion, nationality, membership in a particular social group, or political opinion.[1] The persecutor may be motivated to harm the applicant because the applicant

[1] INA § 101(a)(42); INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992).

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actually possesses a protected belief or characteristic, or because the persecutor wrongly believes that the applicant possesses a protected belief or characteristic.

2.1 Determining Motive

Exact Motive Need Not Be Established

Although the applicant must establish that the persecutor harmed or will harm him or her because of one of the five protected grounds, the applicant does not "bear the unreasonable burden of establishing the [persecutor's] exact motivation."[2] The BIA has recognized that "[p]ersecutors may have differing motives for engaging in acts of persecution."[3] You should make reasonable inferences, keeping in mind the difficulty, in many cases, of establishing with precision a persecutor's motives.

Mixed Motives

The persecutor may have several motives to harm the applicant, some of which may be unrelated to any protected ground. There is no requirement that the persecutor be motivated only by the protected belief or characteristic of the applicant.

The "on account of" requirement focuses on the motivation of the persecutor. The persecutor must be motivated to harm the applicant on account of a protected characteristic. However, the persecutor may have mixed motivations in harming the applicant. In refugee processing cases, the persecutor must be motivated, at least in part, by a protected characteristic.[4] In asylum adjudications, as long as at least one central reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic, the applicant may establish the harm is "on account of" a protected characteristic.[5] This "one central reason" standard was added to the statute by the REAL ID Act, and applies only to asylum adjudications. The Board has explained, however, that the "one central reason" language should be interpreted consistent with prior Board precedent that allows nexus to be established where the persecutor has mixed motivations.[6] These are the same cases governing mixed motivation cases in refugee

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[2] Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988).

[3] Matter of S-P-, 21 I&N Dec. at 489.

[4] If you are processing refugee applications overseas, you must determine if "a reasonable person would fear that the danger arises on account of one of the five grounds." Matter of Fuentes, 19 I&N Dec. at 662.

[5] INA § 208(b)(1)(B)(i), as amended by Section 101(a) of the Real ID Act of 2005, as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, P.L. 109-13 (2005) (hereinafter, "REAL ID Act"). The REAL ID Act added the words "at least one central reason" to describe the extent to which persecution must be on account of a protected ground. See Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 211(BIA 2007), reversed in part by Ndayshimiye v.Att'y Gen. of the U.S., 557 F.3d 124, 129–30 (3d Cir. 2009). This provision of the REAL ID Act applies to asylum applications filed on or after May 11, 2005.

[6] Matter of J-B-N- & S-M-, 24 I&N Dec. at 214 ("Having considered the conference report and the language of the REAL ID Act, we find that our standard in mixed motive cases has not been radically altered by the amendments.")

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processing; thus, the analysis in cases involving mixed motivation is essentially the same in both the refugee and asylum contexts.

The conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of persecution.[7] For example, a rebel group may extort money to fund its operations, but target its political opponents for extortion based on their political opinion.

For further discussion, see ASM Supplement – At Least One Central Reason.

Persecutor's Perception of the Applicant

The persecution must be motivated by a protected belief or trait possessed by the applicant. The persecutor's own political goals or representation of a political entity is not sufficient in itself, nor is it necessary, to establish persecution on account of political opinion. Rather, the evidence must show that the persecutor is motivated to persecute the applicant because the applicant possesses (or is believed to possess) a protected belief or trait.[8]

Initial Motivation Not Determinative

The persecutor's motives may change over time. There is no requirement that the persecutor's harmful contact with the applicant be initially motivated by the applicant's possession of a protected belief or characteristic.[9]

Example

In Sharma v. Holder, Maoists in Nepal first contacted the applicant and kidnapped him in order to recruit him. At the point when he was abducted, there was no evidence that the Maoists were motivated to harm him because of a protected ground.

After he was abducted, the applicant expressed his opposition to the Maoists and his support for a group that opposed them, the Nepal Student Union (NSU). The Maoists did not directly state that they were motivated by the applicant's expression of his political opinion, but he was then subjected to harsher mistreatment and a longer detention than other individuals who had been abducted at the same time.

Although the Maoists had attempted to force the applicant to join them and work for them for reasons unrelated to a protected ground and there was no direct evidence of a

[7] Osorio v. INS, 18 F.3d 1017, 1028 (2d Cir. 1994).

[8] INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992); See also Pedro-Mateo v. INS, 224 F.3d 1147 (9th Cir. 2000)(holding that the evidence did "not indicate that the Kanjobal Indians have been recruited because of their race, political opinion, or any other protected ground")(emphasis in original).

[9] See Sharma v. Holder, 729 F.3d 407, 412–13 (5th Cir. 2013).

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protected ground, the Fifth Circuit Court of Appeals found that the escalation of the abuse and the prolonged detention after he expressed his views was evidence of a nexus between the persecution and his political opinion.[10]

No Punitive or Malignant Intent Required

In most cases, the persecutor intends to harm or punish the applicant. Punitive or malignant intent, or an intent to overcome the protected trait, however, is not required for an applicant to establish a nexus to a protected ground.[11] For example, the persecutor may believe that he or she is helping the applicant by attempting to change the protected characteristic or that he or she has the right to harm the applicant because the applicant has the protected characteristic.[12] The relevant inquiry regarding motivation, therefore, is whether the persecutor has committed an intentional action, or intends to commit an intentional action, because of a characteristic (or perceived characteristic) of the victim.[13]

Examples

- The applicant was detained, harassed, beaten, and forced to undergo psychiatric treatment because of her sexual orientation. The court found that it was improper to conclude that the applicant did not suffer persecution when the authorities' intent was to "cure" the applicant, not "punish" her.[14] "The fact that a persecutor believes the harm inflicted is 'good for' his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution."[15]

- The applicant established the required motive by showing that female genital mutilation (FGM), as described in her case, was practiced "in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM."[16] The required persecutory motive was

[10] Id. at 412.

[11] For additional information on whether "harm" is "persecution," see RAIO Training Module, Definition of Persecution. See also Dea Carpenter, USCIS Deputy Chief Counsel, Guidance on Demiraj v. Holder, 631 F.3d 194 (5th Cir. 2011), Memorandum to Ted Kim, Acting Director, Asylum Division (Washington, DC: February 23, 2012).

[12] See, e.g., DHS's Supplemental Brief in Matter of L-R-, April 13, 2009 (arguing that an individual in the particular social groups of "Mexican women in domestic relationships who are unable to leave" or "Mexican women who are viewed as property by virtue of their positions within a domestic relationship" could establish a nexus to a particular social group if the persecutor believed that he had the right to abuse the victim because she possessed the characteristics that defined the group).

[13] Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996). See also Pitcherskaia v. INS, 118 F.3d 641, 648 (9th Cir. 1997).

[14] Pitcherskaia v. INS, 118 F.3d at 647–48.

[15] Id.at 648.

[16] Matter of Kasinga, 21 I&N Dec. at 367.

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established even though the FGM was inflicted by the applicant's tribe with a "subjectively benign intent."[17]

Prosecution vs. Persecution

All countries have the right to investigate, prosecute, and punish individuals for violations of legitimate laws.[18] This can create serious complications in refugee and asylum adjudication, as government actors often use the guise of legitimate prosecution to harm applicants on account of a protected ground.[19] Conversely, applicants may also claim that a government has instituted criminal prosecution against them because of a protected ground when, in fact, the government is seeking to punish the applicant because he or she violated a criminal law of general applicability. It is also possible that the government has mixed motives and punished the applicant for both a violation of a criminal law and on account of his or her possession of a protected belief or characteristic. You must consider all the facts in the case, along with relevant country of origin information, in determining the government's motivation in instituting criminal processes against an applicant.

Laws of General Applicability

You must also determine if the law that is being used to punish the applicant is a law of general applicability, in that it is neutral in intent. If the law is generally applicable, then, you must determine if the government in question enforces the law fairly. In general, fear of prosecution for a law that is fairly administered is not a basis for asylum or refugee status. Under certain circumstances, i.e., where the law punishes an individual because of a protected ground and the punishment rises to the level of persecution, a person may qualify for protection. [20]

Examples

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[17] Id.

[18] UNHCR Handbook, para. 56; Dinu v. Ashcroft, 372 F.3d 1041, 1044–45 (9th Cir. 2004) (harassment resulting from an investigation does not give rise to an inference of political persecution where police are trying to find evidence of criminal activity and there is a logical reason for pursuit of the individual).

[19] Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996); UNHCR Handbook, para. 57–59.

[20] See, e.g., Long Hao Li v. Holder, 633 F.3d 136, 141 (3d Cir. 2011); Chang v. INS, 119 F.3d 1055 (3d Cir. 1997) (determining that "if the law itself is based on one of the enumerated factors and if the punishment under that law is sufficiently extreme to constitute persecution, the law may provide the basis for asylum or withholding of deportation even if the law is "generally" applicable."); Cruz-Samayoa v. Holder, 607 F.3d 1145, 1152 (6th Cir. 2010); Perkovic v INS, 33 F.3d 615 (6th Cir. 1994) (holding that prosecution for violation of laws against expressing political opinions hostile to the government or engaging in political activity outside of country constitutes persecution on account of political opinion). But see Kimumwe v. Gonzales, 431 F.3d 319, 322 (8th Cir. 2005) (finding that expulsion from school and arrestdid not amount to persecution on account of the applicant's homosexuality where the applicant had been accused of sexual misconduct prohibited for straight as well as gay people).

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- A law prohibits all religious groups from meeting on Fridays. This law would be considered a law of general applicability. However, because the law would punish Muslims, whose day of prayer is on Friday, the harm inflicted by the government under this law would be considered harm inflicted on account of religion.

- A law prohibits all political rallies in a certain city square. In practice, many political rallies are held in the square, but only members of the Socialist Party are arrested and prosecuted under the law. Unequal enforcement of a law that appears neutral may be evidence of persecutory intent. Here, the harm inflicted on a member of the Socialist Party under the law would be considered harm inflicted on account of the member's political opinion.

- A law that criminalizes attending unregistered religious group meetings is not a law of general applicability and harm suffered by an applicant under such a law would be considered harm suffered on account of his or her religion.

However, it is important to remember that simply because a law has some impact on one of the protected grounds, does not mean the law is not a law of general applicability.[21]

Examples

In Germany, all children are required by law to attend public or state-sanctioned private schools. Parents who fail to ensure their children's attendance may be subject to fines, imprisonment, or loss of custody. In Romeike v. Holder, a German couple who homeschooled their children in accordance with their religious values claimed that they feared persecution on account of their religion for violating the compulsory attendance law. The Sixth Circuit Court of Appeals held that because the law applies equally to all parents who fail to comply, is not intended to target the applicants' religion, and does not impose disproportionately harsh penalties on parents who homeschool for religious reasons or homeschoolers in general, no nexus had been established.[22]

A curfew imposed during a period of civil unrest prevents individuals from attending evening religious services. If the law is not intended to target individuals because of their religious beliefs, but rather to ensure public safety, no nexus to religion would be established.

Unduly Harsh Punishment

Punishment that is unduly harsh or disproportionately severe given the nature of the offense committed may be evidence that a government was motivated to harm an applicant on account of one of the protected grounds. In such cases, you should examine country conditions for information on how the country's law enforcement community

[21] See Romeike v. Holder, 718 F.3d 528 (6th Cir. 2013).

[22] Id. at 533–34.

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generally handles violations of the same or similar laws. If the applicant's treatment is significantly worse, this may show that the government harmed the applicant on account of a protected ground.

The government's deprivation of an applicant's basic due process rights, along with serious harm inflicted during detention, suggests the government may have been motivated to harm the applicant on account of a protected ground. However, a showing that an applicant did not receive the due process expected in the United States, without more, does not establish that the investigation or prosecution is pretextual.

The BIA has provided the following list of considerations to aid in identifying motive in this context:[23]

- Indications that the abuse was directed toward modifying or punishing opinion rather than conduct. This includes statements or actions by the government out of proportion to legitimate government functions
- Treatment of others in the population who might be confronted by government agents in similar circumstances
- Conformity to procedures for criminal prosecution or military law, including developing international norms regarding the law of war
- The extent to which anti-terrorism laws are defined and applied to suppress political opinion as well as illegal conduct (e.g., an act may broadly prohibit "disruptive" activities and be applied to peaceful as well as violent expressions of views)
- The extent to which suspected political opponents are subjected to arbitrary arrest, detention, and abuse

Some general issues to consider in evaluating claims involving the use of law-enforcement mechanisms include:

- Is the law generally applicable?
- Is the law equally or unequally enforced?
- How does the persecutor view those who violate the law?
- How does compliance with the law affect the applicant's life with regard to the protected characteristics?

Violation of Departure Laws

[23] Matter of S-P-, 21 I&N Dec. 486, 494 (BIA 1996).

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Punishment for violating departure laws does not, without more, establish an applicant's eligibility for asylum or refugee resettlement. A government has legitimate authority to establish and enforce laws governing departure from the country.[24]

Punishment for violation of travel laws might be used as a pretext to persecute the individual on account of one of the protected grounds.[25] Evidence that the punishment is used as a pretext for persecution may include punishment disproportionate to the crime or country of origin information showing the country in question views individuals who violate departure laws as traitors or subversives.[26]

2.2 Evidence of Motive

Both direct and circumstantial evidence are relevant to determining whether a persecutor was motivated to harm an applicant on account of a protected ground.

Duty to Elicit Testimony

Asylum and refugee applicants are not expected to understand the complexities of the law and may not realize that they are required to establish the motive of the persecutor.[27] Applicants may not know what evidence is relevant to establishing the persecutor's motive. Applicants may not understand the scope of the five protected grounds, and they may be unable to articulate which ground motivated the persecutor.

Although the applicant bears the burden of proof to establish a nexus between the harm, or feared harm, and a protected ground, you have an affirmative duty to elicit all information relevant to the nexus determination.[28] You should fully explore the motivations of any persecutor involved in a case. Reasonable inferences regarding the motivations of persecutors should be made, taking into consideration the culture and patterns of persecution within the applicant's country of origin.

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[24] Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983); Nazaraghaie v. INS, 102 F.3d 460 (10th Cir. 1996).

[25] See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para. 61, which states:

The legislation of certain States imposes severe penalties on nationals who depart from the country in an unlawful manner or remain abroad without authorization. Where there is reason to believe that a person, due to his illegal departure or unauthorized stay abroad is liable to such severe penalties his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons enumerated in Article 1 A (2) of the 1951 Convention . . .

[26] See Rodriguez-Roman v. INS, 98 F.3d 416, 430 (9th Cir. 1996) ("[A] state which severely punishes unlawful departure views persons who illegally leave as disloyal and subversive and seeks to punish them accordingly."); Chang v. INS, 119 F.3d 1055 (3rd Cir. 1997) .

[27] See Jacinto v. INS, 208 F.3d 725, 733–34 (9th Cir. 2000) ("Applicants for asylum often appear without counsel and may not possess the legal knowledge to fully appreciate which facts are relevant." IJs "are obligated to fully develop the record in [such] circumstances…").

[28] 8 C.F.R. § 208.9(b). See also Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); RAIO Training Module, Evidence.

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You may use country of origin information to help you determine the motivation of the persecutor to harm the applicant, especially if the applicant is having difficulty answering your questions regarding motivation.

Many applicants may not know a belief or characteristic is the basis for a refugee or asylum claim and may be reluctant to share information for a variety of reasons, including fear, shame, and ignorance. This is especially true where applicants are not represented. They may only put forward the elements of their past experiences that their family or members of their communities recommend. It is important to explore all possible grounds, despite the applicant's difficulty in articulating a basis for the claim.

The UNHCR Handbook points out that the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the adjudicator. Your role is to "ensure that the applicant presents his case as fully as possible and with all available evidence."[29]

Direct Evidence

Sometimes an applicant is able to provide direct evidence of motive.

Examples of Direct Evidence of Motive

- The persecutor warned the applicant to stop all political activities or face arrest.
- The persecutor's statements and actions are evidence of motive. For example, in a case where a police officer arrested an asylum applicant after having asked if the applicant was gay, and made statements about the applicant's sexuality during a sexual assault, the Ninth Circuit held that these facts constituted sufficient grounds to establish that the officer was motivated to target the applicant on account of his homosexuality.[30]
- The persecutor uses derogatory language, such as a racial, ethnic, or religious slur, when harming or threatening the applicant.
- There are laws in the applicant's country prohibiting the practice of certain religions or punishing apostasy.
- There are laws in the applicant's country that punish homosexual activity.

Circumstantial Evidence

[29] UNHCR Handbook, para.196.

[30] Boer-Sedano v. Gonzales, 418 F.3d 1082, 1089 (9th Cir. 2005).

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Often an applicant will not be able to provide direct evidence of motive, since persecutors do not generally announce their motives or explain their actions. However, motive may be established by circumstantial evidence.[31]

Examples of Circumstantial Evidence of Motive

- Evidence that the persecutor has harmed other individuals who share the applicant's protected belief or characteristic may support an applicant's claim that he or she was targeted on account of a protected characteristic.[32] While evidence that the persecutor seeks to harm others is relevant, it is not required.

- Close proximity in time of arrest to participation in an opposition party meeting may be circumstantial evidence of a connection between the arrest and the applicant's political opinion.

- Country of origin information may provide circumstantial evidence of motive. For example, a reliable report may establish that the persecutor views individuals who are similarly situated to the applicant (e.g., human rights workers or student activists) as political opponents.

Circumstantial evidence may be sufficient to satisfy the nexus requirement, even when the identity of the persecutor cannot be proven precisely. In Bace v. Ashcroft, the Court of Appeals for the Seventh Circuit pointed to both the proximity in time between the applicant's political activity and the harm he suffered, as well as his attackers' statements suggesting that they were likely members of the opposing political party.[33] Although the applicant could not establish the identity of the attackers, he provided sufficient evidence that he was harmed on account of his political opinion.

3 PROTECTED GROUNDS

3.1 Broad Construction

The five protected grounds should be construed broadly. They often include attributes that may not fit an everyday understanding of the terms.

Examples

[31] INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992).

[32] See Garcia-Martinez v. Ashcroft, 371 F.3d 1066, 1076 (9th Cir 2004) (evidence that every family in a Guatemalan village lost a male member to the guerrillas and that the military raped a woman every eight to fifteen days, based on the mistaken belief that the villagers had voluntarily joined the guerrillas, compelled a finding that the applicant's rape by soldiers was on account of a political opinion imputed to her).

[33] Bace v. Ashcroft, 352 F.3d 1133, 1139 (7th Cir. 2003).

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- An individual may face persecution on account of religion, even if he does not characterize his belief, identity, or way of life, as a "religion."[34] Additionally, an individual may establish a nexus based on his choice not to participate in religion.

- Persecution based on political opinion can encompass a much broader array of actions beyond political party membership, including whistleblowing,[35] refusal to follow orders to commit human rights abuses,[36] and, in some instances, opposition to gang violence or recruitment.[37]

- Persecution that at first glance may appear to be based on a personal vendetta or dispute may actually be on account of a protected ground. For example, this may be true in cases where the persecution feared is an honor killing by a family member.[38]

You should analyze the existence of a protected ground in the context of the culture of the country of origin. To the extent possible, you should avoid viewing the case through the prism of your own experiences and world view. However, claims based on purely personal matters, criminal activity, economic gain and laws of general applicability fall outside the protection of asylum and refugee law.[39]

3.2 Duty to Elicit Information regarding all Potential Connections to Protected Ground

An applicant may be unable to articulate a connection to a particular protected characteristic. He or she may state that the claim is based on one ground, while the facts indicate that there is an alternative connection to another ground, or that a connection to another ground may be more relevant to whether the applicant is a refugee. You must determine which protected ground, if any, has a relation to the experiences of the applicant.

Example

If the applicant states that he or she fears harm on account of religion, but the facts of the case indicate that the persecutor was motivated by the applicant's political opinion, then you must evaluate the claim based on political opinion as well as religion.

3.3 Imputation of Protected Ground

[34] See Zhang v. Ashcroft, 388 F.3d 713 (9th Cir. 2004) (per curiam) (holding that Falun Gong practitioner faced persecution on account of his spiritual and religious beliefs even though Falun Gong does not consider itself a religion).

[35] Zhang v. Gonzales, 426 F.3d 540 (2d Cir. 2005).

[36] Barraza Rivera v. INS, 913 F. 2d 1443 (9th Cir. 1990).

[37] Marroquin-Ochoma v. Holder, 574 F. 3d 575 (8th Cir. 2009).

[38] Sarhan v. Holder, 658 F.3d 649, 656 (7th Cir. 2011)

[39] For more information on crime and personal disputes, see below Section 9.7, Crime and Personal Disputes.

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An applicant is not required to actually possess the protected trait that motivates the persecutor. Persecution inflicted on an applicant because the persecutor attributes to the applicant a protected ground constitutes persecution "on account of" that characteristic, regardless of whether the applicant actually possesses the characteristic.[40] Any of the five protected grounds can be imputed to an applicant.

Examples

- In Amanfi v. Ashcroft, the Third Circuit held that an applicant who was targeted because his persecutors believed he was gay could establish persecution on account of imputed membership in a particular social group defined as "homosexuals in Ghana" although "he testified that he was not in fact a homosexual." [41]

- An individual who has relatives who are members of the Baha'i Faith is arrested and badly beaten by the police during a government crackdown on Baha'is. If the evidence supports the conclusion that the authorities believed she was Baha'i, the harm she experienced would be considered to have been inflicted on account of her imputed religion, even though she is not a believer.

The determinative inquiry is whether the persecutor believes the applicant possesses a protected belief or characteristic and whether the persecutor is motivated to harm the applicant because of that imputed belief or characteristic. Some factors to consider include:

- Actions the applicant has taken that would lead the persecutor to believe that he or she possesses a protected belief or characteristic

  Example

During the exile of President Aristide, the de facto government in Haiti associated members of neighborhood improvement committees with President Aristide. In the eyes of the Haitian military and their supporters, sweeping a street or participating in a literacy campaign indicated support for the exiled president.

- Statements the persecutor makes that may constitute evidence that he or she believes the applicant, or persons similarly situated to the applicant, possesses a protected trait

- Treatment of similarly situated individuals

[40] See Grover Joseph Rees III, INS Office of General Counsel, Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion, Memorandum to Jan Ting, Acting Director, Office of International Affairs, at 12 (Jan. 19, 1993).

[41] Amanfi v. Ashcroft, 328 F.3d 719, 730 (3d Cir. 2003).

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- Country of origin information that may provide an understanding of the overall situation in the applicant's country, and provide a context for the persecutor's actions
- Severity of any punishment the applicant received or fears, which may be so far out of proportion "as to seem obviously directed at real or perceived enemies rather than at ordinary lawbreakers"[42]
- Reasons, unrelated to a protected ground, for the persecutor to harm the applicant[43]

4 RACE

4.1 Definition

"Race" should be understood broadly to include all kinds of ethnic groups that are "referred to as races in common usage."[44] Race sometimes overlaps with nationality as a protected ground.

While the idea of "race" is often popularly understood to involve distinct biological groupings, such ideas are scientifically discredited.[45] National and regional cultures vary greatly in their construction of racial groupings. You should, to the extent possible, avoid viewing the case through the prism of your own experiences and world view regarding which "race" an applicant belongs to. The relevant inquiry is how the country of origin or segments of the population delineate racial groupings, and where the applicant fits into that delineation.

4.2 Harm Suffered Because of the Applicant's Disregard of Racial Barriers

Harm suffered because of an applicant's violation of or refusal to adhere to legal or cultural racial barriers within a society may be considered to have been inflicted on account of the applicant's race.[46]

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[42] See Grover Joseph Rees III, INS Office of General Counsel, "Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion," Memorandum to Jan Ting, Acting Director, Office of International Affairs, at 12 (Jan. 19, 1993).

[43] Matter of S-P-, 21 I & N Dec. 486, 495–96 (BIA 1996) (finding that although the applicant may have been initially detained for intelligence gathering purposes, the severity and duration of harm suffered exceeded any legitimate intelligence motive).

[44] UNHCR Handbook, para. 68. See, e.g., Duarte de Guinac v. INS, 179 F.3d 1156, 1159 n.5 (9th Cir. 1999).

[45] "Scientific and Folk Ideas about Heredity," Jonathan Marks, available at http://www.pbs.org/race/000_About/002_04-background-01-12.htm

[46] See, e.g., UNHCR Handbook, para. 69; cf. Bob Jones University v. United States, 461 U.S. 574, 612 (1983) (concluding, in the civil rights context, that a university's ban on interracial relationships constituted racial discrimination).

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Example

> A statute prohibits interracial marriage. A black applicant is arrested and prosecuted when she attempts to marry a person of a different race. Any harm she suffers related to this incident is on account of her race.

Depending on the facts of the case, a finding that the harm was inflicted on account of the applicant's political opinion may also be appropriate.

5 RELIGION

5.1 Definition

The protected ground of religion has been broadly defined to include the right to freedom of thought, conscience, and belief. Religion, as a protected ground, is not limited to familiar religious beliefs and practices. For purposes of establishing refugee and asylum eligibility, persecution suffered or feared on account of a non-traditional belief system may be considered persecution "on account of religion."[47] The International Religious Freedom Act (IRFA) refers to religious freedom without defining what makes a particular practice or belief a religion and does not place any particular religious group in a position of privilege over any other.[48] While many applicants base their claim to refugee or asylum status on their inclusion in well-known faith groups (e.g., Hindus, Christians, or Muslims), other individuals may seek protection based on religious beliefs and practices that may be unfamiliar or based on their non-belief. The protected ground of religion includes the individual's right to be an atheist, an agnostic, or to otherwise reject religious practice.

If an individual's faith or faith group is not familiar to you or a particular practice or belief appears unusual to you, do not allow your unfamiliarity to affect your judgment. Neither courts nor adjudicators may inquire into the popularity, truth, validity, or reasonableness of an applicant's religious beliefs or choice not to believe.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights proclaim the right to freedom of religion. This includes the right to have or adopt a religion of one's choice; the freedom, either individually or in a community with others and in public or private, to manifest a religious belief in worship observance, practice, and teaching; and the right not to be subjected to coercion that would impair freedom to have or adopt a religion or belief of one's choice.[49] Accordingly, the applicant

[47] See UNHCRGuidelines on International Protection: Religion-Based Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees. HCR/GIP/04/06Section II (Apr. 28, 2004).

[48] International Religious Freedom Act of 1998, Pub. L. 105-292. For additional information on the IRFA, see RAIO Training Module, IRFA (International Religious Freedom Act) and Religious Persecution.

[49] Universal Declaration of Human Rights art. 18; the International Covenant on Civil and Political Rights art. 18(1).

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has the right to live an openly religious life in his or her country of origin, and there is no requirement that an applicant conceal his or her religion to be eligible for protection.

In 1998 Congress passed IRFA, which expressed concern about religious freedom throughout the world and established an Annual Report on International Religious Freedom to be prepared by the Department of State.[50] IRFA requires that the Annual Report, with other relevant documentation, serve as a resource for you in cases involving claims of persecution on the grounds of religion.[51] However, you may not deny an applicant's claim solely because the Annual Report does not confirm the conditions described by the applicant.

5.2 General Forms of Religious Persecution

Drawing from international human rights law, the UNHCR Handbook explains that persecution on account of religion takes a number of different forms. Some examples of harm that may be found to have been inflicted on account of an applicant's religion are:

- Prohibition of membership in a religious community
- Prohibition of worship in private or in public
- Prohibition of religious instruction
- Forced renunciation of religious beliefs or desecration of objects of religious importance
- Serious measures of discrimination imposed on persons because they practice their religion or belong to a religious community[52]

5.3 Conversion

In some countries it may be illegal to convert from one religion to another, and the penalties may be severe. For example, in Iran, conversion from Islam to another religion is considered apostasy (renunciation of faith), which is punishable by death. Such punishment is persecution on account of religion.[53]

5.4 Laws Based on Religious Principles

[50] International Religious Freedom Act of 1998, Pub. L. 105-292 , Section 102(b)..

[51] Id. Section 601.

[52] UNHCR Handbook, para. 72.

[53] See, e.g., Bastanipour v. INS, 980 F.2d 1129 (7th Cir. 1992) (prosecution under law against apostasy found to be persecution "on account of" religion).

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Punishment for refusal to comply with religious norms or laws, such as dress codes or gender roles based on religious principles, may constitute persecution on account of religion.

Note that in some countries, religious principles are inseparable from civil and criminal laws. In such countries harm on account of religion may overlap with harm on account of political opinion.

You should focus on whether the persecutor sees the applicant as a simple law-breaker, or as someone who should be punished for possessing "improper" religious values. In many cases the persecutor will view the applicant as both a law-breaker and as an individual possessing "improper" religious values. Although the persecutor may have mixed motives, if the applicant's real or perceived religious values are "at least one central reason" motivating the persecutor,[54] such motivation may be sufficient to establish that the harm is on account of religion in asylum adjudications. In refugee processing, you need to determine if "a reasonable person would fear that the danger arises 'on account of' one of the five grounds,"[55] in this case real or perceived religious values. For further discussion, see ASM Supplement – At Least One Central Reason.

When a civil or criminal law is itself based on religious laws or principles in a country with little separation between church and state, the evaluation of the persecutor's intent may be complex. A thorough understanding of country of origin information will help you evaluate how the authorities view individuals who violate religious laws.

5.5 Differing Interpretation of the "Same" Religion

The persecutor does not have to adhere to a different religion from the applicant. Large religious groupings such as Christianity, Islam, and Buddhism have a wide variety of sects and denominations. Even within smaller religious groupings, individual members may differ greatly as to what practices or beliefs are required by their religion. Harm suffered on account of these differences is harm suffered on account of religion.

Example

Where a daughter's religious opinions were different from her father's concerning how she should dress and with whom she should associate, and the father attempted to impose his religious opinion on his daughter through physical force, the serious harm that the daughter suffered was "persecution on account of religion."[56] Although the daughter and

[54] See infra Section 2.1 on "Mixed Motives."

[55] For further discussion, see RAD Supplement – Motivation. You should not rely on case law that interprets the "one central reason" standard, but you may find such cases helpful in understanding general principles of the nexus requirement. These standards are not the same. You should follow your division's guidance on how to analyze this issue.

[56] Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000).

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father both practiced Islam, the father harmed his daughter because her religious beliefs did not conform to his, particularly with respect to the way women should behave.[57]

6 NATIONALITY

6.1 Definition

For purposes of asylum and refugee adjudications, the term "nationality" is defined more broadly than it is in the first part of the refugee definition (that defines a refugee as someone outside his or her country of "nationality," i.e. citizenship). "Nationality," as a protected ground, is a broad concept that includes ethnic groups, linguistic groups, and groups defined by common cultures.

Note that harm on account of nationality may also overlap with harm on account of race or religion.

Examples

- In the former Soviet Union, "Jewish" was considered a nationality and marked as such on identification documents. A Jewish father and son from the Ukraine, who were attacked by a member of a nationalistic, pro-Ukrainian movement were targeted because of their Jewish nationality.[58]

- Consider a K'iche' (Quiché) applicant from Guatemala. Country conditions reports indicate that the characteristic of being K'iche' may be perceived by the persecutor or feared persecutor as a racial characteristic, an ethnic characteristic (nationality), an immutable characteristic shared with other members of a distinct group (particular social group), a religious characteristic (some communities still practice indigenous religions), or a political characteristic (indigenous communities were often perceived to be linked with guerrilla organizations). The important inquiry is whether the persecutor is motivated to harm the applicant on account of his or her being K'iche'; if so, several protected characteristics may apply.[59]

6.2 Conflicts Between National Groups

When conflict between two or more national (ethnic, linguistic) groups exists in a country, persecution on account of nationality may overlap with persecution on account

[57] Id. at 1336.

[58] Matter of O-Z- & I-Z-, 22 I&N Dec. 23 (BIA 1998).

[59] See Duarte de Guinac v. INS, 179 F.3d 1156, 1159 n.5 (9th Cir. 1999) (noting that ethnicity may be analyzed as both race and nationality).

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of political opinion, particularly where a political movement is identified with a specific nationality.[60]

In some conflicts, members of an ethnic group may be at risk of harm even though they are not directly involved in the conflict. Such cases involve persecutors who associate all members of a cultural grouping with the limited pool of persons from that cultural grouping who are involved in the hostilities.

When there is conflict between one or more "nationalities," you should not assume that claims arising from the conflict are based solely on civil strife. Rather, you must consider carefully the nature of the strife and determine whether the harm the applicant suffered or fears is connected to his or her nationality.[61]

6.3 Examples of Claims Based on Nationality

As noted above, claims based on nationality often overlap with other protected grounds. In the former Soviet Union, nationalities were listed on citizens' passports, including entries for Jews, Germans, Chechens, Russians, and, at one point, 168 others.[62] Other examples of individuals who have been harmed on account of nationality include Armenians in Azerbaijan (may overlap with religion); Bosniaks, Croats, and Serbs in the former Yugoslavia (may overlap with religion); Tibetans in the People's Republic of China (may overlap with religion); or Roma in Bulgaria (may also be analyzed as a particular social group).[63]

7 PARTICULAR SOCIAL GROUP (PSG)

NOTE: Particular Social Group is one of the five grounds in the refugee definition, but it is not being discussed in this module. It is covered in a separate module, Nexus – Particular Social Group.

8 POLITICAL OPINION

8.1 Definition

Expression of a political opinion should not be viewed only in the narrow sense of participation in a political party or the political process. The meaning of "political

[60] UNHCR Handbook, para. 75.

[61] See Civil Strife section, below; see also Matter of H-, 21 I&N Dec. 337 (BIA 1996).

[62] See Sven Gunnar Simonsen, Inheriting the Soviet Policy Toolbox: Russia's Dilemma Over Ascriptive Nationality, 51 Europe-Asia Studies1069 (1999).

[63] Mihalev v. Ashcroft, 388 F.3d 722 (9th Cir. 2004).

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opinion" in the refugee definition "should be understood in the broad sense, to incorporate . . . any opinion on any matter in which the machinery of state, government and police may be engaged."[64]

The Fourth Circuit has described political opinion as "prototypically" exhibited by "evidence of verbal or openly expressive behavior by the applicant in furtherance of a particular cause."[65] In recognizing that "less overtly symbolic acts may also reflect a political opinion," the court set as a baseline that "whatever behavior an applicant seeks to advance as political, it must be motivated by an ideal or conviction of sorts before it will constitute grounds for asylum."[66] Of course, an action could be imputed as political, even if the applicant does not hold an ideal or conviction.

Expression of a political opinion may take various forms, and many types of opinions or views may fall within the broad category of "political." Examples of expression of political opinions outside the traditional political process include:

- Expression of feminist beliefs[67]
- Exposure of government human rights abuses[68]
- Activities to protect or establish the right to association (such as union membership), workers' rights, or other civil liberties[69]
- Participation in certain student groups[70]
- Participation in community improvement organizations or cooperatives, or movements for land reform[71]
- Opposition to a political group's strategy for promoting its ideology[72]

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[64] Guy Goodwin-Gill, The Refugee in International Law 30 (1983) .

[65] Saldarriaga v. Gonzales, 402 F.3d 461, 466 (4th Cir. 2005).

[66] Id.

[67] Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993).

[68] Gao v. Gonzales, 407 F.3d 146, 153 (3d Cir. 2005).

[69] Osorio v. INS, 18 F.3d 1017 (2d Cir. 1993); Bernal-Garcia v. INS, 852 F.2d 144 (5th Cir. 1988).

[70] Osorio v. INS, 18 F.3d 1017 (2d Cir. 1993); Matter of Villalta, 20 I&N Dec. 142 (BIA 1990).

[71] See, e.g., Zamora-Morel v. INS, 905 F.2d 833 (5th Cir. 1990); Vera-Valera v. INS, 147 F.3d 1036 (9th Cir. 1998).

[72] Regalado-Escobar v. Holder, 717 F.3d 724, 729 (9th Cir. 2013) ("When a political organization has a pattern of committing violent acts in furtherance of, or to promote, its politics, such strategy is political in nature…Therefore, opposition to the strategy of using violence can constitute a political opinion that is a protected ground for asylum purposes.")

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- Opposition to gangs and drug cartels

Opposition to a gang may have a political dimension, but a general aversion to gangs and their criminal activity or refusal to join the gang is not necessarily politically motivated.[73] The mere refusal to join a gang, without more, does not establish that the gang's threats against the applicant were on account of an imputed political opinion.[74] Cases involving refusal to join gangs, however, may be mixed motive cases. The fact that an applicant refuses to join a gang, while not alone sufficient to support a conclusion that he was perceived to be politically opposed to gangs, certainly does not undermine such a conclusion. There may well be cases where refusal to join a gang is an element of a cognizable political opinion claim.

To show that violence inflicted by gang members has a nexus to the applicant's actual or imputed political opinion, an applicant needs evidence that he or she was politically or ideologically opposed to the gang's particular ideals or to gangs in general (or that the gang believes this) and not merely that he or she did not want to be personally involved in or had an aversion to specific activities of the particular gang.[75] Even if the applicant shows that he or she possesses an anti-gang political opinion, the applicant must show that the gang targeted him or her on account of that political opinion, and not merely to grow its ranks or to increase its wealth.

- Refusal to follow orders to commit human rights abuses[76]

  For more information, see Section below on "Refusal to serve in a military or commit an action that is condemned by the international community."

- Whistleblowing or otherwise exposing government corruption

In some circumstances, opposition to state corruption may be motivated by an applicant's political convictions, or may cause a persecutor to impute such convictions to the applicant.[77] However, showing retaliation for opposing governmental corruption is not by

[73] Santos-Lemus v. Mukasey, 542 F.3d 738, 747 (9th Cir. 2008) (holding that a "general aversion to gangs does not constitute a political opinion"); Barrios v. Holder, 581 F.3d 849, 855 (9th Cir. 2009).

[74] Marroquin-Ochoma v. Holder, 574 F.3d 574, 578–79 (8th Cir. 2009).

[75] Santos-Lemus v. Mukasey, 542 F.3d 738, 747 (9th Cir. 2008); Barrios v. Holder, 581 F.3d 849, 855 (9th Cir. 2009).

[76] See, e.g., Barraza Rivera v. INS, 913 F. 2d 1443 (9th Cir. 1990).

[77] Ruqiang Yu v. Holder, 693 F.3d 294 (2d Cir. 2012); Zhang v. Gonzales, 426 F.3d 540 (2d Cir. 2005); Hu v. Holder, 652 F.3d 1011, 1019–20 (9th Cir. 2011) (". . . the Chinese police officials who arrested Hu did not accuse him of illegally gathering without a permit. Rather, they accused him of 'gathering a crowd to cause trouble and disturb the order of society, [and] acting against the government and against the party."); Grava v. INS, 205 F.3d 1177 (9th Cir. 2000) ("When the alleged corruption in inextricably intertwined with governmental operation, the exposure and prosecution of such an abuse of public trust is necessarily political."); Baghdasayan v. Holder, 592 F.3d 1018 (9th Cir. 2010) ("Whistle-blowing against government corruption is an expression of political opinion."); Reyes Guerrero v. INS, 192 F.3d 1241, 1245 (9th Cir. 1999).

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itself sufficient to establish a nexus to a political opinion. You also should consider the variety of reasons that persecutors act in such cases. In Matter of N-M-, the BIA held that the following factors should be considered when analyzing nexus in whistleblowing cases:

- Whether and to what extent the individual engaged in activities that could be perceived as expressions of anti-corruption beliefs;
- Any direct or circumstantial evidence that the persecutor was motivated by the individual's actual or perceived anti-corruption beliefs; and
- Any evidence regarding the pervasiveness of corruption within the governing regime.[78]

State actors may be motivated to harm whistleblowers for a variety of reasons that are not related to protected grounds, including a desire for revenge. Personal motivation does not preclude a grant of asylum or refugee status, however, if the state actor is also motivated by the applicant's efforts to "expose" corruption.[79] Even in cases where the applicant's reasons for exposing corruption were purely personal, there may be evidence indicating that state actor perceived the applicant as having a political motive.[80] In other words, state actors may have mixed motives in harming whistleblowers.

Also, campaigning against state corruption through classic political activities such as being active in a political party that opposes state corruption, attending or speaking at rallies against corruption, or writing pamphlets criticizing state corruption would constitute the expression of a political opinion.[81]

Harm suffered for having provided the government information about individuals involved in illegal activities may, or may not, constitute harm suffered on account of a political opinion. Providing the government with information about a guerrilla group, for example, where the guerrilla group would see informing as an expression of opposition, would be considered expressing a political opinion.[82] Providing information on more

[78] Matter of N-M-, 25 I&N Dec. 526, 532–33 (BIA 2011). See also Ruqiang Yu v. Holder, 693 F.3d 294 (2d Cir. 2012) (rejecting the BIA's finding that the applicant opposed "aberrational" corruption where the applicant protested several months of nonpayment of wages and personally escorted 10 employees to confront factory officials).

[79] Antonyan v. Holder, 642 F.3d 1250, 1256 (9th Cir. 2011).

[80] Khudaverdyan v. Holder, 778 F.3d 1101, 1107 (9th Cir. 2015).

[81] Id. But see Liu v. Holder, 692 F.3d 848 (7th Cir. 2012) (writing an anonymous letter asserting corruption in layoffs does not transform an economic protest into a political one where the applicant never acknowledged he wrote the letter or testified that anyone knew he wrote it).

[82] Saldarriaga v. Gonzales, 402 F.3d 461, 467 (4th Cir. 2005). See also Antonyan v. Holder, 642 F.3d 1250, 1255 (9th Cir. 2011) ("In pursuing Andranik's prosecution, Antonyan sought more than an end to his drug-dealing and violence in her community; she also hoped to expose his crooked ties to law enforcement agencies who refused to protect the citizenry.").

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routine criminal matters, outside of a political context, however, likely would fail to satisfy the nexus requirement for political opinion.[83]

- Neutrality

Political neutrality may include the absence of any political opinion. Neutrality can be established by pronouncement or actions. In certain refugee and asylum claims, the refusal to take sides in a political controversy may be considered expressing a political opinion. The critical issue is how the persecutor views the applicant's decision to remain neutral, and whether he or she targets the applicant because of that decision.[84] During periods of conflict, a persecutor may believe that no one can be neutral. In such cases, the persecutor may impute an opposition political opinion to anyone who remains neutral.

Although the BIA has not granted asylum or withholding based on an applicant's decision to remain neutral, the BIA has analyzed claims under the principle that, in some cases, neutrality may be a political opinion.[85]

The First and Ninth Circuits have held that neutrality may constitute a political opinion.[86] The Eighth Circuit has indicated that neutrality might, in some cases, form a political opinion.[87] The Ninth Circuit follows the doctrine of "hazardous neutrality."[88] Remaining neutral in an environment where neutrality brings hazards from a persecutor is an expression of political opinion.[89] For example, the failure to favor either side in a civil war may be perceived as opposition by participants from either side of the conflict. The Sixth Circuit has noted that expression of a political opinion may be affirmative or negative; in some circumstances, refusal to join or express support for a political party may be perceived as an expression of opposition to that party.[90]

- Professional Activities or Associations

Harm inflicted on an applicant because of his or her profession or occupation at the time the harm occurred is generally not, in itself, sufficient to establish that the applicant was

[83] Thuri v. Ashcroft, 380 F.3d 788 (5th Cir. 2004) (the evidence did not compel a finding that reporting a single incident of crime by police officers was viewed by the government as an expression of political opinion).

[84] Ramos-Vasquez v. INS, 57 F.3d 857 (9th Cir.1995); Arriaga-Barrientos v. INS, 937 F.2d 411, 414 (9th Cir. 1991).

[85] See Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); Matter of Maldonado-Cruz, 19 I&N Dec. 509, 516 (BIA 1988); Novoa-Umania v. INS, 896 F.2d 1 (1st Cir. 1990) (indicating BIA used neutrality analysis).

[86] Umanzor-Alvarado v. INS, 896 F.2d 14 (1st Cir. 1990); Arriaga-Barrientos v. INS, 937 F.2d 411 (9th Cir. 1991).

[87] Lopez–Zeron v. INS, 8 F.3d 636 (8th Cir. 1993).

[88] Rivera-Moreno v. INS, 213 F.3d 481, 483 (9th Cir. 2000).

[89] Id.; See also Sangha v. INS, 103 F.3d 1482, 1488 (9th Cir. 1997).

[90] Mandebvu v. Holder, 755 F.3d 417, 429 (6th Cir. 2014).

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persecuted on account of one of the protected grounds.[91] Ideologically motivated groups often seek to harm government employees, such as police officers or members of the military forces, in order to frustrate their official duties or to publicly undermine the regime. Members of other professions may be targeted for recruitment because the persecutors have particular need of their services, or for extortion, because they are perceived to be wealthy.

In such cases, "the mere existence of a generalized political motive underlying the persecutor's actions" is inadequate to establish the requisite nexus.[92] Rather, the applicant must demonstrate that the persecutor is targeting the applicant on account of a belief or characteristic that the applicant possesses or is imputed to possess.

The fact that an applicant is targeted in relation to his or her professional status, however, does not preclude him or her from establishing the requisite nexus to a protected ground.[93] An applicant's profession may cause the persecutor to impute a protected characteristic to him or her, or an applicant may express the belief or opinion that causes him or her to be targeted in the course of his or her official duties. Applicants who work for or have close professional associations with the government may sometimes be targeted as supporters of the government or the ruling political party, whether or not their work is political in nature.

Examples

- A Pakistani "special police officer" began receiving threatening letters and phone calls after, in the course of his official duties, he began going to mosques and social spaces to encourage citizens to oppose the Taliban. The immigration judge found that he was targeted because of his work as a police officer and, therefore, he had not established a nexus to a protected ground, and the BIA affirmed the IJ's decision. The First Circuit Court of Appeals vacated and remanded the case, holding that the fact that the applicant expressed the political views for which he was targeted while on duty did not preclude him from establishing the requisite nexus.[94]

A Colombian applicant owned a catering business that supplied food to governmental and military institutions. The Revolutionary Armed Forces of Colombia (FARC) made

[91] See Matter of Acosta, 19 I&N Dec. 211, 234 (BIA 1985); Matter of Fuentes, 19 I&N Dec.658, 662 (BIA 1988). Note, however, that several courts have found groups defined by former occupation to constitute particular social groups. In some circumstances, moreover, a group defined by a current profession or occupation may be sufficiently fundamental to its members' identity, distinct in society, and defined with particularity to constitute a particular social group. In such cases, it is necessary to analyze whether the applicant was targeted or fears harm on account of his or her membership in that group. See RAIO Training Module, Nexus – Particular Social Group.

[92] INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992).

[93] See Acharya v. Holder, 761 F.3d 289, 301 (2d Cir. 2014); Grava v. INS, 205 F.3d 1177, 1181 (9th Cir. 2000).

[94] Khattak v. Holder, 704 F.3d 197, 204–05 (1st Cir. 2013).

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several threatening phone calls in which they attempted to recruit him as an informant and demanded that he stop providing services to the Colombian military, but the applicant repeatedly refused their demands. The immigration judge found that the FARC was motivated to recruit the applicant because he would be useful to them rather than because of any protected ground.[95] The Third Circuit Court of Appeals held that the IJ's decision was not supported by substantial evidence; given the applicant's long association with and economic dependence on Colombian government and political institutions and the fact that he had repeatedly refused the FARC's overtures, the court was compelled to find that the FARC was motivated by an imputed political opinion.[96]

Governments may also impute opposing political opinions to applicants because of their professional associations. For example, in Javed v. Holder, a Pakistani attorney who represented an opposition political party in litigation was threatened and beaten by a faction of the governing party. The applicant testified that he was not a supporter of either group but that, as a result of his representation of the opposition party, the governing party thought of him as their enemy. The First Circuit Court of Appeals held that this testimony established that the persecutors imputed a political opinion to the applicant.[97]

8.2 Opinion Must Be Applicant's or Attributed to Applicant

Persecution on account of political opinion means persecution on account of the applicant's political opinion, or one attributed to the applicant.[98]

Showing that the persecutor is motivated by political goals or represents a political entity does not in itself establish that the persecution is on account of political opinion. The persecutor must be motivated by the applicant's opinion or perceived opinion.

8.3 Attempts to Overthrow the Government

Prosecution for an attempt to overthrow a government may constitute persecution on account of political opinion if there are no legitimate political means in place to change the government.[99] Legitimate government investigation and punishment of individuals who fight against the government, however, is generally not persecution on account of political opinion.[100]

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[95] Espinosa-Cortez v. Att'y Gen. of U.S., 607 F.3d 101, 104–05 (3d Cir. 2010).

[96] Id. at 111–12.

[97] Javed v. Holder, 715 F.3d 391, 397 (1st Cir. 2013).

[98] INS v. Elias-Zacarias, 502 U.S. 478, 482-83 (1992).

[99] Chanco v. INS, 82 F.3d 298 (9th Cir. 1995); Matter of Izatula, 20 I&N Dec. 149 (BIA 1990); Perlera-Escobar v. EOIR and INS, 894 F.2d 1292 (11th Cir. 1990); Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988).

[100] Perlera-Escobar v. EOIR and INS, 894 F.2d 1292, 1299 (11th Cir. 1990) (noting a duly established government's internationally recognized right to defend itself against attack and rebellion).

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In such cases, your analysis is similar whether the applicant is a participant in an attempted coup d'etat or an armed insurrection. If the harm rises to the level of persecution, then you must determine the motivation of the government in harming the applicant.[101] If institutions exist to provide peaceful means to change the government, prosecution of an individual who attempts to violently overthrow the government will not usually be found to be persecution. A "duly established" government has the right to investigate suspected traitors.[102]

In analyzing an applicant's fear of prosecution for actions he or she took to overthrow the government, you should look at the legitimacy of the law being enforced. When a government does not recognize the international human right to peacefully protest, punishment for a politically motivated act against it may not constitute a legitimate exercise of authority.[103]

You must also consider the actions taken by the applicant in furtherance of the attempt to overthrow the government. Actions involving persecution or torture of others, severe harm to civilians, or terrorist activity may lead you to find that the applicant is barred or ineligible for protection. Note that this is a basis for denial that is separate from the question of whether the nexus requirement has been met.[104]

9 COMMON NEXUS ISSUES

The following section provides guidance on a number of nexus issues that have been commonly encountered in the field.

9.1 Civil Strife

Fear of general civil strife or war, and incidental harm resulting from such violence, does not, by itself, establish eligibility for asylum or refugee status. Such incidental harm is not persecution, because it is not directed at the applicant on account of a protected ground. The applicant may be caught in the middle of crossfire or other violence that would occur regardless of his or her presence.

However, the existence of civil strife or war in the applicant's country does not preclude finding the applicant eligible for asylum or refugee status if the applicant is harmed or at

[101] See Chanco v. INS, 82 F. 3d 298 (9th Cir. 1996); Perkovic v. INS; 33 F.3d 615 (6th Cir. 1994).

[102] Perlera-Escobar v. EOIR and INS, 894 F.2d 1292, 1299 (11th Cir. 1990).

[103] Chanco v. INS, 82 F.3d at 302.

[104] See, e.g., Abdoulaye v. Holder, 721 F.3d 485, 490 (7th Cir. 2013) (upholding a determination that an applicant who had participated in an attempted coup against the military regime in Niger was barred from asylum for having engaged in terrorist activity). See also RAIO Training Modules, National Security, Grounds of Inadmissibility, and Discretion.

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risk for reasons related to a protected ground.[105] The BIA has found that widespread chaos and violence caused by civil strife and the type of individualized harm that constitutes persecution on one of the five protected grounds are not mutually exclusive.[106] Indeed, persecution often occurs during civil war.

Example

Inter-clan violence in Somalia became common during a period of civil war. Harmful acts committed by members of one clan against another because of clan membership during that civil war are on account of the victims' membership in a particular social group. That a large number of people in Somalia might be at risk of clan violence is not relevant to the decision.[107]

Conditions of political upheaval that affect the populace as a whole or in large part, may not be sufficient to establish an individual claim for asylum.[108] When an applicant claims harm from a rival political group, you must determine whether the persecutor was motivated to harm the applicant because of a protected ground.

9.1.1 Considerations

To evaluate whether the harm suffered or feared is incidental to strife or whether it was or might be directed at the applicant on account of one of the protected grounds, you need a firm understanding of the applicant's specific situation and the nature of the civil strife.

- Specific threats

The significance of a specific threat against an applicant is not weakened because the applicant lives in a country where the lives and freedom of many people are threatened. To the contrary, such conditions may make the threat more serious or credible.[109]

- Targeting of non-combatants

In any situation in which non-combatants are intentionally targeted, you should try to ascertain why non-combatants are targeted, whether the non-combatants share a protected characteristic in the refugee definition, and whether the applicant also possesses that

[105] See Mendoza-Pablo v. Holder, 667 F.3d 1308 (9th Cir. 2012).

[106] Matter of H-, 21 I&N Dec. 337, 343 (BIA 1996).

[107] Id.

[108] Meghani v. INS, 236 F.3d 843, 847 (7th Cir. 2001) (citing Mitev v. INS, 67 F.3d 1325, 1330 (7th Cir.1995)); Ali v. Ashcroft, 366 F.3d 407 (6th Cir. 2004) (finding that a leader of the Jamaat party of Bangladesh who was detained by police as a result of his participation in violent conflicts with members of opposing political parties had not established persecution on account of his political opinion).

[109] M.A. v. INS, 899 F.2d 304, 315 (4th Cir. 1990); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1985).

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characteristic. Cases that at first glance appear to be isolated incidents or random acts of violence during a period of civil strife may, upon further inquiry, become valid asylum or refugee claims. For example, in some situations, the civil strife in itself may be rooted in a protected ground, such as nationality or race.[110] If so, the targeting of non-combatants on account of nationality or race would be "on account of" a protected ground.

Example

During the conflict in Iraq, fighting occurred between Sunni and Shi'a militias. The conflict was religious in nature, and militias targeted people of the other denomination. The applicant, a Sunni Muslim, lived in a predominantly Sunni neighborhood. During a battle between the two militias, she was shot when a stray bullet passed through the wall of her home. A witness told her and her family that it appeared the shot was fired by a Shi'a militia man. She would be able to satisfy the nexus requirement as the militia man was motivated to harm residents of the neighborhood on account of religion.

- Legitimate acts of war or violations of humanitarian law

You should consider whether the harm the applicant suffered or fears is a result of a legitimate act of war or a violation of humanitarian law. Even if the applicant is a combatant, he or she may be subject to persecution if the opponent (either government or an insurgent group) acts outside of the internationally recognized parameters of "legitimate" warfare.[111]

- Specific treatment of the applicant

Though the experiences of others mistreated during a period of civil strife are relevant to an applicant's claim, the applicant's specific experience must be considered.
For example, in Ndom v. Ashcroft, the Ninth Circuit overturned a decision by an immigration judge that two arrests of a Senegalese applicant living in the Casamance region of the country at the time of civil unrest were not on account of the applicant's political opinion. The immigration judge had concluded that the applicant was "indiscriminately arrested" with others living in the town and thus was a "victim of civil and military strife."[112]

In reversing this conclusion, the Ninth Circuit identified evidence showing that the applicant was targeted on account of his imputed political opinion. Though he was arrested during mass arrests in his town, the applicant was individually accused of supporting the Mouvement des forces démocratiques de Casamance (MFDC), a group

[110] See, e.g., Mendoza-Pablo v. Holder, 667 F.3d 1308 (9th Cir. 2012) (applicant targeted because he was a member of an indigenous Mayan ethnic group).

[111] See RAIO Training Module, International Human Rights Law.

[112] Ndom v. Ashcroft, 384 F.3d 743, 750 (9th Cir. 2004), superseded by statute on other grounds as recognized in Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008).

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seeking independence for Casamance, and was ordered to sign a confession form stating that he participated in a "rebellious manifestation." The court found that this evidence compelled the conclusion that the applicant had been targeted on account of his political opinion.[113]

9.2 Conscription by Military

A government has a sovereign right to conscript its citizens and maintain a military.[114] Laws pertaining to required military service ordinarily are not intended to punish individuals on account of any of the protected grounds, but rather to form and maintain a military. Punishment for refusing to serve, without evidence of a nexus to a protected ground, is not persecution, but prosecution for refusing to obey the law.[115]

Draft evasion and desertion from the military are not always motivated by a person's religion, political opinion, or other protected characteristic. There are a variety of reasons why an individual might refuse to perform military service.[116]

Even when the avoidance of military service is motivated by an applicant's religion or political opinion, the government may not be motivated to harm the applicant on account of the protected ground.[117] Punishment for draft evasion or desertion, without some evidence that the government's motivation in punishing the evader or deserter is connected to something other than the act of evasion or desertion, generally is not persecution on account of any of the protected grounds.

- Disproportionate punishment

To make a claim based on desertion or draft evasion, the applicant must establish a nexus to a protected characteristic by demonstrating that he or she was or would be subject to disproportionate punishment for military desertion or draft evasion because of an actual or imputed protected characteristic. Disproportionate punishment in this context can be used to describe situations where the penalty for draft evasions for desertion is out of proportion with international norms or where the penalty is out of proportion with that experienced by others who do not share an applicant's protected characteristic.

If an applicant may be subject to disproportionate punishment on account of a protected characteristic he or she actually possesses or is believed to possess because of his or her

[113] Id. at 755.

[114] Matter of Vigil, 19 I&N Dec. 572, 578 (BIA 1988); Nguyen v. Reno, 211 F.3d 692 (1st Cir 2000), citing Foroglou v. INS, 170 F.3d 68, 71 (1st Cir. 1998); see also Islami v. Gonzales, 412 F.3d 391, 397 (2d Cir. 2005).

[115] See Matter of A-G-, 19 I&N Dec. 502, 507 (BIA 1987).

[116] UNHCR Handbook, para. 167; Nguyen v. Reno, 211 F.3d 692 (1st Cir 2000); Castillo v. INS, 951 F.2d 1117 (9th Cir. 1991); M.A. v. INS, 899 F.2d 305, 312 (4th Cir. 1990); Canas-Segovia v. INS, 970 F.2d 599, 601 (9th Cir. 1992).

[117] Milat v. Holder, 755 F.3d 354, 363 (5th Cir. 2014); Zehayte v. Gonzales, 453 F.3d 1182 (9th Cir. 2006).

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refusal to serve or to perform an action during service, the applicant may be able to establish a nexus between this punishment and a protected ground.[118]

- Refusal to serve in a military or commit an action that is condemned by the international community as contrary to basic rules of human conduct

UNHCR guidance states that when an individual is punished for refusing to participate in a military action that is condemned by the international community, the punishment could be regarded as persecution.[119] U.S. courts have interpreted "military action" as encompassing both a specific military action that would be internationally condemned, and a refusal to serve in a military unit or army that engages in internationally condemned activities.[120] Further, the phrase "condemned by the international community as contrary to basic rules of human conduct" has been interpreted to mean that such condemnation must at a minimum come from "recognized international governmental bodies."[121]

U.S. law requires you to determine whether the evidence shows that the persecutor is motivated by the applicant's opposition to the condemned acts.[122] The Fifth Circuit emphasized the need for evidence of the persecutor's motivation in Gomez-Mejia. The applicant in that case never revealed his opposition to the Nicaraguan military's actions and presented no evidence that the military imputed an opposition viewpoint to him. Therefore, any punishment he faced as a result of desertion was not on account of a protected ground.[123] In contrast, the Ninth Circuit has held that an applicant who was punished after he openly voiced his opposition to internationally condemned actions was persecuted on account of his political opinion.[124]

The First Circuit upheld an immigration judge's requirement that an applicant demonstrate that he or she would not be permitted to complete the required service by performing an alternate non-combat role, rather than serving in the military.[125] In this case, the First Circuit concluded that "the record clearly establishes that the Algerian military is a military whose acts are condemned by the international community."[126] The

[118] Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); Vujisic v. INS, 224 F.3d 578 (7th Cir.2000) M.A. v. INS, 899 F.2d 305 (4th Cir. 1990); Mekhoukh v. Ashcroft, 358 F.3d 118, 126 (1st Cir. 2004); UNHCR Handbook, para. 169.

[119] UNHCR Handbook, para. 171.

[120] Mojsilovic v. INS 156 F.3d 743, 748 (7th Cir. 1998); M.A. v. INS, 899 F.2d 304, 321 (4th Cir. 1990).

[121] M.A. v. INS, 899 F.2d 304 (4th Cir. 1990).

[122] Gomez-Mejia v. INS, 56 F.3d. 700, 703 (5th Cir. 1995); Matter of A-G-, 19 I. & N. Dec. 502 (BIA 1987), aff'd, 899 F.2d 304 (4th Cir.1990).

[123] Gomez-Mejia, 56 F.3d at 703.

[124] Barraza Rivera v. I.N.S., 913 F.2d 1443 (9th Cir.1990).

[125] Mekhoukh v. Ashcroft, 358 F.3d 118, 127 (1st Cir. 2004).

[126] Id.

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court rejected the applicant's argument that it would have been futile to ask for alternate service because he failed to make any inquiry or provide a justification for his failure.[127]

9.2.1 Conscientious Objectors

Military service is generally not considered persecution. Some individuals, for reasons of religion or conscience refuse to serve in the military, but such refusal does not result in a per se determination that these individuals are eligible for refugee or asylum status.[128] At least one court has found an applicant eligible for asylum because he was from a country that barred adherents of his religion from conscientious objector status but granted it to adherents of other religions.[129] Another court, in dicta, noted that conscientious objection might be a form of protected activity that would qualify an individual for asylum but rejected the claim on other grounds.[130] Also, as noted above, refusal to participate in specific acts contrary to international standards governing human conduct may, in some cases, provide eligibility for asylum or refugee status.

U.S. asylum and refugee law regarding conscientious objection diverges from guidance in the UNHCR Handbook, which indicates that refusal to perform military service may be the sole basis for a claim to refugee status if the refusal is due to valid reasons of conscience.[131] U.S. law requires evidence that the persecutor is motivated to harm the applicant on account of a protected ground. You must always follow U.S. law, even where it differs from UNHCR Handbook guidance.

9.2.2 Assignments to Life-threatening Duties

The Seventh Circuit has held that individuals who are assigned to life-threatening duties on account of a protected characteristic may establish persecution on account of that protected trait.

In Begzatowski v. Ashcroft, the court found that an ethnic Albanian conscripted into the Yugoslav military who was deprived of bathing facilities, denied adequate military training, experienced physical abuse by the Serbian officers, and was sent to the front lines of battle without bullets or a shovel, suffered persecution on account of his ethnicity. The court reasoned that because the applicant was singled out to "provide a

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[127] Id.

[128] Matter of Canas, 19 I&N Dec. 697 (BIA 1988); Canas-Segovia v INS, 970 F.2d 599 (9th Cir. 1992).

[129] Ilchuk v. Att'y Gen. of the U.S., 434 F.3d 618, 626 (3d Cir. 2006) ("[I]f members of some religions may avoid service without penalty based on conscientious objection, but adherents of other religions are denied the exemption outright, resulting imprisonment is on account of religion, not failure to serve").

[130] Najafi v. INS, 104 F.3d 943, 947 (7th Cir. 1997)

[131] UNHCR Handbook, paras. 170, 172.

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human shield for Serbian soldiers," he was subjected to treatment distinct from the dangerous conditions affecting an entire nation during a time of war.[132]

9.3 Recruitment by Insurgent Groups

Forced recruitment by insurgent groups and harm for refusing to join or cooperate with insurgents do not, per se, satisfy the requirement that the applicant show the harm feared or experienced is on account of a protected ground.[133]

Insurgents may recruit for reasons unrelated to a protected ground, such as the need to increase their ranks or because they believe an individual possesses certain knowledge or expertise.[134] Individuals may refuse to cooperate with insurgents for a variety of reasons unrelated to a protected ground (e.g., the fear of reprisal or the need to remain home to work on the farm). Therefore, there must be some additional evidence, aside from the recruitment effort, to establish a connection to a protected ground.

9.4 Considerations in Conscription and Recruitment Cases

- Duty to elicit information

While forcible recruitment and threats or harm for refusal to cooperate do not in themselves satisfy the nexus requirement, you must elicit information from the applicant to determine whether any additional evidence connects the persecutor's actions to any of the protected grounds.

- Consider the entire record for evidence of a nexus

Consider the content of the threats and any statements the applicant made when refusing to cooperate, including relevant country of origin information.

Even if an applicant does not express an opinion to the guerrillas when refusing to cooperate, other evidence may connect the threats or harm to a protected ground. Such evidence may include:

- Accusations by the guerrillas that the applicant sympathizes with the government
- Prior utterances against the guerrillas or military

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[132] Begzatowski v. Ashcroft, 278 F.3d 665, 670 (7th Cir. 2000). See also Miljkovic v. Ashcroft, 376 F.3d 754, 756 (7th Cir. 2004) (finding that an ethnic Croatian applicant who fled Yugoslavia because he was drafted to perform hazardous duties could be a victim of persecution even though he fled prior to being forced into service).

[133] INS v. Elias-Zacarias, 502 U.S. 478 (1992); Matter of C-A-L- 21 I&N Dec. 754 (BIA 1997); Miranda v. INS, 139 F.3d 624 (8th Cir. 1998); Pedro Mateo v. INS, 224 F.3d 1147 (9th Cir. 2000); Habtemicael v. Ashcroft, 370 F.3d 774 (8th Cir. 2004).

[134] INS v. Elias-Zacarias, 502 U.S. 478 (1992); Matter of C-A-L- 21 I&N Dec. 754 (BIA 1997) (applicant testified that guerrillas contacted him to obtain information and to attempt to recruit him due to his expertise as an artillery specialist).

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- Activities in support of an opposing force
- A family member's association with an opposing force[135]

You must consider all the facts in evaluating the government's or guerrillas' perception of the applicant's refusal to assist them.

Example

While beating a K'iche' (Quiché) man after he had refused to join them, the Guatemalan military accused him of being a guerrilla and demanded information about his "guerrilla friends." The Ninth Circuit found that the statements of the military together with country of origin information documenting the Guatemalan military belief that indigenous people were pro-guerrilla, was sufficient evidence to support a finding that the harm occurred on account of the applicant's (imputed) political opinion.[136]

- Country of origin information

In many conflicts the warring parties may view refusal to cooperate as opposition. Therefore, country of origin information may be useful in evaluating how a guerrilla group views those who refuse to cooperate with its cause.

9.5 Extortion

In some cases, extortion may form the basis for a valid asylum or refugee claim if evidence connects the threats or harm to one of the protected grounds.[137] However, when the persecutor is motivated solely by a desire to obtain money, the applicant will not satisfy the nexus requirement. You must consider why the persecutor chose to extort the applicant. Such cases may also be mixed-motive cases, where the persecutor is motivated both by a protected ground and a desire to obtain money. If you are adjudicating an asylum claim, remember that the protected ground must be "at least one central reason for persecuting the applicant."[138] In refugee processing, you must determine if "a reasonable person would fear that the danger arises on account of" one of the five grounds."[139]

[135] See Rivas-Martinez v. INS, 997 F.2d 1143 (5th Cir. 1993).

[136] Chanchavac v. INS, 207 F.3d 584 (9th Cir. 2000).

[137] Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988) (government-sponsored extortion found to be "on account" of victim's political opinion because people who resisted extortion were marked as subversives); Tapiero de Orejuela, 423 F.3d 666, 673 (7th Cir. 2005).

[138] INA § 208(b)(1)(B)(i).

[139] Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988). See also In re S-P-, 21 I&N Dec. 486 (BIA 1996).

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Evidence that the extortionist is a political entity or is extorting money to support a political cause is not sufficient to establish the requisite nexus. The applicant must show that the persecutor is motivated by the applicant's protected belief or characteristic.[140]

Where the extortionist has branded the applicant a political opponent, the applicant may establish that she has been targeted on account of her political opinion, despite the likelihood that the extortionist also is interested in the applicant's wealth.[141] The Ninth Circuit held an applicant was persecuted on account of his political opinion where the extortion was instigated by the government, and the applicant belonged to an anti-government party.[142]

9.6 Coercive Population Control Policies

On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act,[143] which added the following sentence to the statutory definition of refugee:

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.[144]

The amendment effectively overruled previous BIA precedent decisions in which the BIA concluded that imposition of national population-control policies (including forced sterilization and abortion) did not in itself constitute persecution on account of a protected characteristic in the refugee definition.[145]

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[140] See INS v. Elias-Zacarias, 502 U.S. 478 (1992).

[141] De Brenner v. Ashcroft, 388 F.3d 629, 637 (8th Cir. 2004); Tapiero de Orejuela, 423 F.3d 666, 672 (7th Cir. 2005).

[142] Yazitchian v. INS, 207 F.3d 1164 (9th Cir. 2000).

[143] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Section 601, 110 Stat. 3009 (Sept.30, 1996); Matter of X-P-T-, 21 I&N Dec. 634 (BIA 1996) (recognizing a change in the law and granting asylum to an applicant who was forcibly sterilized); see generally David A. Martin, INS Office of General Counsel, Memorandum to Management Team, et al., Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, HQCOU 120/11.33-P, 6 (Oct. 21, 1996).

[144] INA § 101(a)(42).

[145] See Matter of X-P-T-, 21 I&N Dec. 634 (BIA 1996); Matter of Chang, 20 I&N Dec. 38 (BIA 1989); Matter of G-, 20 I&N Dec. 764 (BIA 1993).

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Claims based on this amended definition of refugee typically arise only in asylum claims. They have not, to date, arisen in the refugee resettlement context. For a more detailed discussion of this type of claim, see ASM Supplement – Coercive Population Control.

9.6.1 Nexus to a Protected Characteristic

The applicant is not required to demonstrate that the population control program was being selectively applied to him or her on account of a protected ground. The statute requires that the harm (either the forced abortion or sterilization itself, or harm for other resistance to a coercive population-control program) be considered to be on account of political opinion. The applicant still must meet the other elements in the refugee definition to establish eligibility.[146]

9.6.2 "Other Resistance"

In Matter of S-L-L- the BIA indicated that "other resistance" may take many forms and cover a wide range of circumstances. Resistance can include

- expressions of general opposition;
- attempts to interfere with enforcement of government policy in particular cases; or
- other overt forms of resistance to the requirements of the family planning law.[147]

Forms of "other resistance" could include removing an IUD or failing to attend a mandatory gynecological appointment.[148] Additionally, refusing to abort a pregnancy and subsequently having a child out of wedlock in violation of Chinese law has also been found to be "other resistance" to a coercive population control program.[149]

In Cao v. Gonzales, the Third Circuit found that writing an article critical of population-control practices and exposing the practice of infanticide constitutes "other resistance" to a coercive population-control program. An applicant engaged in such activities could establish eligibility for asylum based on harm resulting from that resistance, even if the applicant was not personally subjected to forced abortion or sterilization.[150] The Ninth

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[146] See David A. Martin, INS Office of General Counsel, Memorandum to Management Team, et al., Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, HQCOU 120/11.33-P, 6 (Oct. 21, 1996).

[147] Matter of S-L-L-, 24 I&N Dec. 1, 11-12 (BIA 2006) (holding that the applicant's efforts in seeking waivers of the age restrictions were not indicative of resistance but rather were indicative of a desire to comply with the coercive population control program), overruled on other grounds, Matter of J-S-, 24 I&N Dec. 520, 521 (BIA 2008).

[148] Matter of M-F-W- & L-G-, 24 I&N Dec. 633, 638 (BIA 2008). See also Lin v. Ashcroft, 385 F.3d 748, 757 (7th Cir. 2004); Feng Chai Yang v. U.S. Att'y Gen., 418 F.3d 1198, 1205 (11th Cir. 2005).

[149] Fei Mei Cheng v. Att'y Gen. of the U.S., 623 F.3d 175, 191 (3d Cir. 2010). See also Nai Yuan Jiang v. Holder, 611 F.3d 1086 (9th Cir. 2010)(cohabiting and conceiving a child in defiance of Chinese law prohibiting underage marriage and marrying in a traditional ceremony fall within the court's interpretation of "other resistance").

[150] Cao v. Gonzales, 407 F.3d 146, 153 (3d Cir. 2005).

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Circuit has held that hardships, including economic deprivation and denial of access to education, suffered by a child as a result of her parents' resistance to a population-control program were on account of an imputation of the parents' resistance to the child.[151]

The BIA held, however, that impregnating a girlfriend or fiancée or seeking permission to marry or have children outside age limits did not constitute "resistance" under the facts of the case.[152] At least one court has held, however, that similar conduct was "other resistance."[153] In Shi Liang Lin, the Second Circuit held that a spouse or partner needs to demonstrate "past persecution or a fear of future persecution for 'resistance' that is directly related to his or her own opposition to a coercive family planning policy."[154] The court also held that where an applicant has not demonstrated resistance to coercive family-control policies, but his spouse or partner has, he or she may be able to demonstrate that his partner's resistance has been or will be imputed to him.[155]

9.7 Crime and Personal Disputes

Applicants who fear harm by criminals or harm related to personal disputes often have difficulties establishing a nexus.[156] If the persecutor is motivated solely by a desire for economic gain, or purely personal vengeance, there is no nexus to a protected ground.[157] For example, an applicant who fears that the victim of a car accident that he or she caused might retaliate would be unlikely to satisfy the nexus requirement. Similarly, an applicant who fears high levels of robbery in his or her country would be unlikely to establish a nexus.

Applicants who, at first glance, appear to have fear of crime or flee because of a personal dispute, may upon further inquiry prove to have a valid basis for their asylum or refugee claims.[158] For example, a woman who feared that she would be the victim of an honor killing at the hands of her brother was eligible for protection and was not the victim of a personal dispute.[159]

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[151] Xue Yun Zhang v. Gonzales, 408 F.3d 1239, 1246 (9th Cir. 2005).

[152] Matter of S-L-L-, 24 I&N Dec. at 11-12.

[153] Nai Yuan Jiang v. Holder, 611 F.3d 1086 (9th Cir. 2010)

[154] Shi Liang Lin v. United States Dep't. of Justice, 494 F.3d 296, 313 (2d Cir. 2007) (en banc).

[155] Id. See also Xu Ming Li v. Ashcroft, 356 F.3d 1153 (9th Cir. 2004) (en banc).

[156] See Cruz-Funez v. Gonzales, 406 F.3d 1187 (10th Cir. 2005) (finding that applicants who feared an unscrupulous private creditor connected to the allegedly corrupt Honduran government did not fear harm on account of membership in a particular social group, especially where the applicants' debt was settled by a court, which ordered them to pay their creditor back).

[157] See e.g., Cuevas v. INS, 43 F.3d 1167 (7th Cir. 1995); Kozulin v. INS, 218 F.3d 1112 (9th Cir. 2000).

[158] See Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011).

[159] Id. at 656.

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The persecutor may have more than one motive for threatening or harming the applicant. One motive may be a protected belief or characteristic that the applicant possesses or that the persecutor imputes to the applicant and one may be a personal or criminal reason. The persecutor's additional personal or criminal reason does not render the claim invalid.

Personal relationship with persecutor

Having a personal relationship with the persecutor does not, in itself, mean the applicant cannot satisfy the nexus requirement.[160] In many cases, the persecutor is a spouse or other family member.

When the persecutor and the applicant have a personal relationship, the persecutor might target the applicant because of a belief or trait that is not immediately obvious to the adjudicator. You should carefully consider whether the applicant is in fact being targeted because of a belief or trait that might define a social group.[161] Characteristics to consider include the applicant's social status based on his or her position within a domestic relationship, a physical trait, a voluntary association, past experience, beliefs about religion and cultural practices, and cultural identity.

9.8 Minorities and Majorities

Claims based on persecution or feared persecution on account of nationality are often brought by individuals who belong to a national minority.[162] However, in some situations, individuals belonging to a national majority have reason to fear persecution by a minority.[163]

Examples

- Hutu is the majority ethnic group in Rwanda, while Tutsi, the minority group, controls the government. Both Hutus and Tutsis have presented valid claims for asylum and refugee status.

- In Iraq, Shi'a Muslims comprise about 60 percent of the population while Sunni Muslims comprise about 37 percent. Both Shi'a and Sunni Muslims from Iraq have presented valid claims for asylum and refugee status.

10 CONCLUSION

[160] See, e.g., Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011); Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000).

[161] For more information, see RAIO Training Module, Nexus – Particular Social Group.

[162] UNHCR Handbook, para. 76.

[163] Id.

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You must determine whether or not persecution or feared persecution is "on account of" one or more of the five protected grounds in the refugee definition: race, religion, nationality, membership in a particular social group, or political opinion.

To properly determine whether persecution is on account of a protected ground, the officer must understand 1) the "on account of" requirement, which involves the motive of the persecutor, and 2) the parameters of the five grounds for refugee status listed in the refugee definition.

While the burden of proof is on the applicant to prove a nexus to a protected ground, you must elicit sufficient information from the applicant about any possible connection to protected grounds so that you are able to make a determination.

11 SUMMARY

11.1 General Principles Regarding Nexus

11.1.1 Nexus

To be eligible for asylum or refugee status, the applicant must establish that the persecutor harmed or seeks to harm the applicant because the applicant possesses, or is believed to possess, one or more of the protected grounds.

11.1.2 Motive of the Persecutor

The motive of the persecutor is determinative in evaluating whether a nexus to one of the protected grounds has been established. The applicant's possession or imputed possession of a protected characteristic must be part of the motivation for persecuting the applicant. Motive may be established by either direct or circumstantial evidence.

11.1.3 Exact Motive Need Not Be Established

The applicant does not bear the burden of establishing the exact motive of the persecutor. If you are adjudicating asylum applications under INA § 208, you must determine whether the applicant's actual or imputed possession of one of the five protected grounds is at least one central reason motivating the persecutor. If you are processing refugee applications overseas under INA § 207, you must determine that a reasonable person would fear that the danger arises on account of the applicant's actual or imputed possession of a characteristic connected to one of the protected grounds in the refugee definition.

The persecutor may be motivated by several factors; there is no requirement that the persecutor be motivated only by a desire to overcome or change a protected belief or characteristic.

11.1.4 Motive need NOT be Punitive

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There is no requirement that the persecutor's motive be punitive, although it may be punitive.

11.1.5 Imputed Ground

Persecution inflicted upon an individual because the persecutor attributes to the individual one of the protected grounds constitutes persecution on account of that ground.

11.2 Protected Grounds [with Particular Social Group Omitted]

11.2.1 Race

"Race" includes all kinds of ethnic groups and may also entail membership in a specific social group of common descent. Serious harm imposed for disregard of racial barriers may also constitute persecution on account of race.

11.2.2 Nationality

"Nationality" as a protected ground refers to membership in an ethnic or linguistic group as well as country of citizenship. Persecution on account of nationality often overlaps with persecution on account of other protected grounds, such as race, membership in a particular social group, and political opinion.

In some ethnically-based conflicts, members of an ethnic group may be at risk of harm, even though they are not themselves directly involved in the conflict, because the persecutor associates them with the members of their ethnic group who are involved in a conflict.

11.2.3 Religion

Some forms of persecution on account of religion may include actions that seriously impede an individual's ability to practice his or her religion; serious harm for conversion from one religion to another; punishment for violating religious-based laws; and forced compliance with religious laws that are abhorrent to an applicant's own beliefs.

11.2.4 Political Opinion

"Political opinion" should not be interpreted narrowly to include only participation in a political party or the political process. It should be interpreted broadly and may include opinions regarding women's rights, workers' rights, and other human and civil rights. The persecutor's association with a political entity does not establish that the harm or feared harm is on account of political opinion. Persecution on account of political opinion means persecution on account of the applicant's opinion or one that has been attributed to the applicant.

Forced abortion or forced sterilization, persecution for refusal to undergo such procedures, and persecution for resistance to population control policies, by law are

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considered to be persecution on account of political opinion. Coercive family planning cases do not require specific evidence of motivation.

11.3 Common Nexus Issues

Generally, U.S. law requires specific evidence, either direct or circumstantial, that the persecutor is motivated by a protected belief or characteristic that the applicant possesses or is perceived to possess. Evidence that the applicant is in a conflict situation is generally not specific enough to establish nexus. You are responsible for eliciting evidence surrounding the circumstances of the applicant's claim to determine if such specific evidence exists.

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PRACTICAL EXERCISES

Note: Practical Exercises will be added at a later time.

Practical Exercise # 1

- Title:
- Student Materials:

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OTHER MATERIALS

There are no Other Materials for this module.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

RAD Supplement - Motivation

NOTE:

The Immigration and Nationality Act (INA) is the governing statute for asylum and refugee adjudications. INA § 207 is the statutory provision for refugee admissions, and 8 C.F.R. Part 207 contains the corresponding regulations. INA § 208 is the statutory provision for asylum adjudications and 8 C.F.R. Part 208 contains the corresponding regulations.

The REAL ID Act of 2005 amended INA § 208 but did not amend INA § 207. Therefore, any changes the REAL ID Act made to asylum law do not apply in the overseas refugee processing context. The principal change the REAL ID Act makes to the law surrounding nexus is the requirement that asylum applicants establish that one of the five protected grounds was, or would be, at least one central reason in motivating the persecutor. Refugee officers should disregard the word "central" when they see it in this context and should refrain from making it part of their analysis. In the refugee processing context, you must determine whether a reasonable person would fear that the danger arises on account of one of the five grounds.

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1. Joseph E. Langlois, USCIS Asylum Division. Updates to Asylum Officer Basic Training Course Modules as a Result of Amendments to the INA Enacted by the REAL ID Act of May 11, 2005, Memorandum to Asylum Office Directors, et al (Washington, DC: 11 May 2006), 8 p.

2. Memorandum from David A. Martin, INS Office of General Counsel, to Management Team, et al., Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (21 Oct. 1996) (HQCOU 120/11.33-P).

3. UNHCR, Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (Aug. 2005).

SUPPLEMENTS

ASM Supplement - Coercive Population Control

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General Overview

In 1996, Congress amended the refugee definition to allow for claims based upon certain types of harm related to coercive population control programs.[164] Under the amended INA:

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.[165]

According to the BIA, the amended refugee definition created four new and specific classes or categories of refugees:[166]

- persons who have been forced to abort a pregnancy;
- persons who have been forced to undergo involuntary sterilization;[167]
- persons who have been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program; and
- persons who have a well-founded fear that they will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance.

Forced abortion and forced sterilization (the first two categories above) constitute persecution on account of political opinion within the meaning of the refugee definition. Individuals who have not physically undergone forced abortion or sterilization procedures may qualify for refugee status under the third category above, if they show persecution for failure or refusal to undergo these procedures, or persecution inflicted because of other resistance to a coercive population control program. A well-founded fear of forced abortion, sterilization, or other persecution for failing or refusing to undergo such a procedure, or for resisting a coercive

[164] See David A. Martin, INS Office of General Counsel, Memorandum to Management Team, et al., Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, HQCOU 120/11.33-P (Oct. 21, 1996).

[165] INA § 101(a)(42).

[166] Matter of J-S-, 24 I&N Dec 520 (AG 2008).

[167] See Matter of X-P-T-, 21 I&N Dec 634 (BIA 1996) (recognizing change in law and granting asylum to applicant who was forcibly sterilized).

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population control program, may provide a basis for refugee status under the fourth category above.

Element of "force"

In order for an abortion or sterilization procedure to constitute persecution, the applicant must establish that he or she was "forced" to undergo the procedure. In Matter of T-Z-,[168] the BIA held that a procedure is "forced" within the meaning of the INA when:

- a reasonable person would objectively view the threats for refusing the procedure to be genuine, and
- the threatened harm, if carried out, would rise to the level of persecution.

The applicant does not have to demonstrate physical harm or threats of physical harm because "persecution" is not limited to physical harm or threats of physical harm. However, the applicant must demonstrate that the harm he or she feared, if carried out, would rise to the level of persecution.[169]

Threats of economic harm, for example, could suffice, "so long as the threats, if carried out, would be of sufficient severity that they amount to past persecution."[170] However, not all threats involving economic sanctions will rise to the level of persecution. The harm must involve:

- the deliberate imposition of severe economic disadvantage; or
- the deprivation of liberty, food, housing, employment or other essentials of life.

However, "pressure" or persuasion applied to submit to a course of action not preferred is not "force" unless the harm suffered or feared rises to the level of persecution. Thus, for example, economic harm that would not rise to the level of persecution would constitute pressure but would not make an abortion "forced." In Yuqing Zhu v. Gonzales,[171] a case involving an unmarried woman who underwent

[168] Matter of T-Z-, 24 I&N Dec. 163, 168 (BIA 2007) (considering whether undergoing two abortions because of the threat of job loss established that the procedures were forced).

[169] Id. at 170-72. See also Matter of M-F-W- & L-G-, 24 I& N Dec. 633, 636-40 (BIA 2008) (holding that the insertion or removal of an IUD in a routine medical procedure does not rise to the level of persecution, unless aggravating circumstances exist, because unlike sterilization and abortion, the insertion of an IUD is not a permanent measure).

[170] Matter of T-Z-, 24 I&N Dec. at 169-70 (rejecting Lidan Ding v, Ashcroft, 387 F.3d 1131, 1139 (9th Cir. 2004) and Wang v. Ashcroft, 341 F.3d 1015 (9th Cir. 2003) in so far as those decisions suggest that economic harm that does not rise to the level of persecution could establish that an abortion was "forced").

[171] Yuqing Zhu v. Gonzales, 493 F.3d 588 (5th Cir. 2007).

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an abortion before the authorities discovered that she was pregnant, the Fifth Circuit adopted the Matter of T-Z- standard for determining whether an abortion was "forced," but reversed the BIA's finding that the applicant's abortion was not forced. The applicant underwent an abortion because she believed that the law required abortion, and she feared: (1) a later physically compelled abortion; (2) loss of her job, benefits and housing; (3) imprisonment; (4) sterilization; (5) that her child would not be recognized as a Chinese citizen; and (6) her child would be denied services. The court held that the applicant's "abortion was indeed forced, as a reasonable person in Zhu's position 'would objectively view the threats for refusing the abortion to be genuine,' and that harm, 'if carried out, would rise to the level of persecution.'"[172] Specifically, the threat of a later physically compelled abortion or forcible sterilization rose to the level of persecution. The fact that the applicant's boyfriend wanted her to undergo an abortion did not keep the abortion from having been "compelled" by the government.

In Xiu Fen Xia v. Mukasey, the Second Circuit held that an applicant's abortion was not forced, under the interpretation set forth in Matter of T-Z-. Fearing sterilization, a "really heavy fine," arrest, forced abortion, and arrest of her family members, the married applicant from Zhejiang Province obtained an abortion from a private hospital before government authorities knew of her pregnancy. The court held that "force" requires evidence as to the pressure actually exerted on a particular petitioner. Here, no government official was aware of Xia's pregnancy, and therefore no government official forced her to terminate her pregnancy or threatened her with other harm. Additionally, the court held that even if she would face some harm when her pregnancy was discovered, the applicant did not show that she risked anything more than modest fees or fines, which would not be severe enough to rise to the level of persecution.[173]The Ninth Circuit has held, and the BIA recognizes, that an applicant seeking to prove that he or she was subjected to a coercive population control program "need not demonstrate that he [or she] was physically restrained during a 'forced' procedure. Rather, 'forced' is a much broader concept, which includes compelling, obliging, or constraining by mental, moral, or circumstantial means, in addition to physical restraint."[174]

[172] Id. at 590.

[173] Xiu Fen Xia v. Mukasey, 510 F.3d 162 (2d Cir. 2007).

[174] Lidan Ding v, Ashcroft, 387 F.3d 1131, 1139 (9th Cir. 2004) (finding that an applicant who was forced from her home into a van, taken to a hospital, pulled off the floor by two officials when she refused to get up, forced onto a hospital bed, and watched over by two officials underwent a "forced" abortion, despite the fact that she was not physically restrained during the procedure). See also Zi Zhi Tang v. Gonzales, 489 F.3d 987 (9th Cir. 2007) (Abortion was "forced" even though applicant and wife did not express opposition to or attempt to avoid the procedure, where the gynecological test was mandatory, performed by wife's employer on whom she was economically dependent, the employer's policy required that the abortion take place, the employer actually took her to have the procedure performed, and the procedure was "barbarically" performed without the benefit of anesthetics).

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Eligibility of Spouses and Partners of Persons Who Have Been Physically Subjected to a Forced Abortion or Forced Sterilization Procedure

- No *Per Se* Spousal Eligibility

  In 2008, the Attorney General ruled that individuals who have not physically undergone a forced abortion or sterilization procedure, such as spouses of persons forced to undergo these procedures, are no longer per se entitled to refugee status.[175]

  The Attorney General reasoned in Matter of J-S-, as did the Second Circuit in Shi Liang Lin, that the statutory text is limited to the person who was forced to undergo the involuntary procedure. Accordingly, the unambiguous meaning of these clauses is that per se refugee protection is to be afforded only to the person forced to undergo the procedure. Spouses or other partners of individuals who have been physically subjected to a procedure may be able to qualify for asylum on a case-by-case basis, but may not benefit from a presumption of eligibility. Although the Attorney General noted "that application of coercive population control procedures may constitute 'obtrusive government interference into a married couple's decisions regarding children and family' that may 'have a profound impact on both parties to the marriage,'" the Attorney General found no basis to afford automatic eligibility to the spouse who was not physically subjected to a forced procedure.[176] The Attorney General's decision in Matter of J-S- vacated the BIA's earlier decisions in Matter of C-Y-Z- and Matter of S-L-L-, in so far as those decisions held that an applicant whose spouse was forced to undergo an abortion or sterilization procedure was per se eligible for asylum on the basis of past persecution on account of political opinion.[177]

- Eligibility of Other Family Members

  Even before the Attorney General's decision in Matter of J-S-, circuit courts had found that per se asylum eligibility did not extend to family members, including parents, parents-in-law, and children of individuals subject to coercive population control measures.[178] These individuals may be able to qualify for asylum on a case-by-case basis, considering the factors set forth below.

[175] See Matter of J-S-, 24 I&N Dec. 520 (AG 2008) (overruling BIA's per se rule of spousal eligibility); Shi Liang Lin v. USDOJ, 494 F.3d 296 (2d Cir. 2007) (en banc) (same).

[176] Matter of J-S-, 24 I&N Dec. at 541 (AG 2008). See also Definition of Resistance section, below.

[177] Matter of J-S-, 24 I&N Dec. 520 (AG 2008).

[178] See Tao Jiang v. Gonzales, 500 F.3d 137 (2d Cir. 2007) (child); Ai Feng Yuan v. USDOJ, 416 F.3d 192 (2d Cir. 2005) (parents and parents-in-law); Chen v. USDOJ, 417 F.3d 303 (2d Cir. 2005) (per curiam) (child); Wang v. Gonzales, 405 F.3d 134 (3d Cir. 2005) (child); Zhang v. Gonzales, 408 F.3d 1239 (9th Cir. 2005) (child).

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- Case-by-Case Consideration of Eligibility Based on Resistance to Coercive Population Control

In order to determine whether an applicant who has not physically undergone a forced abortion or sterilization procedure can demonstrate eligibility for asylum, you must conduct a case-by-case assessment of the relevant factors.[179] The applicant must show that he or she meets the following three elements:

- failed or refused to undergo an abortion or sterilization procedure, or resisted a coercive population control program;
- suffered harm, or has a well-founded fear of suffering harm, rising to the level of persecution;
- the persecution was inflicted, or he or she has a well-founded fear that it would be inflicted, for resistance to the coercive population control program or for failure or refusal to undergo the procedure.[180]

Definition of "Resistance" in the Context of Coercive Population Control

In Matter of S-L-L- the BIA indicated that "resistance" may take many forms and cover a wide range of circumstances.[181] Resistance can include, for example:

- expressions of general opposition
- attempts to interfere with enforcement of government policy in particular cases
- other overt forms of resistance to the requirements of the family planning law

The BIA held, however, that merely impregnating a girlfriend or fiancée or seeking permission to marry or have children outside age limits does not constitute "resistance" under the refugee definition.[182]

In Matter of M-F-W- & L-G-, the BIA stated that removal of an intrauterine device or failure to attend a mandatory gynecological appointment could constitute other resistance to family planning policies. "[S]uch acts, while arguably not comprising

[179] Matter of C-Y-Z-, 21 I&N Dec. 915 (BIA 1997), vacated in part by Matter of J-S-, 24 I&N Dec. 520 (AG 2008); Matter of S-L-L-, 24 I&N Dec. 1, 6 (BIA 2006) (same). See also Lin v. U.S. Att'y Gen., 555 F.3d 1310, 1315-16 (11th Cir. 2009) ("unmarried partners ….do not automatically qualify for protection under the forced abortion and sterilization provisions").

[180] See Matter of J-S-, 24 I&N Dec. 520 (AG 2008); Shi Liang Lin v. USDOJ, 494 F.3d 296 (2d Cir. 2007) (en banc). For additional information, see section, Definition of Resistance in the Context of Coercive Population Control, below

[181] Matter of S-L-L-, 24 I&N Dec. at 10-11.

[182] Id. at 11-12. See also Zhang v. Ashcroft, 395 F.3d 531 (5th Cir. 2004).

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active or forceful opposition to China's family planning policy, would certainly thwart the goals of the plan and be viewed with disfavor by Chinese officials implementing the plan."[183] The Board warned, however, that the harm must rise to the level of persecution, and the applicant must establish that the harm was inflicted on account of her "resistance" to the family planning policies, not just as part of a routine procedure.

In Xu Ming Li v. Ashcroft, the Ninth Circuit held that the applicant demonstrated both vocal and physical resistance to a coercive population control program. The applicant "vocally resisted the marriage-age restriction when she told the village official that she wanted 'freedom for being in love' and when she publicly announced her decision to marry even after a license was refused. She also resisted the one-child policy when she told the official she intended 'to have many babies,' that she did 'not believe in the policy' limiting family size, and that she did not want him to 'interfere.' Second, she resisted physically by kicking and struggling when forced to undergo a gynecological examination."[184]

Harm Rising to the Level of Persecution

Individuals who offered "other resistance" to a coercive population control program must demonstrate that they suffered harm, or have a well-founded fear of suffering harm, rising to the level of persecution.

- Physical Harm/Restraint

In Yi Qiang Yang v. Gonzales, the Eleventh Circuit upheld the BIA's finding that the harm – a brief physical altercation with family planning officials, a summons to a local security office, and an ongoing interest in the applicant by family planning authorities – suffered by an applicant whose wife was subsequently forced to abort her pregnancy, did not rise to the level of persecution.[185]

- Psychological Harm

In Matter of J-S-, the Attorney General recognized that the application of coercive population control policies may have a profound impact on both parties to the marriage. When judging the psychological harm to an unmarried applicant based on a forced abortion or sterilization procedure performed on a partner, DHS has identified relevant factors, including:[186]

[183] Matter of M-F-W- & L-G-, 24 I&N Dec. 633, 638 (BIA 2008).

[184] Li v. Ashcroft, 356 F.3d 1153, 1160 (9th Cir. 2004) (en banc). See also Lin v. Gonzales, 472 F.3d 1131 (9th Cir. 2007).

[185] Yang v. U.S. Att'y Gen., 494 F.3d 1311 (11th Cir. 2007).

[186] Matter of S-L-L-, 24 I&N Dec. at 10-11 (citing to factors identified in DHS briefing to the BIA in the case).

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- whether the couple has children together
- the length of cohabitation
- whether the couple holds itself out as a committed couple
- whether the couple took any steps to have the relationship recognized in some fashion
- whether the couple is financially interdependent
- whether there is objective evidence that the relationship continues while the applicant is in the United States

Other Forms of Harm Resulting from Forced Compliance with a Coercive Population Control Program

The Ninth Circuit has found that a forced gynecological exam that lasted for half an hour and was followed by threats of being subjected to a similar procedure at any time in the future was harm serious enough to rise to the level of persecution.[187]

Other measures imposed on an individual as part of a coercive population control program, such as substantial monetary fines, the denial of schooling, and forced medical examinations and procedures, may cumulatively rise to the level of persecution.[188] Claims of such experience should be examined for severity, accumulation, and effect on the individual, as would any claim of past mistreatment.

- Continuing Nature of Harm Resulting from Forced Abortions and Sterilizations

  Forced abortion or sterilization has been found by the BIA to be a "permanent and continuing act of persecution that …deprive[s] …couple[s] of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them."[189]

- Harm for Resistance to Coercive Population Control

  The applicant must show that the past or threatened persecution was or would be inflicted for the resistance to a coercive population control program. In Shi Liang Lin, the Second Circuit held that an individual must demonstrate "past persecution

[187] Li v. Ashcroft, 356 F.3d 1153 (9th Cir. 2004) (en banc); cf. Huang v. U.S. Att'y Gen.., 429 F.3d 1002 (11th Cir. 2005)(holding that an intrusive state-ordered gynecological exam, which caused pain and discomfort, along with a 20-day detention because of her refusal to submit to a second exam, amounted to persecution).

[188] Matter of T-Z-, 24 I&N Dec. 163 (BIA 2007).

[189] See Matter of Y-T-L-, 23 I&N Dec. 601, 607 (BIA 2003); Yuqing Zhu v. Gonzales, 493 F.3d 588 (5th Cir. 2007), Qu v. Gonzales, 399 F.3d 1195 (9th Cir. 2005). For additional information, see RAIO Training Module, Well-Founded Fear.

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or a fear of future persecution for 'resistance' that is directly related to his or her own opposition to a coercive family planning policy."[190] In Matter of M-F-W- & L-G-, the BIA explained that "[t]he statute requires more than proof of an act of resistance and an unconnected imposition of harm that rises to the level of persecution. There must be a link between the harm and the 'other resistance.'"[191] The BIA held that the applicant could not meet this requirement because the reinsertion of her IUD was carried out as part of a routine medical procedure, rather than to target her for her opposition or resistance to the family planning policy.

The Second Circuit held in Shi Liang Lin that where an applicant himself has not demonstrated resistance to coercive population control policies, but his spouse or partner has, whether by failure or refusal to undergo a procedure, or for other resistance, the applicant may be able to demonstrate, through direct or circumstantial evidence, that his partner's resistance has been or will be imputed to him.[192]

Persecution of a parent due to resistance to population control measures does not automatically make the child of that parent eligible for asylum. The child, however, may be able to establish eligibility for asylum if the child establishes that he or she suffered persecution on account of any political opinion imputed to the child based on the parent's resistance.[193]

ASM Supplement – At Least One Central Reason

The REAL ID Act requires that the protected ground be at least one central reason motivating the persecutor to harm the applicant. Asylum officers should cite this standard in their assessments.

While several courts have suggested that the "one central reason" requirement is a more onerous burden than the applicant's burden under pre-REAL ID case law,[194]

[190] Shi Liang Lin v. USDOJ. 494 F.3d 296, 313 (2d Cir. 2007) (en banc). See also Li v. Ashcroft, 356 F.3d 1153 (9th Cir. 2004) (en banc).

[191] Matter of M-F-W- & L-G-, 24 I&N Dec. 633, 643 (BIA 2008).

[192] Shi Liang Lin v. USDOJ, 494 F.3d 296, 313 (2d Cir. 2007) (en banc).

[193] Zhang v. Gonzales, 408 F.3d 1239 (9th Cir. 2005) (finding that the hardships suffered by the applicant, including economic deprivation resulting from fines against her parents, lack of educational opportunities, and trauma from witnessing her father's forcible removal from home, were on account of an imputed political opinion based on her parent's resistance to CPC measures). But see Tao Jiang v. Gonzales, 500 F.3d 137 (2d Cir. 2007) (no evidence that resistance was imputed to child of woman who was forcibly sterilized).

[194] Parussimova v. Mukasey, 555 F.3d 734, 740 (9th Cir. 2009) (finding that the REAL ID Act's "one central reason" standard is more onerous than the Ninth Circuit's "at least in part" rule, and overruled the Ninth Circuit's presumption of political motivation absent a legitimate prosecutorial interest); Singh v. Mukasey, 543 F.3d 1, 4-5 (1st Cir. 2008).

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the BIA has held that the "one central reason" standard is not a radical departure from most pre-REAL ID Act case law.[195] The BIA analyzed the legislative history of the REAL ID Act, coming to the conclusion that the "at least one central reason" standard was specifically designed to overrule certain circuit court case law.[196]

In applying the "at least one central reason" standard, the Ninth Circuit has held that, in order for a protected ground to be a central motivating factor, it must have been important enough that the persecutor would not have acted had it not existed.[197] There is no requirement that the motivation relating to the protected ground be dominant or primary.[198]

The applicant must establish that the protected ground was "at least one central reason" and played more than a "minor," "tangential," or "superficial" role.[199] While the applicant is not required to show that the protected characteristic is the sole reason for the persecutor's action, the protected characteristic cannot be tangential or incidental to the persecutor's motivation.[200] The BIA has held that a tangential motivation is one that is only "superficially relevant" and an incidental motivation is one that is minor or casual.[201]

Example: In J-B-N- & S-M-, the applicant and his wife, citizens of Rwanda who were born in Burundi, moved to Rwanda in 1996. In 2004, the applicant's aunt took over a valuable parcel of land that had been deeded to him by his uncle. After a legal ruling declared him the land's owner, the applicant's cousin called him and demanded that he return to Burundi. He testified that his cousin, a major in the national police, placed the calls because he could not bear to lose the property and was hostile to the applicant because the applicant was from Burundi. Later, the applicant's cousin came to the applicant's home with three other men dressed in police uniforms. They demanded that the applicant and his wife return to Burundi, which they did.

An expert witness testified that citizens of Rwanda who are born in Burundi have low social status in Rwanda, and that land disputes are common there. Country conditions also indicated that land disputes are common in Rwanda, and that the

[195] Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 214 (BIA 2007) ("Having considered the conference report and the language of the REAL ID Act, we find that our standard in mixed motive cases has not been radically altered by the amendments.").

[196] Id. at n.9. (Congress sought to overrule the Ninth Circuit's approach in mixed motive cases and overruled the Ninth's Circuit's presumption of political motivation absent a legitimate prosecutorial interest.)

[197] Parussimova v. Mukasey, 555 F.3d 734, 741 (9th Cir. 2009).

[198] Id.

[199] Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 211 (BIA 2007).

[200] Id. at 213 (citing House Conf. Rpt., 109-72, 2005 USCCAN 240, 288).

[201] Id. at 212-13.

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disputes frequently turn violent.

The applicant claimed that his aunt and cousins' motivation was his Burundian origins and because they were "old case-load" refugees. Both he and his wife testified that, before the land dispute, relations between the applicant and his family had been friendly. The BIA rejected the applicant's asylum claim, finding that he was unable to show that his Burundian origins or his status as a repatriated refugee was more than a tangential motivation for the threats against him and his wife.[202]

Asylum may not be granted if a protected ground is only an "'incidental, tangential, or superficial' reason for the persecution of an asylum applicant."[203] Notably, the Third Circuit rejected the BIA's interpretation that the protected ground may not be "subordinate" to other reasons for the persecution.[204]

[202] Id.

[203] Ndayshimiye v. Att'y Gen. of U.S., 557 F.3d 124, 130 (3d Cir. 2009).

[204] Id.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

IO Supplement - Motivation

NOTE:

The Immigration and Nationality Act (INA) is the governing statute for asylum and refugee adjudications. INA § 207 is the statutory provision for refugee admissions, and 8 C.F.R. Part 207 contains the corresponding regulations. INA § 208 is the statutory provision for asylum adjudications and 8 C.F.R. Part 208 contains the corresponding regulations.

The REAL ID Act of 2005 amended INA § 208 but did not amend INA § 207. Therefore, any changes the REAL ID Act made to asylum law do not apply in the overseas refugee processing context. The principal change the REAL ID Act makes to the law surrounding nexus is the requirement that asylum applicants establish that one of the five protected grounds was, or would be, at least one central reason in motivating the persecutor. Refugee officers should disregard the word "central" when they see it in this context and should refrain from making it part of their analysis. In the refugee processing context, you must determine whether a reasonable person would fear that the danger arises on account of one of the five grounds.

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*Note: There are five protected grounds in the refugee definition. "Particular social group" (PSG) is one of these grounds but is not discussed in this module. PSG is covered in a separate module, Nexus – Particular Social Group.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

Training Module

MODULE DESCRIPTION

This module discusses the definition of persecution and the determination as to whether an act constitutes persecution.

TERMINAL PERFORMANCE OBJECTIVE(S)

When adjudicating a request for asylum or refugee resettlement, you will correctly apply the law to determine eligibility for asylum in the United States or resettlement in the United States as a refugee.

ENABLING PERFORMANCE OBJECTIVES

1. Distinguish between government and non-government agents of persecution.
2. Explain factors to consider in determining whether an act(s) is sufficiently serious to constitute persecution.
3. Explain factors to consider when deciding whether an applicant is eligible for asylum or refugee status based on past persecution alone.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Group and individual practical exercises

METHOD(S) OF EVALUATION

- Multiple-choice exam

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REQUIRED READING

1.

2.

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. UNHCR Handbook
2. Matter of Chen, 20 I&N Dec. 16 (BIA 1989)
3. Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996) (en banc)
4. Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997).
5. Matter of T-Z-, 24 I&N Dec. 163 (BIA 2007)
6. Stanojkova v. Holder, 645 F.3d 943 (7th Cir. 2011)
7. Haider v. Holder, 595 F.3d 276, 288 (6th Cir. 2010).
8.

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

Task/ Skill #	Task Description
ILR6	Knowledge of U.S. case law that impacts RAIO (4)
ILR19	Knowledge of criteria for past persecution (4)
ILR20	Knowledge of the criteria for refugee classification (4)
ILR21	Knowledge of the criteria for establishing a well-founded fear (WFF)(4)
ILR23	Knowledge of bars to immigration benefits (4)

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DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5)
DM3	Skill in applying eligibility requirements to information and evidence (5)
DM5	Skill in analyzing complex issues to identify appropriate responses or decisions (5)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
1/20/14	Throughout document	Fixed links, added recent case law examples	RAIO Training

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

This is one in a series of modules on eligibility for asylum and refugee status. This module provides an overview of the definition of persecution and eligibility based on past persecution.

Other RAIO Training modules on asylum and refugee eligibility discuss:

- the basic elements of the refugee definition (Refugee Definition)
- eligibility based on fear of future persecution (Well-Founded Fear)
- the motive of the persecutor and the five protected grounds in the refugee definition (Nexus and the Five Protected Grounds; Nexus: Particular Social Group)
- the burden of proof and evidence (Evidence)
- the role of discretion (Discretion)
- participation in the persecution of others on account of a protected ground (Analyzing the Persecutor Bar)
- entry into and permanent status in a third country (Firm Resettlement)

In addition, for asylum adjudications, one of the Asylum Lesson Plans discusses mandatory reasons to deny asylum. For overseas refugee adjudications, the RAIO Training module, Grounds of Inadmissibility discusses reasons an applicant may be inadmissible to the United States and the availability of waivers. The RAD Access module discusses available means to access the U.S. Refugee Admissions Program.

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2 PAST PERSECUTION

An applicant may establish that he or she is a refugee based on either past persecution or a well-founded fear of future persecution.[1]

The regulations implementing USCIS's discretionary authority to grant asylum, generally require a well-founded fear of persecution. If an applicant establishes past persecution, a rebuttable presumption of a well-founded fear of future persecution is created.[2] Well-founded fear is presumed unless the officer establishes that a fundamental change in circumstances has occurred, such that the applicant no longer has a well-founded fear, or that the applicant could reasonably avoid future persecution by relocating to another part of his or her country of nationality.[3] If the persecutor is the government or is government-sponsored or the applicant has been persecuted in the past, there is a rebuttable presumption that internal relocation is not reasonable, unless you establish by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.[4] Asylum applicants who suffered past persecution but who no longer have a well-founded fear of future persecution may be granted asylum based on being unable or unwilling to return to the country due to the severity of the past persecution or if there is a reasonable possibility that the applicant will face other serious harm upon return.[5]

In the overseas refugee processing context, there is no equivalent regulatory guidance on past persecution at 8 C.F.R. § 207. In the absence of such regulatory guidance, a plain language interpretation of the term refugee as defined in INA § 101(a)(42) is followed in overseas refugee processing. If an applicant credibly establishes that the harm he or she suffered in the past rose to the level of persecution on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility. A rebuttable presumption is neither created nor necessary. Nonetheless, as a matter of policy, refugee officers will always assess an applicant's well-founded fear of future persecution regardless of whether or not he or she has established past persecution.[6]

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[1] INA § 101(a)(42)

[2] INA § 208; INA § 101(a)(42); 8 C.F.R. § 208.13(b)(1).

[3] For additional information, see Eligibility Based on Past Persection, below, and RAIO Training module, Discretion.

[4] 8 C.F.R. § 208.13(b)(3)(ii).

[5] 8 C.F.R. § 208.13(b)(1)(iii); For additional information on granting asylum in the absence of a Well-Founded Fear, see RAIO module, Discretion.

[6] See Refugee Affairs Division (RAD), Refugee Application Assessment: Standard Operating Procedures (SOP) (requiring officers to elicit testimony and assess well-founded fear even where applicants have demonstrated past persecution).

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In contrast, the UN refugee definition focuses primarily on well-founded fear, rather than past persecution. The cessation clauses of the 1951 Convention, however, do provide that a refugee who no longer fears future persecution should be given protection due to compelling reasons arising from previous persecution.[7]

3 PERSECUTION

3.1 General Elements

Severity of Harm

To establish persecution, an applicant must show that the harm that the applicant experienced or fears is sufficiently serious to amount to persecution. The degree of harm must be addressed before you may find that the harm that the applicant suffered or fears can be considered "persecution."

Motivation

An applicant also must prove that the persecutor's motivation in harming, or seeking to harm him or her, is on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.[8] Proving motivation is discussed in more detail in RAIO Training module, Nexus and the Five Protected Grounds. You should separate the analysis of motivation from the evaluation of whether the harm rises to the level of persecution, in order to make the basis of your decision as clear as possible.

Persecutor

The applicant must show that the entity that harmed, or is threatening, the applicant (the persecutor) is either an agent of the government or an entity that the government is unable or unwilling to control.[9]

Location

Only harm suffered in the country of nationality or, if stateless, the country of last habitual residence, may be considered in a finding of past persecution, for the purpose of establishing eligibility. Harm suffered in the United States or a third country may be considered as evidence of a well-founded fear if the applicant can establish a connection between the persecutor and his or her country of origin.[10]

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[7] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Article 1C, paras. (5) and (6), incorporated by reference into the 1967 Protocol relating to the Status of Refugees.

[8] For additional information, see RAIO Training module, Nexus and the Five Protected Grounds.

[9] For additional information, see section, Identifying a Persecutor.

[10] See 8 C.F.R. § 208.13(b)(1); Costa v. Holder, 733 F.3d 13, 15 (1st Cir. 2013).

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Example

Applicant testifies to being the victim of domestic violence while living in the United States. Because applicant has filed a complaint against her spouse, the spouse has been removed to his country of nationality and now the applicant claims to fear additional harm from her spouse if returned to the same country as her spouse. In such a situation the applicant would not be considered to have suffered past persecution, but you would consider the violence suffered in the United States as evidence in your analysis of well-founded fear.

3.2 Whether the Harm Amounts to Persecution

3.2.1 Board of Immigration Appeals (BIA) Decisions

In an often-cited BIA decision, the BIA defined persecution as harm or suffering inflicted upon an individual in order to punish the individual for possessing a belief or characteristic the persecutor seeks to overcome.[11]

The BIA later modified this definition and explicitly recognized that a "punitive" or "malignant" intent is not required for harm to constitute persecution.[12] The BIA concluded that persecution can consist of objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm.[13]

Additionally, the BIA has found that the term "persecution" encompasses more than physical harm or the threat of physical harm so long as the harm inflicted or feared rises to the level of persecution.[14] Non-physical harm may include "the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."[15]

3.2.2 Guidance from the Department of Justice

In a proposed rule providing guidance on the definition of persecution, the Department of Justice indicated its approval of the conclusion in Kasinga that the existence of persecution does not require a malignant or punitive intent.[16] The Department also

[11] Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985), modified by Matter of Mogharrabi, 19 I&N Dec. 439, 446 (BIA 1987).

[12] Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996); Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997).

[13] Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996); for additional information, see RAIO Training module, Nexus and the Five Protected Grounds.

[14] Matter of T-Z-, 24 I&N Dec. 163, 169-71 (BIA 2007).

[15] Matter of T-Z-, 24 I&N Dec. at 171, citing Laipenienks v. INS, 750 F.2d 1427 (9th Cir. 1985).

[16] U.S.Department of Justice, Asylum and Withholding Definitions, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. This proposed rule did not become a regulation but indicates the agency's view on the topic.

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emphasized that the victim must experience the treatment as harm in order for persecution to exist. Thus, under this reasoning, in a case involving female genital mutilation, whether the applicant at hand would experience or has experienced the procedure as serious harm, not whether the perpetrator intends it as harm, is a key inquiry.

3.2.3 Federal Court Decisions

Persecution encompasses more than just physical harm. The Supreme Court has held that persecution is a broader concept than threats to "life or freedom."[17]

The U.S. Court of Appeals for the Ninth Circuit has defined "persecution" as "infliction of suffering or harm upon those who differ . . . in a way regarded as offensive" and "oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate."[18] Such harm could include severe economic deprivation.[19]

Similarly, the Seventh Circuit described persecution as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate."[20] The term "persecution" includes actions less severe than threats to life or freedom. Non-life threatening violence and physical abuse also fall within the definition of persecution.[21] However, "actions must rise above the level of mere 'harassment' to constitute persecution."[22] More recently, the Seventh Circuit has faulted the BIA for failing to distinguish "…among three forms of oppressive behavior" that an applicant might experience: discrimination, harassment, and persecution.[23] The court offered the following definitions, in the absence of an agency definition:

- Discrimination "refers to unequal treatment, and is illustrated historically by India's caste system and the Jim Crow laws in the southern U.S. states."[24]
- Harassment "involves targeting members of a specified group for adverse treatment, but without the application of significant physical force."[25]
- Persecution is "the use of significant physical force against a person's body, or the infliction of comparable physical harm without direct application of force (locking a

[17] INS v. Stevic, 467 U.S. 407, 428 fn. 22 (1984).

[18] Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969); Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985).

[19] Kovac, 407 F.2d at 107.

[20] Tamas-Mercea v. Reno, 222 F.3d 417, 424 (7th Cir. 2000).

[21] Id.

[22] Id.

[23] Stanojkova v. Holder, 645 F.3d 943 (7th Cir. 2011).

[24] Id. at 947-48.

[25] Id. at 948.

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> person in a cell and starving him would be an example), or nonphysical harm of equal gravity," such as refusing to allow a person to practice his religion or pointing a gun at a person's head.[26]

The court then went on to distinguish between harassment and persecution as being the difference "between the nasty and the barbaric, or alternatively between wishing you were living in another country and being so desperate that you flee without any assurance of being given refuge in any other country."[27]

The First Circuit has described persecution as an experience that "must rise above unpleasantness, harassment and even basic suffering."[28] There is no requirement that an individual suffer "serious injuries" to be found to have suffered persecution.[29] However, the presence or absence of physical harm is relevant in determining whether the harm suffered by the applicant rises to the level of persecution.[30]

Serious threats made against an applicant may constitute persecution even if the applicant was never physically harmed.[31] Under some circumstances, a threat may be sufficiently serious and immediate to constitute persecution even if it is not explicit.[32] Consider the following issues to explore when evaluating whether a threat is serious enough to rise to the level of persecution:

- Has the persecutor attempted to act on the threat?[33]
- Is the nature of the threat itself indicative of its seriousness?[34]
- Has the persecutor harmed or attempted to harm the applicant in other ways?[35]
- Has the persecutor attacked, harassed, or threatened the applicant's family?[36]

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[26] Id.

[27] Id.

[28] Nelson v. INS, 232 F.3d 258, 263 (1st Cir. 2000).

[29] Asani v. INS, 154 F.3d 719, 723 (7th Cir. 1998); Mihalev v. Ashcroft, 388 F.3d 722, 730 (9th Cir. 2004); Sanchez-Jimenez v.U.S.Att'y Gen., 492 F.3d 1223 (11th Cir. 2007).

[30] Ruiz v. Mukasey, 526 F.3d 31, 37 (1st Cir. 2008).

[31] Salazar-Paucar v. INS, 281 F.3d 1069, 1074 (9th Cir. 2002), amended by Salazar-Paucar v. INS, 290 F.3d 964 (9th Cir. 2002).

[32] Aldana-Ramos v. Holder, 757 F.3d 9, 17 (1st Cir. 2014).

[33] Navas v. INS, 217 F.3d 646, 658 (9th Cir. 2000) (death threats alone may constitute persecution).

[34] Garrovillas v. INS, 156 F.3d 1010, 1016 (9th Cir. 1998) (three letters within three months containing death threats constituted persecution).

[35] Mejia v. U.S. Att'y Gen., 498 F.3d 1253, 1257-58 (11th Cir. 2007).

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- Has the persecutor carried out threats issued to others similarly situated to the applicant?[37]

- Did the applicant suffer emotional or psychological harm as a result of the threat(s)?[38]

The federal courts, as well as the BIA, have held that cumulative instances of harm, considered in totality, may constitute persecution on account of a protected characteristic, so long as the discrete instances of harm were each inflicted on account of a protected characteristic.[39]

You should evaluate the entire scope of harm experienced and feared by the applicant to determine if he or she was persecuted and fears persecution.

3.2.4 Guidance from the UNHCR Handbook

The UNHCR Handbook explains the following:[40]

- A threat to life or freedom, or other serious violation of human rights on account of any of the protected grounds is always persecution.

- Other, less serious harm may constitute persecution depending on the circumstances.

- Acts that do not amount to persecution when considered separately can amount to persecution when considered cumulatively.

3.2.5 General Considerations

Individual Circumstances

It is important to take into account the individual circumstances of each case and to consider the feelings, opinions, age, and physical and psychological characteristics of the applicant in determining whether the harm suffered or feared rises to the level of persecution.[41] For example, one may hold passionate political or religious convictions, the hindrance of which would cause great suffering; while another may not have such strong convictions.[42]

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[36] Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997); Navas v. INS, 217 F.3d 646, 658 (9th Cir. 2000); Sanchez Jimenez v.U.S.Atty Gen. 492 F.3d 1223, 1233 (11th Cir. 2007).

[37] Garrovillas v. INS, 156 F.3d 1010, 1016 (9th Cir. 1998).

[38] For additional information, see section on Psychological Harm.

[39] Chand v. INS, 222 F.3d 1066, 1073 (9th Cir. 2000); Singh v. INS, 94 F.3d 1353, 1360 (9th Cir. 1996); Korablina v. INS, 158 F.3d 1038, 1045 (9th Cir. 1998); Matter of O-Z-& I-Z-, 22 I&N Dec. 23, 25-26 (BIA 1998); cf. Mihalev v. Ashcroft, 388 F.3d 722, 728 (9th Cir. 2004).

[40] UNHCR Handbook, paras. 51-55.

[41] Id. at para. 52.

[42] Id. at para. 40.

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Age

In assessing whether harm rises to the level of persecution, you should determine the age of the applicant at the time the harm occurred and determine if age is a factor that should be considered.[43] For example, the effect of similar circumstances might be more severe on a child or an elderly person than they may be on others. Harm that may not rise to the level of persecution for an adult may be persecution if the harm is inflicted on a child. In considering whether past harm suffered by a child rises to the level of persecution, it is important to take into account a child's young age and dependence on family and community.[44]

No Set Number of Incidents Required

There is no minimum number of acts or incidents that must occur in order to establish persecution.[45] One serious incident or threat may constitute persecution, or there may be several incidents or acts, which considered together, constitute persecution.

3.3 Human Rights Violations

Violations of "core" or "fundamental" human rights, prohibited by international law, may constitute harm amounting to persecution. These rights include freedom from:[46]

- arbitrary deprivation of life
- genocide
- slavery
- torture and other cruel, inhuman, or degrading treatment
- prolonged detention without notice of and an opportunity to contest the grounds for detention
- rape and other severe forms of sexual violence

Torture can take a wide variety of forms. It can include severe physical pain by beating or kicking, or pain inflicted with the help of objects such as canes, knives, cigarettes, or metal objects that transmit electric shock. Torture also includes the deliberate infliction of

[43] Liu v. Ashcroft, 380 F.3d 307, 314 (7th Cir. 2004); Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2d Cir. 2006); Ordonez-Quino v. Holder, 760 F.3d 80, 93 (1st Cir. 2014).

[44] For additional information, see RAIO Training module, Children's Claims.

[45] See, e.g., Vaduva v. INS, 131 F.3d 689, 690 (7th Cir. 1997); and Lumaj v. Gonzales, 462 F.3d 574, 577 (6th Cir. 2006).

[46] See Guy S. Goodwin-Gill, The Refugee in International Law Second Edition (New York: Oxford University Press, 1998), pp.68-9; and James C. Hathaway, The Law of Refugee Status (Toronto: Butterworths, 1992), p. 109.

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severe mental suffering.[47] Torture will always rise to the level of persecution. Keep in mind, however, that for purposes of asylum or refugee status, as opposed to protection under the Convention Against Torture, torture must have been inflicted on account of one of the five protected grounds. Convention Against Torture protection is available in immigration court removal proceedings, see Asylum Lesson Plans on Credible Fear and Reasonable Fear.

Other fundamental rights are also protected by customary international law, such as the right to recognition as a person in the law, and the right to freedom of thought, conscience, and religion or belief.[48] Deprivation of these rights may also constitute persecution.[49]

Examples

- The BIA has found that the enforcement of coercive family planning policy through forced abortion or sterilization is a violation of fundamental human rights. Forced abortion or sterilization deprives the individual of the right to make individual or conjugal decisions regarding reproductive rights.[50]

- The Third Circuit has stated that compelling an individual to engage in conduct that is abhorrent to that individual's deepest beliefs may constitute persecution.[51]

- UNHCR guidelines on religious-based refugee claims indicate that forced compliance could constitute persecution "if it becomes an intolerable interference with the individual's own religious belief, identity, or way of life and/or if noncompliance would result in disproportionate punishment."[52]

3.4 Discrimination and Harassment

[47] J. Herman Burgers & Hans Danelius, A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988), pp. 117-18. For additional information, see RAIO Training module, International Human Rights Law (section on Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

[48] Guy S. Goodwin-Gill, The Refugee in International Law Second Edition (New York: Oxford University Press, 1998), p.69.

[49] For additional information, see RAIO Training module, The International Religious Freedom Act (IRFA) and Religious Persecution Claims.

[50] See Matter of S-L-L-,24 I&N Dec. 1, 5-7 (BIA 2006), (en banc), overruled on other grounds by Matter of J-S-,24 I&N Dec. 520 (AG 2008); Matter of Y-T-L-, 23 I&N Dec. 601, 607 (BIA 2003); UNHCR, UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (Geneva: Aug. 2005).

[51] Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1993).

[52] UNHRC, Guidelines on International Protection: Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, (HCR/GIP/04/06, 28 April 2004), para. 21.

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Less preferential treatment and other forms of discrimination and harassment generally are not considered persecution.[53] Where discriminatory practices or instances of harassment accumulate or increase in severity to the extent that they lead to consequences of a substantially prejudicial nature, adverse actions that would themselves constitute only discrimination or harassment may, cumulatively, rise to the level of persecution.[54]

The Second Circuit Court of Appeals has indicated that differentiating between harassment and persecution can be a matter of degree and that adjudicators must consider the context in which mistreatment occurs.[55] A minor beating may constitute only harassment when inflicted by a non-governmental entity. In the context of an arrest or detention by a government official, however, a minor beating, if inflicted on account of a protected characteristic, may rise to the level of persecution.

The fact that a non-citizen does not enjoy all of the same rights as citizens in the country of last habitual residence is generally, by itself, not harm sufficient to rise to the level of persecution.[56]

Examples

- Discrimination did not rise to the level of persecution against an Armenian living in Russia when it included merely harassment and pushing by Russian officers because of ethnicity and being denied a job because "there were no jobs for Armenians."[57]
- An Egyptian Coptic Christian claimed that his career as a medical doctor would suffer because of discrimination against Christians. The Ninth Circuit found that this level of discrimination was insufficient to amount to persecution.[58] In contrast, the inability to practice medicine through the invalidation of a medical degree does amount to persecution when it is on account of the applicant's ethnicity.[59]

General Factors to Consider

Some relevant questions to consider in determining whether the discrimination and harassment of the applicant amount to persecution are:

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[53] See UNHCR Handbook, paras. 54-55; Stanojkova v. Holder, 645 F.3d 943, 947-948 (7th Cir. 2011); Matter of A-E-M-, 21 I&N Dec. 1157, 1159 (BIA 1998); Matter of V-F-D-, 23 I&N Dec. 859, 863 (BIA 2006); Baka v. INS, 963 F.2d 1376, 1379 (10th Cir. 1992); Mikhailevitch v. INS, 146 F.3d 384, 390 (6th Cir. 1998).

[54] Ivanishvili v. USDOJ, 433 F.3d 332, 342 (2d Cir. 2006).

[55] Beskovic v. Gonzales, 467 F. 3d 223, 226 (2d Cir. 2006).

[56] Ahmed v. Ashcroft, 341 F.3d 214, 217 (3d Cir. 2003); Najjar v. Ashcroft, 257 F.3d 1262, 1291 (11th Cir. 2001); Faddoul v. INS, 37 F.3d 185, 189 (5th Cir. 1994).

[57] Avetova-Elisseva v. INS, 213 F.3d 1192 (9th Cir. 2000).

[58] Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir.1995); cf. Mansour v. Ashcroft, 390 F.3d 667 (9th Cir. 2004).

[59] Stserba v. Holder, 646 F.3d 964, 976 (6th Cir. 2011).

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- Was the harm actually persecution, not merely discrimination or harassment?
- How long has the discrimination or harassment lasted?
- Which human rights were affected?
- How has the discrimination or harassment affected the particular applicant?
- How many types of discriminatory practices or how much harassment has been imposed on the applicant, cumulatively?
- Has there been any escalation over time in the frequency or seriousness of the discrimination or harassment or has it remained at the same level over time?

Some significant factors to consider in determining whether discrimination and harassment amount to persecution include:

- serious restrictions on the right to earn a livelihood[60]
- serious restrictions on the access to normally available educational facilities
- arbitrary interference with a person's privacy, family, home, or correspondence
- relegation to substandard dwellings
- exclusions from institutions of higher learning
- enforced social or civil inactivity
- passport denial
- constant surveillance
- pressure to become an informer
- confiscation of property
- the accumulation and type of discriminatory practices or harassment that have been imposed on the applicant

Generally none of these factors, by themselves, would be considered to rise to the level of severity necessary to constitute persecution, but may, on a case by case basis, be deemed to rise to the level of persecution. Each case must be judged individually based on the unique facts of that claim.

[60] See, e.g., Gormley v. Ashcroft, 364 F.3d 1172, 1179 (9th Cir. 2004)(in rejecting claim, court relied on fact that South African government provided unemployment compensation to couple laid off pursuant to affirmative action).

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3.5 Arrests and Detention

In evaluating whether a detention is persecution, consider:

- length of the detention
- legitimacy of the government action
- mistreatment during the detention
- judicial processes or due process rights accorded[61]

Generally, a brief detention without mistreatment will not constitute persecution. Prolonged detention is a deprivation of liberty, which may constitute a violation of a fundamental human right and amount to persecution. Similarly, multiple brief detentions may, considered cumulatively, amount to persecution. Evidence of mistreatment during detention also may establish persecution.[62]

Examples

- A Chinese Christian was arrested during an underground religious service, detained for seven days, and repeatedly beaten. On one occasion, he was chained to an iron bar outside in the rain for several hours, causing him to become ill. The Eleventh Circuit Court of Appeals held that the evidence compelled the conclusion that the harm the applicant suffered rose to the level of persecution.[63]
- A Kosovar Albanian was interrogated on three occasions by Serbian police. One time, during a 24-hour detention, he suffered an injury to his hands caused by the police. The Seventh Circuit held that substantial evidence supported a finding that the applicant had not suffered past persecution.[64]
- A 16-year old Chinese girl was detained for two days by police, during which time she was pushed and her hair was pulled, she was expelled from school, and her home was ransacked by police. The Seventh Circuit held that substantial evidence supported a finding that the applicant had not suffered past persecution.[65]

[61] For additional information, see RAIO Training module, Nexus and the Five Protected Grounds.

[62] Asani v. INS, 154 F.3d 719, 723 (7th Cir. 1998)(the court instructed the BIA on remand to apply the correct persecution standard and questioned the BIA, using the incorrect standard applied, "If having two teeth knocked out and being deprived of sufficient food and water are not 'serious injuries' or 'physical harm,' what is?")

[63] Shi v. U.S. Att'y Gen., 707 F.3d 1231, 1237-1239 (11th Cir. 2013).

[64] Prela v. Ashcroft, 394 F.3d 515, 518 (7th Cir. 2005).

[65] Mei Dan Liu v. Ashcroft, 380 F.3d 307, 314 (7th Cir. 2004).

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- A Chinese national was detained at a police station for three days, during which time he was interrogated for two hours and hit on his back with a rod approximately ten times, causing him pain and temporary red marks, but not requiring any medical treatment. The Ninth Circuit found that the facts did not compel a finding of past persecution.[66]

- A Bulgarian Christian was detained by police twice, each for two days, and on a third occasion was beaten by police in her home, resulting in a miscarriage of her pregnancy. The Seventh Circuit found that treatment suffered by the applicant was so severe as to compel a finding of past persecution.[67]

- A Bulgarian of Roma descent was detained by police for ten days, during which time he was beaten daily with sandbags and forced to perform heavy labor. The applicant suffered no significant bodily injury. The Ninth Circuit found that treatment suffered by the applicant was so severe as to compel a finding of past persecution.[68]

3.6 Economic Harm

To rise to the level of persecution, economic harm must be deliberately imposed and severe.[69] Severe economic harm must be harm "above and beyond [the economic difficulties] generally shared by others in the country of origin and involve more than the mere loss of social advantages or physical comforts."[70]

In Matter of T-Z-, the Board held that adjudicators should apply the following test in determining whether economic harm amounts to persecution: whether the applicant suffered or faces a "deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."[71] An applicant, however, need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution.[72]

In this decision, the BIA highlighted some factors to consider in assessing whether the fines and job loss at issue amounted to persecution,[73] including

[66] Gu v. Gonzales, 454 F.3d 1014, 1021 (9th Cir. 2006).

[67] Vladimirova v. Ashcroft, 377 F.3d 690, 693 (7th Cir. 2004).

[68] Mihalev v. Ashcroft, 388 F.3d 722, 730 (9th Cir. 2004).

[69] See Minwalla v. INS, 706 F.2d 831, 835 (8th Cir. 1983); Ambati v. Reno, 233 F.3d 1054, 1060 (7th Cir. 2000); Guan Shan Liao v. INS, 293 F.3d 61, 69-70 (2d Cir. 2002).

[70] Matter of T-Z-, 24 I&N Dec. 163, 173 (BIA 2007).

[71] Matter of T-Z-, 24 I&N Dec. 163, 173 (BIA 2007). See also Vicente-Elias v. Mukasey, 532 F.3d 1086 (10th Cir. 2008)(adopting Matter of T-Z- standard on economic persecution); Borca v. INS, 77 F.3d 210 (7th Cir. 1996) (holding that total economic deprivation is not required to establish persecution).

[72] Matter of T-Z-, 24 I&N Dec. at 173.

[73] Id. at 173-75.

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- the applicant's and his or her household's earnings
- the applicant's net worth
- other employment available to the applicant
- loss of housing
- loss of health benefits
- loss of school tuition and educational opportunities
- loss of food rations
- confiscation of property, including household furniture and appliances
- any other relevant factor

In Vincent v. Holder, the Sixth Circuit held that the burning of the applicant's house was "sufficiently severe and targeted to constitute persecution," relying on T-Z-'s holding that a large-scale confiscation of property may in itself constitute persecution.[74] In contrast, in Yun Jian Zhang v. Gonzales, the Seventh Circuit held that the partial destruction of the applicant's house was not severe economic harm where damage could be repaired, particularly given that the applicant worked in construction; the applicant continued to be gainfully employed; the family found shelter at his in-laws' home; and the government did not continue to harm him or his family.[75]

In Zhen Hua Li v. Att'y Gen. of U.S., the Third Circuit held that a fine worth eighteen months' salary, combined with being blacklisted from any government employment and from most other forms of legitimate employment, the loss of health benefits, school tuition, and food rations, and the confiscation of his household furniture and appliances, would constitute the deliberate imposition of severe economic disadvantage that could threaten his family's freedom, if not their lives.[76] In Mu Ying Wu v. U.S. Att'y Gen., on the other hand, the Eleventh Circuit held that substantial evidence supported a finding that a fine that would amount to about 60 to 100 per cent of the applicant's family's annual income, which could be paid in installments or which the applicant could avoid paying by forgoing free medical care and public education for her children, would not, without any additional harm, rise to the level of persecution.[77]

[74] Vincent v. Holder, 632 F.3d 351, 355 (6th Cir. 2011), citing T-Z-, 24 I&N Dec. at 174.

[75] Yun Jian Zhang v. Gonzales, 495 F.3d 773, 777-78 (7th Cir. 2007).

[76] Zhen Hua Li v. Att'y Gen. of U.S., 400 F.3d 157, 166-69 (3d Cir. 2005).

[77] Mu Ying Wu v. U.S. Att'y Gen., 745 F.3d 1140, 1157 (11th Cir. 2014).

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Applying the BIA's standard in Matter of T-Z-, the Eighth Circuit has held that being relegated to low-level jobs despite advanced schooling did not amount to severe economic deprivation. Because private employment remained available, the economic discrimination was not sufficiently harsh so as to constitute persecution.[78]

An applicant's loss of employment as a result of a government-sponsored employment program instituted to correct past discrimination is not sufficient to support a finding of past persecution on account of a protected characteristic where the government provided considerable unemployment compensation to the applicant, and other similarly situated individuals were able to maintain or regain employment.[79] On the other hand, a program of state-sponsored economic discrimination against a disfavored group within the society that could lead to extreme economic harm may amount to past persecution.[80]

3.7 Psychological Harm

3.7.1 Psychological Harm Alone May Be Sufficient to Constitute Persecution

You should always consider evidence, including the applicant's testimony, that the events he or she experienced caused psychological harm.[81] Psychological harm alone may rise to the level of persecution.[82] Evidence of the applicant's psychological and emotional characteristics, such as the applicant's age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution.

3.7.2 Under The Convention Against Torture, Severe Mental Harm Alone May Be Sufficient to Constitute Torture

Under the Convention Against Torture, severe mental suffering may constitute torture under certain circumstances.[83] Some examples of mental suffering that fall within this definition of torture, and thus would be considered serious enough to rise to the level of persecution, include:

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[78] Beck v. Mukasey, 527 F.3d 737, 741 (8th Cir. 2008).

[79] Gormley v. Ashcroft, 364 F.3d 1172 (9th Cir. 2004).

[80] Himri v. Ashcroft, 378 F.3d 932, 937 (9th Cir. 2004)(finding that Palestinian applicants were members of a persecuted minority who, due to Kuwaiti state-sponsored economic discrimination, would be subject to denial of right to work, attend school, and to obtain drinking water if returned to Kuwait).

[81] For additional information, see RAIO Training module, Interviewing Survivors of Torture.

[82] Ouk v. Gonzales, 464 F.3d 108, 111 (1st Cir.2006) ("a finding of past persecution might rest on a showing of psychological harm"); Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir.2004) ("Persecution may be emotional or psychological, as well as physical."). The Fourth Circuit held that in withholding of removal cases only, which are not at issue in asylum or refugee adjudications, psychological harm alone cannot amount to persecution. Niang v. Gonzales, 492 F.3d 505,512 (4th Cir. 2007).

[83] See 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990); UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465; and 8 C.F.R. § 208.18.

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- mental harm caused by the intentional infliction or threatened infliction of severe physical pain or suffering
- administration or threatened administration of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality
- threat of imminent death
- threat that another person will imminently be subjected to death or severe physical pain or suffering

3.7.3 Other Forms of Mental Harm May Be Sufficient to Constitute Persecution

Other forms of mental harm that amount to persecution, but may not amount to torture include:

- receipt of threats over a prolonged period of time, causing the applicant to live in a state of constant fear
- being forced to witness the harm of others[84]
- forced compliance with religious laws or practices that are abhorrent to an applicant's beliefs

For example, the Ninth Circuit found in Mashiri v. Ashcroft that the emotional trauma suffered by a native of Afghanistan living in Germany was sufficiently severe to amount to persecution. The cumulative harm resulted from watching as a foreign-owned store in her neighborhood was burned, finding her home vandalized and ransacked, running from a violent mob that attacked foreigners in her neighborhood, reading in the newspaper about a man who lived along her son's path to school who shot over the heads of two Afghan children, and witnessing the results of beatings of her husband and children.[85]

The U.S. Court of Appeals for the Third Circuit has indicated that forced compliance with laws that are deeply abhorrent to a person's beliefs may constitute persecution. For example, being forced to renounce religious beliefs or to desecrate an object of religious importance might be persecution if the victim holds strong religious beliefs.[86]

3.8 Sexual Harm

3.8.1 Rape and Other Sexual Abuse

[84] See Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir. 2004); Khup v. Ashcroft, 376 F.3d 898, 904 (9th Cir. 2004). But see Shoaira v. Ashcroft, 377 F.3d 837, 844 (8th Cir. 2004) (upholding a finding that the emotional harm suffered did not rise to the level of persecution).

[85] Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir. 2004).

[86] Fatin v. INS, 12 F.3d 1233, 1241-42 (3d Cir. 1993).

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Rape and other severe forms of sexual harm constitute harm amounting to persecution, as they are forms of serious physical harm.[87] Rape is regarded as a "form of aggression constituting an egregious violation of humanity," which can constitute torture.[88]

You should also consider less severe sexual harm when determining whether harm amounts to persecution.[89] You must examine the entire circumstances of the case before you, including any resulting psychological harm, the social or cultural perceptions of the applicant as a victim of the sexual harm, and other effects on the applicant resulting from the harm.

Example

> The applicant was stopped by the police several times and three times was stripped and twice threatened with sodomy by a gun barrel. In overturning the IJ's decision, the court stated, "[m]ost egregiously, the IJ failed to consider the significance of the sexual humiliation that occurred on three occasions. This court has previously noted that abuse of this nature can make all the difference."[90]

3.8.2 Female Genital Mutilation or Female Genital Cutting

The practice of female genital mutilation (FGM), also known as female genital cutting (FGC), is objectively a sufficiently serious form of harm to constitute persecution.[91] Generally, in determining whether FGM is persecution to the applicant, you should consider whether the applicant experienced or would experience the procedure as serious harm.[92] The BIA in Matter of S-A-K- & H-A-H- recognized that FGM imposed on a young child constituted past persecution.[93] The BIA held that she and her mother had suffered an atrocious form of persecution that resulted in continuing physical pain and discomfort and that they merited humanitarian asylum based on the severity of their harm.[94]

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[87] See Memorandum from Phyllis Coven, INS Office of International Affairs, to INS Asylum Officers and HQASM Coordinators, Considerations For Asylum Officers Adjudicating Asylum Claims From Women, (26 May 1995), p.9.

[88] See UNHCR, Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02, 7 May 2002), para. 9; Hernandez-Montiel v. INS, 225 F.3d 1084, 1097-98 (9th Cir. 2000); Lopez-Galarza v. INS, 99 F.3d 954, 959 (9th Cir. 1996); and Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003).

[89] See, e.g., Angoucheva v. INS, 106 F.3d 781, 790 (7th Cir. 1997).

[90] Haider v. Holder, 595 F.3d 276, 288 (6th Cir. 2010).

[91] See Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996)

[92] U.S. Department of Justice, Asylum and Withholding Definitions, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. The proposed rule did not become a regulation but represents the agency's view on the topic.

[93] Matter of S-A-K- & H-A-H-, 24 I&N Dec. 464, 465 (BIA 2008)

[94] Id. at. 465-66.

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Even in countries that have prohibited the practice of FGM, the government may condone, tolerate, or be unable to protect against the practice. The fact that a state has enacted a law prohibiting FGM does not necessarily indicate that the government is willing and able to protect an applicant.[95]

3.9 Harm to Family Members or Other Third Parties

Harm to an applicant's family member or another third party may constitute persecution of the applicant where the harm the applicant suffers is serious enough to amount to persecution and where the persecutor's motivation in harming the third party is to harm the applicant.[96] The BIA has held that emotional harm may rise to the level of persecution where a person "persecutes someone close to an applicant, such as a spouse, parent, child or other relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself."[97] For example, the wife of a political dissident may be abducted and killed as a way of teaching her husband a political lesson.

An applicant may suffer severe psychological harm from the knowledge that another individual has been harmed in an effort to persecute the applicant.[98] The harm may be intensified if the applicant feels that his or her status or actions led the persecutor to harm the family member or if the applicant witnessed the harm to the family member.[99] The witnessing of harm to a family member or third party will not constitute persecution of the applicant, unless the intent in harming the third party is to cause harm to the applicant, the applicant's family, or all members of a group to which the applicant belongs on account of a protected characteristic.[100] Furthermore, as explained above, harm that would constitute torture will always rise to the level of persecution, and the definition of torture under U.S. law includes threats that another person would be imminently subjected to death or severe physical pain or suffering.[101]

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[95] For additional information, see section, Entity the Government is Unable or Unwilling to Control.

[96] See Memorandum from Joseph Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., Persecution of Family Members, (30 June 1997).

[97] Matter of A-K-, 24 I&N Dec 275 (BIA 2007); see also Sumolang v. Holder, 723 F.3d 1080, 1084 (9th Cir. 2013) (finding that the emotional harm an applicant suffered from the death of her child constituted persecution where doctors had denied the child medical treatment because of the mother's race and the parents' religion).

[98] For additional information, see RAIO Training module, Interviewing - Survivors of Torture.

[99] See Memorandum from Joseph Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., Persecution of Family Members, (30 June 1997).

[100] See N.L.A. v. Holder, 744 F.3d 425, 432-433 (7th Cir. 2014) (holding that a direct threat to an applicant's family member may cause suffering that constitutes persecution of an applicant where the threat is intended to target the entire family); Panoto v. Holder, 770 F.3d 43, 47 (1st Cir. 2014) (finding that the harm an Indonesian Christian applicant suffered when a bomb was planted at her church and, within six months, she witnessed a fellow Christian passenger being brutally murdered during a ferry highjacking by an anti-Christian group could constitute persecution of the applicant on account of her religion).

[101] 8 C.F.R. § 208.18(a)(4)(iv); see also Section 3.3, Human Rights Violations.

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For example, if a persecutor severely assaults an applicant's spouse and indicates that the harm was motivated by the applicant's political activity, the applicant may be able to establish that he was persecuted on account of his political opinion. However, psychological harm suffered by an applicant based on the harm to a family member would not constitute persecution if the family member was targeted solely because of the family member's own protected characteristic rather than the protected characteristic(s) of the applicant. In the latter case, the harm was not directed at the applicant.

4 IDENTIFYING A PERSECUTOR

Inherent in the meaning of persecution is the principle that the harm that an applicant suffered or fears must be inflicted either by the government of the country where the applicant fears persecution, or by a person or group that the government is unable or unwilling to control.[102]

The UNHCR Handbook, para. 65 provides context:

> Persecution is normally related to the action taken by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizable fractions of the population do not respect the religious beliefs of their neighbors. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

4.1 The Government

In cases in which the applicant was harmed or fears harm by the government, the applicant must establish the following:

- the harm or feared harm was on account of a protected characteristic
- the harm or feared harm is sufficiently serious to rise to the level of persecution
- the persecutor or feared persecutor is an agent or agents of the government

The Court of Appeals for the Ninth Circuit has stated that where a government agent is responsible for the persecution, it is unnecessary to consider whether the applicant sought protection from the police or other government entity.[103]

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[102] See Matter of Villalta, 20 I&N Dec. 142, 147 (BIA 1990); Matter of H-, 21 I&N Dec. 337 (BIA 1996); and Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996) (en banc).

[103] Baballah v. Ashcroft, 367 F.3d 1067, 1078 (9th Cir. 2004).

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4.2 Entity the Government Is Unable or Unwilling to Control

4.2.1 General Principles

An applicant may establish that he or she has suffered or will suffer persecution by a non-government actor if the applicant demonstrates that the government of the country from which the applicant fled is unable or unwilling to control the entity doing the harm.[104] The applicant is not required to show direct government involvement or complicity with the non-government actor.

In determining whether a government is unable or unwilling to control the entity that harmed or seeks to harm the applicant, you should address whether:

- there were reasonably sufficient governmental controls and restraints on the entity[ies] that harmed the applicant
- the government had the ability and will to enforce those controls and restraints with respect to the entity that harmed the applicant
- the applicant had access to those controls and constraints
- the applicant attempted to obtain protection from the government and the government's response, or failure to respond, to those attempts[105]

4.2.2 Guidance from Federal Courts

In determining whether a government is unable or unwilling to protect, the Ninth Circuit Court of Appeals looks at both general country conditions and the applicant's specific circumstances:

> While the acts of persecution were not perpetrated directly by government officials, the widespread nature of the persecution of ethnic Armenians documented by the State Department Country Report, combined with the police officer's response when Mr. Andriasian turned to him for help, clearly establishes that the government of Azerbaijan either could not or would not control Azeris who sought to threaten and harm ethnic Armenians living in their country.[106]

A number of courts have explained that the requisite connection to government action or inaction may be shown in one of the following three ways:

- evidence that government actors committed or instigated the acts

[104] See Faruk v, Ashcroft, 378 F.3d 940, 943 (9th Cir. 2004); Nabulwala v. Gonzales, 481 F.3d 1115, 1118 (8th Cir. 2007).

[105] Surita v. INS, 95 F.3d 814, 819-20 (9th Cir. 1996); Ortiz-Araniba v. Keisler, 505 F.3d 39, 42 (1st Cir. 2007).

[106] Andriasian v. INS, 180 F.3d 1033, 1042-43 (9th Cir. 1999).

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- evidence the government actors condoned the acts
- evidence of an inability on the part of the government to prevent the acts[107]

The First Circuit has further explained that the applicant must demonstrate more than "a general difficulty preventing the occurrence of particular future crimes" and that "where a government is making every effort to combat violence by private actors, and its inability to stop the problem is not distinguishable from any other government's struggles, the private violence has no government nexus and does not constitute persecution."[108]

4.2.3 Efforts to Gain Government Protection or an Explanation of Risk or Futility

To demonstrate that the government is unable or unwilling to protect a refugee or asylum applicant, the applicant must show that he or she sought the protection of the government, or provide a reasonable explanation as to why he or she did not seek that protection.[109]

Reasonable explanations for not seeking government protection include evidence that the government has shown itself unable or unwilling to act in similar situations, that the applicant would have increased his or her risk by affirmatively seeking protection, or that the applicant was so young that he or she would not have been able to seek government protection.[110]

In determining whether an applicant's failure to seek protection is reasonable, you should consult and consider country of origin information, in addition to the applicant's testimony.

Examples

- An Indian Muslim applicant was shot by Hindu extremists during the 2002 riots in Gujarat. While he was in the hospital, a police officer visited him and advised him not to tell anyone the truth about what had happened. The applicant remained in India for four years without ever formally reporting the incident to the police or seeking help from state or federal authorities. He explained that based on what the police officer had told him, he believed that reporting would be futile. Considering country conditions evidence indicating that the Indian government was making significant and often successful efforts to apprehend perpetrators of anti-Muslim violence in Gujarat, the

[107] Roman v. INS, 233 F.3d 1027, 1034 (7th Cir. 2000) (citing Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000)); Harutyunyan v. Gonzales, 421 F.3d 64, 68 (1st Cir. 2005); Shehu v. Gonzales, 443 F.3d 435, 437-38 (5th Cir. 2006).

[108] Ortiz-Araniba v. Keisler, 505 F.3d 39, 42 (1st Cir. 2007); Khan v. Holder, 727 F.3d 1, 7 (1st Cir. 2013) (citing Burbiene v. Holder, 568 F.3d 251, 255-56 (1st Cir. 2009).

[109] Roman v. INS, 233 F.3d 1027, 1035 (7th Cir. 2000).

[110] See Matter of S-A-, 22 I&N Dec. 1328, 1335 (BIA 2000); Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1057 (9th Cir. 2006); and cf. Castro-Perez v. Gonzales, 409 F.3d 1069, 1072 (9th Cir. 2005).

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Seventh Circuit held that substantial evidence supported the conclusion that the Indian government was not unwilling or unable to protect him at the time.[111]

- A Colombian applicant who was threatened and attacked several times by the Revolutionary Armed Forces of Colombia (FARC) because of her political activity did not report any of the incidents to the police. The BIA concluded that she had not established that the Colombian government was unwilling or unable to protect her because she did not seek protection from law enforcement. The Eleventh Circuit Court of Appeals held that the BIA erred in its decision because it failed to address the applicant's argument that her testimony and country conditions evidence established that reporting the attacks to law enforcement would have been futile.[112]

4.2.4 Unwilling to Control

There may be situations in which the government is unwilling to control the persecutor for reasons enumerated in the refugee definition (the government shares, or does not wish to oppose, the persecutor's opinion about the applicant's protected characteristic).[113] However, there is no requirement that the government's unwillingness to protect the applicant be motivated by any protected characteristic.[114]

A government may be unwilling to intervene in what are perceived to be domestic disputes within a family, or in disputes between tribes, or in a dispute that involves societal customs.[115] You may need to evaluate country conditions information concerning relevant laws and the enforcement of those laws, as well as the applicant's testimony, to determine if the government is unwilling to control the persecutor.

Evidence that the government is unwilling to control the persecutor could include a failure to investigate reported acts of violence, a refusal to make a report of acts of violence or harassment, closing investigations on bases clearly not supported by the circumstances of the case, statements indicating an unwillingness to protect certain victims of crimes, and evidence that other similar allegations of violence go uninvestigated.[116]

4.2.5 Unable to Control

[111] Vahora v. Holder, 707 F.3d 904, 908-909 (7th Cir. 2013).
[112] Lopez v. U.S. Att'y Gen., 504 F.3d 1341, 1345 (11th Cir. 2010).

[113] UNHCR Handbook, para. 65.

[114] Doe v. Holder, 736 F.3d 871, 878 (9th Cir. 2013).

[115] UNHCR. Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02, 7 May 2002), paras. 9, 15 and 19.

[116] Mashiri v. Ashcroft, 383 F.3d 1112, 1121 (9th Cir. 2004).

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No government can guarantee the safety of each of its citizens or control all potential persecutors at all times. In order for you to find that the government was "unable to control" a non-governmental persecutor when the applicant was harmed, the applicant "must show more than just a difficulty controlling private behavior. Rather, the applicant must show that the government condoned the private behavior or at least demonstrated a complete helplessness to protect the victims."[117] Where the state has made reasonable efforts to control the persecutor or protect the applicant, the harm the applicant suffered does not constitute persecution.[118] However, generalized evidence that the government has attempted to control a private persecutor does not preclude you from finding, based on the applicant's testimony and the record as a whole, that the government was unable or unwilling to control the persecutor in an applicant's individual case.[119] In most cases, the determination of whether a government is unable to control the entity that harmed the applicant requires careful evaluation of the most current country of origin information available, as well as an evaluation of the applicant's circumstances.

Examples

- A Pakistani applicant received death threats from the Taliban after he urged people in his community to oppose them, and his house was attacked with a grenade. He reported the incidents to the police, and they investigated and took statements from witnesses, but they did not apprehend the perpetrators. The First Circuit upheld the BIA's determination that the applicant had not demonstrated the Pakistani government's inability to control the persecutors because law enforcement officials had made reasonable efforts to protect him and, according to country conditions evidence, had had some success in combating the Taliban in his area; although the government had not "eradicated" the threat the Taliban posed, a reasonable factfinder could conclude that it was willing and able to control them.[120]
- A Mexican applicant was kidnapped and beaten by the Los Zetas drug cartel because of his own activities opposing Los Zetas while in the Mexican armed forces. The Ninth Circuit held that the BIA's determination that the Mexican government was willing and able to control the persecutors was in error because it failed to consider significant evidence in the record that the Mexican government's efforts to control the persecutor had been

[117] Gutierrez-Vidal v. Holder, 709 F.3d 728, 732-733 (8th Cir. 2013) (citations omitted); see also Hor v. Gonzales, 400 F.3d 482, 485 (7th Cir. 2005) (holding that the state must provide "protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct").

[118] Khan v. Holder, 727 F.3d 1, 7 (1st Cir. 2013).

[119] See N.L.A. v. Holder, 744 F.3d 425, 441-442 (7th Cir. 2014) (holding that the BIA erred in relying solely on country conditions reports indicating that some parts of the Colombian government have recently engaged in efforts to control the FARC and ignoring applicants' testimony that the police were not willing to help them in their particular situation).

[120] Khan, 727 F.3d at 7.

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> unsuccessful; instead, it had focused solely on the government's willingness.[121]

A government in the midst of a civil war, or one that is unable to exercise its authority over portions of the country may be unable to control the persecutor in areas of the country where its influence does not extend.[122] An evaluation of how people similarly situated to the applicant are treated, even in portions of the country where the government does exercise its authority, is relevant to the determination of whether the government is unable to control the entity that persecuted the applicant.

In order to establish that he or she is a refugee based on past persecution, the applicant is not required to demonstrate that the government was unable or unwilling to control the persecution on a nationwide basis.[123] The applicant may meet his or her burden with evidence that the government was unable or unwilling to control the persecution in the specific locale where the applicant was persecuted.

5 ELIGIBILITY BASED ON PAST PERSECUTION

5.1 In the Refugee Context: Past Persecution is Sufficient

Overseas, if an applicant for classification as a refugee credibly establishes that the harm he or she suffered in the past rose to the level of persecution, and that the harm was on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility for refugee status. However, officers must still elicit testimony on and assess whether or not an applicant has a well-founded fear of persecution on account of any of the five protected grounds.[124]

5.2 In the Asylum Context: Presumption of Well-Founded Fear

In the asylum context, if an applicant has established past persecution on account of a protected characteristic, the applicant is not required to separately establish that his or her fear of future persecution is well-founded.[125] It is presumed that the applicant's fear of future persecution, on the basis of the original claim, is well-founded, and the burden of proof shifts to USCIS to establish by a preponderance of the evidence that,

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[121] Madrigal v. Holder, 716 F.3d 499, 506-507 (9th Cir. 2013).

[122] Matter of H-, 21 I&N Dec. 337, 345 (BIA 1996).

[123] Mashiri v. Ashcroft, 383 F.3d 1121, 1122 (9th Cir. 2004).

[124] See RAD Refugee Application Assessment SOP. RAD requires assessment of both past persecution and well-founded fear for several reasons, including situations of split credibility, where the applicant is found not credible on past persecution, but demonstrates a credible, well-founded fear of future persecution. See RAIO Lesson Plan, Credibility.

[125] 8 C.F.R. § 208.13(b)(1); see Matter of A-T-, 24 I&N Dec. 617 (AG 2008)

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- due to a fundamental change in circumstances, the fear is no longer well-founded

  or

- the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.[126]

If USCIS does not meet this burden, the applicant's fear is well-founded. A well-founded fear of persecution on the basis of the original claim means fear of persecution on account of the protected characteristic on which the applicant was found to have suffered past persecution. If USCIS is able to rebut the presumption of well-founded fear, the applicant may still be granted asylum, in the exercise of discretion, based on severe past persecution, or other serious harm. For more information, see [ASM Supplement 1]

6 CONCLUSION

An applicant must meet all the elements of the refugee definition in order to establish eligibility for protection as a refugee or asylee. Unlike the international definition, the definition of refugee in the INA allows an applicant to establish eligibility by a showing of past persecution, without having to establish a well-founded fear of persecution in the future. In order to show past persecution the applicant must establish that he or she has suffered harm in the past that rises to the level of severity necessary to constitute persecution, that the harm was inflicted on account of a protected characteristic, and that the agent of harm was either a part of the government, or an entity that the government was unable or unwilling to control.

7 SUMMARY

7.1 Persecution

To establish persecution, an applicant must prove that the harm he or she experienced was inflicted by the government or an entity the government was unable or unwilling to control.

To establish persecution, the level and type of harm experienced by the applicant must be sufficiently serious to constitute persecution.

[126] For further information refer to RAIO Training module, Well-Founded Fear and Matter of A-T-, 24 I&N Dec. 617 (AG 2008).

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There is no single definition of persecution. Guidance may be found in precedent decisions, the UNHCR Handbook, and international human rights law. The determination of whether an act or acts constitute persecution must be decided on a case-by-case basis, taking into account all the circumstances of the case including the physical and psychological characteristics of the applicant.

Serious violations of core or fundamental human rights that are prohibited by customary international law almost always constitute persecution. Less severe human rights violations may also be considered persecution. Discrimination, harassment, and economic harm may be considered persecution, depending on the severity and duration of the harm. The harm may be psychological, such as the threat of imminent death, the threat of infliction of severe physical pain or suffering, or the threat that another person will imminently be subjected to death or severe physical pain or suffering.

Acts that in themselves do not amount to persecution may, when considered cumulatively, constitute persecution.

7.2 Eligibility Based on Past Persecution

In the overseas refugee context, an applicant is eligible for refugee status if he or she establishes past persecution on account of one of the five protected grounds. There is no requirement that the applicant have an on-going fear of future persecution. Also, if the past harm is found to have risen to the level of persecution, there is no additional requirement that the harm be particularly severe and compelling in order to grant status on past persecution alone.

In the asylum context, after an applicant has established eligibility through past persecution, you must still consider whether there is a well-founded fear. In this inquiry the burden of proof is on the government to show by a preponderance of the evidence that a well-founded fear no longer exists. If you can show that the applicant no longer has a well-founded fear, the application should be denied or referred as a matter of discretion unless the applicant can show that there are compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution, or that there is a reasonable possibility they would face other serious harm if returned.

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PRACTICAL EXERCISES

Practical Exercise # 1

- Title: Persecution Exercise
- Student Materials:

Fact Pattern:

You are the parent of a sixteen year old girl. She attends the local public high school and is a member of the marching band. She is also involved with several extra-curricular activities. She has a 3.8 grade point average and has already been accepted to several distinguished universities.

One activity that she participates in is a student club known as Students for Civic Responsibility, and she is one of the main organizers. Another is Students for Social Change, and she is the Secretary of this club. These clubs have been very active in holding information fairs on a wide range of issues, such as police violence, spouse abuse, corruption in local government, and environmental concerns. These clubs are regularly contributing articles and letters to the local paper, have their own websites, and produce their own monthly newsletters.

One winter day you returned home from work, and your daughter did not come home from band practice at the normal time that she usually arrives home. After a delay of about 40 minutes, you begin to call a few of her friends. They tell you that band practice was cancelled due to the band director's illness, and that there were no after-school activities. The last person you talk to tells you that he saw your daughter talking to some police officers at the parking lot of the school, but his bus pulled away before he could see what happened. You call the school, but at this late hour, there is no answer.

You then call the local police station to find out if there was some problem involving your daughter, and if they know where she is. The duty officer at the station tells you that he does not have any record of any incident involving your daughter, and that there was no incident at the school that day. When you explain that your daughter was last seen talking to police officers at the school, the duty officer tells you that he has no record of the police being at the school that day. You then request to make a missing persons report, but are advised that you must wait 48 hours after the disappearance before they will take a report.

You call all of the other area police departments, but you are told the same thing. You call every person that you can think of that might know of your daughter's

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whereabouts, explaining the situation, and asking them for more leads. All of your leads turn up dry.

It is now about 10:00 PM. You get in your car and begin driving throughout the neighborhood, starting with the high school, and working your way out. You drive until 2:00 AM, and then return home. No one is at home and there are no messages on your answering machine. You call out from work the next morning, and repeat the whole process. You finally get the police to accept a missing persons report early. You contact the local television news station and ask for help. They tell you to call them the next day, just in case she shows up.

On the third day you call out from work again and continue to look for your daughter. Once again, there is no luck.

The same on the fourth day. But on the fourth night you get a telephone call at 1:00 AM and you hear your daughter crying and begging you in a shaken voice to pick her up outside the Municipal Building. You speed to the building and find your daughter huddled in a phone booth. You make sure that she is not physically injured, and take her home.

After calming her, you are able to talk to her about what happened. She tells you that the police came to the school and stopped her when she came out of the school. Once they verified her identity, they told her that there was a family emergency, and that she must accompany them to the station. Once at the station, she was handcuffed without explanation, and taken by two men in dark suits to a car, and was driven to another building about an hour away. She was placed in a solitary cell. The men did not talk to her at all, despite her plea for an explanation. She was given two meals each day, and her cell had a sink and faucet with potable water. On the last night, she was taken from her cell, again without explanation, and dropped off in front of the municipal building. She saw the telephone booth and called home. She has no idea who the men were or why she was held for four days.

The next day you call the police and demand an explanation, but they tell you that they do not know what you are talking about. You call a reporter at the local television station and try to explain the situation, but the reporter tells you that, without more information, he cannot help you. In the meantime, your daughter refuses to leave the house, and is afraid to be alone.

Finally, one day you get an anonymous telephone call and the caller tells you that they know that your daughter was under the custody of the FBI. You call the nearest FBI office and demand an explanation. You are simply told that it is none of your business, and that if you persist, you might need several days in a cell.

Discussion:

1. Would you conclude that your daughter was a victim of persecution? If so,

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why? If not, why not?

Practical Exercise # 2

- Title: Matter of H- - Past Persecution
- Student Materials:

Fact Pattern:

The applicant is a native of Somalia and an undisputed member of the Darood clan and the Marehan subclan, an entity which is identifiable by kinship ties and vocal inflection or accent. For 21 years Somalia had been ruled by Mohammed Siad Barre, a member of the Marehan subclan, which constitutes less than 1 percent of the population of Somalia. In December of 1990, an uprising was instituted by members of the other clans, which ultimately caused Mohammed Siad Barre to relinquish his power and to flee the capital city of Mogadishu on January 21, 1991.

As a result of favoritism that had been shown to members of the Marehan subclan during the course of Mohammed Siad Barre's often brutal regime, the clans which rebelled against this regime sought to retaliate against those who had benefited from the regime. The applicant's father, a businessman who had greatly benefited from his membership in the Marehan subclan, was murdered at his place of business in Mogadishu on January 12, 1991, by members of the opposition United Somali Congress, composed mostly of members of the Hawiye clan. The applicant's family home, located in the Marehan section of the city, was targeted 2 days later by the same group. During the course of that attack, the applicant's brother was shot. He was later murdered at the hospital to which he had been brought for the treatment of his injury.

On January 13, 1991, 1 day after the attack on the applicant's home, he fled Mogadishu with his step-mother and younger siblings to a smaller town, Kismayu, which was a stronghold of the Darood clan. Approximately 1 month later, that town was attacked by the United Somali Congress. As a result, the applicant, who was not with his family at the time, was rounded up and detained without charges along with many other Darood clan members. During the course of his 5-day detention, the applicant was badly beaten on his head, back, and forearm with a rifle butt and a bayonet, resulting in scars to his body which remain to the present. A maternal uncle of the applicant, who was a member of the United Somali Congress, recognized him and assisted in his escape, driving him approximately 40 kilometers in the direction of Kenya.

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Discussion:

1. Is the applicant unwilling or unable to return to his/her country due to past harm or mistreatment? Yes ☐ No ☐

2. If no, go to Question 3. If yes, identify the perpetrator(s) of, and describe, harm or mistreatment.

Perpetrators:

3. Harm/Mistreatment:

4. Does the claimed harm or mistreatment rise to the level of persecution? If no, explain. Yes ☐ No ☐

Practical Exercise # 3

- Title: Applicant Testimony and Interview Notes – Past Persecution
- Student Materials:

Fact Pattern:

The Applicant testified that before fleeing his country, he resided with his son and his Russian wife in the Ukrainian city of Kharkiv. On February 12, 1992, he attended a political rally at which he gave a short speech promoting democracy and unification with Russia. Immediately after he finished his speech, someone grabbed him and began to beat him. He recognized the insignia on the clothing of his attacker as a symbol of "Rukh," a nationalistic, pro-Ukrainian independence movement. The Applicant required stitches on his lip and eyebrow from the beating. That evening, he discovered a leaflet from Rukh in his pocket, with the message "Kikes, get away from Ukraine." He testified that he began to receive similar anti-Semitic leaflets at home in his mailbox or slipped under the door. The record contains one of the leaflets he received in 1993.

In March 1992, a month after the attack at the rally, the Applicant's apartment was vandalized. The door had been broken down, furniture was ripped open, some of his possessions were stolen, others were smashed, and a half dozen leaflets from Rukh were left at the scene. The leaflets warned that "kikes" and "Moskali," a derogatory term for Russian nationals living in Ukraine, should leave Ukraine to the Ukrainians.

On January 3, 1993, the Applicant was attacked on his way home from work. He heard a voice saying, "Sasha, we've been waiting for you for quite some time." He

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was thrown to the ground and kicked. During the beating, the attackers repeatedly warned him to take his "Moskal" wife and "mixed" son out of Ukraine. He sustained a rib injury from the attack.

On July 3, 1993, the Applicant and his son were physically assaulted at a bus stop near their home by four men who were calling them derogatory names and making anti-Semitic remarks. The Applicant was pushed to the ground, and when his son tried to come to his aid, the assailants picked him up and dropped him on the pavement. The beating left bruises on the Applicant's torso, and his son sustained an injury to his right knee, which required surgery.

The Applicant also recounted the abuse his son endured at school on account of his Jewish background. In 1991, his class was required to read nationalist literature promulgated by Rukh. In December of that year, he was dragged into a corner by some classmates who made anti-Semitic comments and beat him. Also, in December 1993, he was cornered in the men's room by his classmates and forced to remove his pants to show that he had been circumcised. He did not return to school after this incident.

The Applicant testified that he reported the burglary as well as the January 1993 and July 1993 assaults to the police. He testified that the police promised to "take care of [it]" on each occasion, but that no action was ever taken.

Practical Exercise #4

- Title: Eligibility –Discussion of Discrimination or Harassment Persecution
- Student Materials:

Fact Pattern 2-a:

Applicant is a 50-year-old male native and citizen of Egypt who entered the United States in 1990, and was admitted as a visitor.

Applicant credibly testified that he is a Coptic Christian. Applicant was a successful accountant in Cairo and owned his own business. He was the only Christian business owner in a building with approximately 15 businesses. Because of Applicant's social standing, fundamentalist Muslims tried to force him to convert to Islam; they felt that it would be a great success if a successful businessman converted to Islam. Fundamentalist Muslim religious leaders visited Applicant several times at his office and to tell him how much he could benefit by becoming Muslim. Applicant expressed his Christian beliefs and asked the religious leaders to leave him alone. He accused them of being fanatics. The Muslim religious leaders

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then organized a Muslim boycott of Applicant's business. As a result, Applicant lost approximately 40% of his clientele. Other business owners in the building began to pray in front of Applicant's door making it difficult for clients to come and go. Whenever they encountered Applicant, the other business owners would degrade Applicant's religion. One day Applicant found that the sign for his business had been smashed. Applicant learned from a friend that the Muslims who smashed the sign arranged with the police to accuse Applicant of defaming Islam if he reported the incident. Therefore, Applicant was afraid to report the incident to the police. Applicant was also afraid to hang another sign identifying his business. Shortly after this, Applicant's car was vandalized.

Applicant used to attend Church regularly. However, because of the harassment he and other congregants experienced, Applicant began to attend church less frequently. Stones and feces were thrown at his church. Muslims standing outside would call out pejorative names and degrade the Christian religion. As a result, Applicant and his family no longer felt it was safe to go to church.

Because of the decrease in business, Applicant found it more difficult to support his family. He also worried about his children who were often taunted at school because of their religion. He feared the situation for Christians would only deteriorate. Therefore, he brought his family to the United States and applied for asylum.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution.

2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.

3. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-b:

Applicant is a 31-year-old female citizen of Belarus. Applicant credibly testified that she was often humiliated at school because of her Pentecostal religion. As an adult, Applicant continued to be harassed because of her religion. Applicant and her husband often held prayer meetings in their home. Their neighbors, who accused them of participating in a cult and practicing magic, would throw trash and waste in front of Applicant's door and would threaten to call the police, which they often did. When the police arrived, they would push people around and threaten to exile Applicant and her husband if they did not stop praying. On one occasion when a neighbor called the police in 1989, the police roughly pushed the congregants and destroyed some of Applicant's property. Applicant was eight months pregnant at

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the time. The police told the congregants that if they did not stop praying, they would be detained.

Applicant had difficulty finding and retaining employment. Her employers dismissed her after learning that the police were often summoned to her home because she held prayer meetings there.

Applicant received inadequate medical care when she was once hospitalized for removal of a tumor. One of the nurses knew Applicant was Pentecostal. She told the other nurses, who then neglected to care for Applicant. Applicant was often left waiting for long periods of time before nurses would respond to her calls for assistance to get to the bathroom, and several times Applicant was not brought meals when other patients were fed. Two times, nurses neglected to give her pain killers at the prescribed time.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment. Also consider the individual characteristics of Applicant (would it make a difference whether or not she were pregnant when pushed?)

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-c:

Applicant is a 28-year old male from Russia. Applicant credibility testified that he is Jewish, though he has never practiced his religion and does not believe in any one religion. Because he is Jewish, he experienced discrimination in Russia. For example, he was not admitted to a university and could not pursue his dream to study Russian literature. He was admitted to a technical school for machinery and technology, where he learned the trade of machinist. Applicant stated that he had difficulty obtaining employment as a machinist and eventually found work as a cashier. Applicant was never given any raises and was generally harassed at work. For example, his supervisor would tell him that he was not correctly doing his work, even though Applicant followed all the instructions his supervisor gave him. Applicant came to the United States to visit an aunt. He now wants to remain in the United States where he can pursue his life-long dream of studying Russian literature.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past

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amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment. Consider also individual characteristics of Applicant.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-d:

Applicant is a 25-year old citizen of Russia. When Applicant was in primary school, she was the only Jew in her class. The teacher often hit Applicant's hands with a wooden pointer without giving her a reason. She was too young to understand at the time, but she now believes she was treated this way because she is Jewish. None of the other children were treated the same way. Applicant's parents moved her to another school, where she had problems with other students. They made fun of her and taunted her, making pejorative nicknames out of her last names, because she is Jewish. Applicant was moved to a different school. Applicant had difficulties with her feet and received a note from a physician explaining that she should not participate in physical exercises and competition. Her teacher did not believe that she had problems with her feet and said the note was only an excuse from a Jewish doctor. Applicant was forced to participate in a physical competition and, as a result, was hospitalized for several months as doctors tried to heal her feet.

Applicant did not receive good grades at the university, even though she prepared better than other students. Because she did not receive good grades, Applicant was not entitled to a stipend. She believes she was given poor grades, because she is Jewish. Since she could not obtain a stipend, she was forced to attend night school so that she could earn money during the day. She was not able to pass one class, even though she prepared for it. The professor explained that she would not pass the Applicant, because Applicant is Jewish. In 1987, Applicant was expelled from school, because she complained about receiving a lower grade than a student who was not as prepared as she was. When the faculty later changed, Applicant was readmitted. As a result of these set-backs, it took Applicant seven years to graduate from university, even though the average time for completion was four years.

From 1986 to 1988, Applicant worked as an assistant teacher. She felt that other teachers isolated her and made it difficult for her to work with the children by speaking poorly to her in front of the children. Applicant told a teacher that her grandfather was on the ritual committee at the main Moscow synagogue. This exacerbated the poor treatment she had been receiving. Because Applicant felt she could not do her job in that atmosphere, she quit her job. She then worked as a teacher at a different school until she left Russia.

One evening as Applicant was returning home from a friend's house, she was stopped by three men. They pushed her and made pejorative comments such as

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"You Jews should get out of Russia." They spoke in general about Jews and also said, "Pamiat will show you," indicating that they were associated with the anti-Semitic group, Pamiat. A man walked near-by, and his presence frightened the three men. They ran away, leaving Applicant frightened, but unharmed.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-e:

Applicant is a 48-year old male citizen from Belarus. Applicant credibly testified that he was born and raised in Minsk, where he attended the Polytechnic Institute. After graduation, he was certified as an electrical engineer. Applicant interviewed for a position as an electrical engineer at the Enterprise of Refrigeration and was told to report to personnel to complete an application. At the personnel office, Applicant's internal passport was checked. He was then told that there was no position available. Applicant believes he was told this because his internal passport revealed that he is Jewish. Applicant took another job as an electrician and continued to work as an electrician for approximately twenty years until he came to the United States in 1991. Applicant's job required him to travel quite a bit. At one time, he was required to spend two months to the Gomel Region, where radiation from Chernobyl was still very high. When Applicant asked why he, as opposed to other employees, was sent to that region, he was told, "Go to Israel, there is no radiation there. You should be thankful that with your passport, you are able to keep this job."

Applicant's wife worked as an accountant. After Applicant's wife married Applicant, she stopped receiving the promotions she had been receiving every year prior to the marriage.

In the last three or four years that the Applicant lived in Minsk, his family received threatening letters in the mail box once or twice a month. The letters said, "Dirty Jews, go to Israel."

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into

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account severity and duration of discriminatory actions and/or harassment.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-f:

Applicant is a 38-year old male citizen of Romania. Applicant credibly testified that he is a woodcarver and had his own studio and business in Romania. In 1986, Applicant organized the people in his town to strike to protest the building of a chemical plant near the town. Applicant publicly spoke out against the government -- accusing the local politicians of corruption and failure to represent the people's interest. Applicant began receiving anonymous letters stating that if he did not stop speaking out against the government, his home and studio would be burned. Applicant's wife was fired from her government job. Undercover government agents began to watch Applicant and would go to his studio about two or three times a week. When the undercover agents went to Applicant's studio, they would linger inside, asking him questions about what he did and how much money he made, and would watch the people who entered his studio. Sometimes, the agents would remain at the studio all day, making it difficult for Applicant to work. Customers, who feared the agents, stopped coming to Applicant's studio. This continued for several months before Applicant left Romania.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.

2. What additional information could be elicited to better evaluate the claim?

Practical Exercise #5

- Title: Eligibility – Discussion of Past Persecution
- Student Materials:

Fact Pattern 3-a:

Applicant is a 40 year old female native and citizen of India. Applicant credibly testified that she is Muslim, but lived in a predominantly Hindu neighborhood. During Muslim-Hindu riots that erupted after the destruction of a mosque by

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fundamentalist Hindus, Applicant remained hidden in her bedroom, praying for protection of her son, who had been out in the street when the rioting erupted. The riots occurred during the month of Ramadan and Applicant was fasting, as prescribed by her religious beliefs. As Applicant prayed, a Hindu mob burst into the house and pulled Applicant out into the streets. They removed from Applicant's head the scarf that she wore over her head whenever in the company of men and began making obscene gestures at her. Several men then dragged a beaten teenager and threw him at her feet. She recognized the teenager as her son. The leader of the mob thrust a piece of cooked pork into Applicant's hand and ordered her to eat it. At first Applicant refused, because she was prohibited by her religious beliefs from eating pork and she was also prohibited from eating prior to sundown during the month of Ramadan. The leader struck Applicant's son with a bamboo stick, then threatened to beat her son even more if she did not eat the pork. Despite the religious prohibition, Applicant ate the pork to save her son from further abuse. Satisfied, the leader of the mob led the mob on to find their next victim.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 3-b:

Mr. Z is a citizen of Poland. From 1974 to February 1982, he worked as a manager of a livestock farm owned by the Polish government. At the end of 1981, he refused to sign an oath of loyalty to party officials. Soon after this refusal, the police arrested and interrogated Mr. Z three times. He was not physically mistreated on any of these occasions. In February of 1982, he was dismissed from his job. He was not given a reason. He then started his own business, a fox farm. He was again arrested in April of 1982 and interrogated about his association with Mr. M, a Solidarity member to whom he had loaned money. Although Mr. Z had loaned Mr. M money, he was not himself involved in the activities of Solidarity. Beginning in June of 1982 and continuing until December of 1984, the police would summon Mr. Z every two to three months and interrogate him over a period of three to five hours, primarily about his relationship to Mr. M, but also about his own activities. He was not physically harmed during any of these detentions. Mr. Z's final detention occurred in 1984, while he was in Warsaw selling fox furs. He was detained for 36 hours but released once the police determined that his papers were in order. Although the police spoke harshly to the applicant, he was not physically harmed during this detention. When Mr. Z returned home after this detention, he found that his apartment had been searched and some money and foxes confiscated. He left Poland shortly thereafter and entered the United States on a tourist visa.

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Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 3-c:

Applicant is a 42-year-old male native and citizen of Peru. Applicant credibly testified that he lived in the city of Lima, where he worked at a bank. He owned and his wife managed a small dairy farm outside the city. In early 1988, he attended a public rally for the Democratic Action (AD) party at the invitation of his uncle, a political activist. At the rally, Applicant was challenged by a police officer who demanded his identification and questioned him about his supposed membership in Sendero Luminoso (SL). Applicant denied membership in SL. Applicant's wife testified that her husband may have been questioned because his uncle has a history of political activism for the opposition AD party and had often been harassed by the police.

In the weeks following the rally, Applicant was questioned repeatedly at his home and work by police officers concerning his supposed affiliation with SL. On three occasions he was taken from home by the police for further interrogation at the police station. The interrogation sessions at the police station lasted from 3 to 5 hours. During these interrogations, Applicant was initially pressured by slaps in the face with a wet cloth, and then the abuse progressed to blows with closed fists. At the bank where Applicant worked, police officers periodically appeared and kept watch on him while he worked, causing consternation among his co-workers and his supervisor. Applicant insisted that he had no relation to SL and the police were unable to come up with any evidence to link him to the terrorist group.

On May 15, 1988, two men attempted to abduct Applicant’s son as he was leaving school. They were deterred by alarms which Applicant’s wife and other parents raised. Applicant’s wife believes the abductors were policemen. This incident caused Applicant to take precautionary measures. He sent his wife and son to live with his grandparents in another city and began planning the family's departure from Peru.

Applicant testified further that the employees of his dairy farm learned that he was under suspicion as an SL member. Some of the employees were SL members or sympathizers. They took advantage of the situation to invite him to join SL. He said he wanted nothing to do with the SL because he opposed their Communist ideology. Shortly after his departure from Peru in September of 1988, Applicant's dairy was burned by a mob shouting "Long Live Sendero Luminoso!"

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Discussion

1. Does the harm Applicant suffered from the police amount to persecution?
2. Does the harm Applicant suffered from the SL amount to persecution? Discuss which rights have been violated and the degree of harm Applicant suffered from each event and cumulatively.
3. What additional information could be elicited to better evaluate the claim?

Practical Exercise #6

- Title: Eligibility – Discussion of Persecution
- Student Materials:

Fact Pattern 4-a:

Vladimir is a 43-year old native of Lviv, Ukraine, where he owns a small bookstore. He started the bookstore because no one would hire him for employment because his father is ethnic Turkmen. Vladimir's name and distinct facial features make him stand out among Ukrainians and reveal his ethnicity.

Starting five years ago, policemen came to his store demanding that he pay them approximately $100.00 monthly to make sure that "nothing would happen" to his store. Although the amount represented a severe hardship to him, he paid it because he was afraid what might happen if he did not.

Five months ago, the policemen told him that his mandatory monthly donation was increased to $500.00. He told them that he was barely able to pay $100.00. They warned him to consider the consequences. He had no money to pay the demanded amount. The policemen returned after one week, and severely beat him with sticks, and kicked him with their steel-toed boots. They left him alone, bleeding and unconscious in the back of his store. Luckily, he was found by an off-duty employee, who returned to the store having forgotten her keys.

Vladimir returned to the store after a month of recuperation. After he returned to work, he re-arranged the window display to feature a book critical about the Ukrainian role in the Nazi holocaust during World War II. The book had been discussed at the Orthodox Church he attends.

The following morning, before Vladimir opened the store, a large crowd gathered outside and chanted, "No more Jews." A few minutes later, several men in the crowd broke the storefront glass and destroyed all the books in the new display.

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They then proceeded to set the business on fire, which completely destroyed the building.

When Vladimir arrived, he was stunned by the chaotic scene. A policeman passing through the area observed the commotion and quickly came to the scene. When the policeman inquired as to the cause of the trouble, the people in the crowd told him that it was because of the displayed books. The policeman observed the activity for a few minutes and then hit Vladimir on the head several times with his nightstick. Vladimir lost consciousness. "That should do it," the policeman said before returning to his vehicle and driving away.

Vladimir was hospitalized for 2 days to recover from the beating. After he was released, he went to visit the site of his store, and he saw the store had been totally destroyed by fire. On its site was a huge sign, stating "Ukrainians yes, Jews no."

Discussion

1. Discuss whether the harm Vladimir experienced in the past amounts to past persecution.

2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory action and/or harassment.

3. What additional information could be elicited to better evaluate the claim?

Fact Pattern 4-b:

The applicant, Laurita Tong, is a 24-year old Chinese ethnic female native of Indonesia. She has lived her entire life in Jakarta. Three years ago, she completed her university studies with a bachelor's degree in Travel and Tourism. Her family owns a successful travel agency in Jakarta, where she works.

Laurita is Catholic by birth and attends church whenever she can – usually twice a month and on most holy days.

On April 14, 2004, she was walking to work when a native Indonesian man, who was sitting on the steps of his house, stared at her as she walked by. Each day thereafter, he stared at her as she walked to work. Laurita was convinced that he was giving her the "evil eye," and that horrible things would happen to her. The windows of his house were covered with pictures of Muslim religious leaders.

On May 2, 2004, a group of native Indonesians blew up the church that Laurita attends. These people often harassed the churchgoers on Sundays and told them that they would be cursed unless they converted to Islam. Laurita became afraid to attend church after that happened.

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On May 12, 2004, Indonesian natives raped Laurita's best friend, Melanie. The men told her that she should "go back to China."

On May 27, 2004, Laurita was leaving a shoe store when a native Indonesian man grabbed her roughly and yelled, "I hate you rich Chinese. Give me all your money, or I'll kill you now." Laurita handed over her purse, and the man ran away.

After these events, Laurita suffered from severe anxiety and depression. She was afraid to leave her house because she was worried what would happen to her. She did not leave her house until June 2, 2004, when she left Indonesia. Her father gave her an airplane ticket for Seattle, where she arrived the same day.

Discussion

1. Discuss whether the harm experienced by Laurita in the past amounts to persecution.

2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of each act.

Fact Pattern 4-c:

Applicant, Lin Xiang, is a 25-year old female native and citizen of China. For two years, she has worked as a bookkeeper at the Fujian Electronics Cooperative, a private business, which has received subsidies from the Chinese government. During the last three months, Lin and most of the other 314 workers have not received any pay because of unexpected financial shortages.

Lin became increasingly outraged. She wrote and printed a pamphlet explaining that the owners of the business had recently bought new homes, luxury vehicles, and even enjoyed vacations in Monte Carlo. She included a photo of one of the owner's homes in her pamphlet. Because of her position at the company, she had personal knowledge of the financial circumstances of the business.

Lin went out late one night in February to distribute the pamphlets into random mailboxes in several apartment buildings. She distributed the pamphlets in a similar manner each night for ten nights. On the tenth night, she was walking in a different neighborhood with about 75 pamphlets in her backpack when a policeman asked her what she was doing out on the street at 1:10 a.m. She replied that she came outside to walk because she could not sleep. He inquired as to what she carried in her backpack, and she told him she had documents from her work. He insisted on inspecting the documents, and after he did so, he angrily chastised her for lying and for disturbing the public social order. He then handcuffed her and brought her to the local Public Security Bureau.

Upon arrival at the Public Security Bureau, Lin was required to identify herself,

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and to explain what she had been doing. She explained that she had not been paid since December, and that she did not have enough food to feed her little girl. The police asked Lin who employed her and who put her up to distributing the pamphlets. Lin told the police that she does not get paid for her work and that everything she does is accomplished on her own.

The investigator angrily stated, "I don't believe you. I want you to examine yourself, and understand the damage you have done," he said. Then, he grabbed her and struck her on her back with an electric baton. She was released without conditions after 24 hours without further harm. However, as a result of the electric shock, she suffered a miscarriage in her third month of pregnancy.

After her release, she received notice that she was terminated from her employment. She sought other employment, but was unable to find any job because of her "bad record."

She became despondent, and realized that she could no longer live in China.

Discussion

1. Does the harm experienced by the applicant constitute persecution?
2. What facts support your conclusion?
3. What additional information, if any, would help evaluate this claim?

Practical Exercise #7

Alternative Exercise For Any of the PEs Above With Multiple Fact Patterns

- Title: House of Commons Debate
- Introduction

  The participants of the face-to-face session are challenged in the House of Commons debate to react to stimulating positions. A panel chairman facilitates the debate and a jury is responsible for the judgment concerning the content of the arguments. The nature of the positions and the role of the panel chairman guarantee a lively discussion, in which "pro's" and "con's" surface very quickly. Per round you need approximately 45 minutes.

- Output

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The output of the House of Commons debate is an overview of all possible arguments pro and con of the position. Because of the competitive element in the debate all participants are stimulated to actively contribute and take turns.

- Method

Preparation

The debate will be based on any of the fact patterns from the practical exercises above, seeking subject matter that will be stimulating, controversial and interesting for all participants. The group will be split into three teams and for each fact pattern used, one team will be assigned the role of supporter of the applicant's claim, one group will be assigned to oppose the applicant's claim, and the third group will act as a jury. This will not take more than 5 minutes.

Tasks

Every group prepares, in separate rooms, for the coming debate. In approximately 10 minutes, each group collects arguments for the defense of the group's stand in the debate. The participants prepare themselves both on the content of the arguments and on the presentation of the arguments.

Organization

The debate will be facilitated by a panel chairman. Next to this, there is the jury group, who will observe and judge the debate and the debaters.

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OTHER MATERIALS

There are no Other Materials for this module.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the lesson plan referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

RAD Supplement

Module Section Subheading

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the lesson plan referenced in the subheading of the supplement text box.

REQUIRED READING

1. 8 C.F.R. § 208.13(b)

ADDITIONAL RESOURCES

1. 1. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors and Deputy Directors, Change in Instruction Concerning One Year Filing Deadline and Past Persecution, (15 March 2001) (HQ/IAO 120/16.13).

2. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., Persecution of Family Members, (30 June 1997).

3. Memorandum from David A. Martin, INS Office of General Counsel, to Management Team, et al., Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (21 Oct. 1996) (HQCOU 120/11.33-P).

4. Memorandum from David A. Martin, INS Office of General Counsel, to Asylum Division, Legal Opinion: Palestinian Asylum Applicants, (27 Oct. 1995) (Genco Opinion 95-14).

5. Memorandum from David A. Martin, INS Office of General Counsel, to John Cummings, Acting Assistant Commissioner, CORAP, Legal Opinion: Application of the Lautenberg Amendment to Asylum Applications Under INA Section 208, (6 Oct. 1995) (Genco Opinion 95-17).

6. Memorandum from Rosemary Melville, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., Follow Up on Gender Guidelines Training, (7 July 1995) (208.9.9).

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7. Memorandum from Phyllis Coven, INS Office of International Affairs, to Asylum Officers and HQASM Coordinators, Considerations For Asylum Officers Adjudicating Asylum Claims From Women, (26 May 1995).

8. T. Alexander Aleinikoff. "The Meaning of 'Persecution' in United States Asylum Law," International Journal of Refugee Law 3, no. 1 (1991): 411-434.

9. UNHCR, Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (Aug. 2005).

SUPPLEMENTS

ASM Supplement – 1

Exercise of Discretion to Grant Based on Past Persecution, No Well-Founded Fear

If past persecution on account of a protected characteristic is established, then the applicant meets the statutory definition of refugee. Regulation and case law provide guidelines on the exercise of discretion to grant asylum to a refugee who has been persecuted in the past, but who no longer has a well-founded fear of persecution.[127]

- Granting Asylum in the Absence of a Well-Founded Fear

  Regulations direct that the adjudicator's discretion should be exercised to deny asylum to an applicant whose fear of future persecution is no longer well founded,[128] unless either of the following occurs:

  - "The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution."[129]
  - "The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country."[130]

- Severity of Past Persecution

  When evaluating when to exercise discretion to grant asylum based on past

[133] INA 101(a)(42)

[128] 8 C.F.R. § 208.13(b)(1)(iii)

[129] 8 C.F.R. § 208.13(b)(1)(iii)(A)

[130] 8 C.F.R. § 208.13(b)(1)(iii)(B)

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persecution alone, the factors you should consider include:

- duration of persecution
- intensity of persecution
- age at the time of persecution
- persecution of family members
- conditions under which persecution was inflicted
- whether it would be unduly frightening or painful for the applicant to return to the country of persecution
- whether there are continuing health or psychological problems or other negative repercussions stemming from the harm inflicted
- any other relevant factor

- BIA Precedent Decisions

Several BIA decisions provide guidance on the circumstances in which persecution has been so severe as to provide compelling reasons to grant asylum in the absence of a well-founded fear.

Matter of Chen

In Matter of Chen, the BIA held that discretion should be exercised to grant asylum to an applicant for whom there was little likelihood of future persecution. The applicant in that case related a long history of persecution suffered by both himself and his family during the Cultural Revolution in China. As a young boy (beginning when he was eight years old) the applicant was held under house arrest for six months and deprived of an opportunity to go to school and later abused by teachers and classmates in school. The applicant was forced to endure two years of re-education, during which time he was physically abused, resulting in hearing loss, anxiety, and suicidal inclinations. In finding that the applicant was eligible for asylum based on the past persecution alone, the BIA considered the fact that the applicant no longer had family in China and that though there was no longer an objective fear of persecution, the applicant subjectively feared future harm.[131]

Matter of Chen is a leading administrative opinion on asylum eligibility based on past persecution alone; however, the case does not establish a threshold of severity of harm required for a discretionary grant of asylum. In other words, the harm does not have to reach the severity of the harm in Matter of Chen for asylum to be granted based on past persecution alone. However, if the harm described is comparable to the harm suffered by Chen, an exercise of discretion to grant asylum

[131] Matter of Chen, 20 I&N Dec. 16 (BIA 1989).

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may be warranted.

Matter of H-

In Matter of H-, the BIA did not decide the issue of whether the applicant should be granted asylum in the absence of a well-founded fear, but remanded the case to the IJ to decide whether a grant of asylum was warranted. The BIA held that "[c]entral to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past."[132]

Matter of B-

In Matter of B-, the BIA found that an Afghani who had suffered persecution under the previous Communist regime was no longer at reasonable risk of persecution. Nevertheless, the BIA held that discretion should be exercised to grant asylum based on the severity of the persecution the applicant had suffered in the past – a 13- month detention, during which time the applicant endured frequent physical (sleep deprivation, beatings, electric shocks) and mental (not knowing the fate of his father who was also detained and separation from his family) torture, inadequate diet and medical care, and integration with the criminal population – and the on-going civil strife in Afghanistan at the time of decision.[133]

Matter of N-M-A-

In Matter of N-M-A- the BIA found that a grant of asylum in the absence of a well-founded fear was not warranted where the applicant's father was kidnapped, the applicant's home was searched twice, and the applicant was detained for one month (during which time he was beaten periodically and deprived of food for three days). In reaching that conclusion, the BIA noted that the harm was not of a great degree, suffered over a great period of time, and did not result in severe psychological trauma such that a grant in the absence of a well-founded fear was warranted.[134]

Matter or S-A-K- and H-A-H-

In Matter of S-A-K- and H-A-H-, the BIA held that discretion should be exercised to grant asylum to a mother and daughter who had been involuntarily subjected to FGM based on the severity of the persecution they suffered. Some of the factors the Board considered in finding that the persecution was severe were: the applicant's daughter was subjected to FGM at an early age and was not anesthetized for the procedure; the mother nearly died from an infection she developed after the procedure; both mother and daughter had to have their vaginal opening reopened

[132] Matter of H-, 21 I&N Dec. 337, 347 (BIA 1996).

[133] Matter of B-, 21 I&N Dec. 66 (BIA 1995).

[134] Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998).

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later on in their lives, in the case of the mother about five times; mother and daughter continued to experience medical problems related to the procedure (e.g., the mother experienced great pain and the daughter had difficulty urinating and cannot menstruate); and the mother was beaten because she opposed having her daughters subjected to FGM.[135]

- Federal Court Decisions

  A comparison of the decisions above with the federal cases below will help you understand the application of this standard.

  Eighth Circuit – Reyes-Morales v. Gonzales

  The court upheld the BIA's the denial of asylum finding that the applicant did not establish that the past persecution he suffered was sufficiently serious to warrant a discretionary grant of asylum in the absence of a well-founded fear.[136] In this case, members of the Salvadoran military beat the applicant to unconsciousness, resulting in a physical deformity and several scars.[137] The applicant's friend was killed during the same incident. On review, a federal court cannot disturb a discretionary ruling by the BIA unless it is arbitrary or capricious.

  Third Circuit – Lukwago v. Ashcroft

  The court held that although forcible conscription of a child by a guerrilla group may constitute persecution, it was not on account of a protected ground. The severity of past harm cannot provide the basis for a grant of asylum in the absence of a well-founded fear if the applicant has not established that the harm was inflicted on account of a protected ground.[138]

- "Other Serious Harm"

  Even where the past persecution suffered by an applicant does not rise to the higher level of severe persecution, a grant in the absence of a well-founded fear may be justified where there is a reasonable possibility that an applicant who suffered past persecution may face other serious harm upon return.[139]

[135] Matter of S-A-K- and H-A-H-, 24 I&N Dec. 464 (BIA 2008).

[136] For additional federal cases, see Lal v. INS, 255 F.3d 998, 1009–10, as amended by Lal v. INS, 268 F.3d 1148 (9th Cir. 2001); and Vongsakdy v. INS, 171 F.3d 1203, 1206–07 (9th Cir. 1999).

[137] Reyes-Morales v. Gonzales, 435 F.3d 937, 942 (8th Cir. 2006).

[138] Lukwago v. Ashcroft, 329 F.3d 157, 173-74 (3d Cir. 2003).

[139] 8 C.F.R. 208.13(b)(1)(iii)(B)

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By "other serious harm," the Department means harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but that is so serious that it equals the severity of persecution.[140]

In considering whether there is a reasonable possibility of other serious harm, you should focus on current conditions that could severely affect the applicant, such as civil strife and extreme economic deprivation, as well as on the potential for new physical or psychological harm that the applicant might suffer.[141] Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as "other serious harm."

Two federal courts that have considered this regulation have noted that the following circumstances might qualify as "other serious harm:"

- harm resulting from the unavailability of necessary medical care[142]
- debilitation and homelessness due to unavailability of specific medications[143]

In Matter of T-Z- the BIA found that to rise to the level of persecution and, thus, be considered "serious" economic disadvantage, the harm must be not just substantial but "severe," and deliberately imposed.[144] When analyzing whether economic disadvantage constitutes "other serious harm," you need to determine if the harm is "serious." In making that determination, you need to focus your analysis on whether the economic disadvantage feared is "severe" as required by Matter of T-Z, but you do not need to find that the economic harm will be deliberately imposed. The deliberate imposition requirement of Matter of T-Z- is not required in the context of analyzing "other serious harm" because in that context the harm feared does not necessarily have to be volitionally imposed by a persecutor on account of a protected characteristic but can be the result as well from non-volitional situations and events such as, for example, natural disasters.

- Additional Humanitarian Factors

To the extent that the revised regulations changed the parameters governing the exercise of discretion to grant asylum in the absence of a well-founded fear, the current regulations supersede discussions of discretion contained in precedent decisions rendered prior to December 6, 2000.

For example, in Matter of H-, the BIA indicated that on remand the Immigration

[140] 65 FR 76121 at 76127; Matter of L-S-, 25 I&N Dec. 705, 714 (BIA 2012).

[141] Matter of L-S-, 25 I. & N. Dec. 705 (BIA 2012).

[142] PIlumi v. Att'y Gen. of U.S., 642 F.3d 155, 162 (3d Cir. 2011).

[143] Kholyavskiy v. Mukasey, 540 F.3d 555, 577 (7th Cir. 2008).

[144] For additional information, see section on Economic Harm.

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Judge could consider humanitarian factors independent of the applicant's past persecution, such as age, health, or family ties, when exercising discretion to grant asylum.[145] However, in the supplemental information to the final rule, the Department of Justice specifically stated that it did not intend for adjudicators to consider additional humanitarian factors unrelated to the severity of past persecution or other serious harm in exercising discretion to grant asylum in the absence of a well-founded fear.[146] Thus, under the current rules, humanitarian factors such as those that the BIA referenced in Matter of H- are considered in the exercise of discretion analysis only if they have a connection to either the severity of past persecution or to other serious harm that the applicant may suffer.

[145] Matter of H, 21 I&N Dec. 337, 347 (BIA 1996).

[146] 65 FR 76121 at 76127.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the lesson plan referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

IO Supplement

Module Section Subheading

AMERICAN OVERSIGHT
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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

ANALYZING THE PERSECUTOR BAR

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

ANALYZING THE PERSECUTOR BAR

Training Module

MODULE DESCRIPTION

This module addresses the legal analysis of claims where a refugee or asylum applicant may have been involved in the persecution of others as well as related interviewing considerations.

TERMINAL PERFORMANCE OBJECTIVE(S)

During an interview, you (the officer) will be able to elicit all relevant information to correctly determine when an applicant, who is otherwise a refugee, is ineligible for a grant of asylum or refugee status because he or she was involved in the persecution of others on account of a protected ground.

ENABLING PERFORMANCE OBJECTIVES

1. Summarize recent developments in U.S. law regarding the persecutor bar.
2. Explain the standard of proof applicable in the persecutor bar analysis.
3. Explain the factors to consider when determining whether or not an applicant may have ordered or incited an identifiable persecutory act on account of a protected ground.
4. Explain the factors to consider when determining whether or not an applicant may have assisted or otherwise participated in the persecution of another on account of a protected ground.
5. Describe indicators ("red flags") that an individual may have been involved in the persecution of others.

INSTRUCTIONAL METHODS

- Interactive presentation

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- Practical exercise
- Demonstration

METHOD(S) OF EVALUATION

Observed Practical Exercise and Written test

REQUIRED READING

1. Negusie v. Holder, 555 U.S. 511 (2009);
2. Matter of A-H-, 23 I&N Dec. 774 (AG 2005);
3. Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988);

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. Matter of D-R-, 25 I&N Dec. 445 (BIA 2011);
2. Matter of Vides Casanova, 26 I&N Dec. 494 (BIA 2015).

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR23	Knowledge of bars to immigration benefits (4)
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR4	Knowledge of the relevant sections of 8 Code of Federal Regulations (CFR) (4)
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
RI1	Skill and identifying issues of a claim (4)
RI2	Skill in identifying the information required to establish eligibility (4)
RI3	Skill and conducting research (e.g., legal, background, country conditions) (4)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
4/14/15	Throughout document	Minor formatting edits; fixed broken links; a few recent cases added	RAIO Trng

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

The term "refugee" in the Immigration and Nationality Act (INA) "does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[1] The INA also specifically bars the Attorney General from granting asylum to such a person.[2] The persecutor bar may apply to government actors as well as private individuals.[3]

There are a number of human rights-related inadmissibility grounds that may arise for Nazi persecutors, genocidaires, torturers, and foreign government officials who have committed particularly severe violations of religious freedom and seek refugee status through overseas processing. [RAD Supplement – Grounds of Inadmissibility] While there may be instances when acts which implicate the persecutor bar also trigger a human rights-related inadmissibility ground, this module is focused exclusively on the persecutor bar. The human rights-related grounds of inadmissibility are discussed in the RAIO Training module, Overview of Inadmissibility Grounds, Mandatory Bars, and Waivers and in the RAD and IO division-specific courses.

[1] INA § 101(a)(42).

[2] INA § 208(b)(2)(A)(i). This bar also applies to: cancellation of removal, INA § 240A(e)(5); withholding of removal, INA § 241(b)(3)(B)(i); temporary protected status (TPS), INA § 244(c)(2)(B)(ii); adjustment of status of certain entrants before January 1, 1982 (legalization) (applicant must establish that he or she has "not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion), INA § 245A(a)(4)(C); naturalization of persons who have made extraordinary contributions to national security, INA § 316(f)(1); special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105-100, § 203, 111 Stat. 2160 (1997), 8 C.F.R. § 240.66(a); and withholding of removal under the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT), 8 C.F.R. § 208.16(d)(2).

[3] Matter of McMullen, 19 I&N Dec. 90, 96 (1984).

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The statutory exclusion of persecutors from the refugee definition means that even if an applicant has been persecuted in the past, or has a well-founded fear of future persecution on account of one of the protected grounds, he or she does not meet the definition of a refugee under the INA if the persecutor bar applies.

Other statutes and provisions in the INA contain or have contained language relating to persecutors (e.g., the Displaced Persons Act [DPA][4] and the Holtzman amendment[5]). In this module, unless otherwise specified, reference to the "persecutor bar" refers exclusively to the language in the refugee definition in INA § 101(a)(42).

This module addresses individuals who may be barred from refugee or asylum status as "persecutors." This term is used to describe those individuals who have ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five protected grounds. In other settings, references may be made to the broader category of "human rights abusers" or "human rights violators." While persecutors may be included in that group, it is important to keep in mind that the term "persecutor" is a specific term of art in refugee and asylum adjudications, unlike general terms such as "human rights abuser" and "human rights violator."

This module:

- Lays out the elements of the law about which you must elicit testimony during the course of your interview
- Provides an analytical framework to help you analyze the persecutor bar issue
- Provides a list of possible indicators ("red flags") to help alert you when you must explore the persecutor bar issue
- Explains how credibility may play a part in your determinations

1.1 Burden of Proof and Duty to Elicit

The burden is on the applicant to establish eligibility.[6] Asylum and refugee applicants are not expected to understand the complexities of U.S. asylum law and may not realize that they are subject to the persecutor bar, especially if they did not directly commit the act(s)

[4] The Displaced Persons Act of 1948, Pub.L. No. 80-774, 62 Stat. 1009 (1948), as amended by Pub.L. No. 81-555, 64 Stat. 219 (1950).

[5] INA § 212(a)(3)(E); see also INA § 237(a)(4)(D).

[6] 8 C.F.R. § 208.13(a); Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1992) ("UNHCR Handbook"), ¶ 196.

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of persecution.[7] Accordingly, although the applicant has the burden of proving eligibility, you have an equal duty in a non-adversarial interview to elicit detailed testimony from the applicant.[8] If you believe that the persecutor bar may apply, you must question the applicant about his or her possible involvement in persecutory acts. If the applicant denies involvement, you must then determine the credibility of that denial.

For additional information regarding credibility determinations, see section below: Credibility and the Persecutor Bar, and RAIO Training modules, Evidence and Credibility, and ASM Supplement – Burden Shifting

1.2 Standard of Proof

An applicant must establish that he or she is not subject to the persecutor bar by a preponderance of the evidence. When using the preponderance of the evidence standard, it is important to focus on the quality of the evidence, not the quantity.[9] Remember that assessing the quality of testimonial evidence means determining whether or not it is credible. See section below: Credibility and the Persecutor Bar.

1.3 The Rationale behind the Bar

The rationale for the persecutor bar is derived from the general principle in the 1951 Convention relating to the Status of Refugees that even if someone meets the definition of a refugee, i.e., has a well-founded fear of persecution on account of a protected ground, he or she may nonetheless be considered to be undeserving or unworthy of refugee status.[10]

The BIA has recognized that the exclusion from the refugee definition in INA § 101(a)(42) of those who were involved in the persecution of others is consistent with the principles of the 1951 Convention.

> This exclusion from refugee status under the Act represents the view that those who have participated in the persecution of others may be unworthy or undeserving of international protection. The prohibited conduct is deemed so repugnant to civilized society and the community of nations that its justification will not be heard.[11]

---

[7] See Jacinto v. INS, 208 F.3d 725, 733-734 (9th Cir. 2000) ("Applicants for asylum often appear without counsel and may not possess the legal knowledge to fully appreciate which facts are relevant…[adjudicators] are obligated to fully develop the record in [such] circumstances…").

[8] 8 C.F.R. § 208.9(b); UNHCR Handbook, ¶¶ 196, 205(b)(i).

[9] For further information on the preponderance of the evidence standard, see RAIO Training Module Evidence Assessment.

[10] United Nations Convention Relating to the Status of Refugees, art. 9F, July 28, 1951, 189 U.N.T.S. 150.

[11] McMullen, 19 I&N Dec. at 97.

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2 ANALYTICAL FRAMEWORK

If at any time during your adjudication the persecutor bar issue arises, you will need to develop additional lines of questioning and ask follow-up questions until the record reflects that the applicant is either subject to or not subject to the bar. Often this will involve a credibility determination. You must conduct a particularized evaluation and examine all relevant facts in determining whether the persecutor bar applies.[12]

The INA does not define the terms listed in the persecutor bar: "order," "incite," "assist," or "otherwise participate in." Nor have the courts developed a uniform, bright-line test to apply when the persecutor bar is an issue. However, the following analytical framework, derived from existing case law, can assist you in analyzing whether the persecutor bar applies. This analytical framework is explored in greater detail below.

Step One: Determine if there is Evidence of the Applicant's Involvement in an Act that May Rise to the Level of Persecution

- Look for red flags in the evidence to alert you that the persecutor bar may be at issue.
- Evidence may include:
  - the applicant's testimony during the interview;
  - information in the applicant's file indicating his or her involvement with an entity known for committing human rights abuses; and
  - country of origin information (COI)
- If a red flag is present, examine whether there is further evidence of a specific act or acts that may rise to the level of persecution.
- Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.

Step Two: Analyze the Harm Inflicted on Others

- Did the harm rise to the level of persecution?
- Was there a nexus to a protected ground?
- Was the act a legitimate act of war or law enforcement?

Step Three: Analyze the Applicant's Level of Involvement

[12] Vukmirovic v. Ashcroft, 362 F. 3d 1247, 1252 (9th Cir. 2004); Miranda Alvarado v. Gonzales, 449 F.3d 915, 926-27 (9th Cir. 2006); Hernandez v. Reno, 258 F.3d 806, 814 (8th Cir. 2001); see Matter of A-H-, 23 I&N Dec. 774, 784 (AG 2005), overruled on other grounds by Haddam v. Holder, 547 F. App'x 306 (4th Cir. Dec. 4, 2013) ("It is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies.").

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- Did the applicant order, incite, assist, or otherwise participate in the persecutory act(s)?
- Did the applicant know that the persecution was occurring?
- Did the applicant act under duress?

Fully explore this issue for the record and follow Division-specific guidance. Following the analytical framework above will help you avoid using faulty logic that is demonstrated in the following statements:

- "Bad Place + Bad Time = Bad Person"
- "I Know It When I See It"

These statements are not legal standards and should not be the basis of analysis in any decisions relating to the persecutor bar.

2.1 Step One: Determine if there is Evidence of the Applicant's Involvement in an Act that May Rise to the Level of Persecution

When there is an indication that the persecutor bar may be applicable, you must explore the issue thoroughly. Whether it emerges through the applicant's testimony, evidence in the file, or country of origin information (COI), a "red flag" will indicate that you must ask follow-up questions to determine if there is evidence of an act that may rise to the level of persecution. A red flag does not mean that the applicant will be automatically barred from asylum or refugee status. Once you have identified a red flag, you must ask follow-up questions to determine if there is evidence of an act that may rise to the level of persecution.

As noted, evidence may include:

- the applicant's testimony during the interview;
- information in the applicant's file indicating that the applicant may have been involved with an entity known for committing human rights abuses;
- country of origin information

Potential Red Flags

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Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.[13] However, belonging to an organization that engaged in the persecution of others is a "red flag," and you must carefully question the applicant regarding his or her duties or activities within the organization to ascertain whether the applicant was involved in any specific acts that may rise to the level of persecution. The following is a non-exhaustive list of possible red flags or indicators that will alert you to explore the applicant's actions further during your interview.

- Involvement with Agents of Persecution and Positions of Leadership in an Organization or Entity Known for Persecuting Others

Both testimony of the applicants and country of origin research may alert you to acts of persecution committed by organizations or entities known for persecuting others. When an applicant indicates that he or she worked for a government known to have committed human rights abuses, elicit details from the applicant about his position and activities within the government. Furthermore, holding a leadership position in an organization or entity known to have persecuted others during a time when such abuses have been documented is a significant red flag. Elicit testimony regarding the applicant's role(s) and responsibilities, and explore through questioning whether the applicant had any connections with acts that may rise to the level of persecution.

Relevant Questions

- What was the applicant's role(s) and position(s)?
- Did the applicant supervise anyone?
- To whom did the applicant report?
- What functions did the applicant's unit(s) or division(s) perform within the organization?
- What was that unit or division's relationship with other units or divisions who may have been involved in persecutory acts?

See also suggested questions below regarding rank, duties, and structure of government or armed forces.

- Holding an Official Position within a Government or Other Similar Entity

You may be aware of country of origin information about branches of government at the national or local level that have been responsible for human rights abuses, e.g., the

[13] See Matter of Rodriguez-Majano, 19 I&N Dec. 811, 814-15 (BIA 1988); Vukmirovic v. Ashcroft, 362 F.3d at 1252; Hernandez v. Reno, 258 F.3d at 814 (8th Cir. 2001); Xu Sheng Gao v. U.S. Att'y Gen., 500 F.3d 93, 99 (2d Cir. 2007) (mere association "with an enterprise that engages in persecution is insufficient" on its own to trigger the persecutor bar).

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Ministry of Information in Iraq under Saddam Hussein, the civil patrol in Guatemala during the civil war, or the head of a neighborhood committee in China during the Cultural Revolution. Closely examine the activities of an applicant who is associated with a government or branch of government that is known to have committed human rights abuses.

Relevant Questions

- When did the applicant work for that branch of government?
- Why did the applicant work for the government?
- What were the applicant's duties and responsibilities?
- What rank, if any, did the applicant hold? If so, when?

- Membership in an Ethnic or Religious Group Involved in Ethnic Fighting

Where ethnic or religious violence has erupted, in some situations both sides in a conflict may have committed abuses. When interviewing an individual who claims to be a victim of ethnic violence during a civil war, elicit information regarding the applicant's activities during that time period, especially during times when human rights abuses committed by the applicant's group have been documented. Examples: the Bosnian war, the Rwandan genocide, and the Syrian civil war.

- The Military, Police, and Other Security Forces

Where country conditions indicate that the military, paramilitary, police, or other security forces have committed human rights violations against civilians, or members of their own organization (e.g., a whistleblower), elicit detailed testimony about the applicant's duties if he or she was a member of the military, police, or other security forces. Additionally, researching the structure of the military, paramilitary, policy or security forces in the applicant's country of nationality and eliciting background information from the applicant will be helpful in examining whether the persecutor bar may be at issue. Understanding the nature of the applicant's rank and position in the armed forces will help you to develop further lines of questioning into the applicant's activities.

Relevant Questions

- In what branch of the police, military, or security forces did the applicant serve?
- How were the branches organized?
- Were the security forces divided into military and police forces? If, so, what kinds of functions did each perform?
- Were there paramilitary units?

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- Within the branch in which the applicant served, in what specific unit or company did the applicant serve?
- Where did the applicant serve and when?
- Did the applicant serve in the field or at a desk job?
- If it was the military branch, did the applicant serve during a time of war? If so, was the applicant in a combat unit or a support unit?
- What was the applicant's position?
- How long did the applicant serve in the security forces?
- What specifically were his or her duties?
- What types of orders were carried out by the individual/unit/entity and who issued the orders?
- Were there ever any orders that the individual/unit/entity refused to carry out? If so, what were those orders and why were they not carried out?

- Military Service Requirement

Some countries require that all individuals or all males over a certain age serve in the armed forces for a set period of time. Research the service requirement of the applicant's country of nationality to alert you to the fact that the applicant may have served in the military. Explore the applicant's service or non-performance of service during the interview.

Relevant Questions

When an applicant has not listed military experience on his application, determine whether the country of the applicant's nationality had a mandatory service requirement at the time that the applicant was of service age. If there was such a requirement, ask why did the applicant not serve? Did he get an exemption? How? Did anyone assist him? How was he assisted? What kind of an exemption did he get, medical, educational, or otherwise? Did he pay a bribe? Did he have documentation that he needed to present to show an exemption? What kind of documentation? Where is that documentation?

2.2 Step Two: Analyze the Harm Inflicted on Others

2.2.1 Did the Harm Rise to the Level of Persecution?

In order to be subject to the persecutor bar, an applicant must have ordered, incited, assisted, or otherwise participated in conduct that rises to the level of persecution. Once

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you have identified an act, you must then determine whether the harm inflicted rises to the level of persecution.

Persecution has been defined as a threat to the life or freedom of another or the infliction of suffering or harm upon another.[14] Harm can be psychological as well as physical, and can include threats and serious economic harm.[15] If there is evidence of an act, but the harm did not rise to the level of persecution, the applicant is not subject to the bar. For additional guidance on what constitutes persecution, see RAIO Training module, Definition of Persecution and Eligibility Based on Past Persecution.

In the majority of cases where the persecutor bar arises, the evidence will implicate an act or acts that constituted harm that the victim(s) experienced as persecution, such as killing; torture or other cruel, inhumane, or degrading treatment; slavery; and rape or other severe forms of sexual violence. However, in certain instances, you may need to independently assess whether the victim would experience the act or acts in question as serious harm.

Relevant Questions

Elicit detailed testimony about:

- the type of harm that was inflicted
- the severity of the harm
- the effect the act(s) had on the victim(s) or others
- the reason or motivation behind why individual(s) were harmed

2.2.2 Was There a Nexus to a Protected Ground?

To find that the persecutor bar may apply, the persecutory act in question must be "on account of" at least one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.[16] However, it is not necessary that the applicant had a punitive or malignant intent, nor that the applicant shared the same persecutory motive as the person or entity that committed or orchestrated the persecution.[17]

Examples

[14] Matter of Acosta, 19 I&N Dec. 211, 221-23 (BIA 1987).

[15] Matter of T-Z-, 24 I&N Dec. 163 (BIA 2007).

[16] INA § 101(a)(42); Elias-Zacarias v. INS, 502 U.S. 478 (1992).

[17] Matter of Fedorenko, 19 I&N Dec. at 69 (concentration camp guard assisted persecution even if not motivated by racial or religious prejudice); Singh v. Gonzales, 417 F. 3d 736, 740 (7th Cir. 2005); Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003); RAIO Training module, Nexus and the Protected Grounds.

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An individual, who was forcibly recruited into the Revolutionary United Front (RUF) of Sierra Leone and who had murdered a female villager and chopped off the limbs and heads of non-combatants, argued that because he did not share the RUF's intent to target political opponents, he did not engage in persecution on account of political opinion. The court found that the applicant's personal motivation was not relevant, and that the persecutor bar applied because the applicant "participated in persecution, and the persecution occurred because of an individual's political opinion."[18]

The head constable of a local police department participated in raids of homes of innocent Sikh families, helped arrest innocent Sikhs without cause, and transport Sikhs to the police station on orders from the police chief, where they were subsequently beaten. He testified that he was personally opposed to the persecution of innocent Sikhs, and only stayed with the police force due to his need for a steady income. The court found that even though the constable stated that he did not share the persecutory motive, he still assisted in or participated in persecution of others on account of a protected ground.[19]

Relevant Questions

Because the persecutor bar requires that the persecutory act or acts were committed on account of one of the five protected grounds, elicit detailed testimony to ascertain who the victims of the persecutory acts were. Why were they targeted? How were the victims identified? By whom?

For additional guidance on the requirement that there be a connection between the persecution and one of the five protected grounds, see the RAIO Training Module, Nexus and the Five Protected Grounds.

2.2.3 Was the Act a Legitimate Act of War or Law Enforcement?

Legitimate Acts of War

The fear of general civil strife or war, and incidental harm resulting from such violence, may not, by itself, establish eligibility for asylum or refugee status. Likewise, involvement in a civil war may not, by itself, trigger the persecutor bar. Such harm may not constitute persecution if it is not directed at the victim(s) on account of a protected ground.

For example, in open combat, acts of warfare taken in furtherance of political goals are not necessarily acts committed on account of a protected ground. The BIA has stated:

[18] Bah, 341 F.3d at 351.

[19] Singh, 417 F.3d at 740.

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> As the concept of what constitutes persecution expands, the group which is barred from seeking haven in this country also expands, so that eventually all resistance fighters would be excluded from relief. We do not believe Congress intended to restrict asylum and withholding only to those who had taken no part in armed conflict.[20]

Reference to international laws governing warfare may be useful in determining whether actions taken in the context of warfare constitute persecution or are "legitimate" acts of war.[21]

Examples

> An individual forced to assist guerrillas fighting in El Salvador did not participate in persecution on account of a protected ground when he covered guerrillas with weapons while they burned cars and drove supplies for battles, because this was considered a legitimate act of war.[22]

> The rape of Bosnian Muslim women by an ethnic Serb soldier in order to bring shame to the Bosnian Muslim community during the Bosnian War is not a legitimate act of war, and is in fact a crime of war, and would have the requisite nexus to a protected characteristic to subject an applicant to the persecutor bar.[23]

Likewise, true acts of self-defense do not have a nexus to a protected ground and would not subject an applicant to the persecutor bar.[24]

Example

> A Bosnian Serb fended off attacks of Croats who attacked his village. He did not participate in physical attacks against Croats other than in self-defense. The Ninth Circuit held that, given these facts, there was insufficient evidence to find that the applicant was motivated by the Croats' ethnicity or religion and remanded the case to the Immigration Judge for further evaluation.[25]

If you identify an act that rises to the level of persecution but there is no connection to one of the five protected grounds, the applicant is not subject to the bar.

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[20] Rodriguez-Majano, 19 I&N Dec. at 816.

[21] Rodriguez-Majano, 19 I&N Dec. at 816; see RAIO Training Module International Human Rights Law for examples of international instruments relevant to determining what would be considered a "legitimate" act of war.

[22] Rodríguez-Majano, 19 I&N Dec. at 815-16.

[23] See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.N.T.S. 135 (entered into force Oct. 21, 1950) (Geneva Convention III); RAIO Training Module Nexus and the Five Protected Grounds.

[24] Vukmirovic, 362 F. 3d at 1252-53 ("[h]olding that acts of true self-defense qualify as persecution would run afoul of the 'on account of' requirement in the provision.").

[25] Id. at 1253.

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Legitimate Acts of Law Enforcement

Likewise, legitimate acts of law enforcement have no nexus to a protected ground and would not subject the applicant to the persecutor bar. [26]All countries have the right to investigate, prosecute, and punish individuals for violations of legitimate laws.[27] Government actors may seek to legitimately penalize individuals for violations of criminal laws of general applicability. Conversely, government actors may use the guise of prosecutions to harm applicants on account of a protected ground.[28] Consider all the facts in the case, along with relevant country of origin information, in determining whether the applicant was involved in a legitimate act of law enforcement. For additional guidance on the difference between prosecution and persecution, see RAIO Training module, Nexus and the Protected Grounds.

2.3 Step Three: Analyze the Applicant's Level of Involvement

You must evaluate all of the facts in order to determine whether the applicant is subject to the persecutor bar.[29] It is appropriate to look at the totality of the relevant conduct to determine whether the bar applies.[30] The persecutor bar applies even if the individual did not personally commit the persecutory act(s), so long as he or she "ordered, incited, assisted, or otherwise participated in the persecution."[31] It is not necessary for the applicant to have specific knowledge of particular acts of persecution for the bar to apply so long as the applicant is aware that his or her actions resulted in persecution.[32] But while application of the persecutor bar does not require direct personal involvement in the acts of persecution,[33] mere membership in an entity or organization that commits acts of persecution is not enough to apply the bar.[34]

2.3.1 Did the Applicant Order Others to Commit a Persecutory Act?

[26] See Cruz-Samayoa v. Holder, 607 F.3d 1145, 1151-1154 (6th Cir. 2010).

[27] Matter of A-G-, 19 I&N Dec. 502, 506 (BIA 1987); UNHCR Handbook, para. 56; Dinu v. Ashcroft, 372 F.3d 1041 (9th Cir. 2004) (harassment resulting from an investigation does not give rise to an inference of political persecution where police are trying to find evidence of criminal activity and there is a logical reason for pursuit of the individual).

[28] A-G-, 19 I&N Dec. at 506; Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996); UNHCR Handbook, para. 57-59.

[29] Vukmirovic, 362 F. 3d at 1252; Miranda Alvarado, 449 F.3d at 926-27; Hernandez, 258 F.3d at 814.

[30] A-H-, 23 I&N Dec. at 784.

[31] INA § 101(a)(42)(B).

[32] Suzhen Meng v. Holder, 770 F.3d 1071, 1075-76 (2d Cir. 2014) (noting that when "the occurrence of the persecution is undisputed, and there is such evidence of culpable knowledge that the consequences of one's actions would assist in acts of persecution…the evidence need not show that the alleged persecutor had specific actual knowledge that his actions assisted in a particular act of persecution") (citations omitted).

[33] A-H-, 23 I&N Dec. at 784.

[34] Rodriguez-Majano, 19 I&N Dec. at 814-15; Vukmirovic, 362 F.3d at 1252; Hernandez, 258 F.3d at 814.

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If an applicant admits to you that he or she personally ordered others to commit atrocities or harm against others, he or she may be subject to the persecutor bar. As discussed above, the harm inflicted must rise to the level of persecution and must have been on account of one of the five protected grounds.

Neither the BIA nor any federal circuit courts have applied the persecutor bar for directly "ordering" the persecution of others. However, in cases involving acts committed during the Holocaust, where the Displaced Persons Act (DPA) applied, an applicant was found to have assisted in persecution where he ordered the persecution of others.

Example

A Latvian police chief ordered his men to arrest all the inhabitants of a village suspected of being a communist stronghold and to burn down the village. The village was subsequently burned, and all the villagers were shot and killed. The Second Circuit upheld the BIA's finding that "ordering" subordinates to arrest village inhabitants and burn the village to the ground constituted assistance in persecution.[35]

2.3.2 Did the Applicant Incite Others to Commit a Persecutory Act?

If an applicant admits to you that he or she incited others to harm people, he or she may be subject to the bar. Remember, the harm inflicted must rise to the level of persecution and must have been on account of one of the five protected grounds.

While neither the BIA nor any federal circuit courts has directly applied the persecutor bar under the term "incite" in the INA, some courts analyzed the term "incite" under the DPA. At least two courts found that involvement in the publication of anti-Semitic propaganda during the Holocaust constituted assistance in the persecution of others.[36]

The Attorney General has noted in discussion that "[t]o 'incite' means 'to move to a course of action: stir up: spur on: urge on' or 'to bring into being: induce to exist or occur.'"[37] The term "incite," along with the terms "assist" and "participate," "is broad enough to encompass aid and support provided by a political leader to those who carry out the goals of his group, including statements of incitement or encouragement and actions resulting in advancing the violent activities of the group."[38] Moreover, the terms

[35] Maikovskis v. INS, 773 F.2d 435, 446 (2d. Cir. 1985).

[36] U.S. v. Koreh, 59 F.3d 431, 440 (3d. Cir. 1995) (editor of an anti-Semitic publication in Hungary was found to have assisted in the persecution of Hungarian Jews under the DPA by fostering a climate of anti-Semitism); U.S. v. Sokolov, 814 F. 2d 864, 874 (2d Cir. 1987) (German army propagandist assisted in persecution "by creating a climate of opinion where persecution is acceptable").

[37] A-H-, 23 I&N Dec. at 784, citing Webster's Third New International Dictionary of the English Language Unabridged 1142 (2002). Matter of A-H- remains good law for the general propositions as to the meaning of the words "incite," "assist," and "participate".

[38] A-H-, 23 I&N Dec. at 784.

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"are to be given broad application" and "do not require direct personal involvement in the acts of persecution."[39] Finally, whether the alien served in a leadership role may be "highly relevant," and "in certain circumstances statements of encouragement alone can suffice" for a finding that an applicant incited or otherwise participated in the persecution of others.[40]

Example

Statements made by an Algerian opposition political leader in various newspapers could fit within the plain meaning of the word incite when those statements resulted in the violent activities of the armed faction of his political party.[41]

During the 1994 genocide in Rwanda, the radio station Radio Mille Collines played a role in organizing militias, transmitted lists of people to be killed, and urged ethnic Hutus to kill ethnic Tutsis. These acts, if examined under the persecutor bar analysis, would likely be considered evidence of inciting persecution.

2.3.3 Did the Applicant Assist or Otherwise Participate in, or Actively Carry Out or Commit Persecution of Others?

Where an applicant did not order or incite the persecution of others, he or she may still be subject to the persecutor bar if he or she "assisted," or "otherwise participated" in, or actively carried out or committed persecution of others.

Commit or Actively Carry Out

Although the persecutor bar does not expressly include the terms "commit" or "actively carry out," if an applicant admits to you that he or she directly committed or carried out persecutory acts, that applicant has "otherwise participat[ed]" in persecution, and the persecutor bar applies.

Example

A former Iraqi intelligence officer admits to you that he used "creative" techniques when questioning individuals in his custody. When you ask what he means by "creative," he tells you that he sometimes beat these individuals to the point of unconsciousness and used electric shock against them. While this harm seems like enough to subject him to the bar if the detainees were targeted on account of a protected ground, you must develop the record with follow-up

[39] Id.

[40] Id.

[41] Id. at 785.

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questions, not only about what he did, but also about the severity of the harm he caused and the characteristics of the targeted individuals.

Relevant Questions

In the example above, you should elicit testimony that includes:

- what the applicant means by "beating" and using "electric shock" against detainees;
- how many times he beat the detainees;
- how often he beat them;
- how he shocked them
- what he shocked them with;
- how often he shocked them;
- who the detainees were;
- why they were detained;
- whether any particular group of detainees were treated differently from others;
- whether either the detention or any act of mistreatment was on account of the detainees' race, religion, nationality, membership in a particular social group, or political opinion.

Assist or Otherwise Participate

The Attorney General has explained that "[t]o 'assist' means 'to give support or aid: help,' And to 'participate' means 'to take part in something (as an enterprise or activity) usually in common with others.'"[42] To date, neither the BIA nor federal circuit courts have analyzed the meaning of the term "otherwise participate" independently from the term "assist." Accordingly, guidance from case law focuses on the term "assist."

When you analyze the facts of the case before you, focus on whether the applicant's particular conduct can be considered assistance in the persecution of others in the way the Supreme Court did in Fedorenko. The Supreme Court explained that:

> [A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On

[42] A-H-, 23 I&N Dec. at 784, citing Webster's Third New International Dictionary of English Language Unabridged, at 132 ("assist") and 1646 ("participate").

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> the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.[43]

Accordingly, it is appropriate to think of acts that might subject an individual to the persecutor bar along a continuum of conduct.[44] The role the individual played in the commission of the persecutory act will determine whether he or she assisted or otherwise participated in persecution.

Courts have interpreted Fedorenko line-drawing as assigning accountability and personal culpability. According to the Ninth Circuit, to properly analyze what it means to assist or otherwise participate in persecution, you must identify the kinds of acts the applicant engaged in.[45] You must evaluate those acts along a continuum between the two examples listed in Fedorenko to determine the applicant's culpability. Also evaluate the surrounding circumstances, including whether the applicant acted in self-defense.[46] Finally, ask yourself, did the applicant's acts further the persecution, or were they tangential to it?

To aid in this analysis, courts have suggested questions which help to place the applicant's activities along a continuum of conduct. For example, the Second Circuit asks: was the conduct active and did it have direct consequences for the victims or was the conduct tangential to the acts of oppression and passive in nature?[47] The Seventh Circuit draws a distinction between genuine assistance and inconsequential association. This court asks whether the applicant was simply a member of an organization during a pertinent persecutory period or whether the applicant actually assisted or participated in persecution.[48] Similarly, the Ninth Circuit asks whether the acts were instrumental to the persecutory end. Did the acts further persecution or were they tangential to it?[49] These questions are organized in the following chart:

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[43] Fedorenko, 449 U.S. at 513 n.34 (1981).

[44] See id.; Miranda-Alvarado, 449 F.3d at 925-927.

[45] Id. at 926.

[46] Id.

[47] Suzhen Meng, 770 F.3d at 1075; Weng, 562 F.3d at 514; Lin, 584 F.3d at 80; Balachova, 547 F.3d at 385; Gao v. U.S. Atty. Gen., 500 F.3d at 99; Xie v INS, 434 F.3d 136, 143 (2d Cir. 2006).

[48] Singh, 417 F.3d at 739.

[49] Miranda Alvarado, 449 F.3d at 928.

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Did the Applicant Assist in the Persecution of Others?		
Subject to the Bar	**OR**	**Not Subject to the Bar**
Did the applicant assist in the persecution of others?		Did the applicant merely assist in the operation of a location where persecution took place, where his or her duties were not related to the persecution?
Did the applicant's acts further the persecution?		Were the applicant's acts tangential to the persecution?
Was the conduct active and did it have direct consequences for the victims?		Was the conduct tangential to the acts of persecution and passive in nature?
Did the applicant actually assist or otherwise participate in persecution?		Was the applicant simply a member of an entity during a pertinent period of persecution?

Relevant Questions

Elicit detailed testimony about:

- what the applicant did;
- what actions the applicant took, committed, or performed;
- what his or her position was;
- what his or her duties were;
- the dates and locations the applicant performed these actions;
- who, if anyone, the applicant worked for or took orders from;

Case Law Examples

Most case law on the persecutor bar explores the question of whether or not the applicant "assisted" in persecution. Not coincidentally, the majority of the cases you will encounter

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will involve applicants who did not order or incite persecution but may have assisted or otherwise participated in it. The following case summaries are divided into fact specific categories that may help you in your analysis. These categories include intelligence gathering, coercive population control, military or security forces, rebel or opposition forces, and government officials. In each category, the courts have examined the applicant's specific actions to determine whether or not the applicant assisted or otherwise participated in persecution.

- Intelligence Gathering

Examples

Did Not Assist in Persecution

Diaz-Zanatta v. Holder, 558 F.3d 450 (6th Cir. 2009) Peru (military intelligence analyst)

The applicant gathered information and passed it up the chain of command. For example, she gathered information on whether a particular professor at a university had communist tendencies. She also listened to and transcribed telephone conversations of designated individuals. When she heard that other factions of the Peruvian military were engaged in human rights violations, she reported her concerns to superiors and requested an immediate transfer. There was no evidence that information the applicant supplied actually assisted in persecution of any individuals, or that the applicant had prior or contemporaneous knowledge of the persecution.[50]

Did Assist in Persecution

Higuit v. Gonzales, 433 F.3d 417 (4th Cir. 2006) Philippines (intelligence operative)

For 10 years, the applicant provided the Marcos regime with intelligence about the leftist New People's Army and other anti-Marcos communist groups. The applicant testified that the information he gathered on these individuals led to their torture, imprisonment, and death. He argued that he never physically tortured or harmed any person. The Fourth Circuit concluded that while "a distinction can be made between genuine assistance in persecution and inconsequential association with persecutors," in this case there was "no dispute over [the applicant's] personal culpability."

- Coercive Population Control

Examples

[50] See section below: Did the Applicant Know that Persecution was Occurring?

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Did Not Assist in Persecution

Weng v. Holder, 562 F.3d 510 (2d Cir. 2009) China (nurse's assistant)

The applicant provided post-surgical care to women who had undergone forced abortions, registered patients, assisted nurses in caring for patients, recorded vital signs, and maintained patient files. On one occasion she helped guard (unarmed) several women awaiting forced abortions for 10 minutes before helping one woman escape. The Second Circuit found that her conduct, considered in its entirety, was not sufficiently "direct, active, or integral" to the performance of forced abortions. It looked at the 10-minute unarmed guarding incident and her behavior as a whole and found that the post-surgical care she provided did not contribute to or facilitate the victims' forced abortions.

Lin v. Holder, 584 F.3d 75 (2d Cir. 2009) China (nurse)

The applicant was a maternity nurse at a state general hospital from 2003 to 2005, where she assisted with ultrasounds and other prenatal examinations, participated in live-birth deliveries, cared for newborns, and provided recovery care to women who had undergone forced abortions. She "did not participate in the abortion procedure itself," but the examinations she performed "were sometimes used to determine the position of the fetus so that a forced abortion could be performed without threatening the life of the mother." The Second Circuit looked to the applicant's behavior as a whole and found that her examinations did not contribute to or facilitate forced abortions in any direct or active way because they did not cause the abortions nor did they make it more likely they would occur. According to the Second Circuit, her actions were "tangential and not sufficiently direct, active or integral to amount to assistance in persecution."

Did Assist in Persecution

Chen v. U.S. Att'y Gen., 513 F.3d 1255 (11th Cir. 2008) China (employee at a family planning office)

The applicant voluntarily accepted employment at a family planning office and fully understood the forced abortion policy. She was responsible for watching over detained, pregnant women locked in rooms before their scheduled forced abortions. She monitored confined women to ensure they did not escape. She was provided with a rod or baton that she never actually used. She thought that forced abortions were limited to women who were one or two months pregnant and released a woman who was eight months pregnant with her second child. The Eleventh Circuit found while she did not perform the abortions herself or use force against the women, her conduct ensuring the woman did not escape was "essential to the ultimate persecutory goal." Her single redemptive act in releasing

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one woman, "while laudatory," did "not absolve her of the consequences of her personal culpability of her previous assistance."

Xie v. INS, 434 F.3d 136 (2d Cir. 2006) China (van driver)

The applicant occasionally transported pregnant women against their will to hospitals for forced abortions in a locked van. On each occasion the women physically resisted and wept. The court noted that the applicant's actions contributed directly to the persecution. By driving the van, the applicant ensured the women were brought to the place of their persecution: the hospitals where their forced abortions took place. The applicant claimed that his actions were not voluntary. The Second Circuit considered not just the voluntariness of the applicant's actions, but his behavior as a whole and whether his conduct was active and had direct consequences for the victims or was tangential to the acts of oppression and passive in nature. It concluded that the applicant played "an active and direct, if arguably minor, role" in the persecution. Further, the Second Circuit noted that even if voluntariness were an issue, nothing in the record indicated that the applicant did not have the ability to quit his job.

- Military or Security Forces

Examples

Did Not Assist in Persecution

Kumar v. Holder, 728 F.3d 993 (9th Cir. 2013) India (constable who guarded Sikh prisoners and witnessed their mistreatment)

The applicant worked as a constable in the local police department in Punjab. He served as a guard at an intelligence facility where Sikhs suspected of being part of the militant separatist movement were detained and interrogated. The applicant did not arrest, transport, or interrogate the prisoners, but he witnessed prisoners being beaten. He spoke to his superiors about the mistreatment, but nothing was done. After he was promoted to head constable, he spoke to several superior officers about mistreatment he had witnessed but was transferred after only a few weeks in the position. The Ninth Circuit held that the BIA erred in finding that the applicant was subject to the persecutor bar because his position was integral to the functioning of a facility where persecution took place; rather, it should have analyzed whether his conduct was integral to the persecution itself.

Balachova v. Mukasey, 547 F.3d 374 (2d Cir. 2008) Russia (soldier during arrest and rape of two Armenian girls)

The applicant, under orders from his captain, broke down the door of a house to search for arms. The captain ordered the applicant to take two girls found inside

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the house to the car. The applicant told the two girls that they had to go with him. As he reached for one of the girls, she pulled away. The captain then commanded the applicant to hit the girl. The applicant refused, and was forced to relinquish his weapon. He remained handcuffed in the car while refusing to participate in a gang rape of both girls by fellow soldiers. The Second Circuit concluded that the applicant's actions were "tangential to the oppression and had no direct consequences for the victims."

Doe v. Gonzales, 484 F.3d 445 (7th Cir. 2007) El Salvador (Former lieutenant present during execution of Jesuits)

The applicant was a lieutenant in the Atlacatl Battalion who was present during the execution of priests at a Catholic university. He was ordered to accompany troops to kill a Jesuit priest, despite voicing his misgivings. He did not give orders, fire his gun, seize anyone, or block anyone's attempted escape. Troops killed six Jesuits, a cook, and her daughter on that mission. After the attack, the applicant assisted in destroying log books identifying soldiers who had participated. The Seventh Circuit noted that under different facts, personal presence by a military or police officer could maintain order over prisoners and discourage victims from attempting to escape, and as a result, could constitute assistance or participation in persecution. However, under the facts of this case, the applicant's mere presence did not "discourage attempts at escape, help to maintain order, or otherwise contribute to persecution." The Seventh Circuit also examined the applicant's assistance in destroying log books after the attack, and concluded that destruction of the log books did not constitute "assistance" in persecution. It reasoned that helping a murderer cover his tracks would make an individual an accessory after the fact to murder, but not a murderer. The Seventh Circuit remanded to the BIA to consider the applicant's asylum claim on other grounds.

Did Assist in Persecution

Quitanilla v. Holder, 758 F.3d 570 (4th Cir. 2014) El Salvador (Sergeant who oversaw investigation, capture, and transfer of anti-government guerrillas)

The applicant was a sergeant in the Salvadoran military for about five years, three of which he spent in the "Patrulla de Reconocimiento de Alcance Largo" (PRAL). He testified that, during his military service, he investigated and arrested about fifty guerrillas and civilians he believed to be "terrorists" aligned with anti-government guerrillas. He indicated that he never interrogated or mistreated anyone; he simply transferred the prisoners to his superiors. He denied that he was aware of human rights abuses in the Salvadoran military, but the IJ found him not credible on this point, pointing to extensive country conditions evidence detailing severe human rights abuses by the PRAL in particular. The Fourth Circuit found that the applicant's leadership role and oversight over the arrest and investigation

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actively "facilitated" the persecution of guerrillas and civilians and upheld the IJ's adverse credibility finding with respect to the applicant's knowledge. Thus, the applicant "assisted in the persecution of individuals because of their political views."

Miranda Alvarado v. Gonzales, 441 F.3d 750, opinion amended and superseded on denial of reh'g, 449 F.3d 915 (9th Cir. 2006) Peru (Interpreter during torture sessions)

The applicant was a member of the Civil Guard. His duties included protecting government officials and banks from guerrilla attacks. He was also a Quechua interpreter at interrogations during which suspects were subjected to electric shock torture and beatings. He quit after performing his duties for six years and had been present in such interrogations approximately 200 times. The Ninth Circuit explained that determining whether the applicant "assisted in persecution" requires a "particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability." It found that because the applicant translated questions and answers interspersed with electric shock treatment, he played an integral role in facilitating persecution. As a result, he was undisputedly a regular and necessary part of the interrogation. He was not a bystander, but was present and active during the alleged persecution.

Singh v. Gonzales, 417 F.3d 736 (7th Cir. 2005) India (Supervisory constable who helped arrest fellow Sikhs)

The applicant was head constable in the local police department in Punjab during a period of considerable violence between Sikh separatist militants and the authorities. The department engaged in legitimate police activities but also systematically arrested without cause Sikhs accused of being militants. The applicant admitted that he brought suspects into the police station where they were wrongfully beaten by others, but claimed he did not share a persecutory motive. He also admitted that he went on nighttime raids that led to false charges and beatings of innocent Sikhs. The Seventh Circuit found that the applicant's acts constituted assistance or participation in persecution.

- Rebel or Opposition Forces

Examples

Did Not Assist in Persecution

Hernandez v. Reno, 258 F.3d 806 (8th Cir. 2001) Guatemala (Forcibly recruited by guerrillas)

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The applicant was forcibly recruited by guerrillas and given weapons training, to which he objected. He was forced to join the organization after his life was threatened; he did not know that he would be asked to participate in violent activities. On one occasion, he was forced to fire his rifle at villagers but testified that while he fired, he purposefully shot away from the civilians. He escaped from the guerillas after 20 days. The Eighth Circuit stated that the BIA erred in only considering certain facts, and that if properly analyzed under the Fedorenko standard, the applicant "may be seen to have met his burden of proving that he did not assist or participate in the persecution of others." It remanded the case to the BIA to conduct a full analysis of the record.

Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988) El Salvador (Forcibly recruited by guerrillas)

The applicant was taken from his home by guerrillas and given military training. He accompanied the guerillas on propaganda trips, and once covered them with his weapon while they burned cars. After two months, he deserted. He was subsequently imprisoned and tortured with electric shock for having worked with guerrillas. The BIA explained that membership alone in an organization that engages in persecution is not enough to bar one from relief. The BIA also noted that a finding of persecution "requires some degree of intent on the part of the persecutor to produce the harm the applicant fears." The BIA determined that persecution does not include harm resulting from, or directly related to, military objectives of an armed conflict, including drafting of youths as soldiers, unofficial recruiting of soldiers by force, disciplining rebel group members, prosecution of draft dodgers, attacking of garrisons, burning of cars, and destruction of other property.

Did Assist in Persecution

Parlak v. Holder, 578 F.3d 457 (6th Cir. 2009) Turkey (Kurdish PKK supporter)

The applicant smuggled weapons into Turkey and buried them. He then led Turkish authorities to the location of the hidden weapons, even though he claimed they were for his own personal use. The Sixth Circuit found that "smuggling weapons across an international border to aid the Kurdistan Workers Party (PKK) in committing violent acts against Turks and Turkish-aligned Kurds constitutes assistance in persecution."

Matter of A-H-, 23 I&N Dec. 774 (AG 2005) Algeria (Leader of opposition political party), overruled in part by Haddam v. Holder, 547 F. App'x 306 (4th Cir. December 4, 2013)

The applicant, a self-proclaimed leader-in-exile of the Islamic Salvation Front of Algeria (FIS), supported and took credit for the unification of the armed factions

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of his party and other armed groups, which formed the Armed Islamic Group (GIA); made public statements that encouraged atrocities committed by armed groups in Algeria, and made no attempt to publicly disassociate himself from the armed faction of the party until the assassination of 2 FIS leaders. The Attorney General found that the BIA had not applied the correct legal standard when it found that the applicant was not subject to the persecutor bar. The Attorney General explained that "incite" means to move to a course of action, stir up, spur on; "assist" means to give support or aid, or help; and "participate" means to take part in something, usually in common with others. The Attorney General explained that under the correct legal standard, someone who had created and sustained ties between the political movement and the armed group, while aware of the atrocities committed by the armed group, who used his profile and position of influence to make public statements that encouraged those atrocities, and who made statements that appeared to condone the persecution without publicly and specifically disassociating himself or the movement from the acts of persecution, could be barred as a persecutor. The Attorney General remanded to the BIA to apply the correct analysis. (On a separate ground, the Attorney General also determined that there may be reasonable grounds for regarding the applicant as a danger to national security and remanded to the BIA to make factual findings).

On petition for review from the BIA's ultimate decision denying relief to the applicant in A-H-, the Fourth Circuit held, in an unpublished decision, that the Attorney General's construction of the persecutor bar was impermissible to the extent that it could be applied to an applicant whose actions had no causal relationship to an actual instance of persecution. The Fourth Circuit explained that under the Attorney General's test, an applicant who had created and sustained ties with a group that had previously engaged in persecution could be barred even if he did so long after the persecution took place; in such a case, no causal nexus would exist. Although it rejected the A-H- decision in this narrow respect, the Fourth Circuit's logic is consistent with USCIS guidance and did not disturb other aspects of the Attorney General's decision, which remains binding on all RAIO officers.

Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003) Sierra Leone (Forcibly recruited by RUF)

The applicant and his family were captured by the rebel group RUF. The RUF incinerated his father and raped and killed his sister. The applicant was kidnapped and forced to join the RUF. He tried to escape twice. He was ordered to murder a female prisoner and to chop off the limbs and heads of non-combatants. He stated that the RUF engaged in these practices in order to scare civilians so that they would not support the government. He argued that he did not engage in political persecution because he did not share the persecutory intent. The Fifth Circuit found that personal motivation is not relevant, that the applicant had participated

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in persecution, and the persecution occurred because of the victims' political opinions.

Matter of McMullen, 19 I&N Dec. 90 (BIA 1984) Ireland (Active Provisional Irish Republican Army (PIRA) member)

The applicant was a member of the Provisional Irish Republican Army (PIRA), a clandestine, terrorist organization. When the applicant joined the PIRA, its use of violence was escalating. The applicant was respected as an effective member of the PIRA and his duties included training other PIRA members and conducting special operations. He was also personally responsible for coordinating many illegal arms shipments from the United States to Northern Ireland, which the PIRA used to perpetrate acts of persecution and violence. The BIA found that the applicant "assisted" and "otherwise participated" in the persecution of others through his "active and effective" membership in the PIRA and through his coordination of arm shipments.

- Government Officials

Example

Did Not Assist in Persecution

Gao v. U.S. Att'y Gen., 500 F.3d 93 (2d Cir. 2007) China (Supervisory bookstore inspector)

The applicant was the chief officer for the Culture Management Bureau in Qingdao City. His bureau was responsible for inspecting bookstores to determine if they were selling books prohibited under the Chinese government's cultural laws. He and his inspectors issued reports about prohibited books being sold. He confiscated prohibited books and issued citations. He reported these violations up to his superiors, who would then determine whether fines should be imposed or business licenses suspended. He was aware that a violator could receive 10 years in jail but never knew of anyone who was arrested or jailed. The mere fact that the applicant may have been associated with an "enterprise that engages in persecution" is insufficient to apply the bar. The bureau where the applicant worked did not exist solely to persecute those who illegally distributed banned materials, but also performed legitimate tasks such as enforcing copyright and pornography laws. The Second Circuit found that there was no identifiable act of persecution in which applicant assisted.

Did Assist in Persecution

Suzhen Meng v. Holder, 770 F.3d 1071 (2d Cir. 2014) China (public security official)

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The applicant worked as a public security officer in China for 22 years. In this role, she reported pregnant women to China's family planning authorities, including those in violation of the state's coercive population control policies. She knew that women who violated the family planning policies would be punished, including by being forced to undergo sterilization or abortion. The Second Circuit upheld the BIA's conclusion that the applicant had assisted in persecution and rejected the applicant's argument that evidence linking her to a specific act of persecution was required in order for the bar to apply. It concluded that when "the occurrence of persecution is undisputed, and there is such evidence of culpable knowledge that the consequences of one's actions would assist in acts of persecution," evidence of an applicant's assistance or participation in a particular act of persecution is not necessary.

2.3.4 Did the Applicant Know That the Persecution Was Occurring?

In order for an applicant to be subject to the persecutor bar, the applicant must have "sufficient" or "prior or contemporaneous" knowledge of the persecution itself or knowledge that his or her actions would contribute to or result in the persecution of others.[51] Several courts have provided guidance on the knowledge requirement for the persecutor bar.

Example

(Castañeda-Castillo) Castañeda was a lieutenant in the antiterrorist unit of the Peruvian military and worked in areas where the Shining Path was active. During an operation to search for Shining Path members, Castañeda led a patrol that was assigned to block escape routes from the village while two other patrols entered and conducted a search in the village. The two search patrols committed a brutal massacre of innocent villagers. Although Castañeda was in radio contact with the two other patrols, he was unaware that the attack occurred and became a massacre. He stated he did not learn of the atrocities until three weeks after the operation. Because Castañeda did not have prior or contemporaneous knowledge, the First Circuit found that the persecutor bar did not apply.[52] The First Circuit used a hypothetical example of a bus driver who unknowingly and unwittingly drove a killer to the site of a massacre. It said the driver should not be labeled a persecutor even if the objective effect of his actions furthered the killer's secret plan.[53]

[51] Diaz-Zanatta, 558 F.3d 450; Lin, 584 F.3d 75; Weng, 562 F.3d 510; Balachova, 547 F.3d 374; Gao, 500 F.3d 93; Castañeda-Castillo, 488 F.3d 17; Quitanilla, 758 F.3d 570; Suzhen Meng, 770 F.3d 1071.

[52] Castañeda-Castillo, 488 F.3d at 21-22; Castañeda-Castillo v. Holder, 638 F.3d 354, 359 (1st Cir. 2011) (appeal after remand).

[53] Castañeda-Castillo, 488 F.3d at 20.

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Whether knowledge is an issue in a case will depend on the specific facts of the case and the credibility of the applicant's claim.

Examples

> (Diaz-Zanatta) On the one hand, a Peruvian intelligence officer was found not to have assisted in the persecution of others because she testified credibly that she did not know how the information she gathered was used and was not aware that any person about whom she had gathered information was persecuted as a result of her actions.[54]
>
> (Higuit) On the other hand, the persecutor bar applied to a Filipino intelligence officer who admitted that he was aware that the information he gathered was used to torture, imprison, and kill political opponents.[55]

If the applicant you are interviewing denies knowledge, the focus of your analysis will be whether the applicant's denial is credible. If you have a concern about the applicant's credibility, you must confront the applicant, informing him or her of your concern, and give him or her an opportunity to explain or elaborate. See section below: Credibility and the Persecutor Bar.

Relevant Questions

- Does the applicant know if what he or she did resulted in harm to others?
- Did he or she know of instances where others were persecuted as a result of the actions of individuals in similar positions?

2.3.5 Did the Applicant Act under Duress?

In many cases, an applicant may allege that he or she acted under duress when participating in persecution of others. Whether duress may negate an applicant's involvement in persecution under the refugee definition is currently an unsettled question. While the Department of Homeland Security (DHS) and the Department of Justice (DOJ) are developing regulations on this topic, under current provisions an applicant subject to the persecutor bar may not be granted asylum or refugee status even if the persecutory act(s) occurred under duress. While these regulations are pending, it is important to fully explore and document whether the applicant has a plausible claim for duress that could be adjudicated at a future date. If you find that the applicant has a plausible duress claim, follow your division specific guidance for handling such cases. See RAD Supplement-Duress; Asylum Supplement – Headquarters Review.

[54] Diaz-Zanatta, 558 F.3d 450.

[55] Higuit, 433 F.3d 417.

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The duress issue was litigated before the U.S. Supreme Court in Negusie v. Holder in 2009.[56] Negusie was a dual national of Ethiopia and Eritrea who was forced to join the Eritrean army. When he refused to fight against Ethiopia, he was imprisoned, beaten with sticks and placed in the hot sun. After two years he was released and forced to work as a prison guard. He carried a gun, guarded the gate to prevent escape, kept prisoners from taking showers and obtaining fresh air, and forced prisoners to stay out in the hot sun.[57] He claimed that he committed these acts involuntarily. In the lower court decisions, the BIA and the Fifth Circuit held that the persecutor bar contains no exception for coerced acts.

The Supreme Court found that the Fifth Circuit erred by applying the holding of Fedorenko v. United States[58] to the applicant. In Fedorenko, an individual who served as a guard at a concentration camp while held as a German prisoner of war was found to have assisted in the persecution of others without consideration of whether such participation was against his will.[59] While the Fedorenko Court found that voluntariness was not required to apply the persecutor bar, the Negusie Court explained that the Fedorenko decision interpreted the terms of the Displaced Person Act of 1948 and not the Refugee Act of 1980. Accordingly, the Court concluded that the Fedorenko holding does not control the BIA's interpretation of the persecutor bar under the INA. Because the BIA had not exercised its interpretive authority with regard to the INA, the Court remanded the case back to the BIA for the agency to determine, in the first instance, whether the persecutor bar in the refugee definition applies to involuntary actions or whether a duress exception may be read into the refugee definition. The BIA's review of this case is stayed while DHS and DOJ develop regulations.

Despite the holding in Negusie, court decisions prior to Negusie contain relevant guidance on lines of inquiry in assessing a voluntariness element in the context of culpability, and will assist you in fully exploring on the record whether an applicant may have a plausible claim for duress. A particularized evaluation is required to determine whether the applicant's behavior was culpable "to such a degree that he or she could be deemed to have assisted or participated in the persecution of others."[60]

For example, in Hernandez v. Reno, a case pre-dating Negusie, the Eighth Circuit criticized the BIA for solely evaluating the applicant's participation in shooting civilians in reaching its determination that the applicant was a persecutor.[61] The Eighth Circuit explained that the BIA should have also considered the fact that the applicant had been

[56] Negusie, 555 U.S. 511 (2009).

[57] Id. at 514-515 (2009).

[58] Fedorenko, 449 U.S. 490 (1981).

[59] Id. at 512 (interpreting the "voluntariness" aspect of the persecutor bar under the Displaced Persons Act).

[60] Vukmirovic, 362 F.3d at 1252.

[61] Hernandez, 258 F.3d at 814.

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forcibly recruited into the guerrilla organization, that he shared no persecutory motives with the guerrillas, and that he participated in the shooting only while the commander stood behind him during the shooting and checked the magazine of his rifle afterwards. Furthermore, the BIA should have also taken into account the applicant's disagreement with his commander about the shootings immediately following the incident, and that at the first available opportunity, the applicant risked his life to escape the guerrillas.[62]

As discussed above, in all cases involving the persecution of others, even those where the applicant alleges that his or her acts were committed under duress, you must carefully weigh all relevant facts to determine whether the applicant's actions furthered the persecution of others on account of a protected ground. Consider these facts even in cases where the acts were committed involuntarily.[63]

Example

(Miranda-Alvarado v. Gonzales) Upon considering the applicant's interpretation of interrogation questions during torture, his involvement in interrogations for six or seven years two to three times per month, his continued interpretation despite that he would not have suffered dire consequences if he stopped interpreting, and that he made little effort to avoid being involved in the interrogations, other than to ask for the torture to be lessened when it was so extreme that that the victim had difficulty speaking, the Ninth Circuit found that the applicant assisted in the persecution of others.[64]

Relevant Questions

- What led the applicant to commit, assist/participate in the act?
- Did the applicant believe that he or she had a choice?
- Could the applicant have reasonably avoided committing, assisting/participating in the act?
- Did the applicant take steps to avoid committing the act?
- What was the severity and type of harm inflicted and/or threatened by those coercing the applicant to engage in the act?
- To whom was/were those threats and/or harm directed? (e.g., the applicant, his or her family)?
- Was the person threatening the applicant with immediate harm or future harm?

[62] Id.

[63] See, e.g., Miranda Alvarado, 449 F.3d at 927.

[64] Id.

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- What was the perceived likelihood that the threatened harm would actually be inflicted? (e.g., past harm to the applicant, his or her family)?
- Any other relevant factors?

3 CREDIBILITY AND THE PERSECUTOR BAR

As explained in greater detail in the RAIO Training modules Interviewing - Eliciting Testimony and Evidence, while the burden of proof is on the applicant to establish eligibility, your duty to elicit all relevant testimony is equally important. As discussed above, if a "red flag" emerges, because of the non-adversarial nature of the interview, you must utilize interviewing techniques that best allow you to elicit detailed testimony from an applicant, and diligently conduct relevant country of origin (COI) research.

In addition to the applicant's testimony, general country of origin information may be the only other type of evidence available to you when you make your decision in a case involving the persecutor bar.[65] It is important to remember that reliable information may sometimes be difficult to obtain. The absence of such information should not lead you to presume that an applicant assisted or participated in persecutory acts by being a member of or associated with a group that committed persecutory acts.

If an applicant was in a particular place at a time when you know from COI that human rights abuses were being committed but denies any involvement or knowledge, the applicant should be questioned about his or her activities and awareness that abuses were taking place. The credibility of the applicant's responses should be examined in the same way that you would examine any statements that are material or relevant to the claim: the statements are credible if they are detailed, consistent and plausible. If the applicant testifies credibly that he or she did not order, incite, assist, or otherwise participate in the persecution of others on account of a protected ground then he or she is not subject to the persecutor bar. A negative credibility determination must contain well-articulated examples of flaws in the applicant's testimony.[66] Your notes must reflect that you explained your credibility concerns to the applicant, and in turn, gave the applicant an opportunity to address your concerns.

It is important to remember that the evidence refugee applicants can reasonably obtain varies greatly compared with the corroborating evidence some asylum seekers can reasonably obtain.

Relevant Questions

[65] It is well-established that a fact-finder consider both direct and circumstantial evidence in the persecutor bar context. Matter of D-R-, 25 I&N Dec. 445 (BIA 2011).

[66] See RAIO Training Module, Credibility.

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- Is the applicant aware that his or her unit committed human rights abuses ?
- Did the applicant hear or see other members of his or her unit commit human rights abuses?
- How was the applicant able to remain in a unit that committed human rights abuses without learning about them or being involved?

4 Decision-Making and Writing

4.1 Mandatory Nature of the Persecutor Bar

If you determine that the applicant is subject to the persecutor bar, you cannot approve the case.

In asylum cases, you have no discretion to approve the case, even though the applicant may otherwise qualify for asylum or derivative status. If the asylum applicant is subject to the persecutor bar, you do not weigh that adverse factor against the risk of future persecution in an exercise of discretion. You will either deny the applicant, or if the person is not in status, refer the applicant for an immigration court hearing. See ASM Supplement – Discretion.

In the refugee context, there is no waiver available to an applicant who has been denied based on the persecutor bar. Denial in such cases is mandatory in the overseas context.

4.2 Applicability to Dependents

When a principal applicant is granted asylum or refugee status, his or her spouse and/or children, as defined in the Act, may also be granted status if accompanying or following to join. If the principal applicant is subject to the persecutor bar, neither the spouse nor the child is eligible for asylum or refugee status as a dependent. Conversely, if the principal applicant is not subject to the persecutor bar, but his spouse or his child is subject to the persecutor bar, the principal may be approved and the dependent will be denied or referred.[67]

4.3 Relationship to Terrorism-Related Inadmissibility Grounds (TRIG)

When analyzing the facts before you, it is also important to keep the persecutor bar distinct from the terrorist-related inadmissibility grounds, particularly the bar against material support. Some cases that you review will implicate the applicability of both bars. Under the TRIG analysis, the amount of support need not be large or significant, whereas in the persecutor bar analysis, an applicant must be found to have "ordered, incited, assisted, or otherwise participated" in the persecution.

[67] INA § 101(a)(42)(B); INA § 207(c)(2); 8 C.F.R. § 208.21(a).

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Another distinction between these grounds arises regarding application of a duress exception. While the Executive Branch may provide exemptions by policy for applicants who provided material support under duress to designated or undesignated terrorist organizations, as noted above, the Executive Branch is still considering whether a duress exception should be read into the persecutor bar analysis, and what the limits of that exception would be. Although the relevant facts may occasionally overlap, it is important to keep TRIG and persecutor bar concepts distinct when analyzing the facts of the case before you.

Example

On a few occasions, when the applicant was a medical doctor in Syria, he provided medical care to patients whom he knew were members of several armed groups opposed to the Syrian Government. On one occasion, after a violent protest, the applicant was taken by the police and government agents to a locked area and told to revive a man who had fainted. The applicant provided medical care to the patient until he regained consciousness and was able to faintly speak. The police then made the applicant leave. The applicant saw signs of beating on the patient and feared the patient was beaten again after he left.

In such a situation, depending on the facts, testimony and any other relevant evidence, the applicant's treatment of members of armed groups opposing the Syrian regime could render him inadmissible for engaging in terrorist activity by providing material support to a terrorist organization, although he could be eligible for a TRIG exemption for the voluntary medical care. However, depending on the facts, testimony and other evidence, the applicant might also be subject to the persecutor bar for his medical care to the patient he feared was beaten by the police. The applicant would have to be questioned regarding, for example, his contemporaneous knowledge of the harm, why the patient was harmed, if he knew his medical care assisted in any later harm and if he acted under duress.

4.4 Addressing the Bar in your Decision

See ASM Supplement – Decision Writing.
See ASM Supplement – Note Taking.
See ASM Supplement – Identity Checks.
See ASM Supplement – One Year Filing Deadline.
See RAD Supplement – Decision Making and Recording.

5 CONCLUSION

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Adjudicating claims that may involve the persecutor bar present certain challenges. You must carefully consider all relevant evidence in reaching your decision. As always, the law and the facts, rather than your emotions or intuition, must be your guide.

6 SUMMARY

The Rationale behind the Bar

The rationale for the persecutor bar is derived from the general principle in the 1951 Convention relating to the Status of Refugees that even if someone meets the definition of refugee, i.e., has a well-founded fear of persecution on account of a protected ground, he or she may nonetheless be considered undeserving or unworthy of refugee status.

Analytical Framework

Step One: Determine if there is Evidence of the Applicant's Involvement in an Act that May Rise to the Level of Persecution

- Look for red flags in the evidence to alert you that the persecutor bar may be at issue.
- Evidence may include:
  - the applicant's testimony during the interview;
  - information in the applicant's file indicating his or her involvement in an entity known for committing human rights abuses; and
  - country of origin information (COI).
- If a red flag is present, examine whether there is further evidence of a specific act or acts that may rise to the level of persecution.
- Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.

Step Two: Analyze the Harm Inflicted on Others

- Does the harm inflicted rise to the level of persecution?
- Is there a nexus to a protected ground?
- Was the act a legitimate act of war or law enforcement?

Step Three: Analyze the Applicant's Level of Involvement

- Did the applicant order, incite, assist, or otherwise participate in the persecutory act(s)?
- Did the applicant know that the persecution was occurring?

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- Prior or contemporaneous knowledge is required.

- Did the applicant act under duress?
  - Fully explore this issue for the record and follow Division specific guidance.

Do Not Confuse Persecutor Bar with TRIG

It is important not to confuse the persecutor bar with terrorist-related inadmissibility grounds and the security-related mandatory bars to asylum. While some cases may implicate the applicability of both bars, each issue should be analyzed separately.

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PRACTICAL EXERCISES

Practical Exercise # 1

- Title:
- Student Materials:

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OTHER MATERIALS - STEP-BY-STEP PERSECUTOR BAR CHECKLIST

1. **Is there evidence of the applicant's involvement in an act that may rise to the level of persecution?** Yes ☐ No ☐

   If no, stop –applicant is not subject to the bar. If yes, proceed to next step.

2. **Analyze the harm inflicted on others.**

   a) Did the harm rise to the level of persecution? Yes ☐ No ☐

   If no, stop –applicant is not subject to the bar. If yes, proceed to next step.

   b) Was there a nexus to a protected ground? If yes, what was the targeted characteristic?

   Race ☐ Religion ☐ Nationality ☐ Membership in a PSG ☐ Political Opinion ☐

   If no boxes are checked, stop –applicant is not subject to the bar. If yes, proceed to next step.

   c) Was the act a legitimate act of war or law enforcement? Yes ☐ No ☐

   If yes, stop - applicant is not subject to the bar. If no, proceed to next step.

3. **Analyze the Applicant's level of Involvement.**

   a) Did the applicant order, incite, assist, otherwise participate in, or actively carry out or commit persecution of others? Yes ☐ No ☐

   If no, stop –applicant is not subject to the bar. If yes, proceed to Step 3b.

   b) Did the applicant know that the persecution was occurring? Yes ☐ No ☐

   If no, stop –applicant is not subject to the bar. If yes, proceed to Step 3c.

   c) Did the applicant act under duress? Yes ☐ No ☐

If applicant did not act under duress, the persecutor bar applies and he or she is ineligible for refugee or asylum status. If you find he or she has a plausible claim of duress, see division-specific guidance.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.
2.

ADDITIONAL RESOURCES

1.
2.

SUPPLEMENTS

RAD Supplement – Related Grounds of Inadmissibility

In addition to analyzing the possible applicability of the persecutor bar to refugee eligibility, when an applicant engages in activity that may have assisted in, or furthered, the harm or suffering of other individuals, the officer must also consider whether related grounds of inadmissibility may apply to the applicant. The related inadmissibility grounds are directed at preventing individuals from entering the United States if they have:

1. Ordered, incited, assisted or otherwise participated in Nazi Persecutions (INA Section 212(a)(3)(E)(i));
2. Ordered, incited, assisted or otherwise participated in genocide (INA Section 212(a)(3)(E)(ii));
3. Committed, ordered, incited, assisted or otherwise participated in torture or extrajudicial killing under the color of law (INA Section 212(a)(3)(E)(iii));
4. Recruited or used child soldiers in violation of section 2442 of title

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18, U.S. Code; or

5. As a foreign government official, committed particularly severe violations of religious freedom (INA Section 212(a)(2)(G)).

In the first three inadmissibility grounds, the same analysis of the persecutor bar to refugee status is applicable to the determination of whether an applicant ordered, incited, assisted, or otherwise participated in the relevant activity. Further discussion of these provisions can be found in the Inadmissibility module.

RAD Supplement – Decision Making and Recording

Please see Refugee Application Assessment Standard Operating Procedure (SOP): "D. Section IV – BARS AND INADMISSIBILITIES."

http://connect.uscis.dhs.gov/org/RAIO/RAD/Documents/SOP%20-%20Assessment%20SOP,%2001-11-12.pdf

RAD Supplement – Duress

Pursuant to the following guidance, all cases involving persecution committed under duress must be placed on hold for review at RAD Headquarters to ensure the hold is appropriate. When a persecutor hold is appropriate, the applicant may be informed by the RSC regarding his or her options, which may include remaining on long-term hold with RAD, requesting a denial or withdrawing from the USRAP in hope of resettlement in another country. Given the grave consequences for applicants, it is vital that refugee officers elicit all relevant testimony to ensure that the persecutor bar does, in fact, apply. Testimony must be elicited regarding issues such as the applicant's level of involvement in persecution and his or her prior or contemporaneous knowledge of the persecution.

Response to Query

Date: June 30, 2009

Subject: Persecution Committed Under Duress

Keywords: Duress, Persecution, Bars, Negusie

Query: In light of the recent Negusie ruling, what should officers do with cases in which applicants are found to have ordered, incited, assisted or otherwise

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participated in the persecution of others if such actions were taken under duress?

Response: Effective immediately, officers must place on hold any case in which a refugee applicant is found to have ordered, incited, assisted or otherwise participated in the persecution of others if such actions were taken under duress. Supervisors are requested to keep track of all cases (including case numbers) placed on hold pursuant to this instruction in their standard trip report. Where IO staff serve as a team leader or otherwise oversee adjudication of refugee processing (either through nomad circuit rides or as part of the regular IO workload), IO staff should send to RAD Headquarters, through the Overseas District chain of command, a list of the cases on hold, including A-numbers, and note the reason for placement on hold as an applicant found to have ordered, incited, assisted or otherwise participated in the persecution of others while under duress.

While no duress exception to the persecutor bar currently exists, the requirement to place such cases on hold has been made at the request of the Department of Homeland Security's Office of the General Counsel in light of the March 3, 2009, Supreme Court decision in NEGUSIE v. HOLDER.

The issue presented by the case is whether the provision of the Immigration and Nationality Act that prohibits the finding that an individual is a refugee if he/she has engaged in the persecution of others applies to those who were compelled to do so under duress (for example, coercion through physical harm or threats of death or torture.) The petitioner in the case, Negusie, at age 18, was forcibly conscripted by Eritrean military forces in the longstanding war with Ethiopia. On account of his Ethiopian heritage, however, Negusie refused to fight against those he deemed his "brothers." He served roughly two years in prison on account of his refusal. Following his term of imprisonment, Negusie was directed to serve as a guard at the same prison where he had been held. Torture reportedly is common at the prison. Based on his work as a prisoner, the Fifth Circuit denied Negusie relief, finding the forcible service as a prison guard is irrelevant to deciding applicability of the bar.

The Court asserted that, "…the BIA and the Court of Appeals misapplied Fedorenko. We reverse and remand for the agency to interpret the statute, free from the error, in the first instance." The Court held that simply because the INA is silent on a duress exception doesn't mean that one should or should not exist and held that the BIA should use its interpretive authority to decide the matter.

DHS is assessing the issue at this time to formulate a department position. As such, all USCIS Divisions have been instructed to hold any cases that raise a plausible duress claim. Cases put on hold must contain a plausible claim of duress as to any persecutory act and be otherwise eligible for the benefit. If there is no plausible duress claim and/or the individual is not otherwise eligible, the case may be denied.

Refugee Officers are accustomed to analyzing duress in the context of TRIG

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exemptions. The same factors may be considered when determining whether duress was a factor in the applicant's actions. At a minimum, the persecutory act must have been committed as a response to a reasonably-perceived threat of serious harm. Lines of inquiry/considerations to assess whether the action was taken under duress include but are not limited to:

- What led the applicant to commit the act
- Whether the act was voluntary or if the applicant felt pressure to commit the act
- Whether the applicant believed he/she had a choice
- Whether the applicant reasonably could have avoided, or took steps to avoid committing a persecutory act
- The severity and type of harm inflicted or threatened
- To whom the threat of harm was directed (e.g., the applicant, the applicant's family, the applicant's community, etc.)
- The perceived imminence of the harm threatened
- The perceived likelihood that the threatened harm would be inflicted (e.g., based on instances of past harm to the applicant, to the applicant's family, to the applicant's community, and the manner in which harm was threatened, etc.)
- Whether the applicant was aware of other threats or instances of harm inflicted by this group on his community
- Any other relevant factor regarding the circumstances under which the applicant felt compelled to act

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

ASM Supplement - Burden Shifting

The asylum regulations regarding the "mandatory bars" to asylum state that "if the evidence indicates that" an applicant ordered, incited, assisted, or otherwise participated in the persecution of any person on account of one of the five protected grounds, "he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act."[68]

As discussed earlier in this module, the burden is on the applicant to establish eligibility.[69] Credible testimony alone may be enough to meet the applicant's burden. While the applicant has the burden of proving eligibility, you have an equal duty in a non-adversarial interview to elicit detailed testimony from the applicant.[70] If the applicant's testimony, documents in the record, country of origin information, or other evidence indicates that the persecutor bar may apply, you must question the applicant about his or her possible involvement in persecutory acts. If the applicant denies involvement, you must then determine the credibility of that denial. For additional information regarding credibility determinations and

[68] 8 C.F.R. § 208.13(c).

[69] 8 C.F.R. § 208.13(a); UNHCR Handbook, para 196.

[70] 8 C.F.R. § 208.9(b); UNHCR Handbook, para 196, and 205(b)(i).

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evaluation of evidence, see RAIO Training modules, Credibility and Evidence Assessment. Just as you must identify inconsistencies and offer the applicant an opportunity to explain, in the instance where it appears the persecutor bar might apply, you must identify the issues of concern and elicit detailed information on which to base the determination. The applicant must establish that he or she is not subject to the persecutor bar by a preponderance of the evidence.

ASM Supplement - Note-Taking

Asylum Division procedures require that officers take notes in a sworn statement format when the applicant admits, or there are serious reasons to believe, he or she ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five enumerated grounds.

This is crucial because an applicant's admission may be used as a basis to institute deportation or removal proceedings against him or her, or as a basis for DHS to detain the applicant.

For further explanation and requirements, see RAIO Module, Interviewing - Note-Taking, including the Asylum Supplement, and see the Affirmative Asylum Procedures Manual (AAPM).

ASM Supplement - Discretion

There may be some cases in which facts fall short of a mandatory bar to asylum but nonetheless warrant the denial or referral of the asylum application as a matter of discretion, even if the applicant has established refugee status.

Examples:

Although mere membership in an organization that is or has been involved in the persecution of others is insufficient to statutorily bar an applicant from a grant of asylum, it may be considered as an adverse factor when weighing the totality of the circumstances to exercise discretion to grant asylum.

An applicant testifies to serving in his country's police force for several years. Country conditions information reports that many individuals held in police custody are abused by police officers. The applicant admits that he had used extreme force in a number of situations in dealing with prisoners. There is insufficient evidence to support a finding that the applicant's actions amounted to persecution on account of one of the five grounds. In such a situation, the asylum

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officer may be able to support a determination that asylum should not be granted as a matter of discretion.

Asylum officers must bear in mind that the sound exercise of discretion requires a balancing of the fact that the applicant qualifies as a refugee, along with any other positive factors, against any negative factors presented in the case. This should be reflected in the assessment.

The likelihood of future persecution is an important factor in the exercise of discretion. A reasonable possibility of future persecution weighs heavily in favor of exercising discretion to grant asylum. The BIA has held that "the danger of persecution should generally outweigh all but the most egregious of adverse factors."[71]

NOTE: Denials and referrals of applicants who meet the definition of a refugee and are otherwise eligible for asylum, but are denied or referred because of acts that are not a bar to asylum must be reviewed by Headquarters Quality Assurance.

ASM Supplement – Headquarters Review

Cases involving the persecutor bar require headquarters review. Specifically, Headquarters Quality Assurance will review the following cases involving the persecutor bar:

- Grants of cases where evidence indicates that the applicant may have ordered, incited, assisted, or other otherwise participated in persecution of others on account of any of the five grounds, and the applicant is found to have met his or her burden of proof to establish that he or she should not be barred a persecutor.
- All Notices of Intent to Deny (NOID) and referrals to the immigration judge when an applicant is found to be credible and found to be barred as a persecutor.
- All NOIDs and referrals of credible applicants with cases that involve having committed persecution of others under duress. Pending finalization of guidance relating to the issue of voluntariness and the persecutor bar, HQ Quality Assurance will put on hold cases where there is evidence of duress and intent.

[71] Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987); Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996).

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ASM Supplement – Decision Writing

If the evidence indicates that the persecutor bar may apply, the assessment must contain an analysis of that evidence. The analysis must include a summary of the material facts, an explanation of how those facts and other evidence support a finding that the bar may apply, and a conclusion as to whether or not the applicant is subject to the bar.

Where it appears that the persecutor bar may apply to the applicant, your analysis must give a detailed explanation as to whether the applicant ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five protected grounds. The analytical framework described in this module must be followed in order to accurately describe the relevant issues. Because it is an open area of law, the analysis must also address the issues of duress and intent, including the age and/or mental capacity of the applicant at the time he or she may have engaged in the acts of persecution.

Unlike applicants barred from receiving asylum or refugee status on other grounds, an applicant found to be a persecutor CANNOT also be said to be a refugee because this bar is included in the definition of a refugee.

If the case contains evidence indicating that the persecutor bar may apply, but the applicant establishes by a preponderance of evidence that the bar does not apply, the assessment must include an analysis setting forth why the evidence raised the possibility that the bar applies, and that clearly articulates the facts and reasoning by which the bar was found not to apply.

If the facts indicate that a discretionary denial/referral may be warranted, then you must discuss the positive and negative factors considered in reaching that determination, and explain the reason for exercising discretion to grant, deny, or refer the case.

When writing a decision involving an applicant barred as a persecutor, you must analyze all elements of the refugee definition and consider any other bars that may apply. The assessment must not include a statement that "the applicant met the definition of a refugee," even when the applicant established that he or she suffered past persecution or has a well-founded fear of persecution on account of a protected ground. You must follow current Asylum Division decision writing guidance as to appropriate language to use to address the persecutor bar. A possible example would be: "However, the preponderance of evidence indicates that the applicant is subject to the persecutor bar because the applicant assisted in the persecution of others on account of [state the protected ground]." An analysis of why the applicant was found to be a persecutor must follow.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

There is no IO Supplement.

REQUIRED READING

1.
2.

ADDITIONAL RESOURCES

1.
2. 2

SUPPLEMENTS

IO Supplement – 1

There is no IO Supplement.

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Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	Reasonable Fear of Persecution and Torture Determinations
Rev. Date	February 13, 2017; Effective as of Feb 27, 2017.
Lesson Description	The purpose of this lesson is to explain when reasonable fear screenings are conducted and how to determine whether the alien has a reasonable fear of persecution or torture using the appropriate standard.
Terminal Performance Objective	When a case is referred to an Asylum Officer to make a "reasonable fear" determination, the Asylum Officer will be able to correctly determine whether the applicant has established a reasonable fear of persecution or a reasonable fear of torture.
Enabling Performance Objectives	1. Indicate the elements of "torture" as defined in the Convention Against Torture and the regulations. (AIL5)(AIL6) 2. Identify the type of harm that constitutes "torture" as defined in the Convention Against Torture and the regulations. (AIL5)(AIL6) 3. Describe the circumstances in which a reasonable fear screening is conducted.(APT2)(OK4)(OK6)(OK7) 4. Identify the standard of proof required to establish a reasonable fear of torture.(ACRR8)(AA3) 5. Identify the standard of proof required to establish a reasonable fear of persecution.(ACRR8)(AA3) 6. Examine the applicability of bars to asylum and withholding of removal in the reasonable fear context. (ACRR3)
Instructional Methods	Lecture, practical exercises
Student Materials/ References	United Nations. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see RAIO Training Module, International Human Rights Law) Ali v. Reno; Mansour v. INS; Matter of S-V-; Matter of G-A-; Sevoian v. Aschcroft; In re J-E-; Matter of Y-L-; Auguste v. Ridge; Ramirez Peyro v. Holder; Roye v. Att'y Gen. of U.S. Reasonable Fear forms and templates (are found on the ECN website)
Method of Evaluation	Written test
Background Reading	1. Reasonable Fear Procedures Manual (Draft).

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2. Martin, David A. Office of the General Counsel. Compliance with Article 3 of the Convention against Torture in the cases of removable aliens, Memorandum to Regional Counsel, District Counsel, All Headquarters Attorneys (Washington, DC: May 14, 1997), 5 p.

3. Lafferty, John, Asylum Division, Updated Guidance on Reasonable Fear Note-Taking, Memorandum to All Asylum Office Staff (Washington, DC: May 9, 2014), 2p. plus attachments.

4. Lafferty, John, Asylum Division, Reasonable Fear Determination Checklist and Written Analysis, Memorandum to All Asylum Office Staff (Washington, DC: Aug. 3, 2015), 1p. plus attachments.

5. Langlois, Joseph E. INS Office of International Affairs. Implementation of Amendments to Asylum and Withholding of Removal Regulations, Effective March 22, 1999, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, D.C.: March 18, 1999), 16 p. plus attachments.

6. Langlois, Joseph E. Asylum Division, Office of International Affairs. Withdrawal of Request of Reasonable Fear Determination, Memorandum to Asylum Office Directors, et al. (Washington, DC: May 25, 1999), 1p. plus attachment (including updated version of Withdrawal of Request of Reasonable Fear Determination form, 6/13/02 version).

7. Pearson, Michael Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries (Washington, DC: February 23, 2001), 7p. plus attachments.

8. Langlois, Joseph L. Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries (Washington, DC: February 22, 2001), 3p. plus attachments.

9. Langlois, Joseph E. Asylum Division, Office of International Affairs. International Religious Freedom Act Requirements Affecting Credible Fear and Reasonable Fear Interview Procedures, Memorandum for Asylum Office Directors, et al. (Washington, DC: April 15, 2002), 3p.

10. Langlois, Joseph E. Asylum Division. Reasonable Fear Procedures Manual, Memorandum for Asylum Office Directors, et al. (Washington, DC: January 3, 2003), 3p. plus attachments.

11. Langlois, Joseph E. Asylum Division. Issuance of Updated Credible Fear and Reasonable Fear Procedures, Memorandum for Asylum

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Office Directors, et al. (Washington, DC: May 14, 2010), 2p. plus attachments.

12. Ted Kim, Asylum Division. Implementation of Reasonable Fear Processing Timelines and APSS Guidance, Memorandum to All Asylum Office Staff, (Washington, DC: April 17, 2012), 2p. plus attachments.

13. Pearson, Michael Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries (Washington, DC: February 23, 2001), 7p. plus attachments.

14. Langlois, Joseph L. Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries (Washington, DC: February 22, 2001), 3p. plus attachments.

15. Langlois, Joseph E. Asylum Division, Office of International Affairs. International Religious Freedom Act Requirements Affecting Credible Fear and Reasonable Fear Interview Procedures, Memorandum for Asylum Office Directors, et al. (Washington, DC: April 15, 2002), 3p.

16. Langlois, Joseph E. Asylum Division. Reasonable Fear Procedures Manual, Memorandum for Asylum Office Directors, et al. (Washington, DC: January 3, 2003), 3p. plus attachments.

17. Langlois, Joseph E. Asylum Division. Issuance of Updated Credible Fear and Reasonable Fear Procedures, Memorandum for Asylum Office Directors, et al. (Washington, DC: May 14, 2010), 2p. plus attachments.

18. Ted Kim, Asylum Division. Implementation of Reasonable Fear Processing Timelines and APSS Guidance, Memorandum to All Asylum Office Staff, (Washington, DC: April 17, 2012), 2p. plus attachments.

CRITICAL TASKS

Knowledge of U.S. case law that impacts RAIO. (3)
Knowledge of the Asylum Division jurisdictional authority. (4)
Skill in identifying information required to establish eligibility. (4)
Skill in identifying issues of claim. (4)
Knowledge of relevant policies, procedures, and guidelines of establishing applicant eligibility for reasonable fear of persecution of torture. (4)
Knowledge of mandatory bars and inadmissibilities to asylum eligibility. (4)
Skill in organizing case and research materials (4)

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Skill in applying legal, policy, and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence. (5)
Skill in analyzing complex issues to identify appropriate responses or decisions. (5)

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Presentation | References

I. INTRODUCTION

This lesson instructs asylum officers on the substantive elements required to establish a reasonable fear of persecution or torture. More detailed instruction on procedures for conducting interviews and processing cases referred for reasonable fear determinations are provided in the Reasonable Fear Procedures Manual and separate procedural memos. For guidance on interviewing techniques to elicit information in a non-adversarial manner, asylum officers should review the RAIO Training Modules: Interviewing – Introduction to the Non-Adversarial Interview; Interviewing – Eliciting Testimony; and Interviewing – Survivors of Torture and Other Severe Trauma.

II. BACKGROUND

Federal regulations require asylum officers to make reasonable fear determinations in two types of cases referred by other DHS officers, after a final administrative removal order has been issued under section 238(b) of the Immigration and Nationality Act (INA), or after a prior order of removal, exclusion, or deportation has been reinstated under section 241(a)(5) of the INA. These are cases in which an individual ordinarily is removed without being placed in removal proceedings before an immigration judge.

8 C.F.R. § 208.31; Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999).

Congress has provided for special removal processes for certain aliens who are not eligible for any form of relief from removal. At the same time, however, obligations under Article 33 of the Refugee Convention relating to the Status of Refugees and Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention Against Torture", "the Convention", or "CAT") still apply in these cases. Therefore, withholding of removal under either section 241(b)(3) of the INA or under the regulations implementing the Convention Against Torture may still be available in these cases. Withholding of removal is not considered to be a form of relief from removal, because it is specifically limited to the country where the individual is at risk and does not prohibit the individual's removal from the United States to a country other than the country where the individual is at risk.

The purpose of the reasonable fear determination is to ensure compliance with U.S. treaty obligations not to return a person to a country where the person's life or freedom would be threatened on account of a protected characteristic in the refugee definition, or where the person would be tortured, and, at the same time, to adhere to Congressional directives to subject certain categories of aliens to

These treaty obligations are based on Article 33 of the 1951 Convention relating to the Status of Refugees; and Article 3 of the Convention Against Torture.

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streamlined removal proceedings.

Similar to credible fear determinations in expedited removal proceedings, reasonable fear determinations serve as a screening mechanism to identify potentially meritorious claims for further consideration by an immigration judge, and at the same time to prevent individuals subject to removal from delaying removal by filing clearly unmeritorious or frivolous claims.

III. JURISDICTION

See Reasonable Fear Procedures Manual (Draft).

A. Reinstatement under Section 241(a)(5) of the INA

1. Reinstatement of Prior Order

INA § 241(a)(5); 8 C.F.R. § 241.8.

Section 241(a)(5) of the INA requires DHS to reinstate a prior order of exclusion, deportation, or removal, if a person enters the United States illegally after having been removed, or after having left the United States after the expiration of an allotted period of voluntary departure, giving effect to an order of exclusion, deportation, or removal.

Once a prior order has been reinstated under this provision, the individual is not permitted to apply for asylum or any other relief under the INA. However, that person may apply for withholding of removal under section 241(b)(3) of the INA (based on a threat to life or freedom on account of a protected characteristic in the refugee definition) and withholding of removal or deferral of removal under the Convention Against Torture.

There are certain restrictions on issuing a reinstatement order to people who may qualify to apply for NACARA 203 pursuant to the Legal Immigration Family Equity Act (LIFE). The LIFE amendment provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief "shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act."

Langlois, Joseph E. Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries (Washington, DC: February 22, 2001).

Pearson, Michael. Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries (Washington, DC: February 23, 2001).

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In all cases, section 241(a)(5) applies retroactively to all prior removals, regardless of the date of the alien's illegal reentry. There are other issues that may affect the validity of a reinstated prior order, such as questions concerning whether the applicant's departure executed a final order of removal. An Asylum Pre-screening Officer (APSO) who is unsure about the validity of a reinstated prior removal order should consult the Reasonable Fear Procedures Manual, a supervisor, or the Headquarters Quality Assurance Branch.

See Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006).

Note: In the Fifth Circuit, an individual's departure from the U.S. after issuance of an NTA, but prior to the order of removal, does not strip an immigration judge of jurisdiction to order that individual removed; thus, that individual can be subject to reinstatement if previously ordered removed in absentia. See U.S. v Ramirez-Carcamo, 559 F.3d 384 (5th Cir. 2009).

2. Referral to Asylum Officer

If a person subject to reinstatement of a prior order of removal expresses a fear of return to the intended country of removal, the DHS officer must refer the case to an asylum officer for a reasonable fear determination, after the prior order has been reinstated.

8 C.F.R. §§ 208.31(a)-(b), 241.8(e).

3. Country of Removal

Form I-871, Notice of Intent/Decision to Reinstate Prior Order does not designate the country where DHS intends to remove the alien. Depending on which removal order is being reinstated under INA § 241(a)(5), that order may or may not designate a country of removal. For example, Form I-860, Notice and Order of Expedited Removal, does not indicate a country of removal, but an IJ order of removal resulting from section 240 proceedings does designate a country of removal. Regardless of which type of prior order is being reinstated, DHS must indicate where it proposes to remove the alien in order for the APSO to determine if the alien has a reasonable fear of persecution or torture in that particular country.

The asylum officer need only explore the person's fear with respect to the countries designated or the countries proposed. For example, if the applicant was previously ordered removed to country X, but is now claiming to be a citizen of country Y, the asylum officer should explore the person's fear with respect to both countries. If the person expresses a fear of return to any other country, the officer should memorialize it in the file to ensure that the fear is explored should DHS ever contemplate removing the person to that

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other country.

B. Removal Orders under Section 238(b) of the INA (based on aggravated felony conviction)

1. DHS removal order

Under certain circumstances, DHS may issue an order of removal if DHS determines that a person is deportable under section 237(a)(2)(A)(iii) of the INA (convicted by final judgment of an aggravated felony after having been admitted to the U.S.). This means that the person may be removed without removal proceedings before an immigration judge.

INA § 238(b).

2. Referral to an asylum officer

If a person who has been ordered removed by DHS pursuant to section 238(b) of the INA expresses a fear of persecution or torture, that person must be referred to an asylum officer for a reasonable fear determination.

8 C.F.R. §§ 208.31(a)-(b), 238.1(f)(3). Note that regulations require the DHS to give notice of the right to request withholding of removal to a particular country, if the person ordered removed fears persecution or torture in that country. 8 C.F.R. § 238.1(b)(2)(i).

3. Country of Removal

The removal order under section 238(b) should designate a country of removal, and in some cases, will designate an alternative country.

IV. DEFINITION OF "REASONABLE FEAR"

Regulations define "reasonable fear of persecution or torture" as follows:

8 C.F.R. § 208.31(c).

> The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

A few points to note, which are discussed in greater detail later in the lesson, are the following:

1. The "reasonable possibility" standard is the same standard required to establish eligibility for asylum (the "well-founded fear" standard).

8 C.F.R. § 208.31(c); Immigration and Naturalization Service,

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2. Like asylum, there is an "on account of" requirement necessary to establish reasonable fear of persecution: the persecution must be on account of a protected characteristic in the refugee definition.

Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999).

3. There is no "on account of" requirement necessary to establish a reasonable fear of torture.

4. Mandatory and discretionary bars are not considered in a determination of reasonable fear of persecution or reasonable fear of torture.

V. STANDARD OF PROOF

The standard of proof to establish "reasonable fear of persecution or torture" is the "reasonable possibility" standard. This is the same standard required to establish a "well-founded fear" of persecution in the asylum context. The "reasonable possibility" standard is lower than the "more likely than not standard" required to establish eligibility for withholding of removal. It is higher than the standard of proof required to establish a "credible fear" of persecution. The standard of proof to establish a "credible fear" of persecution or torture is whether there is a significant possibility of establishing eligibility for asylum or protection under the Convention Against Torture before an immigration judge.

See RAIO Training Modules, Well-Founded Fear and Evidence.

Where there is disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue, the precedent for the Circuit in which the applicant resides is used in determining whether the applicant has a reasonable fear of persecution or torture. Note that this differs from the credible fear context in which the Circuit interpretation most favorable to the applicant is used.

VI. IDENTITY

The applicant must be able to credibly establish his or her identity by a preponderance of the evidence. In many cases, an applicant will not have documentary proof of identity or nationality. However, credible testimony alone can establish identity and nationality. Documents such as birth certificates and passports are accepted into evidence if available. The officer may also consider information provided by Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP).

See RAIO Training Module, Refugee Definition.

VII. PRIOR DETERMINATIONS ON THE MERITS

An adjudicator or immigration judge previously may have made a determination on the merits of the claim. This is most common in the

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case of an applicant who is subject to reinstatement of a prior order. For example, the applicant may have requested asylum and withholding of removal in prior removal proceedings before an immigration judge, and the immigration judge may have made a determination on the merits that the applicant was ineligible.

The APSO must explore the applicant's claim, according deference to the prior determination unless there is clear error in the prior determination. The officer should also inquire as to whether there are any changed circumstances that would otherwise affect the applicant's eligibility.

VIII. CREDIBILITY

A. Credibility Standard

In making a reasonable fear determination, the asylum officer must evaluate whether the applicant's testimony is credible.

The asylum officer should assess the credibility of the assertions underlying the applicant's claim, considering the totality of the circumstances and all relevant factors.

The U.S. Supreme Court has held that to properly consider the totality of the circumstances, "the whole picture… must be taken into account." The Board of Immigration Appeals (BIA) has interpreted this to include taking into account the whole of the applicant's testimony as well as the individual circumstances of each applicant.

United States v. Cortez, 449 U.S. 411, 417 (1981).

See RAIO Training Module, Credibility; see also Matter of B-, 21 I&N Dec. 66, 70 (BIA 1995) and Matter of Kasinga, 21 I&N Dec. 357, 364 (BIA 1996).

B. Evaluating Credibility in a Reasonable Fear Interview

1. General Considerations

See RAIO Training Module, Credibility.

a. The asylum officer must gather sufficient information to determine whether the alien has a reasonable fear of persecution or torture. The applicant's credibility should be evaluated (1) only after all information is elicited and (2) in light of "the totality of the circumstances, and all relevant factors."

b. The asylum officer must remain neutral and unbiased and must evaluate the record as a whole. The asylum officer's personal opinions or moral views regarding an applicant should not affect the officer's decision.

c. The applicant's ability or inability to provide detailed descriptions of the main points of the claim is critical

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to the credibility evaluation. The applicant's willingness and ability to provide those descriptions may be directly related to the asylum officer's skill at placing the applicant at ease and eliciting all the information necessary to make a proper decision. An asylum officer should be cognizant of the fact that an applicant's ability to provide such descriptions may be impacted by the context and nature of the reasonable fear screening process.

2. Properly Identifying and Probing Credibility Concerns During the Reasonable Fear Interview

a. Identifying Credibility Concerns

In making this determination, the asylum officer should take into account the same factors considered in evaluating credibility in the affirmative asylum context, which are discussed in the RAIO Modules: Credibility and Evidence.

Section 208 of the Act provides a non-exhaustive list of factors that may be used in a credibility determination in the asylum context. These include: internal consistency, external consistency, plausibility, demeanor, candor, and responsiveness.

The amount of detail provided by an applicant is another factor that should be considered in making a credibility determination. In order to rely on "lack of detail" as a credibility factor, however, asylum officers must pose questions regarding the type of detail sought.

While demeanor, candor, responsiveness, and detail provided are to be taken into account in the reasonable fear context when making a credibility determination, an adjudicator must take into account cross-cultural factors, effects of trauma, and the nature of the reasonable fear interview process—including detention, relatively brief and often telephonic interviews, etc.— when evaluating these factors in the reasonable fear context.

b. Informing the Applicant of the Concern and Giving the Applicant an Opportunity to Explain

When credibility concerns present themselves during

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the course of the reasonable fear interview, the applicant must be given an opportunity to address and explain them. The asylum officer must follow up on all credibility concerns by making the applicant aware of each portion of the testimony, or his or her conduct, that raises credibility concerns, and the reasons the applicant's credibility is in question. The asylum officer must clearly record in the interview notes the questions used to inform the applicant of any relevant credibility issues, and the applicant's responses to those questions.

C. Assessing Credibility in Reasonable Fear when Making a Reasonable Fear Determination

1. In assessing credibility, the officer must consider the totality of the circumstances and all relevant factors.

2. When considering the totality of the circumstances in determining whether the assertions underlying the applicant's claim are credible, the following factors must be considered as they may impact an applicant's ability to present his or her claim:

   (i) trauma the applicant has endured;
   (ii) passage of a significant amount of time since the described events occurred;
   (iii) certain cultural factors, and the challenges inherent in cross-cultural communication;
   (iv) detention of the applicant;
   (v) problems between the interpreter and the applicant, including problems resulting from differences in dialect or accent, ethnic or class differences, or other differences that may affect the objectivity of the interpreter or the applicant's comfort level; and unfamiliarity with speakerphone technology, the use of an interpreter the applicant cannot see, or the use of an interpreter that the applicant does not know personally.

3. The asylum officer must have followed up on all credibility concerns during the interview by making the applicant aware of each concern, and the reasons the applicant's testimony is in question. The applicant must have been given an opportunity to address and explain all such concerns during the reasonable interview.

See also RAIO Training Module, Interviewing- Survivors of Torture; RAIO Training Module, Interviewing- Working with an Interpreter.

Asylum officers must ensure that persons with potential biases against applicants on the grounds of race, religion, nationality, membership in a particular social group, or political opinion are not used as interpreters. See International Religious Freedom Act of 1998, 22 U.S.C. § 6473(a); RAIO Training Module, IRFA (International Religious Freedom Act).

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4. Generally, trivial or minor credibility concerns in and of themselves will not be sufficient to find an applicant not credible.

   Nonetheless, on occasion such credibility concerns may be sufficient to support a negative reasonable fear determination considering the totality of the circumstances and all relevant factors. Such concerns should only be the basis of a negative determination if the officer attempted to elicit sufficient testimony, and the concerns were not adequately resolved by the applicant during the reasonable fear interview.

5. The officer sould compare the applicant's testimony with any prior testimony and consider any prior credibility findings. The individual previously may have provided testimony regarding his or her claim in the context of an asylum or withholding of removal application. For example, the applicant may have requested asylum and withholding of removal in prior removal proceedings before an immigration judge, and the immigration judge may have made a determination that the claim was or was not credible. It is important that the asylum officer ask the individual about any inconsistencies between prior testimony and the testimony provided at the reasonable fear interview.

   In any case in which the asylum officer's credibility determination differs from the credibility determination previously reached by another adjudicator on the same allegations, the asylum officer must provide a sound explanation and support for the different finding.

6. All reasonable explanations must be considered when assessing the applicant's credibility. The asylum officer need not credit an unreasonable explanation.

   If, after providing the applicant with an opportunity to explain or resolve any credibility concerns, the officer finds that the applicant has provided a reasonable explanation, a positive credibility determination may be appropriate when considering the totality of the circumstances and all relevant factors.

   If, however, after providing the applicant with an opportunity to explain or resolve any credibility concerns, the applicant fails to provide an explanation, or the officer finds that the applicant did not provide a reasonable

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explanation, a negative credibility determination based upon the totality of the circumstances and all relevant factors will generally be appropriate.

D. Documenting a Credibility Determination

1. The asylum officer must clearly record in the interview notes the questions used to inform the applicant of any relevant credibility issues, and the applicant's responses to those questions.

2. The officer must specify in the written case analysis the basis for the negative credibility finding. In the negative credibility context, the officer must note any portions of the testimony found not credible, including the specific inconsistencies, lack of detail or other factors, along with the applicant's explanation and the reason the explanation is deemed not to be reasonable.

3. If information that impugns the applicant's testimony becomes available after the interview but prior to serving the reasonable fear determination, a follow-up interview must be scheduled to confront the applicant with the derogatory information and to provide the applicant with an opportunity to address the adverse information. Unresolved credibility issues should not form the basis of a negative credibility determination.

IX. ESTABLISHING A REASONABLE FEAR OF PERSECUTION

To establish a reasonable fear of persecution, the applicant must show that there is a reasonable possibility he or she will suffer persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. As explained above, this is the same standard asylum officers use in evaluating whether an applicant is eligible for asylum. However, the reasonable fear standard in this context is used not as part of an eligibility determination for asylum, but rather as a screening mechanism to determine whether an individual may be able to establish eligibility for withholding of removal in Immigration Court.

In contrast to an asylum adjudication, the APSO may not exercise discretion in making a positive or negative reasonable fear determination and may not consider the applicability of any mandatory bars that may apply if the applicant is permitted to apply for withholding of removal before the immigration judge.

A. Persecution

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The harm the applicant fears must constitute persecution. The determination of whether the harm constitutes persecution for purposes of the reasonable fear determination is no different from the determination in the affirmative asylum context. This means that the harm must be serious enough to be considered persecution, as described in case law, the UNHCR Handbook, and USCIS policy guidance. Note that this is different from the evaluation of persecution in the credible fear context, where the applicant need only demonstrate a significant possibility that he or she could establish that the feared harm is serious enough to constitute persecution.

See Discussion of "persecution" in RAIO Training Module, Persecution.

B. Nexus to a Protected Characteristic

As in the asylum context, the applicant must establish that the feared harm is on account of a protected characteristic in the refugee definition (race, religion, nationality, membership in a particular social group, or political opinion). This means the applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the applicant because the applicant possesses or is believed to possess one or more of the protected characteristics in the refugee definition.

8 C.F.R. § 208.31(c).

The applicant does not bear the burden of establishing the persecutor's exact motivation. For cases where no nexus to a protected ground is immediately apparent, the asylum officer in reasonable fear interviews should ask questions related to all five grounds to ensure that no nexus issues are overlooked.

Although the applicant bears the burden of proof to establish a nexus between the harm and the protected ground, asylum officers have an affirmative duty to elicit all information relevant to the nexus determination. Evidence of motive can be either direct or circumstantial. Reasonable inferences regarding the motivations of persecutors should be made, taking into consideration the culture and patterns of persecution within the applicant's country of origin and any relevant country of origin information, especially if the applicant is having difficulty answering questions regarding motivation.

There is no requirement that the persecutor be motivated only by the protected belief or characteristic of the applicant. As long as there is a reasonable possibility that at least one central reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic, the applicant may establish the harm is "on account of" a protected characteristic in the reasonable fear context.

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C. Past Persecution

1. Presumption of future persecution

If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant has a reasonable fear of persecution in the future on the basis of the original claim. This presumption may be overcome if a preponderance of the evidence establishes that,

See 8 C.F.R. § 208.16(b)(1)(i).

a. there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or

b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable to expect the applicant to do so.

2. Severe past persecution and other serious harm

A finding of reasonable fear of persecution cannot be based on past persecution alone, in the absence of a reasonable possibility of future persecution. A reasonable fear of persecution may be found only if there is a reasonable possibility the applicant will be persecuted in the future, regardless of the severity of the past persecution or the likelihood that the applicant will face other serious harm upon return. This is because withholding of removal is accorded only to provide protection against future persecution and may not be granted without a likelihood of future persecution.

In contrast, a grant of asylum may be based on the finding that there are compelling reasons for the applicant's unwillingness to return arising from the severity of past persecution or where the applicant establishes that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country, even if there is no longer a reasonable possibility the applicant would be persecuted in the future. 8 C.F.R. § 208.13(b)(1)(iii).

As noted above, a finding of past persecution raises the presumption that the applicant's fear of future persecution is reasonable.

D. Internal Relocation

As in the asylum context, the evidence must establish that the applicant could not avoid future persecution by relocating within the country of feared persecution or that, under all the circumstances, it would be unreasonable to expect him or her to do so. In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal

See Discussion of internal relocation in RAIO Training Module, Well-Founded Fear; see also 8 C.F.R. § 208.16(b)(3).

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relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

E. Mandatory Bars

Asylum officers may not take into consideration mandatory bars to withholding of removal when making reasonable fear of persecution determinations.

8 C.F.R. § 208.31(c).

See Reasonable Fear Procedures Manual (Draft).

If the asylum officer finds that there is a reasonable possibility the applicant would suffer persecution on account of a protected characteristic, the asylum officer must refer the case to the immigration judge, regardless of whether the person has committed an aggravated felony, has persecuted others, or is subject to any other mandatory bars to withholding of removal.

However, during the interview the officer must develop the record fully by exploring whether the applicant may be subject to a mandatory bar.

If the officer identifies a potential bar issue, the officer should consult a supervisory officer and follow procedures outlined in the Reasonable Fear Procedures Manual on "flagging" such information for the hearing.

The immigration judge will consider mandatory bars in deciding whether the applicant is eligible for withholding of removal under section 241(b)(3) of the Act or CAT.

8 C.F.R. §§ 208.16(c)(4), (d). Please note there are no bars to deferral of removal under CAT.

The following mandatory bars apply to withholding of removal under section 241(b)(3)(A) for cases commenced April 1, 1997 or later:

INA § 241(b)(3)(B); 8 C.F.R. §§ 208.16(d)((2), (d)(3) (for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, mandatory denials are found within section 243 (h)(2) of the Act as it appeared prior to that date).

(1) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(2) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(3) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States;

(4) there are reasonable grounds to believe that the alien is a

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danger to the security of the United States (including anyone described in subparagraph (B) or (F) of section 212(a)(3)); or

(5) the alien is deportable under Section 237(a)(4)(D) (participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing. Any alien described in clause (i), (ii), or (iii) of section 212(a)(3)(E) is deportable.)

X. CONVENTION AGAINST TORTURE – BACKGROUND

This section contains a background discussion of the Convention Against Torture, to provide context to the reasonable fear of torture determinations. As a signatory to the Convention Against Torture the United States has an obligation to provide protection where there are substantial grounds to believe that an individual would be in danger of being subjected to torture. Notably, there are no bars to protection under the Convention Against Torture. Torture is an act universally condemned and so repugnant to basic notions of human rights that even individuals who are undeserving of refugee protection, will not be returned to a country where they are likely to be tortured. An overview of the Convention Against Torture may be found in the RAIO Module: International Human Rights Law.

A. U.S. Ratification of the Convention and Implementing Legislation

The United States Senate ratified the Convention Against Torture on October 27, 1990. President Clinton then deposited the United States instrument of ratification with the United Nations Secretary General on October 21, 1994, and the Convention entered into force for the United States thirty days later, on November 20, 1994.

Recognizing that a treaty is considered "law of the land" under the United States Constitution, the Executive Branch took steps to ensure that the United States was in compliance with its treaty obligations, even though Congress had not yet enacted implementing legislation. The INS adopted an informal process to evaluate whether a person who feared torture and was subject to a final order of deportation, exclusion, or removal would be tortured in the country to which the person would be removed. The United States relied on this informal process to ensure compliance with Article 3 in immigration cases until the CAT rule was promulgated.

Similarly, the Department of State considered whether a person would be subject to torture when addressing requests for extradition.

On October 21, 1998, President Clinton signed legislation that required the Department of Justice to promulgate regulations to

Section 2242(b) of the Foreign Affairs Reform and

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implement in immigration cases the United States' obligations under Article 3 of the Convention Against Torture, subject to any reservations, understandings, and declarations contained in the United States Senate resolution to ratify the Convention.

Restructuring Act of 1998 (Pub. L. 105-277, Division G, Oct. 21, 1998).

Pursuant to the statutory directive, the Department of Justice regulations provide a mechanism for individuals fearing torture to seek protection under Article 3 of the Convention in immigration cases. One of the mechanisms for protection provided in the regulations, effective March 22, 1999, is the "reasonable fear" screening process.

See 8 C.F.R. §§ 208.16-208.18.

B. Article 3

1. Non-Refoulement

Article 3 of the Convention provides:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

This provision does not prevent the removal of a person to a country where he or she would not be in danger of being subjected to torture. Like withholding of removal under section 241(b)(3) of the INA, which is based on Article 33 of the Convention relating to the Status of Refugees, protection under Article 3 of the Convention Against Torture is country-specific.

In addition, this obligation does not prevent the United States from removing a person to a country at any time if conditions have changed such that it no longer is likely that the individual would be tortured there.

See 8 C.F.R. §§ 208.17(d)-(f), 208.24 for procedures for terminating withholding and deferral of removal.

2. U.S. Ratification Document

When ratifying the Convention Against Torture, the U.S. Senate adopted a series of reservations, understandings and declarations, which modify the U.S. obligations under Article 3, as described in the section below on the Convention definition of torture. These reservations, understandings, and declarations are part of the substantive standards that are binding on the United States and are reflected in the implementing regulations.

XI. DEFINITION OF TORTURE

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Torture has been defined in a variety of documents and in legislation unrelated to the Convention Against Torture. However, only an act that falls within the definition described in Article 1 of the Convention, as modified by the U.S. ratification document, may be considered "torture" for purposes of making a reasonable fear of torture determination. These substantive standards are incorporated in the regulations at 8 C.F.R. § 208.18(a) (1999).

See RAIO Training Module, Interviewing - Survivors of Torture and Other Severe Trauma, background reading associated with that lesson; Alien Tort Claims Act, codified at 28 U.S.C. § 1350.

Article 1 of the Convention defines torture as:

See also 8 C.F.R. §§ 208.18(a)(1), (3).

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate adopted several important "understandings" regarding the definition of torture, which are included in the implementing regulations and are discussed below. These "understandings" are binding on adjudicators interpreting the definition of torture.

136 Cong. Rec. S17429 at S17486-92 (daily ed. October 27, 1990); 8 C.F.R. § 208.18(a).

A. Identity of Torturer

> The torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Convention Against Torture, Article 1.

1. Public official

> The torturer or the person who acquiesces in the torture must be a public official or other person acting in an official capacity in order to invoke Article 3 Convention Against Torture protection. A non-governmental actor could be found to have committed torture within the meaning of the Convention only if that person inflicts the torture (1) at the instigation of, (2) with the consent of, or (3) with the acquiescence of a public official or other person acting in an official capacity.

Convention against Torture, Article 1. See also Committee on Foreign Relations Report, Convention Against Torture, Exec. Report 101-30, August 30, 1990 (hereinafter "Committee Report"), p. 14; Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8483 (Feb. 19, 1999); Ali v. Reno, 237 F.3d 591, 597 (6th Cir.

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2001).

The phrase "acting in an official capacity" modifies both "public official" and "other person," such that a public official must be "acting in an official capacity" to satisfy the state action element of the torture definition.

Matter of Y-L-, A-G-, R-S-R, 23 I&N Dec. 270 (AG 2002); Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000); Matter of J-E-, 23 I&N Dec. 291 (BIA 2002).

When a public official acts in a wholly private capacity, outside any context of governmental authority, the state action element of the torture definition is not satisfied. On this topic, the Second Circuit provided that, "[a]s two of the CAT's drafters have noted, when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons."

Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004).

To determine whether a public official is acting in a private capacity or in an official capacity, APSOs must elicit testimony to determine whether the public official was acting within the scope of their authority and/or under color of law. A determination that the public official is acting under either of the scope of their authority or under color of law would result in a determination that the public official was acting "in an official capacity".

Although the regulation does not define "acting in an official capacity," the Attorney General equated the term to mean "under color of law" as interpreted by cases under the civil rights act.

See Ali v. Reno, 237 F.3d 591, 597 (6th Cir. 2001); Ahmed v. Mukasey, 300 Fed.Appx. 324 (5th Cir. 2008) (unpublished).

Thus, a public official is acting in an official capacity when "he misuses power possessed by virtue of law and made possible only because he was clothed with the authority of law."

Ramirez Peyro v. Holder, 574 F.3d 893 (8th Cir. 2009).

To establish whether a public official is acting in an official capacity (i.e. under the color of law), the applicant must establish a nexus between the public official's authority and the harmful conduct inflicted on the applicant by the public official. The Eighth Circuit addressed "acting in an official capacity" in its decision in Ramirez Peyro v. Holder. The court indicated such an inquiry is fact intensive and includes considerations like "whether the officers are on duty and in uniform, the motivation behind the officer's actions and whether the officers had access to the victim because of their positions, among others." Id.

See U.S. v. Colbert, 172 F.3d 594, 596 - 597 (8th Cir 1999); West v. Atkins, 487 U.S. 42, 49 (1988).

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Following the guidance provided in Ramirez Peyro v. Holder, the Fifth Circuit also addressed "acting in an official capacity" by positing "[w]e have recognized on numerous occasions that acts motivated by an officer's personal objectives are 'under color of law' when the officer uses his official capacity to further those objectives." Citing directly to Ramirez Peyro v. Holder, the Fifth Circuit determined that "proving action in an officer's official capacity 'does not require that the public official be executing official state policy or that the public official be the nation's president or some other official at the upper echelons of power. Rather ... the use of official authority by low-level officials, such a[s] police officers, can work to place actions under the color of law even where they are without state sanction.'"

Marmorato v. Holder, 376 Fed.Appx. 380, 385 (5th Cir. 2010) (unpublished).

In this context, the court points to two published cases as examples. First, Bennett v. Pippin, 74 F.3d 578, 589 (5th Cir.1996), in which the court found "that an officer's action was 'under color of state law' where a sheriff raped a woman and used his position to ascertain when her husband would be home and threatened to have her thrown in jail if she refused." The Fifth Circuit compared this case to Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir.1981) (per curiam), in which the court found "no action under color of law where a police chief assaulted his sister-in-law over personal arguments about family matters, but did not threaten her with his power to arrest."

See also Miah v. Mukasey, 519 F. 3rd 784 (8th Cir. 2008) (elected official was not acting in his official capacity in his rogue efforts to take control of others property).

As Marmorato v. Holder illustrates with its citation to Bennett v. Pippin, an official need not be acting in the scope of their authority to be acting under color of law.

It is unsettled whether an organization that exercises power on behalf of the people subjected to its jurisdiction, as in the case of a rebel force which controls a sizable portion of a country, would be viewed as a "government actor." It would be necessary to look at factors such as how much of the country is under the control of the rebel force and the level of that control.

See Matter of S-V-, Int. Dec. 3430 (BIA 2000) (concurring opinion); see also Habtemichael v. Ashcroft, 370 F.3d 774 (8th Cir. 2004) (remanding for agency determination as to the extent of the Eritrean People's Liberation Front's (EPLF) control over parts of Ethiopia during the period when the applicant was conscripted by the EPLF); D-Muhumed v. U.S. Atty. Gen., 388 F.3d 814 (11th Cir. 2004) (denying protection under CAT because "Somalia currently

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has no central government, and the clans who control various sections of the country do so through continued warfare and not through official power."); but see the Committee Against Torture decision in Elmi v. Australia, Comm. No. 120/1998 (1998) (finding that warring factions in Somalia fall within the phrase "public official(s) or other person(s) acting in an official capacity). Note that the United Nations Committee Against Torture a monitoring body for the implementation and observance of the Convention Against Torture. The U.S. recognizes the Committee, but does not recognize its competence to consider cases. The BIA considers the Committee's opinions to be advisory only. See Matter of S-V-, I&N Dec. 22 I&N Dec. 1306, 1313 n. 1 (BIA 2000).

2. Acquiescence

When the "torturer" is not a public official or other individual acting in an official capacity, a claim under the Convention Against Torture only arises if a public official or other person acting in an official capacity instigates, consents, or acquiesces to the torture.

A public official cannot be said to have "acquiesced" in torture unless, prior to the activity constituting torture, the official was "aware" of such activity and thereafter breached a legal responsibility to intervene to prevent the activity.

8 C.F.R. § 208.18(a)(7).

The Senate ratification history explains that the term "awareness" was used to clarify that government acquiescence may be established by evidence of either actual knowledge or willful blindness. "Willful blindness" imputes knowledge to a government official who has a duty to prevent misconduct and "deliberately closes his eyes to what would otherwise have been obvious to him."

136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990); Committee Report (Aug. 30, 1990), p. 9; see also S. Hrg 101-718 (July 30, 1990), Statement of Mark Richard, Dep. Asst. Attorney General, DOJ Criminal Division, at 14.

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In addressing the meaning of acquiescence as it relates to fear of Colombian guerrillas, paramilitaries and narco-traffickers who were not attached to the government, the Board of Immigration Appeals (BIA) indicated that more than awareness or inability to control is required. The BIA held that for acquiescence to take place the government officials must be "willfully accepting" of the torturous activity of the non-governmental actor.

Matter of S-V-, Int. Dec. 3430 (BIA 2000).

Several federal circuit courts of appeals have rejected the BIA's "willful acceptance" phrase in favor of the more precise "willful blindness" language that appears in the Senate's ratification history.

For purposes of threshold reasonable fear screenings, asylum officers must use the willful blindness standard.

Pieschacon-Villegas v. Att'y Gen. of U.S., 671 F.3d 303 (3d Cir. 2011); Hakim v. Holder, 628 F. 3d 151 (5th Cir. 2010); Aguilar-Ramos v. Holder, 594 F.3d 701, 706 (9th Cir. 2010); Diaz v. Holder, 2012 WL 5359295 (10th Cir. 2012) (unpublished); Silva-Rengifo v. Atty. Gen. of U.S., 473 F.3d 58, 70 (3d Cir. 2007); Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004); Lopez-Soto v. Ashcroft, 383 F.3d 228, 240 (4th Cir. 2004); Azanor v. Aschcroft, 364 F.3d 1013 (9th Cir. 2004); Amir v. Gonzales, 467 F.3d 921, 922 (6th Cir. 2006); Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003); Ontunez-Turcios v. Ashcroft, 303 F.3d 341, 354-55 (5th Cir. 2002); Ali v. Reno, 237 F.3d 591, 597 (6th Cir. 2001).

The United States Circuit Court of Appeals for the Ninth Circuit ruled that the correct inquiry concerning the acquiescence of a state actor is "whether a respondent can show that public officials demonstrate willful blindness to the torture of their citizens." The court rejected the notion that acquiescence requires a public official's "actual knowledge" and "willful acceptance." The Ninth Circuit subsequently reaffirmed that the state actor's acquiescence to the torture must be "knowing," whether through actual knowledge or imputed knowledge ("willful blindness"). Both forms of knowledge constitute "awareness."

Zheng v. INS, 332 F.3d 1186 (9th Cir. 2003).

Azanor v. Ashcroft, 364 F.3d 1013, 1020 (9th Cir. 2004).

The United States Circuit Court of Appeals for the Second Circuit agreed with the Ninth Circuit approach on the issue of acquiescence of government officials, stating "torture requires only that government officials know of or remain

Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004) (finding that even if the Egyptian police who would

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willfully blind to act and thereafter breach their legal responsibility to prevent it."

carry out the abuse were not acting in an official capacity, "the 'routine' nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either know of the torture or remain willfully blind to the torture and breach their legal responsibility to prevent it").

a. Relevance of a government's ability to control a non-governmental entity from engaging in acts of torture

The requirement that the torture be inflicted by or at the instigation, or with the consent or acquiescence of a public official or other person acting in an official capacity is distinct from the "unable or unwilling to protect" standard used in the definition of "refugee".

Pieschacon v. Attorney General, 671 F.3d 303 (3d Cir. 2011) (quoting from Silva-Rengifo v. Att'y Gen. of U.S., 473 F.3d 58, 65 (3d Cir. 2007)); see also Gomez v. Gonzales, 447 F.3d 343 (C.A.5, 2006); Reyes-Sanchez v. U.S. Atty. Gen., 369 F.3d 1239 (C.A.11, 2004)("That the police did not catch the culprits does not mean that they acquiesced in the harm.").

Although a government's ability to control a particular group may be relevant to an inquiry into governmental acquiescence under CAT, that inquiry does not turn on a government's ability to control persons or groups engaged in torturous activity.

In De La Rosa v. Holder the Second Circuit stated "it is not clear to this Court why the preventative efforts of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the CAT. Where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture would seem neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question of whether torture would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

De La Rosa v. Holder, 598 F.3d 103 (2d Cir. 2010).

In a similar case, the Third Circuit remanded to the BIA, indicating that the fact that the government of Colombia was engaged in war against the FARC, it did not in itself establish that it could not be consenting or acquiescing to torture by members of the FARC.

Pieschacon-Villegas v. Attorney General, 671 F.3d 303 (3d Cir. 2011); Gomez-Zuluaga v. Attorney General, 527 F.3d 330 (3d Cir. 2008).

Evidence that private actors have general support, without more, in some sectors of the government may be insufficient to establish that the officials would acquiesce to

Ontunez-Tursios; 303 F.3d

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torture by the private actors. Thus, a Honduran peasant and land reform activist who testified to fearing severe harm by a group of landowners did not demonstrate that government officials would turn a blind eye if he were tortured simply because they had ties to the landowners.

341 (5th Cir. 2002).

There is no acquiescence when law enforcement does not breach a legal responsibility to intervene to prevent torture. For example, in Ali v. Reno, the Danish police arrested and incarcerated the male relatives of a domestic violence victim while charges against them were pending. Only after the victim requested that the male relatives not be punished were they released.

Ali v. Reno, 237 F.3d 591, 598 (6th Cir. 2001).

In the context of government consent or acquiescence, the court in Ramirez-Peyro v. Holder reiterated its prior holding that "[u]se of official authority by low level officials, such a police officers, can work to place actions under the color of law even when they act without state sanction."

574 F.3d 893, 901 (8th Cir. 2009).

Therefore, even if country conditions show that a national government is fighting against corruption, that fact may not mean there is no acquiescence/consent by a local public official to torture. The Fifth Circuit visited this issue in Marmorato v. Holder, in which the court found that the immigration judge misinterpreted "in official capacity" when it found that the consent or acquiescence standard could never be satisfied in a country like Italy, but only in nations with "rogue governments" with "no regard for human rights or civil rights. The Fifth Circuit rejected "any notion that a petitioner's entitlement to relief depends upon whether his country of removal could be included on some hypothetical list of 'rogue' nations."

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The Convention Against Torture is designed to protect against future instances of torture. Therefore, the asylum officer should consider whether there is a reasonable possibility that:

See Sevoian v. Ashcroft, 290 F.3d 166 (3d Cir. 2002) (finding that there is no "acquiescence" to torture unless officials know about the torture before it occurs).

1. A public official would have prior knowledge or would willfully turn a blind eye to avoid gaining knowledge of the potential activity constituting torture; and

2. The public official would breach a legal duty to intervene to prevent such activity.

Evidence of how an official or officials have acted in the past (toward the applicant or others similarly situated) may shed light on how the official or officials may act in the future. "Official as well as unofficial country reports are probative evidence and can, by themselves, provide sufficient proof to sustain an alien's burden under the INA."

Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).

B. Torturer's Custody or Control over Individual

The definition of torture applies only to acts directed against persons in the offender's custody or physical control.

8 C.F.R. § 208.18(a)(6); Committee Report, p. 9 (Aug. 30, 1990).

The United States Circuit Court of Appeals for the Ninth Circuit held that an applicant need not demonstrate that he or she would likely face torture while in a public official's custody or physical control. It is enough that the alien would likely face torture while under private individuals' exclusive custody or control if such torture were to take place with consent or acquiescence of a public official or other individual acting in an official capacity.

Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004); Azanor v. Ashcroft, 364 F.3d 1013, 1019 (9th Cir. 2004).

For example, the Seventh Circuit has posited in dictum that "[p]robably more often than not the victim of a murder is within the murderer's physical control for at least a short time before the actual killing…" However, the court provided "that would not be true if for example the murderer were a sniper or a car bomber".

Comollari v. Ashcroft, 378 F.3d 694, 697 (7th Cir. 2004).

Pre-custodial police operations or military combat operations are outside the scope of Convention protection.

Establishing whether the act of torture may occur while in the offender's custody or physical control is very fact specific and in

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practicality it is very difficult to establish. While the applicant bears the burden of establishing "custody or physical control", the burden must be a reasonable one and this element may be established solely by circumstantial evidence.

While the law is unsettled as to the meaning of "in the offender's custody or physical control", when considering this element, APSOs must give applicants the benefit of doubt.

C. Specific Intent

For an act to constitute torture, it must be specifically intended to inflict severe physical or mental pain or suffering. An intentional act that results in unanticipated and unintended severity of pain is not torture under the Convention definition.

8 C.F.R. §§ 208.18(a)(1), (5); Auguste v. Ridge, 395 F.3d 123, 146 (3d Cir. 2005); 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990). See Committee Report, pp 14, 16.

Where the evidence shows that an applicant may be specifically targeted for punishment that may rise to the level of torture, the harm the applicant faces is specifically intended.

However an act of legitimate self-defense or defense of others would not constitute torture.

Kang v. Att'y Gen. of the U.S., 611 F.3d 157 (3d Cir. 2010) (distinguishing the facts from those in Auguste v. Ridge).

Also, harm resulting from poor prison conditions generally will not constitute torture when such conditions were not intended to inflict severe physical or mental pain or suffering.

For example, in Matter of J-E- the BIA considered a request for protection under the Convention Against Torture by a Haitian national who claimed that upon his removal to Haiti, as a criminal deportee, he would be detained indefinitely in substandard prison conditions by Haitian authorities. The BIA found that such treatment does not amount to torture where there is no evidence that the authorities are "intentionally and deliberately maintaining such prison conditions in order to inflict torture." Like other elements of the reasonable fear of torture analysis, the evidence establishing specific intent can be circumstantial.

Matter of J-E-, 23 I&N Dec. 291, 300-01 (BIA 2002); but see Matter of G-A-, 23 I&N Dec. 366, 372 (BIA 2002) (finding that where deliberate acts of torture are pervasive and widespread and where authorities use torture as a matter of policy, the specific intent requirement can be satisfied); see also Settenda v. Ashcroft, 377 F.3d 89 (1st Cir. 2004); Elien v. Ashcroft, 364 F.3d 392 (1st Cir. 2004); Cadet v. Bulger, 377 F.3d 1173 (11th Cir. 2004).

It is important to analyze the specific facts of each case in order to accurately determine the specific intent element. For example, in a case that was very similar to the facts in Matter of J-E-, the Eleventh Circuit directed the BIA to consider whether a Haitian criminal deportee, who was mentally ill and infected with the AIDS virus satisfied the specific intent element where there was evidence that mentally ill detainees with HIV are

Jean-Pierre v. U.S. Attorney General, 500 F.3d 1315 (11th Cir. 2007).

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singled out for forms of punishment that included ear-boxing (being slapped simultaneously on both ears), beatings with metal rods, and confinement to crawl spaces where detainees cannot stand up was eligible for withholding of removal under the CAT. In distinguishing the facts from Matter of J-E-, the court stated that in J-E-, the petitioner did not establish that he would be individually and intentionally singled out for harsh treatment and only produced evidence of generalized mistreatment and isolated instances of torture.

Note that, in contrast, when determining asylum eligibility, there is no requirement of specific intent to inflict harm to establish that an act constitutes persecution: "requiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture."

See Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996); Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997).

Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).

1. Reasons torture is inflicted

   The Convention definition provides a non-exhaustive list of possible reasons torture may be inflicted. The definition states that torture is an act that inflicts severe pain or suffering on a person for such purposes as:

8 C.F.R. § 208.18(a)(1).

   a. obtaining from him or a third person information or a confession,

   b. punishing him for an act he or a third person has committed or is suspected of having committed,

   c. intimidating or coercing him or a third person, or

   d. for any reason based on discrimination of any kind

Note: All discrimination is not torture.

2. No nexus to protected characteristic required.

   Unlike the non-return (non-refoulment) obligation in the Convention relating to the Status of Refugees, the Convention Against Torture does not require that the torture be connected to any of the five protected characteristics identified in the definition of a refugee, or any other characteristic the individual possesses or is perceived to possess.

D. Degree of Harm

"Torture" requires severe pain or suffering, whether physical or

8 C.F.R. § 208.18(a)(1).

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mental. "Torture" is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

8 C.F.R. § 208.18(a)(2).

See Matter of J-E-, 23 I&N Dec. 291 (BIA 2002) (citing to Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (1978) (discussing the severe nature of torture)).

The Report of the Committee on Foreign Relations, accompanying the transmission of the Convention to the Senate for ratification, explained:

Committee Report, p. 13.

> The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. . . ." The negotiating history indicates that the underlined portion of this description was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.

Therefore, certain forms of harm that may be considered persecution may not be considered severe enough to amount to torture.

See, RAIO Training Module, Interviewing- Survivors of Torture and other Severe Trauma, section Forms of Torture.

Types of harm that may be considered torture include, but are not limited to, the following:

1. rape and other severe sexual violence;

Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003).

2. application of electric shocks to sensitive parts of the body;

3. sustained, systematic beating;

4. burning;

5. forcing the body into positions that cause extreme pain, such as contorted positions, hanging, or stretching the body beyond normal capacity;

Matter of G-A-, 23 I&N Dec. 366, 372 (BIA 2002).

6. forced non-therapeutic administration of drugs; and

7. severe mental pain and suffering.

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Any harm must be evaluated on a case-by-case basis to determine whether it constitutes torture. In some cases, whether the harm above constitutes torture will depend upon its severity and cumulative effect.

The BIA in Matter of G-A- held that treatment that included "suspension for long periods in contorted positions, burning with cigarettes, sleep deprivation, and … severe and repeated beatings with cables or other instruments on the back and on the soles of the feet … beatings about the ears, resulting in partial or complete deafness, and punching in the eyes, leading to partial or complete blindness" when intentionally and deliberately inflicted constitutes torture.

Matter of G-A-, 23 I&N Dec. 366, 370 (BIA 2002).

E. Mental Pain or Suffering

For mental pain or suffering to constitute torture, the mental pain must be prolonged mental harm caused by or resulting from:

8 C.F.R. § 208.18(a)(4); 136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

a. The intentional infliction or threatened infliction of severe physical pain or suffering;

b. The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

c. The threat of imminent death; or

d. The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

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F. Lawful Sanctions

Article 1 of the Convention provides that pain or suffering "arising only from, inherent in or incidental to lawful sanctions" does not constitute torture.

8 C.F.R. § 208.18(a)(3).

8. Definition of lawful sanctions

"Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture."

8 C.F.R. § 208.18(a)(3).

The supplementary information published with the implementing regulations explains that this provision "does not require that, in order to come within the exception, an action must be one that would be authorized by United States law. It must, however, be legitimate, in the sense that a State cannot defeat the purpose of the Convention to prohibit torture."

Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999).

Note that "lawful sanctions" do not include the intentional infliction of severe mental or physical pain during interrogation or incarceration after an arrest that is otherwise based upon legitimate law enforcement considerations.

See 8 CFR § 208.18; Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004).

9. Sanctions cannot be used to circumvent the Convention

A State Party cannot through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture. In other words, the fact that a country's law allows a particular act does not preclude a finding that the act constitutes torture.

8 C.F.R. § 208.18(a)(3); 136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

Example: A State Party's law permits use of electric shocks to elicit information during interrogation. The fact that such treatment is formally permitted by law does not exclude it from the definition of torture.

10. Failure to comply with legal procedures

Failure to comply with applicable legal procedural rules in imposing sanctions does not per se amount to torture.

8 C.F.R. § 208.18(a)(8).

11. Death penalty

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The Senate's ratification resolution expresses the "understanding" that the Convention Against Torture does not prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution.

136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

The supplementary information to the implementing regulations explains,

> "The understanding does not mean . . . that any imposition of the death penalty by a foreign state that fails to satisfy United States constitutional requirements constitutes torture. Any analysis of whether the death penalty is torture in a specific case would be subject to all requirements of the Convention's definition, the Senate's reservations, understandings, and declarations, and the regulatory definitions. Thus, even if imposition of the death penalty would be inconsistent with United States constitutional standards, it would not be torture if it were imposed in a legitimate manner to punish violations of law. Similarly, it would not be torture if it failed to meet any other element of the definition of torture."

Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8482-83 (Feb. 19, 1999).

XII. ESTABLISHING A REASONABLE FEAR OF TORTURE

To establish a reasonable fear of torture, the applicant must show that there is a reasonable possibility the applicant would be subject to torture, as defined in the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

8 C.F.R. §§ 208.31(c), 208.18(a).

A. Torture

In evaluating whether an applicant has established a reasonable fear of torture, the asylum officer must address each of the elements in the torture definition and determine whether there is a reasonable possibility that each element is satisfied.

1. Severity of feared harm

Is there a reasonable possibility the applicant will suffer severe pain and suffering?

If the feared harm is mental suffering, does it meet each of the requirements listed in the Senate "understandings," as

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reflected in the regulations?

2. State action

   Is there a reasonable possibility the pain or suffering would be inflicted by or at the instigation of a public official or other person acting in an official capacity?

   If not, is there a reasonable possibility the pain or suffering would be inflicted with the consent or acquiescence of a public official or other person acting in an official capacity?

3. Custody or physical control

   Is there a reasonable possibility the feared harm would be inflicted while the applicant is in the custody or physical control of the offender?

4. Specific intent

   Is there a reasonable possibility the feared harm would be specifically intended by the offender to inflict severe physical or mental pain or suffering?

5. Lawful sanctions

   Is there a reasonable possibility the feared harm would not arise only from, would not be inherent in, and would not be incidental to, lawful sanctions?

   If the feared harm arises from, is inherent in, or is incidental to, lawful sanctions, is there a reasonable possibility the sanctions would defeat the object and purpose of the Convention?

B. No Nexus Requirement

There is no requirement that the feared torture be on account of a protected characteristic in the refugee definition. While there is a "specific intent" requirement that the harm be intended to inflict severe pain or suffering, the reasons motivating the offender to inflict such pain or suffering need not be on account of a protected characteristic of the victim.

Rather, the Convention definition provides a non-exhaustive list of possible reasons the torture may be inflicted, as described in section IX.C. above. The use of the modifier "for such purposes"

See Committee Report, p. 14.

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indicates that this is a non-exhaustive list, and that severe pain and suffering inflicted for other reasons may also constitute torture.

Note that the reasons for which a government has inflicted torture on individuals in the past may be important in determining whether the government is likely to torture the applicant.

See Sevoian v. Ashcroft, 290 F.3d 166 (3d Cir. 2002) (finding that the BIA did not abuse its discretion in denying a motion to reopen to consider a Convention claim when country conditions indicate that the government in question usually uses torture to extract confessions or in politically-sensitive cases and there is no reason to believe that the applicant falls into either category).

C. Past Torture

Unlike a finding of past persecution, a finding that an applicant suffered torture in the past does not raise a presumption that it is more likely than not the applicant will be subject to torture in the future. However, regulations require that any past torture be considered in evaluating whether the applicant is likely to be tortured, because an applicant's experience of past torture may be probative of whether the applicant would be subject to torture in the future.

Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999); 8 C.F.R. § 208.16(c)(3).

However, for purposes of the reasonable fear screening, which requires a lower standard of proof than is required for withholding of removal, that an applicant who demonstrates that he or she has been tortured in the past should generally be found to have met his or her burden of establishing a reasonable possibility of torture in the future, absent evidence to the contrary.

Conversely, past harm that does not rise to the level of torture does not mean that torture will not occur in the future, especially in countries were torture is widespread.

This approach governs only the reasonable fear screening and is not applicable to the actual eligibility determination for withholding under the Convention Against Torture. See Abdel-Masieh v. INS, 73 F.3d 579, 584 (5th Cir. 1996)(past actions do not create "an outer limit" on the government's future actions against an individual).

D. Internal Relocation

Regulations require the immigration judge to consider evidence that the applicant could relocate to another part of the country of removal where he or she is not likely to be tortured, in assessing whether the applicant can establish that it is more likely than not that he or she would be tortured. Therefore, asylum officers should consider whether or not the applicant could safely

8 C.F.R. § 1208.16(c)(3)(ii).

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relocate to another part of his or her country in assessing whether there is a reasonable possibility that he or she would be tortured.

8 C.F.R. §§ 208.16(c)(2), (3)(ii).

Under the Convention Against Torture, the burden is on the applicant to show that it is more likely than not that he or she will be tortured, and one of the relevant considerations is the possibility of relocation. In deciding whether the applicant has satisfied his or her burden, the adjudicator must consider all relevant evidence, including but not limited to the possibility of relocation within the country of removal.

Maldonado v. Holder, 786 F.3d 1155, (9th Cir. 2015) (overruling Hassan v. Ashcroft, 380 F.3d 1114 (9th Cir. 2004) ("Section 1208.16(c)(2) does not place a burden on an applicant to demonstrate that relocation within the proposed country of removal is impossible because the IJ must consider all relevant evidence; no one factor is determinative…. Nor do the regulations shift the burden to the government because they state that the applicant carries the overall burden of proof.")

Credible evidence that the feared torturer is a public official will normally be sufficient evidence that there is no safe internal relocation option in the reasonable fear context.

See, e.g., Comollari v. Ashcroft, 378 F.3d 694, 697-98 (7th Cir. 2004).

Unlike the persecution context, the regulations implementing CAT do not explicitly reference the need to evaluate the reasonableness of internal relocation. Nonetheless, the regulations provide that "all evidence relevant to the possibility of future torture shall be considered…" Therefore, asylum officers should apply the same reasonableness inquiry articulated in the persecution context to the CAT context.

8 C.F.R. § 208.16(c)(3)(iv).

8 C.F.R. § 208.13(b)(3); See RAIO Training Module, Well Founded Fear.

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E. Mandatory Bars

Although certain mandatory bars apply to a grant of withholding of removal under the Convention Against Torture, no mandatory bars may be considered in making a reasonable fear of torture determination.

8 C.F.R. §§ 208.16(d)(2); 208.31(c).

Because there are no bars to protection under Article 3, an immigration judge must grant deferral of removal to an applicant who is barred from a grant of withholding of removal, but who is likely to be tortured in the country to which the applicant has been ordered removed. Therefore, the reasonable fear screening process must identify and refer to the immigration judge aliens who have a reasonable fear of torture, even those who would be barred from withholding of removal, so that an immigration judge can determine whether the alien should be granted deferral of removal.

8 C.F.R. § 208.17(a).

APSOs must elicit information regarding any potential bars to withholding of removal during the interview.

The officer must keep in mind that the applicability of these bars requires further evaluation that will take place in the full hearing before an immigration judge if the applicant otherwise has a reasonable fear of persecution or torture. In such cases, the officer should consult a supervisory officer and follow procedures on "flagging" such information for the hearing as outlined in the Reasonable Fear Procedures Manual.

XIII. EVIDENCE

A. Credible Testimony

To establish eligibility for withholding of removal under section 241(b)(3) of the Act or the Convention Against Torture, the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

8 C.F.R. §§ 208.16(b); 208.16(c)(2).

As in the asylum context, there may be cases where lack of corroboration, without reasonable explanation, casts doubt on the credibility of the claim or otherwise affects the applicant's ability to meet the requisite burden of proof. Asylum officers should follow the guidance in the RAIO Modules, Credibility, and Evidence, and HQASY memos on this issue in evaluating whether lack of corroboration affects the applicant's ability to establish a reasonable fear of persecution or torture.

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B. Country Conditions

Country conditions information is integral to most reasonable fear determinations, whether the asylum officer is evaluating reasonable fear of persecution or reasonable fear of torture.

See RAIO Training Module, Country of Origin Information (COI) Researching and Using COI in RAIO Adjudications.

The Convention Against Torture specifically requires State Parties to take country conditions information into account, where applicable, in evaluating whether a person would be subject to torture in a particular country.

> "[T]he competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

Convention Against Torture, Article 3, para. 2.

The implementing regulations reflect this treaty provision by providing that all evidence relevant to the possibility of future torture must be considered, including, but not limited to, evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable, and other relevant information regarding conditions in the country of removal.

8 C.F.R. §§ 208.16(c)(3).

As discussed in the supplementary information to the regulations, "the words 'where applicable' indicate that, in each case, the adjudicator will determine whether and to what extent evidence of human rights violations in a given country is in fact a relevant factor in the case at hand. Evidence of the gross and flagrant denial of freedom of the press, for example, may not tend to show that an alien would be tortured if referred to that country."

Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999).

Analysis of country conditions requires an examination into the likelihood that the applicant will be persecuted or tortured upon return. Some evidence indicating that the feared harm or penalty would be enforced against the applicant should be cited in support of a positive reasonable fear determination.

See Matter of M-B-A-, 23 I&N Dec. 474, 478-79 (BIA 2002) (finding that a Nigerian woman convicted of a drug offense in the United States was ineligible for protection under the Convention where she provided no evidence that a Nigerian law criminalizing certain drug offenses committed outside Nigeria would be enforced against her).

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In Matter of G-A-, the BIA found that an Iranian Christian of Armenian descent who lived in the U.S. for more than 25 years and who had been convicted of a drug-related crime is likely to be subjected to torture if returned to Iran. The BIA considered the combination of the harsh and discriminatory treatment of ethnic and religious minorities in Iran, the severe punishment of those associated with narcotics trafficking, and the perception that those who have spent an extensive amount of time in the U.S. are opponents of the Iranian government or even U.S. spies to determine that, in light of country conditions information, the individual was entitled to relief under the Convention Against Torture.

Matter of G-A-, 23 I&N Dec. 366, 368 (BIA 2002).

In Matter of J-F-F-, the Attorney General held that the applicant failed to meet his evidentiary burden for deferral of removal to the Dominican Republic under the Conventions Against Torture. Here, the IJ improperly "…strung together [the following] series of suppositions: that respondent needs medication in order to behave within the bounds of the law; that such medication is not available in the Dominican Republic; that as a result respondent would fail to control himself and become 'rowdy'; that this behavior would lead the police to incarcerate him; and that the police would torture him while he was incarcerated." The Attorney General determined that this hypothetical chain of events was insufficient to meet the applicant's burden of proof. In addition to considering the likelihood of each step in the hypothetical chain of events, the adjudicator must also consider whether the entire chain of events will come together to result in the probability of torture of the applicant.

Matter of J-F-F-, 23 I&N Dec. 912, 917 n.4 (AG 2006) ("An alien will never be able to show that he faces a more likely than not chance of torture if one link in the chain cannot be shown to be more likely than not to occur." Rather, it "is the likelihood of all necessary events coming together that must more likely than not lead to torture, and a chain of events cannot be more likely than its least likely link.") (citing Matter of Y-L-, 23 I&N Dec. 270, 282 (AG 2002)).

"Official as well as unofficial country reports are probative evidence and can, by themselves, provide sufficient proof to sustain an alien's burden under the INA".

Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).

The Ninth Circuit has also addressed the use of country conditions in withholding cases, holding in Kamalthas v. INS that the "BIA failed to consider probative evidence in the record of country conditions which confirm that Tamil males have been subjected to widespread torture in Sri Lanka."

Kamalthas v. INS, 251 F.3d 1279 (9th Cir. 2001).

XIV. INTERVIEWS

A. General Considerations

See Reasonable Fear Procedures Manual (Draft).

Interviews for reasonable fear determinations should generally be conducted in the same manner as asylum interviews. They should be conducted in a non-adversarial manner, separate from the public and consistent with the guidance in the RAIO

8 C.F.R. § 208.31(c).

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Combined Training lessons regarding interviewing.

The circumstances surrounding a reasonable fear interview may be significantly different from an affirmative asylum interview. A reasonable fear interview may be conducted in a jail or other detention facility and the applicant may be handcuffed or shackled. Such conditions may be particularly traumatic for individuals who have escaped persecution or survived torture and may impact their ability to testify. Additionally, the applicant may have an extensive criminal record. Given these circumstances, officers should take particular care to maintain a non-adversarial tone and atmosphere during reasonable fear interviews.

At the beginning of the interview, the asylum officer should determine whether the applicant has an understanding of the reasonable fear process and answer any questions the applicant may have about the process.

8 C.F.R. § 208.31(c).

Officers should read to the applicant paragraph 1.19 on Form I-899, which describes the purpose of the interview.

B. Confidentiality

The information regarding the applicant's fear of persecution and/or fear of torture is confidential and cannot be disclosed without the applicant's written consent, unless one of the exceptions in the regulations regarding the confidentiality of the asylum process apply. At the beginning of the interview, the asylum officer should explain to the applicant the confidential nature of the interview.

8 C.F.R. § 208.6.

C. Interpretation

If the applicant is unable to proceed effectively in English, the asylum officer must use a commercial interpreter with which USCIS has a contract to conduct the interview.

If the applicant requests to use a relative, friend, NGO or other source as an interpreter, the asylum officer should proceed with the interview using the applicant's interpreter. However, asylum officers are required to use a contract interpreter to monitor the interview to verify that the applicant's interpreter is accurate and neutral while interpreting.

The applicant's interpreter must be at least 18 years old. The interpreter must not be:

- the applicant's attorney or representative,
- a witness testifying on behalf of the applicant, or
- a representative or employee of the applicant's country of nationality, or if the applicant is stateless, the

8 C.F.R. § 208.31(c).

Asylum officers may conduct interviews in the applicant's preferred language provided that the officer has been certified by the State Department, and that local office policy permits asylum officers to conduct interviews in languages other than English.

See Reasonable Fear Procedures Manual (Draft).

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applicant's country of last habitual residence.

D. Note Taking

Interview notes must be taken in a Question & Answer (Q&A) format. It is preferable that the interview notes be typed. When the interview notes are taken longhand, the APSO must ensure that they are legible. Interview notes must accurately reflect what transpired during the reasonable fear interview so that a reviewer can reconstruct the interview by reading the interview notes. In addition, the interview notes should substantiate the asylum officer's decision.

8 C.F.R. § 208.31(c).

Lafferty, John, Asylum Division, Updated Guidance on Reasonable Fear Note-Taking, Memorandum to All Asylum Office Staff (Washington, DC), May 9, 2014.
See also Reasonable Fear Procedures Manual (Draft).

The Reasonable Fear Q&A interview notes are not required to be a verbatim transcript.

Although interview notes are not required to be a verbatim record of everything said at the interview, they must provide an accurate and complete record of the specific questions asked and the applicant's specific answers to demonstrate that the APSO gave the applicant every opportunity to establish a reasonable fear of persecution, or a reasonable fear of torture. In doing so, the Q&A notes must reflect that the APSO asked the applicant to explain any inconsistencies as well as to provide more detail concerning material issues. This type of record will provide the SAPSO with a clear record of the issues that may require follow-up questions or analysis, as well as assist the asylum officer in the identification of issues related to credibility and analysis of the claim after the interview.

Before ending the interview, the APSO must provide a summary of the material facts related to the protection claim and read it to the applicant who, in turn, will have the opportunity to add, or correct facts. The interview record is not considered complete until the applicant agrees that the summary of the protection claim is complete and correct.

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E. Representation

The applicant may be represented by counsel or by an accredited representative at the interview. The representative must submit a signed form G-28. The role of the representative in the reasonable fear interview is the same as the role of the representative in the asylum interview.

The representative may present a statement at the end of the interview and, where appropriate, should be allowed to make clarifying statements in the course of the interview, so long as the representative is not disruptive. The asylum officer, in his or her discretion, may place reasonable limits on the length of the statement.

See Reasonable Fear Procedures Manual (Draft).

8 C.F.R. § 208.31(c); see discussion on role of the representative in the RAIO Training Module, Interviewing-Introduction to the Non Adversarial Interview.

F. Eliciting Information

The APSO must elicit all information relating both to fear of persecution and fear of torture, even if the asylum officer determines early in the interview that the applicant has established a reasonable fear of either.

Specifically, the asylum officer must explore each of the following areas of inquiry, where applicable:

1. What the applicant fears would happen to him/her if returned to a country (elicit details regarding the specific type of harm the applicant fears)

2. Whom the applicant fears

3. The relationship of the feared persecutor or torturer to the government or government officials

4. Was a public official or other individual acting in an official capacity? Often the public official is a police officer. The following is a brief list of questions that may be asked when addressing whether a police officer was acting in an official capacity:

   a. Was the officer on duty?

See RAIO Training Module, Interviewing – Eliciting Testimony, section 3.0: "Officer's Duty to Elicit Testimony". "Eliciting" testimony means fully exploring an issue by asking follow-up questions to expand upon and clarify the interviewee's responses before moving on to another topic.

The list of areas of inquiry is not exhaustive. There may be other areas of inquiry that arise in the course of the interview. Also, the asylum officer is not required to explore the areas of inquiry in the sequence listed below. As in an asylum interview, each interview has a flow of information unique to the applicant.

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b. Was the officer in uniform?

c. Did the officer show a police badge or other type of official credential?

d. Did the officer have access to the victim because of his/her authority as a police officer?

e. If a potential torturer is not a public official or someone acting in official capacity, is there evidence that a public official or other person acting in official capacity had ,or would have prior knowledge of the torture and breached, or would breach a legal duty to prevent the torture, including acting a manner that can be considered to be willfully blind to the torture? Is the torturer part of the government in that country (including local government)?

f. If not, would a government or public official know what they were doing?

g. Would a government or public official think it was okay?

h. If you believe that the government would think this was okay or that the government is corrupt, why do you think this?

i. What experiences have you or people you know of had with the authorities that make you think they would think it was okay if someone was tortured?

j. Would the (agents of harm?) person or persons inflicting torture be told by the government or public official to do that?

k. Did you report any past harm to a public official?

l. What did the public official say to you when you reported it?

m. Did the public official ask you questions about the incident? Did public officials go to crime scene to investigate?

n. Did you ever speak with police after you reported incident?

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o. Did you inquire about any investigation? If so, please provide details.

p. Do you know if anyone was ever investigated or charged with crime?

5. The reason(s) someone would want to harm the applicant. For cases where no nexus to a protected ground is immediately apparent, the asylum officer in reasonable fear interviews should ask questions related to all five grounds to ensure that no nexus issues are overlooked.

6. Whether the applicant has been and/or would be in the feared offender's custody or control

   a. How do you think you will be harmed?

   b. How will the feared offender find you?

7. Whether the harm the applicant fears may be pursuant to legitimate sanctions

   a. Would anyone have a legal reason to punish you in your in your home country?

   b. Do you think you will be given a trial if you are arrested?

   c. What will happen to you if you are put in prison?

8. Information about any individuals similarly situated to the applicant, including family members or others closely associated with the applicant, who have been threatened, persecuted, tortured, or otherwise harmed

9. Any groups or organizations the applicant is associated with that would place him/her at risk of persecution or torture, in light of country conditions information

10. Any actions the applicant has taken in the past (either in the country of feared persecution or another country, including the U.S.) that would place him/her at risk of persecution or torture, in light of country conditions information

11. Any harm the applicant has experienced in the past:

    a. a description of the type of harm

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b. identification of who harmed the applicant

c. the reason the applicant was harmed

d. the relationship between the person(s) who harmed the applicant and the government

e. whether the applicant was in that person(s) custody or control

f. whether the harm was in accordance with legitimate sanctions

When probing into a particular line of questioning, it is important to keep asking questions that elicit details so that information relating to the issues above is thoroughly elicited. It is also important to ask the application questions such as, "Is there anyone else or anything else you are afraid of, other than what we've already discussed?" until the applicant has been given an opportunity to present his or her entire claim.

The asylum officer should also elicit information relating to exceptions to withholding of removal, if it appears that an exception may apply. This information may not be considered in evaluating whether the applicant has a reasonable fear, but should be included in the interview Q&A notes, where applicable.

XV. REQUESTS TO WITHDRAW THE CLAIM FOR PROTECTION

See Reasonable Fear Procedures Manual (Draft).

An applicant may withdraw his or her request for protection from removal at any time during the reasonable fear process. When an applicant expresses a desire to withdraw the request for protection, the asylum officer must conduct an interview to determine whether the decision to withdraw is entered into knowingly and willingly. The asylum officer should ask sufficient questions to determine the following:

- The nature of the fear that the applicant originally expressed to the DHS officer,
- Why the applicant no longer wishes to seek protection and whether there are any particular facts that led the applicant to change his or her mind,
- Whether any coercion or pressure was brought to bear on the

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applicant in order to have him or her withdraw the request, and

- Whether the applicant clearly understands the consequences of withdrawal, including that he or she will be barred from any legal entry into the United States for a period that may run from 5 years to life.

An elicitation of the nature of the fear that the applicant originally expressed does not require a full elicitation of the facts of the applicant's case. Rather, information regarding whether the request to withdraw is knowing and voluntary is central to determining whether processing the withdrawal of the claim for protection is appropriate. The determination as to whether the request to withdraw is knowing and voluntary is unrelated to whether the applicant has a fear of future harm. Processing the withdrawal of the claim for protection is appropriate when the decision was made knowingly and voluntarily even when the applicant still fears harm.

XVI. SUMMARY

A. Applicability

Asylum officers conduct reasonable fear of persecution or torture screenings in two types of cases in which an applicant has expressed a fear of return: 1) A prior order has been reinstated pursuant to section 241(a)(5) of the INA; or 2) DHS has ordered an individual removed pursuant to section 238(b) of the INA based on a prior aggravated felony conviction.

B. Definition of Reasonable Fear of Persecution

A reasonable fear of persecution must be found if the applicant establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

C. Definition of Reasonable Fear of Torture

A reasonable fear of torture must be found if the applicant establishes there is a reasonable possibility he or she will be tortured.

D. Bars

No mandatory bars may be considered in determining whether an individual has established a reasonable fear of persecution or torture.

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E. Credibility

The same factors apply in evaluating whether an applicant's testimony is credible as apply in the asylum adjudication context. The asylum officer should assess the credibility of the assertions underlying the applicant's claim, considering the totality of the circumstances and all relevant factors.

F. Effect of Past Persecution or Torture

1. If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant has a reasonable fear of future persecution on the basis of the original claim. This presumption may be overcome if a preponderance of the evidence establishes that,

    a. due to a fundamental change in circumstances, the fear is no longer well-founded, or

    b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable to expect the applicant to do so.

2. If the applicant establishes past torture, it may be presumed that the applicant has a reasonable fear of future torture, unless a preponderance of the evidence establishes that there is no reasonable possibility the applicant would be tortured in the future.

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G. Internal Relocation

To establish a reasonable fear of persecution, the applicant must establish that it would be unreasonable for the applicant to relocate. If the government is the feared offender, it shall be presumed that internal relocation would not be reasonable, unless a preponderance of the evidence establishes that, under all the circumstances, internal relocation would be reasonable.

Asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in reasonable fear of torture determinations. Credible evidence that the feared torturer is a public official will normally be sufficient evidence that there is no safe internal relocation option in the reasonable fear context. Asylum officers should apply the same reasonableness inquiry articulated in the persecution context to the CAT context.

H. Elements of the Definition of Torture

1. The torturer must be a public official or other person acting in an official capacity, or someone acting with the consent or acquiescence of a public official or someone acting in official capacity.

2. The applicant must be in the torturer's control or custody.

3. The torturer must specifically intend to inflict severe physical or mental pain or suffering.

4. The harm must constitute severe pain or suffering.

5. If the harm is mental suffering, it must meet the requirements listed in the regulations, based on the "understanding" in the ratification instrument.

6. Harm arising only from, inherent in, or incidental to lawful sanctions generally is not torture. However, sanctions that defeat the object and purpose of the Torture Convention are not lawful sanctions. Harm arising out of such sanctions may constitute torture.

7. There is no requirement that the harm be inflicted "on account" of any ground.

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I. Evidence

Credible testimony may be sufficient to sustain the burden of proof, without corroboration. However, there may be cases where a lack of corroboration affects the applicant's credibility and ability to establish the requisite burden of proof. Country conditions information, where applicable, must be considered.

J. Interviews

Reasonable fear screening interviews generally should be conducted in the same manner as interviews in the affirmative asylum process, except DHS is responsible for providing the interpreter. The asylum officer must elicit all relevant information.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

REFUGEE DEFINITION

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

REFUGEE DEFINITION

Training Module

MODULE DESCRIPTION:

This module discusses the definition of a refugee as codified in the Immigration and Nationality Act and its interpretation in administrative and judicial case law.

TERMINAL PERFORMANCE OBJECTIVE(S)

When adjudicating a request for asylum or refugee resettlement, you will correctly apply the law to determine eligibility for asylum in the United States or resettlement in the United States as a refugee.

ENABLING PERFORMANCE OBJECTIVES

1. Explain the elements necessary to establish that an individual is a refugee.
2. Explain eligibility issues raised by facts presented in a case.
3. Describe how to determine nationality, if any, of an applicant.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Group and individual practical exercises

METHOD(S) OF EVALUATION

- Multiple-choice exam

REQUIRED READING

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1. INA §101(a)(42)

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. UNHCR Handbook

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

SOURCE: The Tasks listed below are from the Asylum Division's 2001 Revalidation. These tasks will need to be modified to reflect the results of the RAIO Directorate – Officer Training Validation study.

Task/ Skill #	Task Description
001	Read and apply all relevant laws, regulations, procedures, and policy guidance.
006	Determine applicant's identity and nationality.
012	Identify issues of claim.
024	Determine if applicant is a refugee.
SS 8	Ability to read and interpret statutes, precedent decisions and regulations.
SS 13	Ability to analyze complex issues.

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
12/12/2012	Entire Lesson Plan	Published	RAIO Trng
01/20/2015	Throughout document	Fixed links; minor edits and additions of recent case law	RAIO Trng
04/29/2016	Section 3.4 (Statelessness)	Modified to reflect OCC guidance on "last habitual residence"	RAIO Trng

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

In order to be granted either asylum or refugee status, U.S. law requires that an applicant satisfy the definition of refugee under the Immigration and Nationality Act (INA).[1] This module provides an overview of the refugee definition and the legal requirements an applicant must meet in order to establish that he or she is a refugee, and is the first in a series of modules on the elements of the refugee definition.

It is important to note that while there are multiple other eligibility determinations that must be made when adjudicating claims for asylum or refugee status, both adjudications are predicated on a determination that the individual satisfies the refugee definition. These other eligibility determinations in the asylum context include, for example, the applicability of mandatory bars and the exercise of discretion. In the refugee context, a determination of admissibility and whether the applicant is of special humanitarian concern and has proper access to the U.S. Refugee Admissions Program must be made. Subsequent modules discuss these and other requirements for asylum and refugee eligibility, including:

- The definition of persecution and eligibility based on past persecution (Definition of Persecution and Eligibility Based on Past Persecution);
- Eligibility based on fear of future persecution (Well-Founded Fear);
- The motive of the persecutor and the five protected grounds in the refugee definition (Nexus and the Protected Grounds and Nexus – Particular Social Group);
- The burden of proof and evidence (Evidence);
- The role of discretion (Discretion);

[1] INA § 207 and § 208.

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- Participation in the persecution of others on account of a protected ground (Analyzing the Persecutor Bar); and

- Entry into and permanent status in a third country (Firm Resettlement).

Additionally, for asylum adjudications, the RAIO module, Mandatory Bars to Asylum discusses mandatory reasons to deny asylum. For overseas refugee adjudications, the RAIO module, Overview of Inadmissibility Grounds, Mandatory Bars, and Waivers discusses reasons an applicant may be inadmissible to the United States and waiver availability, and the Access, Processing Priorities & Case Composition module discusses available means to access the U.S. Refugee Admissions Program.

2 BASIC DEFINITION OF "REFUGEE"

The INA provides that an applicant may be granted asylum or refugee status, in the exercise of discretion, if the applicant is a refugee within the meaning of section 101(a)(42) of the INA.[2] Therefore, a firm understanding of the definition of refugee is critical to determine whether an alien is eligible for asylum or refugee status.

2.1 Section 101(a)(42)(A) & (B) of the INA

The term "refugee" as defined at INA section 101(a)(42) includes two subparagraphs—section 101(a)(42)(A) and (B). Subparagraph (A) provides the broad definition of "refugee," whereas subparagraph (B) provides for so-called "in-country" overseas refugee processing in certain special circumstances. Specifically, under INA section 101(a)(42)(A), a refugee is:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[3]

INA section 101(a)(42)(B) provides for in-country processing under special circumstances as specified by the President for:

> any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of

[2] INA § 208; Note that INA § 207, the statute governing the annual admission of refugees to the U.S., is written in such a way that it assumes a refugee status determination has already been made prior to the actual admission.

[3] INA § 101(a)(42)(A).

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> persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[4]

For both subparagraphs (A) and (B), the refugee definition "does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[5] This exclusion from the definition is known as the "persecutor bar," and is the subject of a separate module, Analyzing the Persecutor Bar.

Finally, the statute specifically includes provisions dealing with coercive population control in the refugee definition, stating:

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.[6]

For more information on coercive population control claims, see ASM Supplement – Coercive Population Control in RAIO module, Nexus and the Protected Grounds.

2.2 Comparison with Convention Definition

As explained in previous modules, the U.S. definition of refugee was derived from the definition of refugee in the 1951 Convention relating to the Status of Refugees (1951 Convention, Refugee Convention, or Convention), as amended in the 1967 Protocol Relating to the Status of Refugees (1967 Protocol or Protocol). The 1951 Convention definition of refugee, as amended, is:

> Any person who … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.[7]

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[4] INA § 101(a)(42)(B).

[5] INA § 101(a)(42); INA § 208(b)(2)

[6] INA § 101(a)(42).

[7] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, Vol. 189.

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While the U.S. definition of refugee, which was codified by the Refugee Act of 1980 and subsequently modified by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), is derived from the Convention definition, there are several key differences between the two. These differences are explained below.

2.2.1 Past Persecution

Unlike the Convention definition, which requires a well-founded fear of future persecution, inclusion in the U.S. refugee definition may be based on either past persecution or a well-founded fear of future persecution.[8]

The regulations implementing USCIS's discretionary authority to grant asylum, however, generally require a well-founded fear of persecution. If an applicant establishes past persecution, a rebuttable presumption of a well-founded fear of future persecution is created.[9] In order to rebut the presumption of well-founded fear, the officer must either establish that a fundamental change in circumstances has occurred, such that the applicant no longer has a well-founded fear, or establish that the applicant could reasonably avoid future persecution by relocating to another part of his or her country of nationality. Asylum applicants who suffered past persecution but who no longer have a well-founded fear of future persecution may be granted asylum based on being unable or unwilling to return to the country due to the severity of the past persecution or if there is a reasonable possibility that the applicant will face other serious harm they may face upon return.[10]

In the overseas refugee processing context, there is no equivalent regulatory guidance on past persecution at 8 C.F.R. § 207. In the absence of such regulatory guidance, a plain language interpretation of the term refugee as defined in INA § 101(a)(42) is followed in overseas refugee processing. If an applicant credibly establishes that the harm he or she suffered in the past rose to the level of persecution on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility. A rebuttable presumption is neither created nor necessary.[11]

In contrast, the UN refugee definition focuses primarily on having a well-founded fear, not past persecution. The cessation clauses of the 1951 Convention, however, do provide

[8] INA § 101(a)(42).

[9] INA § 208; INA § 101(a)(42); 8 C.F.R. § 208.13(b)(1).

[10] 8 C.F.R. § 208.13(b)(1)(iii); For additional information on granting asylum in the absence of a Well-Founded Fear, see RAIO modules, Discretion and Definition of Persecution and Eligibility Based on Past Persecution.

[11] Nonetheless, as a matter of policy, refugee officers must still elicit testimony regarding both past persecution and well-founded fear of future persecution. See RAD Refugee Application Assessment SOP. RAD requires assessment of both past persecution and well-founded fear for several reasons, including situations of split credibility, where, e.g. the applicant is found not credible on past persecution, but demonstrates a credible, well-founded fear of future persecution. See RAIO Lesson Plan, Credibility.

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that a refugee who no longer fears future persecution should be given protection due to compelling reasons arising from previous persecution.[12]

2.2.2 Coercive Population Control

Unlike the Convention, the INA specifically incorporates language dealing with coercive population control stating that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion."[13] There is no provision in the Convention definition dealing with coercive population control.

2.2.3 Location of Individual

Generally, to meet the Convention definition of "refugee," an individual must be outside of his or her country of nationality or, if stateless, country of last habitual residence.[14]

The U.S. definition of refugee at section 101(a)(42)(B), however, permits the President to specify circumstances under which in-country refugee processing is allowed. For example, the U.S. Refugee Admissions Program conducts in-country processing of certain nationals of the former Soviet Union in Moscow, certain Cubans in Havana, Cuba, certain Iraqis in Baghdad, Iraq, and certain minors in Honduras, El Salvador, and Guatemala.[15] In accordance with the President's determination, any U.S. Ambassador may also refer an individual to the program for in-country processing.[16]

2.2.4 Persecution of Others

The U.S. definition explicitly excludes from the refugee definition anyone who has participated in the persecution of others on account of a race, religion, nationality, membership in a particular social group, or political opinion.[17]

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[12] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Article 1C, paras. (5) and (6), incorporated by reference into the 1967 Protocol relating to the Status of Refugees.

[13] INA § 101(a)(42). Coercive Population Control (CPC) scenarios, while possible, are less prevalent in overseas refugee processing as they are in asylum processing. For more information on coercive population control claims, see ASM Supplement – Coercive Population Control in RAIO module, Nexus and the Protected Grounds.

[14] UNHCR Handbook, para. 88.

[15] In the Presidential Determination for FY 2016 Refugee Admissions, in-country processing was designated for persons in Cuba, Eurasia and the Baltics, Iraq, Honduras, Guatemala, El Salvador, and, in exceptional circumstances, persons identified by a U.S. embassy in any location.

[16] Id.

[17] See INA § 101(a)(42). For additional information, see RAIO module, Analyzing the Persecutor Bar.

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In contrast, the Refugee Convention excludes from refugee status any person who has "committed a crime against peace, a war crime, or a crime against humanity, as defined in international instruments."[18] The United Nations High Commissioner for Refugees (UNHCR) advises that an adjudicator must first determine whether a person meets the definition of refugee and only then determine whether the person is subject to the exclusion clause as not deserving of international protection.[19]

2.3 Elements of the Refugee Definition

For asylum and refugee adjudication purposes, the following are the pertinent elements of the refugee definition:

1. Is outside his or her country of nationality (or if stateless, the country of last habitual residence), and
    - is unable or unwilling to return to, and
    - is unable or unwilling to avail himself or herself of the protection of the country of nationality (or if stateless, the country of last habitual residence), or
    - in the context of in-country, overseas processing, whether the applicant is a national or habitual resident within the country of processing;[20]
2. Because he or she
    i. has suffered past persecution,

    or

    ii. has a well-founded fear of persecution;
3. On account of race, religion, nationality, membership in a particular social group, or political opinion.

An applicant must establish all three elements (1, 2, and 3) to meet the definition of a refugee.[21] The applicant can establish that he or she is a refugee by demonstrating either actual past persecution or a well-founded fear of future persecution, but does not need to establish both.[22]

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[18] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Article 1F(a), incorporated by reference into the 1967 Protocol relating to the Status of Refugees.

[19] UNHCR Handbook, Chapter II – Inclusion Clauses, Chapter IV – Exclusion Clauses.

[20] INA §§ 101(a)(42)(A) and (B).

[21] INA § 101(a)(42)(A).

[22] 8 C.F.R. § 208.13(b).

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3 DETERMINING COUNTRY OF NATIONALITY OR, IF STATELESS, COUNTRY OF LAST HABITUAL RESIDENCE

3.1 Definition of Nationality

For purposes of the first part of the refugee definition – "outside any country of such person's nationality" – nationality, in most cases, refers to "citizenship."[23]

Contrast this with the definition of "nationality" in the second part of the refugee definition – "on account of … nationality." In the second part of the definition, "nationality" is not to be understood only as "citizenship," but also refers to ethnic or linguistic groups, and may overlap with the term "race."[24]

The INA defines "national" as a "person owing permanent allegiance to a state."[25] The U.S. Court of Appeals for the Second Circuit has noted that "[n]ationality is a status conferred by a state, and will generally be recognized by other states provided it is supported by a 'genuine link' between the individual and the conferring state."[26]

3.2 Identifying Nationality

3.2.1 Passports

Presumption of Nationality

Possession of a passport creates a presumption that the holder is a national of that country, unless the passport states otherwise.[27]

Overcoming the Presumption of Nationality

There may be reliable information that a travel document or passport does not establish nationality, but is a so-called "passport of convenience."[28] You must consider the circumstances under which the applicant obtained the passport and available information on whether a country issues passports to non-nationals. Some countries have issued passports to non-nationals for the sole purpose of allowing these individuals to leave the country issuing the passport. Some applicants have obtained passports through misrepresentation or payment of bribes.

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[23] UNHCR Handbook, para. 87.

[24] UNHCR Handbook, para. 74.; see also, RAIO module, Nexus and the Five Protected Grounds, (section on Nationality).

[25] INA § 101(a)(21).

[26] Dhoumo v. BIA, 416 F.3d 172, 175 (2d Cir. 2005).

[27] UNHCR Handbook, para. 93.

[28] Id,

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The presumption of nationality may be rebutted by, for example, an assertion that a passport is a travel document only, combined with information from the issuing country that it has issued such passports to non-nationals for travel purposes only. If information from the issuing authority cannot be obtained, the applicant's consistent and detailed explanation of the circumstances could rebut the presumption of nationality established by the passport.[29]

When determining whether the presumption of citizenship created by the presentation of a passport is overcome, you must weigh all of the available evidence, including the applicant's testimony.[30]

3.2.2 Inability to Establish Nationality

An applicant is not required to establish nationality in order to be eligible for asylum or refugee status, but the issue of the applicant's nationality is a threshold matter that you must address.[31] Documentary evidence is not necessarily required for an applicant's nationality to be established; in some circumstances, you may find the applicant's credible testimony alone to be sufficient to resolve this issue.[32] If nationality cannot be clearly established, you should determine asylum or refugee status based on the country of the applicant's last habitual residence. See the discussion of statelessness, below.

There is no precedent case law directly on point describing the standard of proof required to establish nationality. The UNHCR Handbook indicates that when an applicant cannot clearly establish his or her nationality, the country of his or her former habitual residence must be taken into account.[33] UNHCR does not appear to be speaking to a standard of proof in this paragraph, but to the issue of analyzing well-founded fear of a person who cannot clearly establish his or her nationality.

In general, the evidentiary standard to establish a fact in asylum and refugee adjudications is preponderance of the evidence. If the adjudicator finds upon consideration of all available evidence that it is more likely than not that a fact is true, then the fact is established. Therefore, for purposes of asylum and refugee adjudications, nationality must be established by a preponderance of the evidence.

3.3 Multiple Nationality

3.3.1 Eligibility

[29] Id.

[30] See Palavra v. INS, 287 F.3d 690, 694 (8th Cir. 2002).

[31] See Dulane v. INS, 46 F.3d. 988 (10th Cir. 1995); Wangchuck v. DHS, 448 F.3d 524, 528 (2d Cir. 2006).

[32] Urgen v. Holder, 768 F.3d 269, 273 (2d Cir. 2014).

[33] UNHCR Handbook, para. 89.

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The refugee definition provides that the applicant must be unable or unwilling to return to "any country of such person's nationality ... "[34] A dual citizen must establish persecution or a well-founded fear of persecution in both countries of nationality to be eligible for asylum or refugee status.[35]

You must evaluate asylum or refugee eligibility with respect to any country of which the applicant is a citizen[36] or national.[37]

For example, an applicant is a citizen of country X and lived there from birth until coming to the United States. She is a citizen of country Y through her mother. To be eligible for asylum or refugee status, she would need to establish persecution or a well-founded fear of persecution in both country X and country Y.

3.3.2 Distinction between Issue of Multiple Nationality and Firm Resettlement

An applicant may have resided in a third country before entering the United States, but after fleeing his or her country of nationality. Residence alone does not necessarily confer citizenship or nationality.

Permanent residence in a third country may indicate that the applicant was firmly resettled in that country. Firm resettlement is a bar to asylum and to refugee resettlement and is a distinct issue from multiple nationality.[38]

3.3.3 Citizens of North Korea

Section 302 of the North Korean Human Rights Act provides that asylum applicants from North Korea are not ineligible for asylum in the United States on account of "any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea."[39] Based on this law, you may not treat a citizen of North Korea as a dual national of South Korea, unless the applicant is a former North Korean citizen who has already availed him or herself of the rights of citizenship in South Korea.

3.4 Statelessness

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[34] INA § 101(a)(42)(A); UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Article I A(2); UNHCR Handbook, para. 106.

[35] Matter of B-R-, 26 I&N Dec. 119 (BIA 2013) (holding that a dual citizen of Venezuela and Spain could not meet the definition of a refugee where he had no fear of persecution in Spain).

[36] UNHCR Handbook, para. 106.

[37] INA § 101(a)(21).

[38] For additional information, see RAIO module, Firm Resettlement.

[39] North Korean Human Rights Act of 2004, H.R. 4011, P.L. 108-333 (Oct. 18, 2004), 118 Stat. 1287; and Memorandum from Joseph E. Langlois, Director, USCIS Asylum Division, to Asylum Office Directors, et al., North Korean Human Rights Act of 2004, (HQASM 120/9) (22 October 2004).

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If stateless, the applicant must establish persecution or a well-founded fear of persecution in the country of his or her last habitual residence.[40] The fact that an applicant is stateless is not itself sufficient to establish eligibility for asylum or refugee status.[41] On the other hand, if a state divests an applicant of citizenship and renders him or her stateless on account of a protected ground, the applicant's denaturalization may constitute persecution in some circumstances.[42]

3.4.1 Definition

The UN has defined "stateless person" as "a person who is not considered as a national by any State under the operation of its law."[43] The INA defines "national" as a person owing permanent allegiance to a State.[44] Both definitions should be considered when determining whether an individual is stateless for purposes of the asylum or refugee adjudication. Even if the applicant believes he or she owes allegiance to a State, if the State does not consider the applicant to be a national of that State, the applicant should be considered stateless.

3.4.2 Country Where Applicant Last Habitually Resided

General Definition

The INA does not define "last habitually resided" for purposes of asylum or refugee eligibility, and there is little case law discussing how to determine an applicant's last habitual residence. When you encounter a stateless applicant, you must determine the country of last habitual residence by considering relevant factors that may vary depending on the context and the facts of the case before you. ."

Determining the Country of Last Habitual Residence

A stateless person may have formerly resided in more than one country and may fear persecution in more than one of those countries.[45] However, eligibility for asylum or refugee status should be analyzed based on the country of last habitual residence only.[46] There can only be one country of last habitual residence. There is no case law addressing

[40] INA § 101(a)(42).

[41] Agha v. Holder, 743 F.3d 609, 618 (8th Cir. 2014); Ahmed v. Keisler, 504 F.3d 1183, 1191 n.5 (9th Cir. 2007); Najjar v. Ashcroft, 257 F.3d 1262, 1293 (11th Cir. 2001); Ahmed v. Ashcroft, 341 F.3d 214, 218 (3d Cir. 2003); UNHCR Handbook, para. 102.

[42] Stserba v. Holder, 646 F.3d 964, 973 (6th Cir. 2011); Haile v. Holder, 591 F.3d 572, 574 (7th Cir. 2010).

[43] UN General Assembly, Convention Relating to the Status of Stateless Persons, Article I, para. 1, United Nations Treaty Series, No. 5158, Vol. 360.

[44] INA § 101(a)(21).

[45] UNHCR Handbook, para. 104.

[46] INA § 101(a)(42).

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the issue of how the refugee definition should be applied to stateless individuals who last habitually resided in territories that are not part of any recognized state (such as the West Bank, the Gaza Strip, or Western Sahara), but some courts have assumed without deciding that these claims should be analyzed by treating those territories as places of last habitual residence.[47]

In Paripovic v. Gonzales, one of the only precedent decisions addressing the issue of last habitual residence, the U.S. Court of Appeals for the Third Circuit considered an Immigration Judge's (IJ's) determination that a stateless asylum applicant last habitually resided in Serbia, where he had lived in a refugee camp for two years. The Court held that the IJ could apply INA § 101(a)(33), which defines "residence" as "the place of general abode; the … principal, actual dwelling place in fact, without regard to intent" in the asylum context.[48] The Court also upheld the IJ's conclusion that the fact that the applicant did not intend to reside in the Serbian camp was not relevant in determining his country of last habitual residence.[49] Finally, the Court held that it was permissible for the IJ to consider the amount of time the applicant spent in Serbia in determining whether his residence there was "habitual." The Court therefore concluded that substantial evidence supported the IJ's determination that the applicant had last habitually resided in Serbia given that he had resided there, in a semi-permanent dwelling, for two years.[50]

The Court in Paripovic held that length of stay is an appropriate factor to consider in determining the applicant's country of last habitual residence.[51] This factor, however, may not always be the primary consideration in the analysis. The Court suggested that the nature of the applicant's stay may also be an important factor, indicating that if the applicant had been forced to stay in the country, his residence there would not have been "habitual."[52]

In the refugee processing context, the country of last habitual residence is usually determined to be the country from which the stateless applicant fled. The analysis may be more complicated, however, for stateless applicants born in refugee camps or in protracted urban refugee situations to parents who fled their countries of origin before their children's birth. For some stateless refugee populations, USCIS has determined that for discrete groups of stateless applicants who share a common history of last habitual

[47] See, e.g.,; Al Yatim v. Mukasey, 531 F.3d 584, 588 (8th Cir. 2008); Jabr v. Holder, 711 F.3d 835, 838 (7th Cir. 2013).

[48] INA § 101(a)(33); see also 8 C.F.R. § 214.7(a)(4)(i) (definition of habitual residence in the territories and possessions of the United States).

[49] Paripovic v. Gonzales, 418 F.3d 240, 245 (3d Cir. 2005).

[50] Id.

[51] Paripovic v. Gonzales, 418 F.3d 240, 245 (3d Cir. 2005).

[52] Id.

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residence in a given country, that country may be found to be their country of last habitual residence by virtue of their membership in the group even individual applicants never personally resided there.[53]

Example

A Bhutanese couple of Nepali ethnic origin fled persecution in Bhutan and entered Nepal in 1992. Their daughter, born in a refugee camp in Nepal in 1993, is stateless. She applied for refugee status in the United States in 2015. Because the stateless applicant is a member of a group – Bhutanese of Nepali ethnic origin – with a common history of residence in Bhutan, her country of last habitual residence is Bhutan[54].

No Requirement of Firm Resettlement

Last habitual residence is distinct from firm resettlement. An applicant may have habitually resided in a country, even if he or she has not been firmly resettled there.

Example

A Palestinian born in the Israeli-occupied territories, who then moved to Kuwait where he worked legally but did not receive permanent residency rights, is stateless and the country of last habitual residence is Kuwait.

Case-by-Case Determination

When the country of last habitual residence is not readily apparent, you should consult your supervisor. If your supervisor cannot provide an answer, the supervisor may contact Asylum HQ Quality Assurance or RAD Policy and Regional Operations if the issue requires further review.

4 UNABLE OR UNWILLING TO RETURN

4.1 General Principles

To meet the requirements of the refugee definition, the asylum or refugee status applicant must establish that he or she is unable or unwilling to return to his or her country because of past or feared persecution.[55] In most cases, the fact that the applicant applied for asylum or refugee status is evidence that the applicant is unwilling to return to that country.

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[53] See Memorandum from Molly Groom, Chief, Refugee and Asylum Law Division, Office of Chief Counsel, to Joseph Langlois, Associate Director, RAIO, "Last Habitual Residence for Stateless Refugee Applicants" (February 4, 2015).

[54] Id. at 1-2.

[55] INA § 101(a)(42).

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There may be cases in which the applicant is willing to return, despite a risk, but is unable to do so. For example, the applicant may be stateless and the country of last habitual residence will not allow the applicant to return, or the country may have denied the applicant travel documents or refused to renew a passport and therefore the applicant cannot return.

4.2 Return to Country of Past or Feared Persecution

An asylum or refugee applicant's return to a country of persecution or feared persecution may indicate that the applicant is willing and able to return, but does not in and of itself preclude establishment of eligibility.[56] You must evaluate the reasons that motivated the applicant's temporary visit, the circumstances surrounding that visit, any problems or lack of problems the applicant faced upon return, and any precautions the applicant took to determine if the applicant is unable or unwilling to return.

4.2.1 Does Return Indicate that the Applicant Is Able and Willing to Return?

In evaluating whether an applicant's return to the country of claimed persecution may indicate that he or she is both willing and able to return, you must first consider the reason for the applicant's return. Circumstances may have compelled the applicant's return. For example, one of the applicant's immediate family members may have died or may have been in a grave situation that compelled the applicant to return. The applicant remained unwilling to return, but the death or illness compelled him or her to return. During the interview, you must elicit and evaluate information concerning the applicant's reasons for return and any precautions the applicant took to avoid harm. You should not conclude that a return due to compelling factors establishes that the applicant is able and willing to return.[57] [ASM Supplement – 1]

4.2.2 What Happened when the Applicant Returned?

You must also elicit information to determine if harm or threats occurred after the applicant returned to the country of claimed persecution, if the applicant took precautions to avoid harm, or if circumstances have subsequently occurred that put the applicant at risk. Subsequent harm, threats, or risk, may establish that the applicant, while willing and able to return for the last visit, is no longer willing and able to return.[58]

5 Unable or Unwilling to Avail Oneself of Protection

[56] 8 C.F.R. § 208.8(b).

[57] De Santamaria v.US Att'y Gen., 525 F.3d 999 (11th Cir. 2008) (applicant who returned to Colombia to continue philanthropic and political activities and to be with her family was found eligible for asylum).

[58] For additional information, see RAIO module, Well-Founded Fear.

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In most cases, an individual's application for asylum or refugee status is sufficient proof that he or she is unwilling to seek protection in the country from which he or she fled.[59] The definition of refugee requires that a refugee be unable or unwilling to avail him or herself of protection. An applicant is not required to prove both. Either proof of being unable or proof of being unwilling is sufficient for this part of the refugee definition.

Note that whether an applicant is unable or unwilling to avail himself or herself of the protection of the country from which he or she fled could be important to determining whether it would be reasonable for the applicant to internally relocate within that country. Whether there is a reasonable internal relocation option relates to whether the applicant has a well-founded fear of persecution and is discussed in the RAIO module, Well-Founded Fear.[60]

This concludes the basic overview of the refugee definition. Subsequent lessons on Past Persecution, Well-Founded Fear, Nexus, and the Persecutor Bar will delve further into the refugee definition, providing advanced instruction on the remaining elements of the refugee definition.

[59] For additional information, see RAIO module, Definition of Persecution and Eligibility Based on Past Persecution, (section on Identifying a Persecutor).

[60] For additional information, see RAIO module, Well-Founded Fear, (section on Internal Relocation).

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PRACTICAL EXERCISES

[NOTE: If there are no practical exercises, state "There are no Practical Exercises for this module." If there is only one practical exercise, do not number it.]

Practical Exercise # 1

- Title:
- Student Materials:

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OTHER MATERIALS

There are no Other Materials for this module.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

RAD Supplement

Module Section Subheading

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. 8 CFR § 208.13

ADDITIONAL RESOURCES

1. Memorandum from Joseph E. Langlois, Director, USCIS Asylum Division, to Asylum Office Directors, et al., North Korean Human Rights Act of 2004, (HQASM 120/9) (22 October 2004).

2. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors and Deputy Directors, Change in Instruction Concerning One Year Filing Deadline and Past Persecution, (15 March 2001) (HQ/IAO 120/16.13).

3. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., Persecution of Family Members, (30 June 1997).

4. Memorandum from David A. Martin, INS Office of General Counsel, to Asylum Division, Legal Opinion: Palestinian Asylum Applicants, (27 Oct. 1995) (Genco Opinion 95-14).

5. Memorandum from David A. Martin, INS Office of General Counsel, to John Cummings, Acting Assistant Commissioner, CORAP, Legal Opinion: Application of the Lautenberg Amendment to Asylum Applications Under INA Section 208, (6 Oct. 1995) (Genco Opinion 95-17).

6. Memorandum from Rosemary Melville, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., Follow Up on Gender Guidelines Training, (7 July 1995) (208.9.9).

7. Memorandum from Phyllis Coven, INS Office of International Affairs, to Asylum Officers and HQASM Coordinators, Considerations For Asylum Officers Adjudicating Asylum Claims From Women, (26 May 1995).

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8. T. Alexander Aleinikoff. "The Meaning of 'Persecution' in United States Asylum Law," International Journal of Refugee Law 3, no. 1 (1991): 411-434.

9. UNHCR, Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (Aug. 2005).

SUPPLEMENTS

ASM Supplement – 1

Does Return Indicate that the Applicant is Able and Willing to Return?

8 C.F.R. § 208.8(a) and (b):

Procedurally, asylum applicants who leave the United States without first obtaining advance parole [a type of re-entry document] are presumed to have abandoned their asylum applications. 8 C.F.R. § 208.8(a).

Asylum applicants who leave the United States with advance parole documents, but who return to their country of claimed persecution, are presumed to have abandoned their asylum application absent "compelling reasons" for their return. 8 C.F.R. § 208.8(b).

An applicant can overcome the presumption of abandonment by a preponderance of the evidence indicating that he or she did not abandon the asylum application. Appearance at the asylum office by an applicant, generally, is substantial evidence that he or she has not abandoned his or her asylum application. This factor must be weighed along with other evidence relating to the reasons for the return and events that occurred during the return.

For applicants who leave the United States without advance parole documents, the presumption of abandonment is rebuttable. Applicants who leave the United States with advance parole documents and return to their country of claimed persecution may overcome the presumption of abandonment if there are compelling reasons for the applicant's return to that country.

If the presumption of abandonment is not overcome by compelling reasons for the return, events that occurred during the time that the applicant was in his or her country could be the basis for a new claim.

An applicant's return to the country of feared persecution, and the events that occur during that return, may not lead to a procedural finding that the asylum application was abandoned; however, the return to the country of persecution raises substantive questions regarding whether or not the applicant has a well-founded fear of return

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to that country.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

IO Supplement

Module Section Subheading

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

SOURCES OF AUTHORITY

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

SOURCES OF AUTHORITY

Training Module

MODULE DESCRIPTION:

This module describes the legal sources that provide officers in the RAIO Directorate with the authority to make case decisions and determinations. It also describes the sources of law you must follow when making those decisions and determinations and demonstrates how to properly cite to them.

TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing, adjudicating, eliciting information, or making determinations in the field, you will be able to determine the sources of authority that apply and will cite or refer to these sources correctly whenever appropriate.

ENABLING PERFORMANCE OBJECTIVES

1. Identify the sources of law from which you derive the authority to make decisions and determinations.
2. Identify the sources of law you must follow when making decisions and determinations.
3. Cite to relevant sources of law in your decisions and determinations.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Practical exercises

METHOD(S) OF EVALUATION

- Written exam

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- Practical exercise exam

REQUIRED READING

1. Title 8 of the Code of Federal Regulations 8 C.F.R. § 2.1
2. The Immigration and Nationality Act (INA § 101(a)(42))

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

None

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR1	Knowledge of the United Nations High Commissioner for Refugees (UNHCR) 1951 convention relating to the status of refugees (2)
ILR2	Knowledge of the relevant international human rights conventions related to refugees (2)
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR4	Knowledge of the relevant sections of 8 Code of Federal Regulations (CFR) (4)
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
RI3	Skill in conducting research (e.g., legal, background, country conditions)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

This training module introduces the statute, regulations, case law, and other sources that provide you, an officer in the RAIO Directorate, with the authority to make decisions and determinations and the fundamental principles you must follow to make those decisions and determinations. The module also provides you with guidance on how to access those sources and use them in your work.

You will refer to the sources listed below in your day-to-day work to varying degrees. In some cases, you will need to cite to these sources in your decisions, determinations, or even in discussions with your supervisors or coworkers. Citing to an authority can often help establish the validity of your argument. When citing to a particular source, you may want to re-read the specific section of the source you are citing to ensure that it supports or substantiates the point or points you are trying to make.

Authority can either be mandatory or persuasive. Mandatory authority is an authority that you are required to follow. Persuasive authority need only be consulted for guidance or where mandatory authority does not exist in a particular area or jurisdiction. You may not rely on persuasive authority if it conflicts with authority that is mandatory.

The responsibilities of each of the three divisions in the RAIO Directorate - the Refugee Affairs Division, the Asylum Division, and the International Operations Division - are described briefly below:

Refugee Affairs Division

The laws pertaining to refugee adjudication focus on the establishment of the DHS Secretary's authority to admit certain aliens, under certain circumstances, with wide authority to determine the practices and procedures with which to exercise this

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authority. Therefore, USCIS, through the Secretary's authority, has been given great latitude in determining how refugees are to be processed.

As officers in the Refugee Corps and officers from other RAIO divisions and USCIS components detailed overseas with the Refugee Affairs Division (RAD), your responsibilities include conducting refugee admission interviews, including interviews related to Form I-730 Refugee/Asylee Relative Petitions. You will also review and adjudicate Requests for Review and Form I-602 Applications by Refugee for Waiver of Grounds of Excludability.

These topics and the specific sections of the INA and 8 C.F.R., case law, memoranda, and other sources of authority relevant to those topics will be discussed in greater detail in other RAIO and division training modules.

Because officers who conduct overseas refugee interviews do not always have access to the Internet or to the complete versions of the INA and 8 C.F.R., the entire text of relevant sections of the INA are reproduced throughout the RAIO and RAD training materials. INA § 207 and 8 C.F.R. § 207 are included in their entirety in the RAD Supplement section of this module. The entire text of INA §212(a) is located in the Refugee Officer Basic Training Course lesson - Grounds of Inadmissibility.

Asylum Division

Asylum Officers derive authority from statute and regulations to adjudicate asylum requests, make credible and reasonable fear determinations, and adjudicate applications for suspension of deportation and special rule cancellation of removal under Section 203 of the Nicaraguan Adjustment and Central American Relief Act ("NACARA 203")

As officers in the Asylum Corps your responsibilities include conducting asylum, NACARA 203, credible fear, and reasonable fear interviews. These topics and the specific sections of the INA and 8 C.F.R., case law, memoranda, and other sources of authority relevant to these topics will be discussed in greater detail in other RAIO and division training modules. See INA § 208 and 8 C.F.R. § 208.

International Operations Division

As Adjudication Officers you derive authority from statute and regulations to adjudicate a variety of immigration benefits including, but not limited to Form I-130, Petition for Alien Relative; Refugee Admissions interviews (Form I-590) and Form I-730, Refugee/Asylee Relative Petition; Form I-601, Application for Waiver of Grounds of Inadmissibility; Form I-600, Petition to Classify Orphan as an

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Immediate Relative; Form I-600A, Application for Advance Processing of Orphan Petition; Form N-400, Application for Naturalization for active-duty military members and their spouses and children; Form I-131, Application for Travel Document; Form I-407, Abandonment of Lawful Permanent Resident Status; Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant; and boarding letters.

These topics and the specific sections of the INA and 8 C.F.R., case law, memoranda, and other sources of authority relevant to those topics will be discussed in greater detail in other RAIO and division training modules.

2 SOURCES OF AUTHORITY

2.1 U.S. Constitution

As officers in the RAIO Directorate, you have taken an oath to protect and defend the U.S. Constitution. The Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . ." Art. VI, cl. 2.

2.2 Treaties

As set forth in the Constitution, treaties are also part of the laws of the United States if the United States has signed and ratified, or acceded to the treaty. The following are examples of treaties that have been signed and ratified, or acceded to by the United States that affect RAIO adjudications.[1]

- The 1967 Protocol relating to the Status of Refugees (which incorporates by reference Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees (July 28, 1951))
- The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)
- The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption

Courts have distinguished between treaties that are self-executing and those that are not. A self-executing treaty is one that creates a private right of action for enforcement in U.S. courts, without domestic implementing legislation. The vast majority of the treaties that the U.S. Government has signed are not self-executing, and the U.S. often ratifies treaties

[1] To find out if and when the United States has signed and ratified, or acceded to a treaty, visit the following website: http://treaties.un.org/pages/ParticipationStatus.aspx

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with a declaration of non-self execution. However, even if a treaty is not self-executing, it remains law, equal to a federal statute under the Constitution. As such, it can impose obligations on the Executive Branch, including DHS, to ensure compliance with its terms, even if it creates no private right of action to enforce those terms in the courts.

For further discussion, see RAIO Training module, International Human Rights Law.

2.3 U.S. Statutes

The U.S. Congress, the Legislative branch of the U.S. Government, creates statutes which make up the laws of the United States.

The Immigration and Nationality Act

The Immigration and Nationality Act ("the INA" or "the Act"), found in the U.S. Code, is the federal statute that contains many of the laws related to how non-U.S. citizens can be admitted to, paroled into, or allowed to remain in the United States. Section 101 of the INA contains some helpful definitions of the key terms used throughout the statute, including the terms "admission and admitted," "aggravated felony," "child," "immigrant," and "refugee." There are, however, many terms in the INA that are not defined. For clarification of those terms, you will refer to the regulations, case law, and other sources listed below.

The INA was enacted by the U.S. Congress in 1952 and has been amended by Congress through the passage of additional legislation. For example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the REAL ID Act of 2005, and the Lautenberg Amendment to the Foreign Operations Appropriations Act are all examples of legislation that have amended specific provisions of the INA that you will encounter in your adjudications and determinations.

Citing to the INA

A citation to the INA, for example,

INA § 208(a)

consists of two parts:

1. The letters "INA" followed by a space; and,
2. The section symbol (§) and a space followed by the specific section

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and sub-section.

No punctuation separates these parts. Nothing is italicized or underlined.[2]

Sections of the INA can be lengthy. When citing to or referring to the INA, you must cite to the specific subsection.

For example, if you are referring to the mandatory bars to asylum, cite to:

INA § 208(b)(2), not merely INA § 208.

2.4 Regulations

The agency or agencies within the Executive branch of the U.S. Government charged with administering a statute are also responsible for providing regulations by which the law is administered. DHS and the Department of Justice (DOJ) are the primary federal agencies responsible for publishing regulations that correspond to the laws set forth in the INA.

The Code of Federal Regulations

The Code of Federal Regulations (CFR) is "the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the Federal Government. It is divided into 50 titles that represent broad areas subject to Federal regulation. Each volume of the CFR is updated once each calendar year and is issued on a quarterly basis."[3] Title 8 of the Code of Federal Regulations ("8 C.F.R."), Aliens and Nationality, provides procedures for administering the laws set forth in the INA and supplements, defines, and further explains those laws.[4]

Title 8 of the C.F.R. contains (DHS and DOJ) regulations that provide not only basic procedures but also address substantive eligibility issues. It consists of two chapters, "Department of Homeland Security," and "Executive Office for Immigration Review (EOIR)." Parts 1 to 499 correspond to DHS and Parts 1000 to 1399 correspond to EOIR.

Generally the 8 C.F.R. part and section correspond to the same section number and content in the INA.

Example

8 C.F.R. § 207.1 corresponds to INA § 207, which governs overseas refugee processing.

[2] Introduction to Basic Legal Citation (online ed. 2010), by Peter W. Martin. Cornell Law School.

[3] U.S. Government Printing Office, Home Page, Executive Branch, Code of Federal Regulations, http://www.gpoaccess.gov/cfr/.

[4] See 8 C.F.R. § 1.1.

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Citing to 8 C.F.R.

A citation to the C.F.R. for example,

8 C.F.R. § 207.1

consists of two parts:

1. The title number, 8, followed by a space and "C.F.R.," (for "Code of Federal Regulations") followed by a space; and,

2. The section symbol (§) followed by a space and the part number.

No punctuation separates adjudications.

Example

8 C.F.R. § 208.1(a) corresponds to INA § 208, which governs asylum adjudications.

Nothing is italicized or underlined.

Like the INA, 8 C.F.R. can be lengthy. You must cite to a specific subsection of 8 C.F.R. For example, when citing to the section on firm resettlement in the overseas refugee context, cite to:

8 C.F.R. § 207.1(b), not merely 8 C.F.R. § 207.

2.5 Case Law

Case law is made up of published decisions from:

- The federal courts, which consist of the U.S. Supreme Court, the U.S. Courts of Appeals, and U.S. District Courts, all of which are part of the Judicial Branch of the U.S. Government; and
- The Board of Immigration Appeals (BIA), which is part of the Executive Branch of the U.S. Government.

The BIA is "the highest administrative body for interpreting and applying immigration law." It has "been given nationwide jurisdiction to hear appeals from certain decisions rendered by immigration judges" (IJs) and by USCIS district directors "in a wide variety of proceedings in which the Government of the United States is one party and the other party is an alien, a citizen, or a business firm." BIA decisions "are binding on all USCIS

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officers and IJs unless modified or overruled by the Attorney General (AG) or a federal court. Most BIA decisions are subject to judicial review in the federal courts."[5]

Case law develops when individuals apply for benefits under the INA and a dispute arises over the meaning of key terms contained in the INA or the 8 C.F.R. One of two parties can appeal the decision to approve or deny the benefit. The courts and the BIA publish opinions that analyze whether the decision was legally correct and interpret the terms and issues more clearly. These opinions are referred to collectively as "case law" and are the source of authority most cited to in our legal system. As such, case law is the source of authority you will refer and cite to most in your work.

In some situations, your adjudications and determinations may make their way through our legal system and can become part of case law. A recent example is the case of Daniel Girmai Negusie. An Asylum Officer made a credible fear determination and referred Mr. Negusie to the Immigration Judge (IJ) for an asylum hearing. The IJ denied his asylum claim and Mr. Negusie appealed the decision first to the Board of Immigration Appeals (BIA), then to the U.S. Court of Appeals for the Fifth Circuit, and eventually to the U.S. Supreme Court.[6]

A binding decision is one that a court or administrative body issues and that must be followed by the courts and administrative agencies below. The issuing court or administrative body is also bound by its own published decisions. However, on occasion, courts can reverse their previous decisions.

In the immigration context, case law consists of both administrative law and federal court decisions issued by, in order of descending precedential authority:[7]

- U.S. Supreme Court
- U.S. Court of Appeals, also called U.S. Circuit Court of Appeals
- U.S. District Court (in very limited circumstances)
- Attorney General
- Board of Immigration Appeals
- Administrative Appeals Office

For general guidance regarding the U.S. court system, how to read and use case law, how to cite to a case, and the binding nature of case law, see the RAIO Training module, Reading and Using Case Law.

2.6 Legal Memoranda

[5] United States Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals. http://www.justice.gov/eoir/biainfo.htm

[6] Negusie v. Holder, 555 U.S. 511 (2009).

[7] American Jurisprudence, "Judicial Precedents as Binding or Persuasive," 20 Am. Jur. 2d Courts § 129 (2010).

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If the INA, 8 C.F.R., and case law do not address a specific legal issue or the issue needs clarification, DHS Office of General Counsel (OGC) and USCIS Office of Chief Counsel (OCC) may issue legal memoranda that explain their interpretation of particular legal issues.

A citation to these legal memoranda should include the name and title of the official who issued it, the title of the memo, who the memo is directed to, the office it was issued from, the city where is was issued, the date it was issued, and if you are citing to a specific part of the memo, the page you are citing to.

Example

> Lynden D. Melmed, Chief Counsel. Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate (Washington, DC: 12 Jan 2007), p. 2.

2.7 The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee* (*UNHCR Handbook*)

The UNHCR Handbook, produced by the Office of the United Nations High Commissioner for Refugees, provides guidance to government officials concerned with the determination of refugee status pursuant to their obligations under the 1951 United Nations Convention relating to the Status of Refugees and the 1967 United Nations Protocol relating to the Status of Refugees.[8]

The interpretations provided in the UNHCR Handbook do not have the force of law and are not binding on you. However, the Supreme Court has stated that the UNHCR Handbook "provides significant guidance in construing the Protocol, to which Congress sought to conform."[9]

Explanations in the Handbook are often referred to by both the BIA and federal courts. Where guidance in the UNHCR Handbook is inconsistent with U.S. law, as interpreted by precedent decisions, you must follow U.S. law.

2.8 International Law

International law may assist in determining whether an applicant is a refugee, unless it directly conflicts with binding U.S. law. In particular, international human rights and

[8] Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria For Determining Refugee Status (Geneva, 1979, reedited 1992), p. 2.

[9] INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n. 22 (1987); INS v. Aguirre-Aguirre, 516 U.S. 415, 426-427 (1999); Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982).

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humanitarian law may provide guidance when evaluating whether particular acts constitute persecution.[10]

2.9 Other Guidance

2.9.1 Adjudicator's Field Manual (AFM)

This manual is a comprehensive "how to" manual detailing policies and procedures for all aspects of USCIS adjudications. The AFM is intended to be used in concert with the INA, 8 C.F.R., and the agency's Administrative Manual (AM), among others.

2.9.2 Headquarters Memoranda

RAIO Headquarters or RAD, Asylum, or IO Headquarters issue memoranda on a variety of topics. These memoranda are official forms of internal communication between headquarters and the field that offer guidance on how to address substantive legal or procedural issues.

2.9.3 Division Procedures Manuals

Procedures manuals and Standard Operating Procedures (SOPs) set forth the essential procedures that you must follow to perform certain tasks. They provide those of you who are new to the adjudication process the necessary information and tools to perform your jobs effectively and efficiently. Procedures manuals and SOPs also serve as useful reference guides for experienced officers who need to remain current with changes in policy and law.

2.9.4 RAIO Training Modules and Division Lesson Plans

RAIO training modules and division training materials not only provide a curriculum for their corresponding training courses, they are also designed to be used as reference tools in your day-to-day work.

2.9.5 Foreign Affairs Manual (placeholder)

The Foreign Affairs Manual (FAM) is a multi-volume guidance document that details the policies and structure of the Department of State (DOS) and provides operational instruction for DOS employees. Details about DOS administration are found in the accompanying notes. Title 9 of the FAM relates to visas and provides useful information to USCIS adjudicators. The FAM does not govern USCIS staff but is often consulted by USCIS staff and other U.S. Government agencies, in particular in the overseas context.

3 CONCLUSION

[10] See RAIO Training module, International Human Rights Law.

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When adjudicating cases, look to the statute, regulations, case law, and other sources of authority. These sources address the legal and procedural issues you will encounter in your field work. Understanding how to read, interpret, and use these sources in your adjudications is important for all officers within the RAIO Directorate.

4 SUMMARY

4.1 The U.S. Constitution

The U.S. Constitution sets forth the fundamental principle that the statutes passed by Congress are the "supreme Law of the Land." Art. VI, cl. 2.

4.2 The INA and 8 C.F.R.

Officers derive authority from statute and regulations to gather information, adjudicate benefits and requests, and make determinations. The INA and 8 C.F.R. also define key terms, set forth procedures and standards, and explain requirements, bars, and waivers for a variety of immigration benefits.

4.3 Case Law

Case law is the aggregate of reported cases that form a body of jurisprudence on a particular subject. Case law resolves ambiguities that are discernable in statutes, regulations, and even prior case law. On occasion, case law reverses or overrules previous case law.

When the INA and corresponding regulations do not define some of their own key terms, or when disputes arise over the meaning of terms in the INA, the BIA and federal courts issue opinions that interpret the terms and issues more clearly. This is referred to as "case law."

4.4 Legal Memoranda

You must apply the law as interpreted in the memoranda of DHS Office of General Counsel and USCIS Office of Chief Counsel.

4.5 *UNHCR* Handbook

You should seek guidance from the UNHCR Handbook. However, the guidance in the UNHCR Handbook does not have the force of law and may not be followed where it is inconsistent with U.S. law.

4.6 International Law

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If no domestic law addresses a specific legal issue, international human rights and humanitarian law may provide guidance in determining whether an applicant meets the definition of refugee.

4.7 Other Guidance

Memos by the division chiefs, procedures manuals, and RAIO and division training modules are also sources you should follow and refer to in your work.

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PRACTICAL EXERCISES

Practical Exercise – 1

Where is it Written That…?

Find the exact language in the statute, regulation, opinion, or memorandum where the following legal principles are found. You may use the materials in this module, the internet, or any other available resource for this exercise.

Where is it written that:

1. a child, for immigration purposes, must be under 21 and unmarried?
2. there are three grounds of inadmissibility that do not apply to individuals seeking admission as refugees?
3. a person can qualify as a refugee if he or she was never harmed in the past?
4. persecution can mean psychological harm not just physical harm?

Practical Exercise – 2

Which Came First?

To put these sources of authority into perspective, you will chart the chronology of the term "well-founded fear" in U.S. and international law. Below is a list of authorities that mention or define well-founded fear. In this exercise, you will put this list in chronological order, identify the source, and indicate whether the source is binding or persuasive authority for your determinations.

- INS v. Cardoza-Fonseca

http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=480&page=421

- Convention relating to the Status of Refugees

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http://www.unhcr.org/3b66c2aa10.html

- 8 C.F.R. § 208.13(b)(2)

http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-14927/0-0-0-15161.html

- Refugee Act – defining "refugee" under the INA
- Matter of Mogharrabi

http://www.justice.gov/eoir/vll/intdec/vol19/3028.pdf

- Protocol relating to the Status of Refugees (acceded to by the U.S. in 1968)

http://www.unhcr.org/3b66c2aa10.html

- Matter of Acosta

http://www.justice.gov/eoir/vll/intdec/vol19/2986.pdf

- UNHCR Handbook, paras. 37-50

http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf

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OTHER MATERIAL

Refugee Definition

INA § 101(a)(42)

In order to be eligible for refugee resettlement, an applicant for refugee status must show that he or she is a refugee as defined in the INA. This definition is the foundation of the refugee adjudication, though other eligibility criteria (e.g. admissibility) must also be considered. The refugee definition is replete with terms and concepts that are subject to specific interpretations and will be discussed in the RAIO Training modules: Refugee Definition and Past Persecution, Well-Founded Fear, Nexus and the Five Protected Characteristics. In 1996, the refugee definition was amended to address the issue of coercive population control programs, though such claims do not commonly arise in the overseas refugee resettlement context. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) Section 601(a)(1), Div. C., Pub. L. No. 104-208 (1996) (codified as amended at 8 U.S.C. Section 1101(a)(42).

INA § 101(a)(42) defines the term "refugee" as:

> (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or
>
> (B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has

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> a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. INA § 207 (Reproduced in its entirety below).
2. 8 C.F.R. § 207 (Reproduced in its entirety below).
3. INA § 212(a) (Reproduced in RAD Grounds of Inadmissibility lesson).

ADDITIONAL RESOURCES

None

SUPPLEMENTS

RAD Supplement – Refugee Affairs Division

INA § 207 – Annual Admission of Refugees and

Admission of Emergency Situation Refugees (August 2011)

Sec. 207. [8 U.S.C. § 1157]

(a)(1) Except as provided in subsection (b), the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation (as defined in subsection (e)), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

(2) Except as provided in subsection (b), the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

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(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.

(4) In the determination made under this subsection for each fiscal year (beginning with fiscal year 1992), the President shall enumerate, with the respective number of refugees so determined, the number of aliens who were granted asylum in the previous year.

(b) If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a), the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.

(c)(1) Subject to the numerical limitations established pursuant to subsections (a) and (b), the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this Act.

(2)(A) A spouse or child (as defined in section 101(b)(1)(A), (B), (C), (D), or (E) of this Act) of any refugee who qualifies for admission under paragraph (1) shall, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 101(a)(42) of this Act, be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this Act. Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation established in accordance with the appropriate subsection under which the refugee's admission is charged.

B) An unmarried alien who seeks to accompany, or follow to join, a parent granted admission as a refugee under this subsection, and who was under 21 years of age on the date on which such parent applied for refugee status under this section, shall continue to be classified as a child for purposes of this paragraph, if the alien attained 21 years of age after such application was

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filed but while it was pending.

(3) The provisions of paragraphs (4), (5), and (7)(A) of section 212(a) shall not be applicable to any alien seeking admission to the United States under this subsection, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Any such waiver by the Attorney General shall be in writing and shall be granted only on an individual basis following an investigation. The Attorney General shall provide for the annual reporting to Congress of the number of waivers granted under this paragraph in the previous fiscal year and a summary of the reasons for granting such waivers.

(4) The refugee status of any alien (and of the spouse or child of the alien) may be terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 101(a)(42) of the Act at the time of the alien's admission.

(d)(1) Before the start of each fiscal year the President shall report to the Committee on the Judiciary of the House of Representatives and of the Senate regarding the foreseeable number of refugees who will be in need of resettlement during the fiscal year and the anticipated allocation of refugee admissions during the fiscal year. The President shall provide for periodic discussions between designated representatives of the President and members of such committees regarding changes in the worldwide refugee situation, the progress of refugee admissions, and the possible need for adjustments in the allocation of admissions among refugees.

(2) As soon as possible after representatives of the President initiate appropriate consultation with respect to the number of refugee admissions under subsection (a) or with respect to the admission of refugees in response to an emergency refugee situation under subsection (b), the Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of such consultation.

(3)(A) After the President initiates appropriate consultation prior to making a determination under subsection (a), a hearing to review the proposed determination shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(B) After the President initiates appropriate consultation prior to making a determination, under subsection (b), that the number of refugee admissions should be increased because of an unforeseen emergency refugee situation, to the extent that time and the nature of the emergency refugee situation permit,

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a hearing to review the proposal to increase refugee admissions shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(e) For purposes of this section, the term "appropriate consultation" means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

(1) A description of the nature of the refugee situation.

(2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members.

To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions in person by designated representatives of the President with such members.

(f)(1) The Attorney General, in consultation with the Secretary of State, shall provide all United States officials adjudicating refugee cases under this section with the same training as that provided to officers adjudicating asylum cases under section 208.

(2) Such training shall include country-specific conditions, instruction on the internationally recognized right to freedom of religion, instruction on methods of

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religious persecution practiced in foreign countries, and applicable distinctions within a country between the nature of and treatment of various religious practices and believers.

RAD Supplement – Refugee Affairs Division

Title 8 Code of Federal Regulations § 207 (August 2011)

§ 207.1 Eligibility.

(a) Filing jurisdiction. Any alien who believes he or she is a refugee as defined in section 101(a)(42) of the Act, and is included in a refugee group identified in section 207(a) of the Act, may apply for admission to the United States by filing an application in accordance with § 207.2. In those areas too distant from a Service office, the application may be filed at a designated United States consular office.

(b) Firmly resettled. A refugee is considered to be "firmly resettled" if he/she has been offered resident status, citizenship, or some other type of permanent resettlement by a country other than the United States and has travelled to and entered that country as a consequence of his/her flight from persecution. Any applicant who has become firmly resettled in a foreign country is not eligible for refugee status under this chapter.

(c) Not firmly resettled. Any applicant who claims not to be firmly resettled in a foreign country must establish that the conditions of his/her residence in that country are so restrictive as to deny resettlement. In determining whether or not an applicant is firmly resettled in a foreign country, the officer reviewing the matter shall consider the conditions under which other residents of the country live: (1) Whether permanent or temporary housing is available to the refugee in the foreign country; (2) nature of employment available to the refugee in the foreign country; and (3) other benefits offered or denied to the refugee by the foreign country which are available to other residents, such as (i) right to property ownership, (ii) travel documentation, (iii) education, (iv) public welfare, and (v) citizenship.

(d) Immediate relatives and special immigrants. Any applicant for refugee status who qualifies as an immediate relative or as a special immigrant shall not be processed as a refugee unless it is in the public interest. The alien shall be advised to obtain an immediate relative or special immigrant visa and shall be provided with the proper petition forms to send to any prospective petitioners. An applicant who may be eligible for classification under sections 203(a)(1), (2), (3), (4), (5), (6), or (7) of the Act, and for whom a visa number is now available, shall be advised of such eligibility but is not required to apply.

§ 207.2 Applicant processing.

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(a) Forms. Each applicant who seeks admission as a refugee shall submit an individual Form I-590 (Registration for Classification as Refugee). Additionally, each applicant 14 years old or older must submit completed forms G-325C (Biographical Information) and FD-258 (Applicant Card).

(b) Hearing. Each applicant 14 years old or older shall appear in person before an immigration officer for inquiry under oath to determine his/her eligibility for admission as a refugee.

(c) Medical examination. Each applicant shall submit to a medical examination as required by sections 221(d) and 234 of the Act.

(d) Sponsorship. Each applicant must be sponsored by a responsible person or organization. Transportation for the applicant from his/her present abode to the place of resettlement in the United States must be guaranteed by the sponsor.

§ 207.3 Waivers of inadmissibility

(a) Authority. Section 207(c)(3) of the Act sets forth grounds of inadmissibility under section 212(a) of the Act which are not applicable and those which may be waived in the case of an otherwise qualified refugee and the conditions under which such waivers may be approved. Officers in charge of overseas offices are delegated authority to initiate the necessary investigations to establish the facts in each waiver application pending before them and to approve or deny such waivers.

(b) Filing requirements. The applicant for a waiver must submit Form I-602, Application by Refugee for Waiver of Grounds of Inadmissibility, with the Service office processing his or her case. The burden is on the applicant to show that the waiver should be granted based upon humanitarian grounds, family unity, or the public interest. The applicant shall be notified in writing of the decision, including the reasons for denial, if the application is denied. There is no appeal from such decision.

§ 207.4 Approved application.

Approval of Form I-590 by an officer in charge outside the United States authorizes the district director of the port of entry in the United States to admit the applicant conditionally as a refugee upon arrival at the port within four months of the date the Form I-590 was approved. There is no appeal from a denial of refugee status under this chapter.

§ 207.5 Waiting lists and priority of handling.

Waiting lists are maintained for each designated refugee group of special humanitarian concern. Each applicant whose application is accepted for filing by the Immigration and Naturalization Service shall be registered as of the date of filing. The date of filing is the priority date for purposes of case control. Refugees

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or groups of refugees may be selected from these lists in a manner that will best support the policies and interests of the United States. The Attorney General may adopt appropriate criteria for selecting the refugees and assignment of processing priorities for each designated group based upon such considerations as: Reuniting families, close association with the United States, compelling humanitarian concerns, and public interest factors.

§ 207.6 Control over approved refugee numbers.

Current numerical accounting of approved refugees is maintained for each special group designated by the President. As refugee status is authorized for each applicant, the total count is reduced correspondingly from the appropriate group so that information is readily available to indicate how many refugee numbers remain available for issuance.

§ 207.7 Derivatives of refugees.

(a) Eligibility. A spouse, as defined in section 101(a)(35) of the Act, and/or child(ren), as defined in section 101(b)(1)(A), (B), (C), (D), or (E) of the Act, shall be granted refugee status if accompanying or following-to-join the principal alien. An accompanying derivative is a spouse or child of a refugee who is in the physical company of the principal refugee when he or she is admitted to the United States, or a spouse or child of a refugee who is admitted within 4 months following the principal refugee's admission. A following-to-join derivative, on the other hand, is a spouse or child of a refugee who seeks admission more than 4 months after the principal refugee's admission to the United States.

(b) Ineligibility. The following relatives of refugees are ineligible for accompanying or following-to-join benefits:

(1) A spouse or child who has previously been granted asylee or refugee status;

(2) An adopted child, if the adoption took place after the child became 16 years old, or if the child has not been in the legal custody and living with the parent(s) for at least 2 years;

(3) A stepchild, if the marriage that created this relationship took place after the child became 18 years old;

(4) A husband or wife if each/both were not physically present at the marriage ceremony, and the marriage was not consummated (section 101(a)(35) of the Act);

(5) A husband or wife if the U.S. Attorney General has determined that such alien has attempted or conspired to enter into a marriage for the purpose of evading immigration laws; and

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(6) A parent, sister, brother, grandparent, grandchild, nephew, niece, uncle, aunt, cousin or in-law.

(c) Relationship. The relationship of a spouse and child as defined in sections 101(a)(35) and 101(b)(1)(A), (B), (C), (D), or (E), respectively, of the Act, must have existed prior to the refugee's admission to the United States and must continue to exist at the time of filing for accompanying or following-to-join benefits and at the time of the spouse or child's subsequent admission to the United States. If the refugee proves that the refugee is the parent of a child who was born after the refugee's admission as a refugee, but who was in utero on the date of the refugee's admission as a refugee, the child shall be eligible to accompany or follow-to-join the refugee. The child's mother, if not the principal refugee, shall not be eligible to accompany or follow-to-join the principal refugee unless the child's mother was the principal refugee's spouse on the date of the principal refugee's admission as a refugee.

(d) Filing. A refugee may request accompanying or following-to-join benefits for his/her spouse and unmarried, minor child(ren) (whether the spouse and children are in or outside the United States) by filing a separate Form I-730 Refugee/Asylee Relative Petition, for each qualifying family member with the designated Service office. The Form I-730 may only be filed by the principal refugee. Family members who derived their refugee status are not eligible to file the Form I-730 on behalf of their spouse and child(ren). A separate Form I-730 must be filed for each qualifying family member before February 28, 2000 or within 2 years of the refugee's admission to the United States, whichever is later, unless the Service determines that the filing period should be extended for humanitarian reasons. There is no time limit imposed on a family member's travel to the United States once the Form I-730 has been approved, provided that the relationship of spouse or child continues to exist and approval of the Form I-730 petition has not been subsequently revoked. There is no fee for filing this petition.

(e) Evidence. Documentary evidence consists of those documents which establish that the petitioner is a refugee, and evidence of the claimed relationship of the petitioner to the beneficiary. The burden of proof is on the petitioner to establish by a preponderance of the evidence that any person on whose behalf he/she is making a request under this section is an eligible spouse or unmarried, minor child. Evidence to establish the claimed relationship for a spouse or unmarried, minor child as set forth in 8 CFR part 204 must be submitted with the request for accompanying or following-to-join benefits. Where possible this will consist of the documents specified in § 204.2(a)(1)(i)(B), (a)(1)(iii)(B), (a)(2), (d)(2), and (d)(5) of this chapter. In addition, a recent photograph of each derivative must accompany the Form I-730. The photograph must clearly identify the derivative, and will be made part of the derivative's immigration record for identification purposes.

(f) Approvals--

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(1) Spouse or child in the United States. When a spouse or child of a refugee is in the United States and the Form I-730 is approved, the Service will notify the refugee of such approval on Form I-797, Notice of Action. Employment will be authorized incident to status.

(2) Spouse or child outside the United States. When a spouse or child of a refugee is outside the United States and the Form I-730 is approved, the Service will notify the refugee of such approval on Form I-797. The approved Form I-730 will be sent by the Service to the Department of State for forwarding to the American Embassy or Consulate having jurisdiction over the area in which the refugee's spouse or child is located.

(3) Benefits. The approval of the Form I-730 shall remain valid for the duration of the relationship to the refugee and, in the case of a child, while the child is under 21 years of age and unmarried, provided also that the principal's status has not been revoked. However, the approved Form I-730 will cease to confer immigration benefits after it has been used by the beneficiary for admission to the United States as a derivative of a refugee. To demonstrate employment authorization, the Service will issue a Form I-94, Arrival-Departure Record, which also reflects the derivative's current status as a refugee, or the derivative may apply under § 274a.12(a) of this chapter, using Form I-765, Application for Employment Authorization, and a copy of the Form I-797.

(g) Denials. If the spouse or child of a refugee is found to be ineligible for derivative status, a written notice explaining the basis for denial shall be forwarded to the principal refugee. There shall be no appeal from this decision. However, the denial shall be without prejudice to the consideration of a new petition or motion to reopen the refugee or asylee relative petition proceeding, if the refugee establishes eligibility for the accompanying or following-to-join benefits contained in this part.

§ 207.8 Physical Presence in the United States.

For the purpose of adjustment of status under section 209(a)(1) of the Act, the required one year physical presence of the applicant in the United States is computed from the date the applicant entered the United States as a refugee.

§ 207.9 Termination of refugee status.

The refugee status of any alien (and of the spouse or child of the alien) admitted to the United States under section 207 of the Act shall be terminated by any district director in whose district the alien is found if the alien was not a refugee within the meaning of section 101(a)(42) of the Act at the time of admission. The district director shall notify the alien in writing of the Service's intent to terminate the alien's refugee status. The alien shall have 30 days from the date notice is served upon him/her or, delivered to his/her last known address, to present written or oral

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evidence to show why the alien's refugee status should not be terminated. There is no appeal under this chapter from the termination of refugee status by the district director. Upon termination of refugee status, the district director shall process the alien under sections 235, 240, and 241 of the Act.

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

Statute and Regulations

INA § 101(a)(42) – definition of refugee
INA § 208 – asylum
INA § 209 – refugee and asylee adjustment
INA § 235 – credible fear determinations
INA § 241(b)(3) – withholding of removal
INA § 212(a) – inadmissibilities
INA §241(a)(5) - reinstatement
INA §238- administrative removal for aggravated felons
8 C.F.R. § 208.1 et seq. – process
8 C.F.R. § 240.60 et seq. – suspension of deportation, special rule cancellation of removal, 'NACARA 203'

ADDITIONAL RESOURCES

None

SUPPLEMENTS

ASM Supplement

A summary of Asylum Officer responsibilities is located at the beginning of this module in the light yellow Asylum Division text box. The required reading may be found using the internet link provided earlier in this chapter. Discussion of pertinent statutes and regulations, along with additional sources, will occur throughout the RAIO course and division specific training.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

None

ADDITIONAL RESOURCES

None

SUPPLEMENTS

IO Supplement

There is no International Operations Division Supplement. A summary of the responsibilities an officer working for the International Operations Division is located at the beginning of this module in the light purple International Operations Division text box. It was deemed not necessary to include the entire text of the sections of the INA and 8 CFR IO Officers will refer to in the course of their work for several reasons: First, the list would be quite extensive. Second, IO Officers generally have access to hard copies or digital copies of the INA and CFR, unless they are on circuit rides adjudicating refugee applications in remote areas.

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Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	Suspension of Deportation and Special Rule Cancellation of Removal under NACARA
Rev. Date	May 9, 2013
Terminal Performance Objective	Given the field situation in which the asylum officer has jurisdiction over a request for suspension of deportation or special rule cancellation of removal under provisions of the Nicaraguan Adjustment and Central American Relief Act (NACARA), the asylum officer will be able to apply appropriate law to determine whether an applicant is eligible for suspension of deportation or special rule cancellation of removal.
Enabling Performance Objectives	After the lesson, the asylum officer will be able to: 1. Explain the origins of NACARA. (ACRR9) 2. Identify the statutory elements required to establish eligibility to apply for suspension of deportation or special rule cancellation of removal under NACARA. (AIL2) 3. Identify when the Asylum Division has jurisdiction to grant requests for suspension of deportation or special rule cancellation of removal under NACARA. (ACRR9) 4. Identify the eligibility criteria for qualified relatives of NACARA-eligible "sponsors." (ACRR9) 5. Identify the distinctions between suspension of deportation and special rule cancellation of removal. (AA2) 6. Identify the statutory criteria for eligibility for suspension of deportation and special rule cancellation of removal. (AA2) 7. Identify the appropriate factors to consider in evaluating whether an applicant has established continuous physical presence. (ACRR9)

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8. Identify the appropriate factors to consider in evaluating whether an applicant has established good moral character. (ACRR9) (AA2)

9. Identify the appropriate factors to consider in evaluating whether an applicant has established extreme hardship. (AA2)

10. Identify circumstances under which an applicant is entitled to a presumption of extreme hardship and circumstances in which the presumption may be overcome.(AA2)

11. Identify bars to an asylum officer grant of suspension of deportation or special rule cancellation of removal. (ACRR9)(AA2)

12. Identify the type of evidence that may aid in establishing the statutory requirements of continuous physical presence, good moral character, and extreme hardship. (ACRR9)(AA2)

13. Identify the burden of proof required to establish eligibility for suspension of deportation or special rule cancellation of removal. (ACRR9)(AA2)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
10/5/2015		Removed comment that appeared in final version concerning correct name of LP for Mandatory Bars to Asylum; corrected hyperlink to ABC/NACARA Procedures Manual.	Joanna-maria Brown

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New Critical Tasks

Knowledge of case law that impacts Asylum Division policies and procedures.

Knowledge of applications eligible for special group processing (e.g., ABC, NACARA, Mendez).

Knowledge of relevant NACARA policies, procedures, and guidelines of establishing applicant eligibility for Suspension of Deportation or Special Rule Cancellation of Removal (I-881).

Knowledge of procedures and legal requirements for Suspension of Deportation and Special Rule Cancellation of Removal (I-881).

Knowledge of the Nicaraguan Adjustment and Central American Relief Act (NACARA).

Knowledge of the ABC Settlement Agreement (i.e., American Baptist Churches v. Thornburgh).

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Presentation	References

I. INTRODUCTION

At the conclusion of this section, the asylum officer will understand the history of NACARA.

A. Relief from Deportation Prior to IIRIRA

Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), individuals in deportation proceedings could apply for suspension of deportation under section 244(a) of the Immigration and Nationality Act (INA).

Under section 244(a) of the INA, the Attorney General could exercise discretion to grant suspension of deportation to an individual who established seven years continuous physical presence in the U.S., good moral character during that period, and that deportation would result in extreme hardship to the individual or to his or her spouse, parent, or child who was a US citizen or lawful permanent resident. By regulation, this authority was delegated to the Executive Office for Immigration Review (EOIR).

Pre-IIRIRA INA section 244(a)(1).

Under some circumstances (for example, when the individual was convicted of a certain crime), an individual was required to meet a higher standard and show, among other things, 10 years continuous physical presence and that deportation would result in "exceptional and extremely unusual hardship."

Pre-IIRIRA INA section 244(a)(2).

When an individual is granted suspension of deportation, his or her status is adjusted to that of lawful permanent resident.

Pre-IIRIRA INA section 244(a).

B. Changes resulting from IIRIRA

In passing IIRIRA, Congress consolidated deportation proceedings and exclusion proceedings into removal proceedings. In addition, IIRIRA dramatically restricted the availability of suspension of deportation, now called cancellation of removal, in the following ways:

1. Lengthened the time required for continuous physical presence in the US — INA section 240A(b)(1)(A).

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An individual must show continuous physical presence in the United Stated for 10 years to be eligible for cancellation of removal.

2. Heightened the hardship standard — INA section 240A(b)(1)(D).

To establish eligibility for cancellation of removal, the individual must now show that removal would result in "exceptional and extremely unusual hardship" to the alien's spouse, parent, or child, who is a US citizen or alien lawfully admitted for permanent residence. Unlike suspension of deportation, hardship to the applicant may no longer be considered.

3. Established an annual numerical cap — INA section 240A(e).

The number of individuals who can be granted suspension of deportation or cancellation of removal is now limited to 4,000 per year.

4. Established the "stop-time" rule — INA section 240A(d)(1).

Before IIRIRA, the period of continuous physical presence was calculated from the date of entry into the US to the date of application for suspension of deportation. The date of application was the date of decision. An individual could continue to accrue time toward the 7-year requirement after charging documents were served, an appearance was made in Immigration Court, and while the case was on appeal. To reduce the incentive for prolonging cases in order to reach the minimum 7 years, Congress created the "stop-time" rule providing that the period of physical presence necessary for purposes of cancellation of removal must have accrued before initiation of removal proceedings. Once proceedings are initiated, the time accrued toward physical presence "stops" as a matter of law.

NOTE: The new provision also stops time from accruing when the individual commits offenses that render him or her inadmissible or removable under certain provisions of the INA.

In Matter of N-J-B-, the BIA held that the stop-time rule applies retroactively to individuals placed in deportation proceedings prior to the effective date of IIRIRA (April 1, 1997), as well as to individuals

Matter of N-J-B-, 21 I&N Dec. 821 (BIA 1997).

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placed in removal proceedings after that effective date.

C. Enactment of the Nicaraguan Adjustment and Central American Relief Act (NACARA)

1. Effects of N-J-B and IIRIRA

On July 10, 1997, Attorney General Janet Reno announced that the Administration would act to mitigate the effects of IIRIRA and the BIA decision Matter of N-J-B on Central Americans and others with long-standing ties to the US.

2. Proposed legislation

The Administration submitted to Congress the "Immigration Reform Transition Act," which, among other provisions, would have allowed eligible class members covered by the settlement agreement reached in American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (ABC), to apply for relief from removal under the pre-IIRIRA suspension of deportation standards. It also clarified that the "stop-time" rule applied only to applicants placed in proceedings on or after April 1, 1997, and exempted certain classes of individuals from the cap on the number of grants of suspension of deportation or cancellation of removal allowed each year.

3. Enacted legislation

During the course of the legislative process, Congress significantly altered the bill, which was passed as the Nicaraguan Adjustment and Central American Relief Act (NACARA). In particular, Section 202 allowed certain Cubans and Nicaraguans to apply for adjustment of status based primarily on date of entry and physical presence requirements. In contrast, Section 203 permitted certain Guatemalans and Salvadorans to apply for suspension of deportation or cancellation of removal, which, if granted, would result in adjustment of status, but required higher

On November 19, 1997, President Clinton signed NACARA, stating that he was pleased with the legislation, but had concerns about several aspects of the legislation. In particular, he stated that he was "troubled by the

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eligibility criteria (such as extreme hardship and good moral character). NACARA 203 also included relief for certain nationals of the former Soviet bloc countries, exempted NACARA beneficiaries from the "stop-time" rule, and made clear that the "stop-time" rule applied retroactively to everyone else, including those placed in deportation proceedings prior to April 1, 1997.

President Clinton signed the legislation on November 19, 1997. For persons seeking suspension of deportation or special rule cancellation of removal in deportation or removal proceedings, section 203 of NACARA was effective immediately.

fact that [NACARA] treats similarly situated people differently." Statement by President Clinton, November 14, 1997, released by White House Press Office. The president also urged the Attorney General to implement NACARA with an eye toward the ameliorative nature of the legislation.

D. Overview of NACARA

NACARA provides various forms of immigration benefits and relief from deportation to certain Nicaraguans, Cubans, Salvadorans, Guatemalans, and nationals of former Soviet bloc countries.

Nicaraguan Adjustment and Central American Relief Act, enacted as title 2 of Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997) (as amended by Technical Corrections to the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-139, 111 Stat. 2644 (1997)).

1. Section 202

Section 202 of NACARA directs the Attorney General to adjust to the status of lawful permanent resident qualified Nicaraguans and Cubans who have been physically present in the US since December 1, 1995, and their qualified dependents. The interim regulation implementing section 202 of NACARA became effective June 22, 1998. Section 202 remains under the jurisdiction of the District Office. The applicant files form I-485 that is to be adjudicated by the District Office or the Immigration Court. The Asylum Office was not given jurisdiction over these applications.

2. Section 203

IIRIRA section 309(f), as added by NACARA section 203(b).

a. Eligibility

Section 203 applies to certain Guatemalans, Salvadorans and nationals of former Soviet bloc countries who entered the US by certain dates and applied for asylum or registered for benefits under the ABC Settlement Agreement,

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and to their qualified family members.

For those already in proceedings before April 1, 1997, Section 203 permitted consideration of suspension of deportation under standards in effect prior to IIRIRA.

b. Created "special rule" cancellation of removal

Section 203 of NACARA allows eligible individuals to apply for special rule cancellation of removal under standards very similar to those that existed for suspension of deportation before IIRIRA was enacted.

c. Exempts beneficiaries from stop-time rule

Section 203 NACARA exempts all beneficiaries (both those beneficiaries in deportation proceedings prior to April 1, 1997, who apply for suspension of deportation and those who apply for special rule cancellation of removal) from the stop-time rule. Thus, NACARA section 203 beneficiaries are able to count all of their time in the US since their continuous physical presence began, regardless of when charging documents were issued.

Sections 309(c)(5)(C)(i) (for suspension of deportation applications) and 309(f)(1) (for special rule cancellation of removal applications) of IIRIRA, as amended by NACARA section 203. NACARA codified N-J-B-, clarifying that for persons not eligible for relief under section 203 NACARA, the stop-time rule applies regardless of the date the person was placed in proceedings. Amended INA section 240A(e)(3)(A).

3. Section 204

Section 204 exempts NACARA beneficiaries from the annual limit now placed on the number of suspension of deportation and cancellation of removal requests that may be granted.

E. Attorney General's Decision to Accord Jurisdiction to Asylum Officers

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At the time of enactment of NACARA only EOIR had authority to grant suspension of deportation or cancellation of removal.

Pre-NACARA 8 CFR §§ 240.11(a), 240.20, and 240.56.

1. The interim rule implements the Attorney General's decision to give authority to asylum officers to adjudicate suspension of deportation or special rule cancellation of removal in certain circumstances. The limits of this authority are detailed in section III, Jurisdiction, below.

8 CFR § 240.62 (published in the Federal Register on May 21, 1999 at 64 FR 27856).

2. The decision to give asylum officers authority to grant relief under section 203 of NACARA in certain cases is based on the efficient management of resources. At the time NACARA was enacted, most NACARA section 203 beneficiaries had asylum applications pending with the Asylum Program, including most of the approximately 240,000 registered ABC class members. Allowing these individuals and their qualified family members to apply for relief under section 203 while their asylum applications are pending with the USCIS Asylum Division has provided an efficient method for resolving most of the claims at an earlier stage in the administrative process.

F. Expansion of Categories of Individuals Eligible to Apply for Relief under Section 203 of NACARA

Section 1504 of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) (Pub. L. 106–386, 114 Stat. 1522) amended INA section 240(b)(2) to expand the categories of individuals eligible to apply for relief under section 203 of NACARA. This includes individuals who have been battered or subjected to extreme cruelty by a spouse or parent who is or was a US citizen, lawful permanent resident, or NACARA beneficiary. In order to qualify under this provision, an alien must be inadmissible or deportable, must be continuously physically present in the U.S. for at least three years, must have been a person of good moral character during the three-year period, and the removal of the alien must result in extreme hardship to the alien, the alien's child, or the alien's parent.

NOTE: Only EOIR has the authority to adjudicate

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applications for NACARA relief pursuant to the VTVPA.

II. ELIGIBILITY TO APPLY FOR BENEFITS UNDER SECTION 203 OF NACARA

First, an applicant must establish eligibility to apply for relief under NACARA. Then, the applicant must establish that he or she meets the specific criteria required for suspension of deportation or special rule cancellation of removal.

NOTE: Not every individual who is eligible to apply for NACARA suspension of deportation or special rule cancellation of removal may apply with USCIS. See section III below on jurisdiction.

At the conclusion of this section, the asylum officer will be able to identify the statutory elements required to establish eligibility to apply for suspension of deportation or special rule cancellation of removal under NACARA.

There are five eligibility categories.

A. Registered ABC Class Members

The first group of individuals eligible to apply for NACARA relief is comprised of class members of the ABC Settlement Agreement who timely registered for ABC benefits and have a pending asylum application. If the asylum application has been denied, it is not "pending." The file must contain proof that the denial or referral was personally served on the alien or mailed to the last known address.

8 CFR § 240.61(a)(1).

8 CFR § 240.60.

There are two categories of registered ABC class members who are eligible to apply:

The group of registered ABC class members corresponds to block "a)" on page one of the I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (NACARA).

1. A Guatemalan who:

   a. first entered the U.S. on or before October 1, 1990; and

   b. registered for ABC benefits on or before December 31, 1991, or filed an I-589 during the period on or after December 19, 1990 and

See section X.A.2 of the ABC-NACARA Procedures Manual on

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on or before December 31, 1991; and

evidence necessary to determine registration. Chaly-Garca v. U.S., 508 F.3d 1201 (9th Cir. 2007).

c. has not been convicted of an aggravated felony; and

d. has not been apprehended at time of entry after December 19, 1990.

2. A Salvadoran who:

a. first entered the U.S. on or before September 19, 1990; and

b. registered for ABC benefits on or before October 31, 1991 (either by direct registration or by applying for Temporary Protected Status (TPS) or by filing an I-589 on or after December 19, 1990 and on or before October 31, 1991); If the EAD reflects a code of A(11), A(12), or C(19) before April 30, 1996 means there is a presumption that the person timely filed for TPS on or before October 31, 1991; and

Under §303 of the Immigration Act of 1990, TPS "designation shall take effect on the date of the enactment of this section and shall remain in effect until the end of the 18-month period beginning January 1, 1991."

c. has not been convicted of an aggravated felony; and

Chaly-Garca v. U.S., 508 F.3d 1201 (9th Cir. 2007).

d. has not been apprehended at time of entry after December 19, 1990.

NOTE: Under the ABC Settlement Agreement, asylum officers are to determine whether an ABC class member has been apprehended at time of entry. If a class member is apprehended after an entry has been effected, the apprehension does not render the class member ineligible to apply for relief under NACARA.

The determination of whether an entry has been effected involves consideration of three factors: (1) whether the class member has crossed into the territorial limits of the US; (2) whether the class member has been inspected or admitted by an immigration officer, or has actually and intentionally

Dixon, David M., Deputy General Counsel, INS Office of General Counsel, The ABC Settlement

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evaded inspection at the nearest inspection point; and (3) whether the class member crossed into the territorial limits of the US free from official restraint, including free from surveillance.

One of the factors to determine if the person was apprehended at entry before April 1, 1997 is whether or not the person was placed in exclusion proceedings. If apprehended after April 1, 1997, check to see if the person was placed in removal proceedings or charged with an inadmissibility ground including expedited removal.

Agreement term: "apprehended at time of entry," Memorandum to Office of Field Operations, Office of International Affairs, Office of Programs, Regional Offices, District Offices, Border Patrol (Washington, DC 22 July 1999), 4p. See section XXXI of the ABC-NACARA Procedures Manual for further guidance.

B. Guatemalans and Salvadorans Who Filed for Asylum on or Before April 1, 1990

This group includes Guatemalan and Salvadoran nationals who filed a complete application for asylum, either directly with the INS or with the Immigration Court, on or before April 1, 1990, and who have not been convicted of an aggravated felony.

See 8 CFR § 240.62(b). Since applications for suspension of deportation do not get a de novo interview, the Asylum office only has jurisdiction over individuals that fall into Category B (filed an Asylum application on or before April 1, 1990) if they are applying for special rule cancellation. If the applicant is solely eligible for NACARA based on the "on or before April 1, 1990" asylum application and they are applying for suspension of deportation, the jurisdiction remains with the court. The asylum office only obtains jurisdiction over an applicant for suspension of deportation if they are also a registered ABC class member and therefore fall under Category A as well.

8 CFR § 240.61(a)(2).

This group corresponds to block "b)" on page one of the I-881.

C. Nationals of Former Soviet Bloc Countries

An individual from a former Soviet bloc country who has not been convicted of an aggravated felony is eligible to apply for benefits under NACARA if each of the following criteria are met:

8 CFR § 240.61(a)(3).

This group corresponds to block

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"c)" on page one of the I-881.

1. Entered the U.S. on or before December 31, 1990;

2. Filed an application for asylum on or before December 31, 1991; and

3. At the time of filing was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia.

D. Qualified Family Members

Certain family members of individuals described in Categories A, B or C above are also eligible to apply for benefits under section 203 of NACARA. The required family relationship must exist at the time that the parent or spouse described in categories A, B, or C above is granted suspension of deportation or special rule cancellation of removal, but the statute does not require that the relationship still be in existence at the time that the qualified family member is considered for relief.

Qualified family members are those that have not been convicted of an aggravated felony and fit into one of the following categories at the time the parent or spouse is approved:

This group corresponds to block "d)" on page one of the I-881.

NOTE: Although the parent or spouse must have been granted the benefit, USCIS will accept the qualified family member's applications prior to the grant, but will not adjudicate the application until a decision is made on the parent or spouse's application.

1. Spouse; 8 CFR § 240.61(a)(4).

2. Children (unmarried under 21 years of age, as defined at section 101(b)(1) of the INA); and 8 CFR § 240.61(a)(4).

3. Unmarried sons or daughters (21 years of age or older). 8 CFR § 240.61(a)(5).

   NOTE: If the unmarried son or daughter is 21 years of age or older at the time the parent is granted the

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benefit, the son or daughter must have entered the US on or before October 1, 1990. Also, the son or daughter must be unmarried at the time of their own application is adjudicated to qualify under this category

When determining whether an applicant qualifies as a spouse of an individual described in categories A, B, or C above, an officer must look to the laws of the jurisdiction in which the couple claims to have married. The term "married" includes the common law marriage of a couple residing in a jurisdiction that recognizes common law marriage, be it a state in the US or a foreign country.

See Martin, David A., General Counsel, INS Office of General Counsel, Common law marriage and conditional permanent residence—Texas Declaration and Registration of Informal Marriage, Legal Opinion 95-8 (Washington, DC 26 August 1995).
Roddy, Nadine E., Interstate Recognition of Common Law Marriages, 9 Divorce Litigation 193-200 (October 1997).

Currently, there are 9 US states and the District of Columbia that recognize common law marriage. Some states also recognize the common law marriage of a couple who resided in a common law marriage state at the time of the "marriage." To establish a common law marriage, jurisdictions recognizing such relationships generally require a showing that the couple 1) had the capacity to enter into a marriage, 2) had an agreement to be married, 3) cohabited, and 4) held themselves out to the community as husband and wife.

Currently, only 9 states (Alabama, Colorado, Kansas, Rhode Island, South Carolina, Iowa, Montana, Oklahoma, and Texas) and the District of Columbia recognize common-law marriages contracted within their borders. In addition, five states have "grandfathered" common law marriage (Georgia, Idaho, Ohio, Oklahoma and Pennsylvania) allowing those established before a certain date to be

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recognized. Utah recognizes common law marriages only if they have been validated by a court or administrative order.

The term "unmarried" includes individuals who have been married but are divorced or widowed. For example, an applicant who has been married but is divorced or widowed at the time that his or her parent is granted relief under section 203 of NACARA may be eligible to apply for relief as a child, if still under 21 at the time the sponsoring parent or spouse is granted relief, or an unmarried son or daughter if over 21.

INA § 101(a)(39).

Qualified Family Members(QFM) do not need to have a Form I-589 pending to be eligible to apply for NACARA. Additionally, apprehension at entry is not a bar for a QFM because it is only a bar for an ABC registered class member. Since QFM's are not necessarily ABC registered class members, the apprehension bar does not apply. If a QFM is an ABC registered class member but also eligible as a QFM, the apprehension at entry would not necessarily bar them. They would adjust as a Category D on the application.

E. Victims of Domestic Violence

Pursuant to the Victims of Trafficking and Violence Protection Act (VTVPA), certain aliens who have been battered or subjected to extreme cruelty by a spouse or parent who is or was a US citizen, lawful permanent resident, or NACARA beneficiary may apply for NACARA relief.

NOTE: Only EOIR has authority to adjudicate requests for relief pursuant to the VTVPA.

F. Special Eligibility Preconditions for Applicants with Deportation, Removal, or Voluntary Departure Orders

IIRIRA section 309(g), as added by NACARA section 203(c).

1. Final Orders of Deportation or Removal:

An individual who

- is otherwise eligible to apply for NACARA because he or she is described in categories A, B, C, or D above, and

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- who has an outstanding final order of deportation or removal

must first file and be granted a motion to reopen before he or she may apply for benefits under section 203 of NACARA.

This requirement applies to class members eligible for ABC benefits that have final orders of deportation but are awaiting their de novo asylum interviews by the Asylum Division pursuant to the ABC Settlement Agreement. If a registered ABC class member in these circumstances did not file a motion to reopen, or it was filed but not approved by EOIR, the class member is ineligible to apply for NACARA with either USCIS or EOIR.

8 CFR § 1003.43 (published in the Federal Register on June 11, 1998 as 8 CFR 3.43, at 63 FR 31890; with later amendments published on March 22, 1999, at 64 FR 13663). Although applicants subject to a final order were required to have filed a motion to reopen by September 11, 1998, there may still be some circumstances in which an INS or Department of Homeland Security (DHS) attorney agreed to join in a motion to reopen after the regulatory deadline.

INA § 101(g).

2. Execution of a Final Order:

A final order is no longer outstanding if it has been executed as a result of an individual's subsequent deportation/departure from the US.

3. Salvadorans with TPS:

A Salvadoran with Temporary Protected Status who 1) was subject to an outstanding final order of deportation and 2) left and returned to the US pursuant to a grant of advance parole did not execute the final order of deportation by this advance parole departure. Unless the final order was executed by some other departure from the US, such an individual would still be subject to an outstanding final order and must file and be granted a motion to reopen before he

Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102-232, 105 Stat. 1733, Title III, section 304(c) (amendment to Immigration Act of 1990 covering authorized travel

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or she may apply for benefits under section 203 of NACARA.

Please note: this only applies to Salvadorans with TPS under the previous designation, which ran from 1/1/91 to 6/30/92.

abroad by beneficiaries of TPS and family unity).

4. Voluntary Departure:

If an applicant was given Voluntary Departure and did not leave the U.S. during the required period of time, in most cases the order will have been converted to a final order of deportation or removal. If the applicant has not since left the US, he or she would continue to be subject to the final order.

If, however, an ABC class member was given Voluntary Departure, and the Voluntary Departure period extended beyond the date the ABC Settlement Agreement was signed (December 14, 1990), the Voluntary Departure period was in effect tolled by the Settlement Agreement. In the case of an ABC class member who was granted Voluntary Departure, and the Voluntary Departure period coincided with the Settlement Agreement, the applicant is eligible to apply for NACARA 203 relief, and the USCIS Asylum Division has jurisdiction over the case. If the Voluntary Departure period does not include the December 14, 1990, Settlement date and the Applicant has not otherwise left, the Applicant will continue to be under an unexecuted final order.

See section III of this lesson for a discussion of jurisdiction over NACARA applications.

If an applicant was given Voluntary Departure and left the US during the requisite period of time, the applicant would have executed the Voluntary Departure order.

5. Reinstatement of a Prior Order

If an individual returns to the U.S. illegally after having been removed from the U.S., or departed voluntarily while under an order of removal, deportation or exclusion, the individual will generally be subject to reinstatement of the prior order. 8 CFR § 241.8. However, under the Amendments to the Legal Immigration Family Equity Act of 2000

Life Act Amendments, Title XV of H.R. 5666, enacted by reference in Pub.L. 106-554 (December 21, 2000); Pearson, Michael A. Implementation of Amendment to Legal Immigration Family

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	(LIFE), an applicant who is otherwise eligible for relief under NACARA 203 is not barred from seeking such relief because the applicant is subject to reinstatement of a prior order of deportation or removal pursuant to INA section 241(a)(5). Because of this special exception, if an applicant appears to be subject to reinstatement, the asylum officer may grant NACARA relief as long as the applicant otherwise qualifies for relief.	Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries, Memorandum (February 23, 2001)

Review Questions

1. Identify the categories of individuals who may apply under NACARA.

2. If an individual who was granted suspension of deportation under NACARA later gets married, can his wife apply for benefits under NACARA?

3. Does a Guatemalan or Salvadoran have to be a class member to apply for benefits under NACARA?

4. If an applicant is 20 years old when her mother is granted special rule cancellation of removal but waits until she is 22 years old to submit her own application for NACARA benefits, does she have to enter the US by a certain date to be eligible to apply?

5. What must an applicant who has an outstanding final order of deportation do in order to be eligible to apply for relief under section 203 of NACARA?

6. What effect did the ABC Settlement Agreement have on applicants who were given Voluntary Departure before, but who were obligated to leave the US after, December 14, 1990?

Practical Exercises:

1. A person born January 1978 enters the U.S. in June 1991. He applies for NACARA 203 relief in March 2001. His mother was granted special rule cancellation of removal pursuant to NACARA 203 in February 1998. Is this person eligible to apply for NACARA 203 relief?

2. A 26-year–old, unmarried woman applied for NACARA 203 relief in December 1999. Her father also applies for NACARA 203 relief in December 1999. Is the woman eligible to apply for NACARA

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203 relief? What are the determining factors?

III. JURISDICTION

At the conclusion of this section, the asylum officer will be able to identify the circumstances under which the asylum office has jurisdiction to interview applicants requesting suspension of deportation or special rule cancellation of removal under NACARA.

A. USCIS Asylum Division

Except when EOIR has exclusive jurisdiction (as explained in subsection B below), the USCIS Asylum Division has jurisdiction to grant, dismiss, or refer to the Immigration Court applications for suspension of deportation or special rule cancellation of removal for the following NACARA applicants.

NOTE: Asylum officers do not have authority to deny relief under NACARA. Only an immigration judge can deny a NACARA application.

1. Asylum applicants eligible for a de novo asylum adjudication under the terms of the ABC Settlement Agreement.

   a. A Guatemalan who meets each of the following criteria:

      i. first entered the U.S. on or before October 1, 1990; and

      ii. registered for ABC benefits on or before December 31, 1991 by either filing an ABC registration form or by filing an I-589 during the period beginning on or after December 19, 1990 and ending on or before October 31, 1991; and

      iii. applied for asylum on or before January 3, 1995, and that application is still pending adjudication by USCIS; and

      iv. has not been apprehended at time of entry after December 19, 1990.

8 CFR §§ 240.61(a)(1);

8 CFR § 240.62(a)(2).

8 CFR § 240.60 defines "application pending adjudication by the Service" (now USCIS)

Chaly-Garcia v. U.S., 508 F.3d 1201 (9th

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			Cir. 2007). See section XXXI of the ABC-NACARA Procedures Manual and section II of this lesson for a more thorough discussion of the ABC Settlement Agreement term, "apprehended at time of entry."
b.	A Salvadoran who meets each of the following criteria:		
	i.	first entered the U.S. on or before September 19, 1990; and	8 CFR § 240.61(a)(1).
	ii.	registered for ABC benefits on or before October 31, 1991 (either directly or by applying for TPS or by filing an I-589 on or after December 19, 1990 and on or before October 31, 1991); and	
	iii.	applied for asylum on or before January 31, 1996 (administrative grace period extended acceptance date to February 16, 1996), and that application is still pending adjudication by USCIS; and	8 CFR § 240.62(a)(1). Or, the applicant may have applied within 90 days of receiving Notice 5. See section XXXIII of the ABC-NACARA Procedures Manual. 8 CFR § 240.60 defines "application pending adjudication by the Service" (now USCIS).
	iv.	has not been apprehended at time of entry after December 19, 1990.	Chaly-Garca v. U.S., 508 F.3d 1201 (9th Cir. 2007).

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		See section XXXI of the ABC-NACARA Procedures Manual or section II of this lesson for a more thorough discussion of the ABC Settlement Agreement term, "apprehended at time of entry."
2.	A Guatemalan or Salvadoran national who filed an application for asylum on or before April 1, 1990, and that application is still pending with USCIS	8 CFR § 240.61(a)(2);
3.	A former Soviet Bloc national who is eligible to apply under NACARA and whose asylum application is still pending with USCIS	8 CFR § 240.62(a)(3). 8 CFR § 240.60 defines "application pending adjudication by the Service" (now USCIS). See 8 CFR § 240.62(b). If the case was administratively closed by IJ AND if filed before 4/1/90 then must have registered for ABC, or jurisdiction remains with IJ.
4.	A spouse, child, unmarried son, or unmarried daughter eligible to apply under NACARA and whose spouse or parent either has a. a NACARA application pending with the Asylum Program, or b. been granted suspension of deportation or special rule cancellation of removal by the Asylum Program.	8 CFR §§ 240.61(a)(4) or (5); 240.62(a)(4) NOTE: If NACARA relief was granted by EOIR, USCIS does not have jurisdiction over the qualified family member's application.

B. EOIR

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1. General rule — 8 CFR § 240.62(b).

   Except as explained below, EOIR has exclusive jurisdiction over applications for suspension of deportation or special rule cancellation of removal under NACARA once the applicant has been placed in deportation or removal proceedings; that is, once the applicant has been served with charging documents and the charging documents have been filed with EOIR.

2. Exceptions

   a. A Registered ABC class member whose proceedings were administratively closed or continued by EOIR and who has not yet had a de novo asylum adjudication by an asylum officer — 8 CFR § 240.62(b)(1).

      NOTE: For Principal Applicants, this includes cases that were closed specifically because of the ABC Settlement Agreement, as well as cases that were closed for other reasons.

   b. A Registered ABC class member who has not yet had a de novo asylum adjudication by an asylum officer and who is subject to a final order of deportation or removal — 8 CFR §240.62(b)(1).

      AND

      i. has been granted a motion to reopen previous proceedings as required under 8 CFR 3.43, — 8 CFR § 1003.43 (published in the Federal Register on June 11, 1998 as 8 CFR 3.43, at 63 FR 31890; with later amendments published on March 22, 1999, at 64 FR 13663).

      AND

      ii. whose reopened case has been administratively closed by the immigration judge to allow the class member to seek suspension of deportation or special rule cancellation of removal before the Asylum Program

   c. A NACARA beneficiary who is eligible to apply for NACARA benefits based on a parent — 8 CFR § 240.62(b)(2).

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or spouse's eligibility and whose case has been administratively closed because the parent or spouse's application is pending with the Asylum Division. If a Dependent's case is closed for any reason other than to pursue ABC or NACARA, the Immigration Court retains jurisdiction. The administrative closure must be specifically for the dependent to pursue ABC or NACARA relief.

Review Questions

1. What is the main difference between those eligible to apply for NACARA relief before USCIS and those eligible to apply for NACARA relief with EOIR?

2. Identify the exceptions to EOIR's exclusive jurisdiction for individuals already in proceedings.

Practical Exercises

1. A registered ABC class member has a final order of deportation against him. The applicant has not yet had a de novo asylum hearing on his ABC asylum claim. Does USCIS have jurisdiction over an application for suspension of deportation or special rule cancellation of removal by this applicant? What do you need to know to make this determination?

2. An individual is married and her husband is eligible to apply for NACARA relief. She is eligible to apply for NACARA because of her relationship to her husband. She is currently in removal proceedings. Can she apply for NACARA relief with USCIS? What do you need to know to make this determination?

IV. QUALIFIED FAMILY MEMBERS

At the conclusion of this section, the asylum officer will be able to identify eligibility based on parent-child or spousal relationships (qualified family members of NACARA-eligible "sponsors").

A. Derivative Status

In contrast to asylum law, there is no derivative status under NACARA. In other words, there is no "Follow to Join" component in NACARA. Each individual must submit a separate application and independently establish eligibility

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for suspension of deportation or special rule cancellation of removal.

B. Eligibility of Qualified Family Members to Apply with USCIS

As noted in section II. D. above, certain individuals are only eligible to apply for relief under NACARA if their spouse or parent ("sponsor") has been granted suspension of deportation or cancellation of removal. However, for administrative efficiency and to promote family unity, USCIS will accept applications from those individuals before their spouse or parent is granted relief under NACARA if there is evidence that the sponsor's NACARA application is pending with USCIS. The application will not be accepted if the sponsor's application was dismissed or referred by USCIS to the Immigration Court. Under these circumstances USCIS will accept the fee and process biometrics, if the family member (spouse or child) is also in proceedings.

NOTE: Applications for NACARA relief are filed at the Vermont or California Service Center, depending on the applicant's state of residence. An asylum office cannot accept applications because a fee must accompany the application, and there is no method to receipt-in the fees at the asylum office.

The asylum officer cannot adjudicate the qualified family member's application until after the sponsor's application has been adjudicated.

8 CFR § 240.62(a)(4).

C. Qualified Family Members in Proceedings

An individual who has been placed in proceedings and whose sponsor has a NACARA application pending with USCIS may ask EOIR to administratively close the proceeding so that the individual may also file a NACARA application with USCIS. In 1998 and 1999, INS and EOIR issued guidance to immigration judges and government trial attorneys regarding individuals in proceedings who appear eligible to apply for relief under NACARA based on a relationship to a parent or spouse who is eligible to apply for relief with the Asylum Program. To promote family unity and administrative efficiency the following procedures were put in place.

1. A qualified spouse, child, unmarried son or daughter was permitted to request a continuance of his or her case until September 1, 1999, if the individual provided reasonable evidence of the relationship to the NACARA-eligible sponsor.

2. If the individual later provides evidence that his or her sponsor has applied for NACARA suspension of

Virtue, Paul W, INS Office of General Counsel. Section 203 NACARA Dependents scheduled for April Master Calendars, Memorandum to Regional Counsel, District Counsel Management Team (Washington, DC: 16 April 1999), 1 p; Virtue, Paul W, INS Office of General Counsel. Spouses, children, and unmarried sons and daughters of persons eligible for suspension of deportation or cancellation of removal under Section 203 of NACARA, Memorandum to Regional Counsel, District Counsel Management Team (Washington, DC: 28 May 1998), 6 p.; Creppy, Michael J., Office of the

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deportation or special rule cancellation of removal with USCIS and the sponsor appears to be eligible for NACARA benefits, EOIR may administratively close the case so that the individual may also submit his or her NACARA application to USCIS.

3. Since September 1, 1999, requests by individuals for continuances or administrative closures have been handled on a case-by-case basis.

NOTE: While USCIS may take jurisdiction over the qualified family member's NACARA application once EOIR proceedings have been administratively closed, USCIS would not have jurisdiction over any asylum application of the qualified family member, either as a principal asylum applicant or as a dependent. In order for USCIS to take jurisdiction over the asylum application, the Immigration Court must terminate proceedings. It is not sufficient if the IJ only administratively closes the proceedings, unless it is an asylum application of an applicant protected under the ABC Settlement.

Chief Immigration Judge, Continuances for Spouses, Children, and Unmarried Sons and Daughters of Aliens who Are Eligible for Suspension of Deportation or Cancellation of Removal under NACARA, Memorandum to Immigration Judges, Court Administrators and Judicial Law Clerks (Falls Church, VA 13 May 1998), 2 p.

Review Questions

1. Is there derivative status for dependents (spouses or children) applying for NACARA? Explain your answer.

2. Can an applicant whose eligibility to apply for NACARA depends on the eligibility of his or her parent or spouse submit an application to USCIS for relief under NACARA before the sponsor has been granted relief?

V. STATUTORY ELIGIBILITY FOR SUSPENSION OF DEPORTATION AND SPECIAL RULE CANCELLATION OF REMOVAL

At the conclusion of this section, the asylum officer will be able to identify the basic eligibility criteria for a USCIS grant of suspension of deportation or special rule cancellation of removal and understand the distinction between suspension of deportation and special rule cancellation of removal.

NOTE: When adjudicating a request for suspension of deportation or special rule cancellation of removal under NACARA 203, an asylum officer must consider whether the applicant is subject to any threshold ineligibility grounds (see section X below for a description

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of statutory bars to NACARA relief), before addressing the eligibility criteria described in this section. Where a bar applies, it is not necessary to consider whether the applicant meets the basic eligibility criteria or merits a favorable exercise of discretion. The step-by-step process used in adjudicating an application for relief under section 203 of NACARA can best be understood by referring to the adjudication worksheets found at Appendices AM and AN of the ABC-NACARA Procedures Manual.

A. Statutory Criteria for a Grant of Suspension of Deportation or Special Rule Cancellation of Removal by USCIS

To be eligible for suspension of deportation under NACARA, the applicant must be deportable under certain provisions of the INA as it existed prior to IIRIRA. To be eligible for special rule cancellation of removal under NACARA, the applicant must be inadmissible or deportable under certain provisions of the INA. Additionally, individuals who are inadmissible or deportable under certain grounds of the INA, as discussed in section XII of this lesson, are not eligible for a USCIS grant of relief.

Pre-IIRIRA INA section 244(a)(1); IIRIRA section 309(f)(1), as added by NACARA section 203(b); 8 CFR § 240.70(b),(c), and (d).

An applicant who is in exclusion proceedings is not eligible for relief under NACARA. This includes individuals whose exclusion proceedings have been administratively closed under the ABC Settlement Agreement.

Simeonov v. Ashcroft, 371 F.3d 532 (9th Cir. 2004); Fieran v. INS, 268 F.3d 340, 345 (6th Cir. 2001); Sherifi v. INS, 260 F.3d 737, 741-42 (7th Cir. 2001).

All applicants must also meet the following three criteria and merit a favorable exercise of discretion:

1. Continuous physical presence in the U.S. for 7 years prior to the date of decision on their application for suspension of deportation or special rule cancellation of removal;

2. Good moral character during that time; and

3. Extreme hardship to the applicant or to the applicant's spouse, parent, or child who is a US citizen or lawful permanent resident, should the applicant be removed from the U.S.

B. Distinction between Suspension of Deportation and Special Rule Cancellation of Removal

Each form of relief results in adjustment of status to lawful

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permanent resident. Eligibility criteria for each form of relief is distinct:

1. Applicants who may be eligible to apply for suspension of deportation

   Applicants placed in deportation proceedings prior to April 1, 1997, may apply for suspension of deportation

   This group includes:

   a. Registered ABC class members whose cases were administratively closed or continued by EOIR to have a de novo asylum interview

      NOTE: Any Salvadoran class member who meets the following four criteria was to be admitted back into the US in the same status as that which he or she possessed prior to departure:

      - Was in deportation proceedings that were administratively closed or continued by EOIR,
      - Registered for ABC by filing for TPS and the TPS application was approved,
      - Departed the US under a grant of advance parole during the period that the individual was in valid TPS status (TPS for Salvadorans ran from 1/1/91 to 6/30/92), and
      - Returned to the US within the authorized advance parole period

      Such an individual would return to being the subject of administratively closed or continued deportation proceedings. The NACARA application filed by such an individual would be a request for suspension of deportation.

      For all other individuals with NACARA applications pending before USCIS who left the US while in deportation proceedings, including administratively closed or continued proceedings, proceedings will be considered

Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102-232, 105 Stat. 1733, Title III, section 304(c) (amendment to Immigration Act of 1990 covering authorized travel abroad by beneficiaries of TPS and family unity).

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terminated as of the date of the applicant's departure from the U.S. This is the case, regardless of whether or not the applicant's departure and return were pursuant to a grant of advance parole. The NACARA application is therefore an application for special rule cancellation of removal.

b. Registered ABC class members who had outstanding final orders of deportation issued by the IJ or BIA and who have timely filed a motion to reopen, which has been granted

c. Qualified spouses, children, unmarried sons or unmarried daughters in deportation proceedings

2. Applicants who may be eligible to apply for special rule cancellation of removal

This group includes applicants who were or will be placed in proceedings on or after April 1, 1997, and applicants never placed in proceedings but eligible to apply for NACARA 203 relief affirmatively with USCIS. It also includes applicants who left the US and returned while in deportation proceedings, and as a result, those proceedings were terminated. It also includes applicants who executed a final order by departing the U.S. This is important to note when the applicant is applying solely under category B, an alien who filed for asylum on or before April 1, 1990. In general, if the Immigration Court has administratively closed the case for a Category B, USCIS will not have jurisdiction. See 8 CFR § 240.62(b). The alien will have to successfully move to re-calendar the Immigration Court proceedings and proceed in court. However, if the Immigration Court has administratively closed the case for a category B, and after such closure, the alien has left the U.S., the case reverts to special rule cancellation of removal and barring other jurisdictional issues, USCIS may have jurisdiction over the case.

NOTE: There are minor distinctions, particularly with regard to requirements for continuous physical presence and threshold ineligibility grounds, between

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the adjudication of a request for suspension of deportation and the adjudication of a request for special rule cancellation of removal. The differences will be noted throughout the lesson, where applicable.

C. Distinction between Deportation, Exclusion and Removal Proceedings

Prior to IIRIRA, the determination to place an individual into deportation proceedings or exclusion proceedings was based on whether or not an individual had made an entry into the US. An individual illegally in the US was subject to deportation and an individual who had not yet made an entry into the US was subject to exclusion.

A person in exclusion proceedings cannot apply for suspension of deportation or special rule cancellation of removal because they have never effected an entry and therefore are unable to accrue the necessary physical presence. After IIRIRA, deportation proceedings and exclusion proceedings were consolidated into removal proceedings. A person could be charged with either an inadmissibility ground or a deportability ground in removal proceedings, depending on whether he or she had been admitted into the US. A person in removal proceedings can apply for cancellation of removal, regardless of whether he or she is charged with being inadmissible or deportable.

Please refer to the Supplementary Information portion of the interim regulation governing section 203 of NACARA for a more detailed discussion of the exclusion issue. 64 FR 27856, 27859-60 (May 21, 1999) (section titled "Eligibility to Apply for NACARA in Exclusion Proceedings"); see also Simeonov v. Ashcroft, 371 F.3d 532 (9th Cir. 2004); Fieran v. INS, 268 F.3d 340, 345 (6th Cir. 2001); Sherifi v. INS, 260 F.3d 737, 741-42 (7th Cir. 2001).

Review Questions

1. What are the basic eligibility criteria for a grant of suspension of deportation or special rule cancellation or removal?

2. What factor determines whether an applicant applies for suspension of deportation or special rule cancellation of

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removal?

3. Can a person who is in exclusion proceedings apply for suspension of deportation or special rule cancellation of removal?

VI. CONTINUOUS PHYSICAL PRESENCE

At the conclusion of this section, the asylum officer will be able to identify appropriate factors to consider in evaluating whether an applicant has established continuous physical presence.

A. Requisite Number of Years

The applicant must have been continuously physically present in the U.S. for the 7 years immediately prior to the date the decision is made on the NACARA application.

By definition, the U.S. includes the continental U.S., Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands. INA section 101(a)(38).

NOTE: Though the statutory provisions covering applications for suspension of deportation and special rule cancellation of removal specifically state that the 7-year period is counted back from the "date of such application," the courts have counted back 7 years from the date they are reviewing and deciding the case. This is consistent with the statutory language because an application is considered to be a continuing application until the date that it is finally considered. (Compare to the asylum one-year filing rule, which is measured from the date that the "application has been filed.")

Matter of Castro, 19 I&N Dec. 692 (BIA 1988); see also Vargas-Gonzalez v. INS, 647 F.2d 457 (5th Cir. 1981); Cipriano v. INS, 24 F.3d 763 (5th Cir. 1994).

10 years physical presence:
If the applicant is deportable or inadmissible under certain grounds, he or she must establish 10 years continuous physical presence. For applicants applying for suspension of deportation, this includes individuals found deportable under section 241(a)(2), (3), or (4) of the INA as it existed prior to IIRIRA. For applicants applying for special rule cancellation of removal, this includes individuals found inadmissible or deportable under section 212(a)(2) or 237(a)(2)(other than 237(a)(2)(A)(iii)), or 237(a)(3) of the INA. These individuals must be referred to the Immigration Court for consideration under the higher standard. USCIS does not have the jurisdiction to adjudicate these applications. Please refer to the NACARA act §203(b)(f)(1) which excludes INA §240A(b)(1)
[higher standard] from AG jurisdiction

See Matter of Alarcon, 20 I&N Dec. 557 (BIA 1992) (an application for admission and adjustment of status is a continuing application, subject to any change in the law that is enacted after the date that the application is filed, but prior to the date of

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decision).

An applicant who is deportable or inadmissible under these more serious grounds will be referred to Immigration Court for adjudication of the NACARA application.

B. Absences from the United States

1. General Rule

If the applicant is applying for suspension of deportation, the applicant must establish that any absence from the US during the seven years prior to the date of decision on the application was brief, casual, and innocent, and did not meaningfully interrupt the applicant's period of continuous physical presence in the US.

Pre-IIRIRA INA section 244(b)(2); 8 CFR § 240.64(b).

Absences that reveal a lack of commitment to living in the US break the period of continuous physical presence.

Castrejon-Garcia v. INS, 60 F.3d 1359 (9th Cir. 1995).

2. "Brief"

a. The interim rule provides that any absence from the US for 90 days or less or absences in the aggregate of 180 days or less are considered brief.

8 CFR § 240.64(b)(1) and (2).

b. For suspension of deportation, there is no statutory or regulatory definition of what is considered brief. Therefore absences in excess of 90 days or absences that in the aggregate exceed 180 days will be considered on a case-by-case basis in conjunction with applicable case law to determine if the absence should be considered brief.

8 CFR § 240.64(b)(1).

c. When calculating continuous physical

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		presence in evaluating eligibility for special rule cancellation of removal, any absence from the US for a period in excess of 90 days or absences that in the aggregate exceed 180 days are considered a break in the applicant's continuous physical presence.	309(f)(2), as added by NACARA section 203(b) (referring to INA section 240A(d)(2) for treatment of certain breaks in presence); 8 CFR § 240.64(b)(2).
5.	"Casual and innocent and does not meaningfully interrupt continuous physical presence" Even if an absence or absences are considered "brief," the asylum officer still needs to evaluate whether the absence is casual and innocent and did not meaningfully interrupt the period of continuous physical presence. Examples of departures that are not casual or innocent and that meaningfully interrupt continuous physical presence include the following:		8 CFR § 240.64(b)(1) and (2).
	a.	Departures that are regular and frequent	Castrejon-Garcia v. INS, 60 F.3d 1359 (9th Cir. 1995).
	b.	Departures during which the applicant formed the intent to commit a crime in the foreign country, or part of the scheme was formed there.	The crime can be a crime under domestic or foreign law.
	c.	Removal from the U.S. pursuant to a final order or voluntary departure under threat of deportation within last 7 years. This includes voluntary departure ordered by the court.	8 CFR § 240.64(b)(3). Vasquez-Lopez v. Ashcroft, 343 F.3d 961, (9th Cir. 2003)(voluntary departure represents an agreement between individual and government that he will leave the country; to treat it as a brief or casual departure is

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inconsistent with intent of statute).

d. Departures to serve a foreign government

Examples of departures that have been found to be casual, innocent and did not meaningfully interrupt continuous physical presence include the following: Castrejon-Garcia v. INS, 60 F.3d 1359 (9th Cir. 1995).

a. Departure that occurred when the individual's train crossed into Canada while traveling between two points in the US — Di Pasquale v. Karnuth, 158 F 2d 878 (2d Cir. 1947).

b. Departure that occurred when individual was taken from his torpedoed ship to Cuba to recuperate from injuries — Delgadillo v. Carmichael, 332 U.S. 388, 68 S.Ct. 10, (1947).

c. Departure to Mexico for a couple of hours for a pleasure trip — Rosenberg v. Fleuti, 374 U.S. 449 (1963)

C. Alien Who Has Served in the US Armed Forces — Pre-IIRIRA INA section 244(b)(2) (suspension of deportation); INA section 240A(d)(3) (cancellation of removal)

The requirements of continuous physical presence in the US shall not apply to an alien who:

1. Has served for a minimum period of 24 months in an active duty status in the Armed Forces of the US and, if separated from such service, was separated under honorable conditions, and

2. At the time of the alien's enlistment or induction, was in the US

D. Advance Parole

Leaving the U.S. and returning pursuant to a grant of advance parole does not, in and of itself, meaningfully interrupt continuous physical presence. However, the absence of an individual from the US under a grant of advance parole must still fall within the requirements described in section A and B above.

Remember: Prior to the consolidation of deportation and exclusion proceedings into one removal process under IIRIRA, persons paroled into the U.S. were generally subject

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to grounds of excludability once parole status was terminated. An individual whose parole status was terminated prior to IIRIRA's effective date (April 1, 1997) may have been placed into exclusion proceedings. As noted in section V.C above, individuals in exclusion proceedings are not eligible to apply for suspension of deportation or special rule cancellation of removal.

E. Departures after Filing NACARA Application

An applicant's departure from the U.S. after filing a NACARA application does not constitute an abandonment of the application. When an applicant appears for interview, he or she should be asked if there were any departures from the U.S. since the NACARA application was submitted, and any absences should be analyzed to determine if there was a break in continuous physical presence. The application should be dismissed or referred for failure to appear if the applicant fails to attend an interview because he or she is outside the U.S. at the time and does not provide a reasonable explanation for the failure to appear.

F. Failure to Establish Continuous Physical Presence

If an applicant is unable to establish continuous physical presence, he or she is ineligible for a grant of NACARA 203 relief by USCIS. It is not necessary to consider whether the applicant meets the other basic eligibility criteria (good moral character and extreme hardship), or merits a favorable exercise of discretion.

Please refer to the adjudication worksheets found at Appendices AM and AN of the ABC-NACARA Procedures Manual for a more complete understanding of the step-by-step process of NACARA adjudication.

Review Questions

1. How many years must an applicant be physically present in the U.S. to establish eligibility for NACARA 203 relief?

2. What factors should be considered when determining whether an applicant for suspension of deportation has established continuous physical presence?

3. What factors should be considered when determining whether an applicant for special rule cancellation has established continuous physical presence?

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4. What is the difference in evaluating continuous physical presence for suspension of deportation and for special rule cancellation of removal?

Practical Exercise

Make your decision on the following scenarios under both suspension of deportation and special rule cancellation of removal.

1. Does an individual who departs the U.S. to serve 60 days in the Salvadoran Armed Forces during the seven-year period preceding adjudication of the NACARA application break continuous physical presence in the U.S.? This person has not left the US before.

2. Does an individual who departs the U.S. 25 times for 3 days at a time during the seven-year period preceding adjudication of the NACARA application for the purpose of running a business in Guatemala break continuous physical presence in the US? The individual has not left the U.S. other than those times.

3. Same facts as 2, but the individual left on one other occasion (during the 7-year period) for 90 days

4. Same facts as 2, but the purpose of leaving was to try to sell an inherited business

5. Same facts as 2, but instead of departing 25 times for 3 days at a time, the individual departed 3 times, once for 90 days, once for 30 days, and once for 59 days, and the individual sold the business a few months ago

VII. CRIMINAL AND MANDATORY BARS TO NACARA

First, an applicant must establish they are within USCIS jurisdiction and that they have the requisite physical presence. Then, they have the burden of showing they are not barred by either criminal or mandatory bar issues. This must be determined before there is any analysis of good moral character or extreme hardship to the applicant.

A. Criminal Conviction Analysis

Once an applicant for NACARA has demonstrated they are within the jurisdiction of USCIS and have the requisite physical presence, they must demonstrate they are not barred by any criminal

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convictions or other mandatory bars to NACARA. If an applicant has a history of criminal arrests or convictions, the steps below should be used to analyze whether any resulting convictions bar the applicant from relief through NACARA.

B. Establish if a Conviction Exists

In order to be barred from NACARA relief on criminal grounds, the applicant has to have a conviction for immigration purposes under the definitions found in the INA and case law. For immigration purposes, a conviction occurs whenever a formal judgment of guilt of the alien is entered by a court or, in certain circumstances, if adjudication of guilt has been withheld. See INA §101(a)(48). It is important to note, that a conviction for immigration purposes may exist in situations where there is probation before judgment or deferred judgment when a case is held for a period of time while the person completes classes, community service, good behavior, has to pay court costs, etc. The rap sheet or other conviction documents may show the charge or case as dismissed but if the dismissal occurs a year or more after the charge, a certified disposition should be obtained to see if the dismissal occurred after the applicant complied with court orders, such that a conviction for immigration purposes may still exist.

INA §§ 101(a)(48), 212(a)(2), Matter of Pickering, 23 I&N Dec. 621, 624 (BIA 2003); Matter of Cabrera, 24 I&N Dec. 459 (BIA 2008).

C. Do Aggravated Felony Analysis

Once it has been established that the applicant has a conviction for immigration purposes, the first step of analysis should determine if the conviction meets the definition of an aggravated felony found in INA §101(a)(43). If the conviction is an aggravated felony, the applicant is ineligible to apply for NACARA. It is important to note that it does not matter when the conviction occurred in order to apply this standard or whether the application is for suspension of deportation or special rule cancellation of removal.

INA §101(a)(43).

D. Determine if Conviction Constitutes a Ground of Threshold Ineligibility

If the conviction is not an aggravated felony, the next step of the analysis requires the officer to determine if the conviction falls within the threshold ineligibility grounds listed below in Section VIII. It is important to distinguish between deportable and inadmissible and between suspension of deportation and special rule cancellation of removal. Such distinctions determine which section of law applies to the application. Convictions are treated differently depending on which form of relief is being sought and whether the

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person is inadmissible or deportable. It is important to read the distinctions in Section VIII carefully as some of the ineligibility grounds have varying starting dates for the application of the ground of ineligibility.

E. Use the Correct pre or post-IIRIRA Analysis

Criminal issues for suspension of deportation applications are analyzed under pre-IIRIRA INA §241. Special rule cancellation of removal issues are analyzed under INA §212 if the applicant is inadmissible, or INA §237 if the applicant is deportable.

VIII. THRESHOLD INELIGIBILITY GROUNDS

Please refer to the adjudication worksheets found at found at Appendices AM and AN of the ABC-NACARA Procedures Manual for a more complete understanding of the step-by-step process of NACARA adjudication.

If an applicant is subject to a threshold ineligibility ground (statutory bar) to a grant of NACARA relief, he or she must be referred on that basis. The adjudicating officer need not consider whether the applicant meets the basic eligibility criteria (continuous physical presence, good moral character, extreme hardship, discretion) outlined in sections IX through XI of this lesson. If an applicant is ineligible due to criminal grounds and is not eligible for any exceptions, the person is subject to the higher standard of 10 years physical presence after the commission or conviction of a crime and must demonstrate exception and extremely unusual hardship to a qualified family member. Only the IJ has jurisdiction to adjudicate this relief. Please see NACARA §203(b)(f)(1).

A. Statutory Bars to Both Suspension of Deportation and Special Rule Cancellation of Removal

1. Individuals in Exclusion Proceedings

Simeonov v. Ashcroft, 371 F3d 532 (9th Cir. 2004); Fieran v. INS, 268 F.3d 340, 345 (6th Cir. 2001); Sherifi v. INS, 260 F.3d 737, 741-42 (7th Cir. 2001).

An applicant in exclusion proceedings may not apply for relief under section 203 of NACARA.

2. Conviction of an Aggravated Felony

Nguyen v. Ashcroft, 366 F.3d 386 (5th Cir. 2004)

The aggravated felony bar applies to an applicant who is convicted of an aggravated felony at any time after entry, or an applicant who is deportable for having

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been convicted of an aggravated felony at any time after admission. An individual who has been convicted of an aggravated felony is ineligible to apply for relief under section 203 of NACARA. "Aggravated felony" is defined in INA section 101(a)(43).

An aggravated felony conviction as a ground for removability is found at INA §237(a)(2)(A)(iii). If a person is applying for special rule cancellation of removal and is deportable, then INA §237 would apply and bar the applicant from relief under NACARA. If a person is applying for special rule cancellation of removal and is inadmissible then INA §212 would apply, as well as INA §101(f) which states a person convicted of an aggravated felony at any time, is precluded from establishing good moral character. Generally it is unnecessary to analyze an aggravated felony under INA §101(f) since it is a statutory and threshold bar.

A full and unconditional pardon of the conviction by the President of the U.S. or the governor of a state takes the applicant out of this category.

Evangelista v. Ashcroft, 359 F.3d 145 (2d Cir. 2004).

A more complete discussion of what constitutes an aggravated felony is contained in the Asylum Officer Training Lesson Plan, Mandatory Bars to Asylum.

a. DUI Offenses

DUI convictions are generally not considered aggravated felonies. INA section 101(a)(43)(F) defines an aggravated felony as a "crime of violence (as defined in section 16 of Title 18 [USC], but not including a purely political offense) for which the term of imprisonment [is] at least one year."

In 2004, the U.S. Supreme Court held that "[t]he ordinary meaning of the term ["crime of violence"] suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."

Leocal v. Ashcroft, 543 U.S. 1, 11 (2004).

NOTE: The Supreme Court also indicated that "[t]his

Prior to the Supreme

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	case does not present us with the question whether a state or federal offense that requires proof of the reckless use of force. . . qualifies as a crime of violence." Therefore, depending on the relevant statute, a DUI offense may still constitute a crime of violence, and hence an aggravated felony, if it involves the reckless use of force or mens rea (criminal intent). Id. at 13.	Court's ruling, some circuit case law provided that a DUI offense may constitute an aggravated felony. Subsequent to Leocal, the Ninth Circuit held that a conviction of the offense of gross vehicular manslaughter while intoxicated involved only gross negligence, and therefore could not be found to be a "crime of violence." Lara-Cazares v. Gonzales, 408 F.3d 1217 (9th Cir. 2005).
3.	Crewmembers An individual who entered the US as a crewman subsequent to June 30, 1964 is ineligible for suspension of deportation or special rule cancellation of removal.	Pre-IIRIRA INA section 244(f)(1); current INA section 240A(c)(1).
4.	Exchange Visitors An individual admitted as or who acquired the status of a nonimmigrant exchange alien, as defined in INA section 101(a)(15)(J), to receive graduate medical education or training is barred from suspension of deportation or special rule cancellation of removal, regardless of whether the individual is subject to or has fulfilled the two-year foreign residency requirement. All other nonimmigrant exchange aliens, as defined in INA section 101(a)(15)(J), are barred from suspension of deportation or special rule cancellation of removal only if they are subject to a two-year foreign residency requirement and they have not yet fulfilled the requirement or received a waiver. NOTE: To determine whether the applicant is subject	Pre-IIRIRA INA section 244(f)(2) & (3); current INA section 240A(c)(2) & (3).

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to the two-year foreign residency requirement, the officer should refer to the Exchange Visitor Skills List, available on the website of the Department of State. The list enumerates fields of specialized knowledge or skills and countries that clearly require the services of persons engaged in those fields.

Example: A national of El Salvador who was admitted as a J-1 Exchange Visitor to study computer science would be subject to the two-year foreign residency requirement. The individual's field of study and country of origin both appear on the Exchange-Visitor Skills List.

5. Failure to Register and Falsification of Documents

a. An applicant who has failed to register and notify the Attorney General or Secretary of Homeland Security of changes of address as required under section 265 of the INA, unless the failure was reasonably excused or was not willful.

Pre-IIRIRA INA section 241(a)(3)(A); current INA section 237(a)(3)(A)

NOTE: In order to be barred from a grant of special rule cancellation of removal under this provision, the applicant must be deportable.

i. Willful is defined as an act done "with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law."

Black's Law Dictionary; see also, Matter of B-, 5 I&N 692 (BIA 1954).

An individual who has no knowledge of the requirement to notify INS or USCIS of a change in address cannot then be said to have willfully disobeyed the law.

ii. The purpose of registering and

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	notifying the Attorney General or Secretary of Homeland Security of a change of address is to enable DHS to locate the applicant, if necessary. If the applicant has made himself or herself available for the interview, the intent to evade the purpose of the registration statute is absent.	
b.	An applicant who has been convicted under the Alien Registration Act of 1940 (8 USC 451), or violations of, attempt to violate, or conspiracy to violate the Foreign Agents Registration Act of 1938 (22 USC 611) or US Code provisions relating to fraud and misuse of visas, permits or other entry documents	Pre-IIRIRA INA section 241(a)(3)(B); current INA section 237(a)(3)(B). NOTE: In order to be barred from a grant of special rule cancellation of removal under this provision, the applicant must be deportable. The Alien Registration Act requires aliens seeking entry into the U.S. to be registered and fingerprinted before a visa can be issued. The Foreign Agents Registration Act requires agents of foreign governments or political parties to register.
c.	An applicant who is the subject of a final order for document fraud under INA §274C	Pre-IIRIRA INA section 241(a)(3)(C) current INA section 237(a)(3)(C). NOTE: In order to be barred from a grant of special rule cancellation of removal under this

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provision, the applicant must be deportable.

6. Firearms Offenses – Suspension of Deportation and Special Rule Cancellation / Deportable — Pre-IIRIRA INA section 241(a)(2)(C); current INA section 237(a)(2)(C).

An applicant who at any time after entry is, or who is deportable at any time after admission for having been, convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying any weapon, part, or accessory which is a firearm or destructive device (as defined in 18 USC section 921(a)) in violation of any law. The state statute must mirror 18 USC §922. The state statute must include wording to show the applicant was an illegal alien or alien convicted of purchasing, selling, offering for sale, exchanging, using, owing, possession or carrying any weapon, part, or accessory which is a firearm or destructive device. — Matter of Barrett, 20 I&N Dec. 171 (BIA 1990).

NOTE: Because this ground is not found in INA §212(a)(2), it does not apply to Special Rule Cancellation / Inadmissible.

7. Controlled Substance Offenses — See Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000). Within the Ninth Circuit, a person sentenced under the Federal First Offender Act (FFOA) or a state statute that mirrors the FFOA, may not have a conviction for immigration purposes, as to that conviction. It requires a case by case analysis.

a. Suspension of Deportation

i. An applicant who at any time after entry has been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the — Pre-IIRAIRA INA §241(a)(2)(B)(i).

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U.S., or a foreign country relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

ii. An applicant who is, or at any time after entry has been, a drug abuser or addict. — Pre-IIRIRA INA §241(a)(2)(B)(ii).

b. Special Rule Cancellation of Removal

i. Inadmissible:

a. An individual who is inadmissible because he or she was convicted of a violation, or a conspiracy or an attempt to violate, any law or regulation of a State, the U.S., or a foreign country relating to a controlled substance. — INA section 212(a)(2)(A)(i)(II).

b. An applicant who is inadmissible because an asylum officer knows or has reason to believe the applicant is or has been an illicit trafficker in any controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in illicit trafficking in any controlled substance. — INA section 212(a)(2)(C).

ii Deportable:

a. An applicant who is deportable for having been convicted at any time after admission of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the U.S., or a foreign country relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana — INA section 237(a)(2)(B)(i).

b. An applicant who is deportable because he or she is, or at any time after admission has been, a drug abuser — INA section 237(a)(2)(B)(ii).

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or addict

8. Crimes Involving Moral Turpitude

a. Suspension of Deportation

i. An applicant who is deportable because he or she is convicted of a crime involving moral turpitude within 5 years after date of entry, and the sentence that may be imposed for this criminal conviction is one year or longer

Pre-IIRIRA INA §241(a)(2)(A)(i).

A full and unconditional pardon of the conviction by the President of the United States or the governor of any state takes the applicant out of this category.

ii. An applicant who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of misconduct, regardless of confinement or if the convictions were in a single trial

Pre-IIRIRA INA §241(a)(2)(A)(iv).

A full and unconditional pardon of the conviction by the President of the United States or the governor of a state takes the applicant out of this category.

Pre-IIRIRA INA section 241(a)(2)(A)(ii).

b. Special Rule Cancellation of Removal

Pre-IIRIRA INA section 241(a)(2)(A)(iv).

1. Deportable:

i. An applicant who is deportable because he or she is convicted of a crime involving moral turpitude within 5 years after date of entry, and the sentence that may be imposed for this criminal conviction is one year or longer

INA section 237(a)(2)(A)(i).

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	A full and unconditional pardon of the conviction by the President of the United States or the governor of any state takes the applicant out of this category.	INA section 237(a)(2)(A)(v).
ii.	An applicant who is deportable for having been convicted of two or more crimes involving moral turpitude at any time after admission, not arising out of a single scheme of misconduct, regardless of confinement or if the convictions were in a single trial	INA section 237(a)(2)(A)(ii); see Matter of Islam, 25 I&N Dec. 637 (BIA 2011). In determining whether an alien's convictions for two or more crimes involving moral turpitude arose out of a "single scheme of criminal misconduct" within the meaning of section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, the Board will uniformly apply its interpretation of that phrase in all circuits. Matter of Adetiba, 20 I&N Dec. 506 (BIA 1992), followed.
	A full and unconditional pardon of the conviction by the President of the United States or the governor of any state takes the applicant out of this category.	INA section 237(a)(2)(A)(v).
2.	Inadmissible:	INA section 212(a)(2)(A).
iii.	An applicant who is inadmissible	INA 212(a)(2)(A)(i)(I).

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because he or she was convicted of, or admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense), or an attempt or conspiracy to commit such crime

Exception: The applicant is not barred from relief under NACARA based on commission of a crime involving moral turpitude in the following circumstances:

Exception for certain crimes committed while under 18

- Only one crime of moral turpitude was committed; and
- the applicant was under 18 years old when the crime was committed; and
- the crime was committed and the applicant released from any resulting confinement to a prison or correctional institution more than 5 years before the date of decision on the application.
- In the case of an alien who at the time the crime was committed is 15, 16 or 17 years of age, and; the offense is a felony involving violence; and the alien is tried and convicted as an adult, the juvenile exception will not apply.

18 USC §5032. HQ should be consulted on any case with this criminal issue.

OR

Mild penalty exception

- only one crime of moral turpitude was committed; and
- the maximum possible penalty for the crime did not exceed

INA §212(a)(2)(A)(ii)(II).

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imprisonment for 1 year; and

- the applicant was not sentenced to a term of imprisonment in excess of 6 months, regardless of the time actually served. A suspended sentence counts as a sentence; probation does not.

The criminal act cannot be construed to be a purely political offense if the common law or criminal character of the act outweighs the political nature of the crime.

An admission by an applicant of committing a crime involving moral turpitude cannot lead to a finding of a lack of good moral character, unless the applicant admits every element of the crime, as outlined by the relevant statute. Because such documented admissions will likely be infrequent, HQASM should be consulted in any case involving such an admission.

2. Analysis for crime involving moral turpitude (CIMT)
The analysis of a CIMT is not confined to the last 7 years. The conviction must first be analyzed under the threshold bars. If it is found to be a threshold bar, no further analysis is necessary. If it is determined the conviction is not a threshold bar and occurred within the last 7 years, the conviction goes to the good moral character and discretionary analysis.

a. All CIMTs should be analyzed using the three part categorical/modified categorical analysis.

Matter of Silva-Trevino, 24 I&N Dec. 687 (AG 2008).

- Categorical analysis

Look first to the statute of conviction rather than to the specific facts of the alien's crime. Does the statute, on its face, realistically include conduct that does not involve moral turpitude? Where the categorical inquiry does not establish that an alien's crime necessarily involved moral turpitude, there must be further inquiry into the particular facts of the

The finding in this case is a departure from previous practice. In general, the officer was told not to look behind the

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offense. Is there is a "realistic probability, not a theoretical possibility," that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude? If there is a realistic probability that the statute could reach conduct that does not involve moral turpitude, use the modified categorical step below.

- Modified categorical

The adjudicator should examine the record of conviction such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea or plea transcript for evidence the crime involved moral turpitude.

If it is still unclear, the officer may consider evidence, to the extent it is necessary and appropriate beyond the formal record of conviction.

The additional information is to be used to determine if the facts of an individual case are such that the conviction is for a CIMT. It is NOT an occasion to re-litigate the underlying facts or determinations made earlier by the previous trier of fact. The additional evidence may include other documents not listed above and statements made by the alien or any witnesses.

record of conviction, but it may now be necessary in the sole context of determining whether a crime constitutes a CIMT. It is important to note that this investigation does not allow the officer to re-litigate or second guess the finding of the previous State or Federal trier of fact. It does allow the officer to review any additional evidence reasonably necessary to accurately resolve the moral turpitude question.

See also Matter of Ahortalejo-Guzman, 25 I&N Dec. 465 (BIA 2011).

Evidence outside of an alien's record of conviction may properly be considered in determining whether the alien has been convicted of a crime involving moral turpitude only where the conviction record

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			itself does not conclusively demonstrate whether the alien was convicted of engaging in conduct that constitutes a crime involving moral turpitude. Matter of Silva-Trevino, 24 I&N Dec. 687 (AG 2008), followed.
3.	Definitions of moral turpitude		
	a.	To qualify as a crime involving moral turpitude for purposes of the INA, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness or recklessness.	Matter of Silva-Trevino, 24 I&N Dec. 687 (AG 2008).
	b.	It is proper to treat convictions obtained under statutes that limit convictions to defendants who knew, or reasonably should have known, that their intentional sexual acts were directed at children categorically as convictions for crimes involving moral turpitude.	Matter of Silva-Trevino, 24 I&N Dec. 687 (AG 2008).
	c.	A crime of moral turpitude is a nebulous concept that refers to conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between persons or to society in general.	Matter of Franklin, 20 I&N Dec. 867 (BIA 1994); Matter of Tran, 21 I&N Dec. 291 (BIA 1996); Matter of Danesh, 19 I&N Dec. 669 (BIA 1988); Matter of Flores, 17 I&N Dec. 225 (BIA 1980).
	d.	Moral turpitude has also been defined as an act that is per se morally reprehensible and intrinsically wrong.	Matter of Franklin, 20 I&N Dec. 867 (BIA 1994).
	e.	The essence of moral turpitude is an evil or malicious intent.	Matter of Tran, 21 I&N Dec. 291(BIA

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	But such a specific intent is not a prerequisite to a finding that a crime involves moral turpitude.	1996). Matter of Franklin, 20 I&N Dec. 867 (BIA 1994); Matter of Lopez-Meza, 22 I&N Dec. 1188 (BIA 1999).
f.	The test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind.	Maghsoudi v. INS, 181 F.3d 8 (9th Cir. 1999); Matter of Franklin, 20 I&N Dec. 867 (BIA 1994).
e.	It is the combination of the base or depraved act and the willfulness of the action that makes the crime one of moral turpitude.	Grageda v. INS, 12 F.3d 919 (9th Cir. 1993).

3. General considerations

a.	Violations of statutes that merely license or regulate and impose criminal liability without regard to evil intent do not generally involve moral turpitude. In some jurisdictions, driving under the influence or while intoxicated is an example of a violation of a statute that licenses or regulates and imposes criminal liability without regard to intent.	Matter of Torres-Varella, 23 I &N Dec. 78 (BIA 2001) (Arizona statute of aggravated DUI with two or more convictions was not a CIMT because the individual acts were not CIMTs); see also Matter of L-V-C-, 22 I&N Dec. 594 (BIA 1999); Goldeshtein v. INS, 8 F.3d 645 (9th Cir. 1993).

4. Examples

a. Crimes found to involve moral turpitude

• Spousal abuse Spousal abuse is a crime involving moral turpitude. This principal extends to the abuse of a cohabitant.	Grageda v. INS, 12 F.3d 919 (9th Cir. 1993); Matter of Tran, 21 I&N Dec. 291 (BIA 1996).

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- Statutory rape — Matter of Imber, 16 I&N Dec. 256 (BIA 1977).
- Incest — Gonzalez-Alvarado v. INS, 39 F.3d 245 (9th Cir. 1994).
- Crimes involving fraud are almost always crimes involving moral turpitude because such crimes usually require an intent to deceive. — Jordan v. DeGeorge, 341 US 223 (1951).
- Conviction(s) for passing bad checks

  For the crime to constitute a crime involving moral turpitude, an intent to defraud when passing the bad check must be an element of the crime. The element of fraudulent intent must be required by statute or case law. — Matter of Balao, 20 I&N Dec. 440 (BIA 1992).

  A conviction for passing bad checks where intent to defraud is not a necessary element of the crime does not involve moral turpitude. — Matter of Zangwill, 18 I&N Dec. 22 (BIA 1981).

b. Crimes found not to involve moral turpitude

- Malicious mischief ordinarily does not rise to the level of depravity or fraud that could qualify the crime as one involving moral turpitude. — Rodriguez-Herrera v. INS, 52 F.3d 238 (9th Cir. 1995).
- Assault under certain circumstances where the crime does not have an element of intent — Matter of Fualaau, 21 I&N Dec. 475 (BIA 1996).
- Passing a check with insufficient funds (where intent to defraud is not an element of the crime) — Matter of Balao, 20 I&N Dec. 440 (BIA 1992).
- Indecent exposure — Matter of H, 7 I&N Dec. 301 (BIA 1956).

  NOTE: the felony offense of indecency

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with a child by exposure under Texas law, which requires the perpetrator have knowledge of the presence of a child, has been held to be an aggravated felony because it falls within the definition of sexual abuse of a minor under INA Sec. 101(a)(43)(A). See subsection J pertaining to aggravated felony convictions, which, like CIMT convictions, may preclude an applicant from establishing good moral character.

9. Persecution of Others

a. Suspension of Deportation

An individual who participated in Nazi persecution or in genocide is barred from a grant of suspension of deportation. — Pre-IIRIRA INA §241(a)(4)(D).

Although an applicant for suspension of deportation who participated in persecution unrelated to Nazi persecution or genocide would not be barred from a grant of NACARA relief, the applicant still may be ineligible for relief on other grounds. If the persecution occurred during the 7-year requisite good moral character period, the applicant may be unable to establish good moral character, provided the applicant's conduct in its entirety would suffice to establish good moral character. — Pre-IIRIRA INA section 244(a).

In most cases, the persecution will have taken place long before the 7-year good moral character period. In these cases the persecution is considered, along with any other negative factors and all positive factors in the case, in determining whether to exercise discretion in the applicant's favor.

HQASM will review all cases in which there is evidence the applicant assisted or participated in the persecution of others, but the officer has recommended granting NACARA relief. In addition,

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any referral in which the officer determines that the applicant has assisted or participated in persecution, and the case may by publicized nationally or the person may pose a threat to others must be referred to HQASM for quality assurance review.

b. Special Rule Cancellation of Removal

For those seeking special rule cancellation of removal, the bar to eligibility based on persecution of others has been broadened to include not only participants in Nazi persecution and genocide, but all persecutors.

An applicant is ineligible for special rule cancellation, if he or she is inadmissible or deportable because he or she at any time participated in Nazi persecution or genocide, committed any act of torture or extrajudicial killing, or, while serving as a foreign government official, was responsible for or directly carried out particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402).

Additionally, an applicant may be ineligible for special rule cancellation of removal because he or she is described in INA section 241(b)(3)(B)(i), as an individual who ordered, incited, assisted, or otherwise participated in the persecution of others on account of a protected characteristic.

INA sections 212(a)(3)(E); 212(a)(2)(G).

INA section 237(a)(4)(D); 237(a)(4)(E).

Evidence the applicant participated in persecutory acts may include information from country conditions reports or the El Rescate or Guatemalan Military Database, indicating the applicant served with a "bad unit," at a "bad time," and in a "bad place." In other words, there is evidence the applicant's military, guerrilla, or security force unit committed serious abuses at a time when and location where the applicant served.

If there is evidence the applicant participated

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in the persecution of others on account of a protected characteristic, the applicant bears the burden of clearly establishing otherwise.

The applicant may meet this burden by providing detailed, credible testimony, explaining how he or she was able to avoid assisting in the persecution of others, given the circumstances.

In determining whether the applicant has met his or her burden of clearly establishing that he or she did not participate in the persecution of others, the asylum officer has the affirmative duty to elicit all relevant testimony from the applicant, including testimony concerning the applicant's duties and responsibilities, the location(s) where the applicant served, whether the applicant commanded others, etc. The officer should make sure to ask sufficient follow-up questions and give the applicant an opportunity to provide detailed information. It is improper for an asylum officer to determine that an applicant failed to provide detailed testimony, if the officer did not ask the applicant sufficient questions about his or her service with a military, guerrilla, or security force.

See Kiyaga v. Ashcroft, 77 Fed. Appx. 16 (1st Cir. 2003), citing Fedorenko v. U.S., 449 U.S. 490, 494, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981) (Asylum case in which the First Circuit upheld an IJ determination that the applicant participated in persecution of civilians on account of political opinion, based on evidence the applicant's unit in the Ugandan military committed atrocities at the time and location the applicant served). Please note, this is an unpublished case and is therefore presented here as a teaching tool.

10. Security and Related Grounds

a. Suspension of Deportation

i. An applicant who is convicted of an offense (and the conviction is final), or convicted of a conspiracy or attempt to violate specified espionage, treason, or sabotage laws of the U.S. for which a

Pre-IIRIRA INA §241(a)(2)(D).

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	term of imprisonment of five years or more may be imposed; sections 871 (threats against the President and his or her successors) or 960 (military expeditions against friendly nations) of title 18 of the United States Code; the Military Selective Service Act or Trading With the Enemy Act; or sections 215 (travel documentation of aliens and citizens) or 278 (importation of alien for immoral purposes) of the INA	
ii.	An applicant who has engaged, is engaged, or at any time after entry has engaged in: - any activity to violate any law of the U.S. relating to espionage or sabotage, or to violate or evade any law prohibiting the export from the U.S. of goods, technology, or sensitive information; - any other criminal activity which endangers the public safety or national security; or - any activity the purpose of which is to overthrow the U.S. government by force, violence, or other unlawful means	Pre-IIRIRA INA section 241(a)(2)(D)
iii.	An applicant who has engaged, is engaged, or at any time after entry has engaged in terrorist activity	Pre-IIRIRA INA §241(a)(4)(B).
iv.	An applicant whose presence or activities in the U.S. would have potentially adverse foreign policy consequences for the U.S. (the determination is made by the Secretary of State)	Pre-IIRIRA INA §241(a)(4)(B).
	A letter from the Secretary of State is sufficient proof to establish the alien is	Pre-IIRIRA INA §241(a)(4)(C).

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		deportable under 241(a)(4)(C).	
		Exception to Terrorist Activity Bar: An applicant who is deportable because of Terrorist Activity (and certain other grounds) can be granted suspension of deportation if he has been present in the U. S. for ten years, has established good moral character, and whose deportation would result in exceptional and extremely unusual hardship to the applicant or qualifying relatives.	Pre-IIRIRA INA §244(a)(2).
b.	Special Rule Cancellation of Removal		Matter of Ruiz-Massieu, 22 I&N Dec. 833 (BIA 1999).
	i.	An applicant who is deportable for having been convicted of an offense (and the conviction is final), or convicted of a conspiracy or attempt to violate specified espionage, treason, or sabotage laws of the U.S. for which a term of imprisonment of five years or more may be imposed; sections 871 (threats against the President and his or her successors) or 960 (military expeditions against friendly nations) of title 18 of the United States Code; the Military Selective Service Act or Trading With the Enemy Act; or sections 215 (travel documentation of aliens and citizens) or 278 (importation of alien for immoral purposes) of the INA	INA §237(a)(2)(D).
	ii.	Any applicant who is inadmissible for seeking to enter the U.S. to engage in any activity in violation of the espionage or sabotage laws or to violate any law prohibiting the export of goods, technology, or sensitive information or to otherwise engage in activity to oppose, control or	INA §212(a)(3)(A).

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overthrow the U.S. government by force, violence, or other unlawful means

iii. Any applicant who is inadmissible or deportable because:

- the applicant has engaged in terrorist activity
- a consular officer or the Attorney General knows, or has reasonable grounds to believe, the applicant is engaged in or is likely to engage after entry in any terrorist activity
- the applicant has incited terrorist activity under circumstances indicating an intention to cause death or serious bodily harm
- the applicant is a representative of a terrorist organization, as defined in INA section 212(a)(3)(B)(vi)
- the applicant is a representative of a political, social, or other similar group that endorses or espouses terrorist activity
- the applicant is a member of a terrorist organization, as that term is defined in INA section 212(a)(3)(B)(vi)(I) or (II)
- the applicant is a member of a terrorist organization, as that term is defined in INA section 212(a)(3)(B)(vi)(III), unless the applicant can demonstrate by clear and convincing evidence that the applicant did not know, and should not reasonably have known, that the organization was a terrorist organization
- the applicant endorses or espouses terrorist activity, or persuades others to endorse or espouse terrorist activity or support a terrorist organization
- the applicant has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) from or on behalf of any

INA §212(a)(3)(B) and §237(a)(4)(B), as amended by §103 and §105(a) of the REAL ID Act (May 11, 2005).

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organization that, at the time the training was received, was a terrorist organization (as defined in INA section 212(a)(3)(B)(vi)), or

- the applicant is the spouse or child of an alien who is inadmissible under this section, if the activity causing the alien to be found inadmissible occurred within the last 5 years

The INA defines "terrorist activity," "engaging in terrorist activity," "representative," and "terrorist organization."

INA sections 212(a)(3)(B)(iii), (iv), (v), and (vi).

iv. Any applicant who is inadmissible or deportable because his or her presence or activities in the U.S. would have potentially adverse foreign policy consequences for the U.S. (the determination is made by the Secretary of State)

INA sections 212(a)(3)(C) and 237(a)(4)(C).

v. Any applicant who is inadmissible due to membership or affiliation with the Communist or any other totalitarian party

INA section 212(a)(3)(D)(ii) & (iii).

B. Additional Bars to Special Rule Cancellation of Removal

1. High Speed Flight

An applicant who is deportable because he or she has been convicted of a violation of §758 of title 18, United States Code (relating to high speed flight from an immigration checkpoint), is ineligible.

INA section 237(a)(2)(A)(iv). NOTE: This section is not retroactive; it applies only to convictions, or violations of court orders, occurring after the date of the enactment of IIRIRA – September 30, 1996.

2. Crimes Related to Domestic Violence

INA section 237(a)(2)(E)(i)

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An applicant who is deportable because he or she was convicted on or after September 30, 1996 of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment. For all other applicants, generally a conviction of this type is a CIMT and should be analyzed as such.

NOTE: This section is not retroactive; it applies only to convictions, or violations of court orders, occurring after the date of the enactment of IIRIRA – September 30, 1996.

A crime of domestic violence includes any crime of violence committed against a person

- by a current or former spouse of the person
- by an individual with whom the person shares a child in common
- by an individual who is cohabiting with or has cohabited with the person as a spouse
- by any individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs
- by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the U.S., or any State, Indian tribal government, or unit of local government

This provision applies to special rule cancellation of removal cases where the applicant has been admitted to the U.S. and thus subject to grounds of deportation. When an applicant is an applicant for admission and thus subject to grounds of inadmissibility rather than deportation and has been convicted of a domestic crime of violence, the conviction should be analyzed as a CIMT under INA §212(a)(2).

3. Violation of Protection Orders

INA section 237(a)(2)(E)(ii).

An applicant who is deportable because, on or after September 30, 1996

- the applicant was enjoined under a protection

This section is not retroactive; it applies only to convictions, or violations of court

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	order issued by a court, and • the court determines that the applicant has engaged in conduct that violates the portion of the protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued Under this provision, "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as an order entered during the pendency of another proceeding.	orders, occurring after the date of the enactment of IIRIRA – September 30, 1996.
4.	False Representation of United States Citizenship An applicant who is deportable for falsely representing that he or she is a U.S. citizen for any purpose or benefit under the INA, or any federal or state law	INA §237(a)(3)(D). Pichardo v. INS, 216 F.3d 1198 (9th Cir. 2000). NOTE: This section is not retroactive; it applies only to convictions, or violations of court orders, occurring after the date of the enactment of IIRIRA – September 30, 1996.
6.	Criminals Who Have Asserted Immunity Certain aliens who are inadmissible due to commission of serious criminal offenses in the U.S. and for whom immunity from criminal jurisdiction was exercised	INA section 212(a)(2)(E).
7.	Conviction of Two or More Offenses Any alien who is inadmissible because he or she has been convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the	INA section 212(a)(2)(B).

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offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more

C. Bars to Discretionary Relief

The information regarding failure to appear or to depart under a final order of deportation is provided so that the asylum officer has a complete picture of all of the bars to NACARA relief. Any individual who would be subject to one of these bars is either subject to 1) an outstanding final order of deportation or removal and would have to be granted a NACARA motion to reopen by EOIR in order to seek NACARA relief, or 2) executed the final order by departing the U.S., thus breaking continuous physical presence.

For anyone in the first category, the immigration judge adjudicating the NACARA motion to reopen would have determined the applicability of the bar when deciding whether to approve the motion. If the motion to reopen was granted, then it is reasonable to assume that the immigration judge determined that the bar was not applicable to the case. The Asylum Division will accept such cases for NACARA adjudication only after the motion to reopen has been granted and the case has been administratively closed so that the applicant can seek NACARA relief in front of an asylum officer.

Though such instances should be rare, if the asylum officer believes such a bar applies, he or she should discuss the case with a supervisor and HQASM should be contacted. A significant issue will be whether the warning notices were provided at the time of the hearing or departure order.

1. Suspension of Deportation (5 year bar)

b. <u>Failure to depart pursuant to order of voluntary departure</u> – An applicant granted voluntary departure shall not be eligible for suspension of deportation for a period of 5 years after the scheduled date of departure (or the date of unlawful reentry) if the applicant:

Pre-IIRAIRA INA section 242B(e)(1).

i. remained in the U.S. after the date of the scheduled departure and

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ii. received written notice in English and Spanish and oral notice in a language that the applicant understood of the consequences of the failure to depart

Exception: This does not apply if exceptional circumstances existed for the failure to depart. This would include the ABC Settlement, which permitted registered class members to remain in the U.S. pending a de novo adjudication of their asylum claims, even if the class member had already been granted voluntary departure.

c. Failure to appear under deportation order – An applicant shall not be eligible for suspension of deportation for a period of 5 years after the date he or she was required to appear for deportation, if the applicant failed to appear for deportation at the time and place ordered and the applicant:

Pre-IIRAIRA INA section 242B(e)(2).

i. was given oral notice in the applicant's native language or a language the applicant understood and in the final order of deportation and

ii. the notice explained the consequences of the failure to appear for deportation at the time and place ordered

Exception: This does not apply if exceptional circumstances prevented the appearance.

d. Failure to appear for asylum hearing – An applicant whose period of authorized presence in the U.S. has expired and who has filed an asylum application is not eligible for suspension of deportation for a period of 5 years after the date of a scheduled asylum hearing, if the applicant:

Pre-IIRIRA INA section 242B(e)(3).

i. fails to appear for the asylum hearing

ii. has received written notice in English and Spanish of the hearing date, and

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iii. has received oral notice in a language the applicant understands of the hearing date

Exception: This does not apply if exceptional circumstances prevented the appearance.

2. Special Rule Cancellation of Removal (10 year bar) — INA section 240(b)(7).

a. Final order of removal – An applicant is ineligible for cancellation of removal for 10 years after the date of the entry of the final order of removal if:

i. the final order of removal was issued in absentia

ii. the applicant was previously provided oral notice in his or her native language or a language he or she understands and

iii. the notice explained the time and place of the proceedings, and

iv. the notice explained the consequences for failure to appear

b. Failure to Depart - An applicant is ineligible for 10 years for the relief of cancellation of removal if:

Even after 10 years, jurisdiction for NACARA lies with Immigration Court for an unexecuted order unless applicant is an ABC registered class member.

i. the applicant was given a final order allowing him or her to depart voluntarily, and

ii. the applicant failed to depart within the time specified

Exception: This does not apply if the order permitting the applicant to depart voluntarily did not inform the applicant of these penalties.

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IX. GOOD MORAL CHARACTER

At the conclusion of this section, the asylum officer will be able to identify the appropriate factors to consider in evaluating whether an applicant has established good moral character.

A. General Considerations

1. The applicant must establish he or she has been and still is a person of good moral character during the entire required 7-year period of physical presence in the U.S.
2. A child who is less than 14 years of age is presumed to be a person of good moral character and is not required to submit documentation establishing good moral character. — 8 CFR § 204.2(e)(2)(v).
3. Good moral character does not demand moral excellence — Matter of Sanchez-Linn, 20 I&N Dec. 362 (BIA 1991).

B. Statutory Definition of Lack of Good Moral Character

It is important to note that any criminal or good moral issue should first be analyzed under INA §212, §237 or Pre-IIRIRA §241 as applicable. If the alien is still eligible after such an analysis, the statutory grounds stated at INA §101(f) should apply.

An applicant cannot establish good moral character if he or she falls into one of the categories listed in INA section 101(f) during the 7-year period for which good moral character is required to be established. The categories listed in INA section 101(f) are as follows (and are described in greater detail in subsections C through J below):

1. A habitual drunkard;
2. [Stricken by Sec. 2(C)(1) of Pub. L. 97-116];
3. An individual who has been convicted or admits the commission of an offense that would make him or her a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D) Prostitution and Commercialized Vice, (6)(E) Smugglers, and (9)(A) Certain Aliens previously removed, of section 212(a) of the INA; or subparagraphs (A) Convictions of certain crimes and

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(B) Multiple criminal convictions of section 212(a)(2) of the INA and subparagraph (C) Controlled Substance traffickers thereof (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marijuana); and the offense described therein was committed during the required period of good moral character;

4. One whose income is derived principally from illegal gambling activities;
5. One who has been convicted of two or more gambling offenses committed during the good moral character period;
6. One who has given false testimony for the purpose of obtaining any benefits under the INA;
7. One who during the good moral character period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense(s) were committed within or without the good moral character period;
8. One who at any time has been convicted of an aggravated felony defined in section 101(a)(43) of the INA; or
9. One who at any time has engaged in conduct described in section 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 212(a)(2)(G) (relating to severe violations of religious freedom).

NOTE: The definition of an individual lacking good moral character in section 101(f), prior to IIRIRA, differs very slightly from the present definition in the INA, in reference to certain excludability grounds that were amended by IIRIRA. However, the differences are not relevant for purposes of asylum officer identification of applicants who are clearly eligible for relief under section 203 of NACARA. Note: The Asylum Officer does not apply

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the 30 gram exception to Special Rule Cancellation applicant who is inadmissible. Those aliens are barred under threshold ineligibility grounds found in INA §212(a)(2)(A)(II) which does not allow any exception.

Term of imprisonment or sentence: Whenever a provision requires a particular term of imprisonment or sentence in order to be applicable, the period of confinement or incarceration ordered by the court is applicable, regardless of any suspension in imposition or execution of imprisonment or sentence. However, where the statutory requirement is actual confinement, such as in paragraph 7 above, the asylum officer considers only the time actually served.

Acts of juvenile delinquency: When determining whether INA section 101(f) precludes an applicant from establishing good moral character, acts of juvenile delinquency are not to be considered crimes, nor are adjudications of juvenile delinquency to be considered convictions.

Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981); Matter of De La Nues, 18 I&N Dec. 140 (BIA 1981).

C. Characteristics Identified Solely in INA §101(f)

1. An applicant who is a habitual drunkard

INA §101(f)(1).

a. There must be evidence demonstrating an individual is a "habitual drunkard" before he or she is precluded from establishing good moral character.

b. For example, a doctor's testimony or information indicating that an individual had been committed to an institution for a course of treatment for chronic alcoholism could be evidence that might preclude a finding of good moral character.

c. There have been few precedent decisions applying this provision. It would be

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reasonable to consider an alien's good faith efforts at sobriety in determining whether the alien is a habitual drunkard.

2. Deriving income principally from illegal gambling activities

   If an applicant has a financial interest in an illegal gambling establishment, engages in illegal gambling activities him- or herself, or is employed in an illegal gambling establishment, he or she is generally considered to fall into this category. — INA section 101(f)(4).

3. Conviction of two or more gambling offenses — Matter of S-K-C-, 8 I&N Dec. 185 (BIA 1958).

   An applicant who has been convicted of two or more gambling offenses committed during the 7-year period required to establish good moral character cannot establish good moral character.

4. Providing false testimony for the purpose of obtaining any benefit under the INA — INA section 101(f)(5).

   a. False oral statements made under oath to an asylum officer can constitute false testimony. — INA section101(f)(6).

   b. Testimony is limited to oral testimony under oath. Falsified documents and statements not made under oath do not constitute false testimony. — Matter of R-S-J-, 22 I&N Dec. 863 (BIA 1999).

   c. The dishonesty must carry with it an intent to obtain immigration benefits. False testimony made for other reasons, such as embarrassment, fear, or a desire for privacy, is not enough to demonstrate that the applicant is a person lacking in good moral character. — Kungys v. U.S., 485 U.S. 759 (1988).

   d. False testimony does not include concealments. — Id.

   e. False testimony need not be material if the testimony was given in an attempt to gain immigration benefits. — Id.

      For example, false testimony by the applicant

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	about his or her date of birth may not necessarily be material in a suspension or cancellation claim. But if the falsity provided was or is with the intent to obtain immigration benefits and not out of fear, lack of knowledge, or a desire for privacy, this may contribute to a finding that the applicant is precluded from establishing good moral character.	
f.	If the false testimony is withdrawn voluntarily and without delay and without exposure, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn. Without delay is generally interpreted within the same incident, interview or line of testimony. Exposure is generally in the form of documentary evidence to the contrary of the false statement.	Id.
g.	A finding that testimony lacked credibility does not alone justify the conclusion that false testimony has been given. False testimony means knowingly giving false information with the intent to deceive. A finding of lack of credibility does not necessarily stem from a conclusion that the speaker intends to deceive.	Llanos-Senarillos v. U.S., 177 F.2d 164 (9th Cir. 1949); Matter of Namio, 14 I&N Dec. 412 (BIA 1973) In Llanos, the court stated that "[i]f the witness withdraws the false testimony of his own volition and without delay and without exposure, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn. Another relevant case, Matter of M—, 9 I&N Dec. 118, 119 (BIA 1960), cites to Matter of R—

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			R—(BIA 1949), which states in pertinent part, "[when] an alien in an immigration proceeding testifies falsely under oath as to a material fact but voluntarily and without prior exposure of his false testimony comes forward and corrects his testimony, perjury has not been committed and the charge based thereon is not sustained."
	h.	It is legally invalid to assume that a witness whose testimony is not accepted by the trier of fact is not a person of good moral character. The trier of fact may have considered the testimony unreliable because of the witness's poor memory, lack of personal knowledge, or other reasons that do not necessarily involve a holding that the witness deliberately gave false testimony.	Rodriguez-Gutierrez v. INS, 59 F.3d 504 (5th Cir. 1995).
	i.	An asylum officer must give the applicant an opportunity to explain any inconsistent statements or discrepancies. Errors in testimony may result from translation error, misunderstanding of questions, or other miscommunications.	Id. (quoting Acosta v. Landon, 125 F. Supp. 434 (S.D. Ca. 1954)).
5.		Conviction resulting in incarceration for 180 days or more	When a court "suspends' the imposition of a sentence, the sentence was not actually imposed. Matter of Esposito, 21 I&N Dec. 1 (BIA 1995); Matter of Castro, 19 I&N Dec. 692 (BIA 1988).

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An applicant who has been confined to a penal institution, as a result of a conviction, for an aggregate period of 180 days or more within the required period of good moral character, regardless whether the offenses were committed within the requisite 7-year good moral character period, cannot be found to have good moral character.	INA section 101(f)(7).
Confinement that was served prior to the actual conviction, for which the individual was given credit in determining the date of release, counts towards the 180-day limit. Also, confinement that results from a violation of probation rather than from the original sentence to incarceration also may be counted towards the 180-day limit. The confinement must be within the 7-year period necessary to establish good moral character, though the crime could have been committed before the 7-year good moral character period.	Fonseca-Leite v. INS, 961 F.2d 60 (5th Cir. 1992).
A penal institution is a generic term to describe places of confinement for those convicted of crimes, such as jails, prisons, workhouses, houses of correction, and other correctional institutions.	Matter of Valdovinos, 18 I&N Dec. 343 (BIA 1982). Matter of Piroglu, 17 I&N Dec. 578 (BIA 1980).
When determining whether the applicant's 180 day incarceration falls within the 7-year time period, the asylum officer must look at the 7-years immediately preceding the date of decision rather than the 7-years immediately preceding the date of application.	Black's Law Dictionary.
The applicant must have actually served the confinement of 180 days or more to be precluded from establishing good moral character on this basis. If an applicant is sentenced to but serves less than 180 days, he or she is not precluded from establishing good moral character under INA section 101(f).	Cipriano v. INS, 24 F.3d 763 (5th Cir. 1994).

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a. Engaging in prostitution

To find that an applicant has "engaged in" prostitution, there must be a "continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts" (emphasis added). Therefore, a single act of prostitution within the last 7 years generally would not, in itself, preclude a finding of good moral character. However, the applicant may be found to have been convicted of a crime involving moral turpitude. In such cases, the asylum officer must take into account the mild-penalty exception in determining whether the applicant is precluded from establishing good moral character as a result of conviction of a crime involving moral turpitude.

b. Procuring a prostitute

It is necessary to distinguish between procuring and solicitation.

A conviction for solicitation of a prostitute on one's own behalf is distinguished from procurement and is not a threshold bar under INA §212(a)(2)(D). If the applicant has one or more convictions for solicitation on one's own behalf and the conviction is within the 7 years immediately preceding the interview, the Asylum Officer should review these convictions to determine if the person has shown good moral character.

Matter of Gonzalez-Zoquiapan, 24 I&N Dec. 549 (BIA 2008). Arrests for solicitation on one's own behalf may not render the applicant inadmissible under INA §212(a)(2)(D)(ii).

IMPORTANT: If the applicant is convicted under INA section 212(a)(2)(D) rendering the person inadmissible and the person is seeking special rule cancellation, he or she is barred for a 10 year period immediately preceding the date of interview. If the conviction occurred outside of the 10 year period, the person is not barred nor are they precluded from establishing good moral character. For special rule

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cancellation (inadmissible) - The Asylum Officer does not analyze a conviction described in §212(a)(2)(D) under 101(f) because a conviction under §212(a)(2)(D) is a threshold bar to eligibility if the conviction occurred within the 10 years immediately preceding the interview.

G. Polygamy / Aliens Previously Removed

INA §101(f)(3) referencing §212(a)(2)(D)(iii).

Prior to IIRIRA, INA section 101(f) specifically referenced the inadmissibility ground regarding polygamy (212(a)(9)(A)) as a ground for finding lack of good moral character. While Congress renumbered the ground for inadmissibility based on polygamy to 212(a)(10)(A), it did not make the corresponding change to section 101(f). Although this has been interpreted as a technical error by many, the Ninth Circuit has declined to treat it as one, finding instead that the plain meaning of the law now defines an individual who attempts to enter the U.S. within 5 years of being previously removed through expedited removal or removal proceedings initiated upon the individual's arrival into the U.S. as without good moral character. Thus far, no other circuit has ruled on this question of statutory interpretation.

H. Alien Smuggling

INA 101(f)(3) referencing 212(a)(6)(E).

An applicant who knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the U.S. in violation of the law during the applicable period is required to show good moral character

To find that an applicant is precluded from establishing good moral character under this provision, there must be sufficient evidence the applicant "knowingly" assisted another individual in illegally entering the U.S. Evidence that an applicant simply sent money to his or her family abroad, and one or more family members later entered the U.S. illegally, in itself, is insufficient to satisfy this requirement. To determine whether an applicant knowingly assisted another to enter the U.S. illegally, the asylum officer should ask several follow-up questions during the interview, if there are grounds to suspect the applicant of having engaged in smuggling. For example, the officer should ask whether the applicant regularly sent money to his or her relatives abroad, whether

The AO should record his or her questions and the applicant's responses in Q&A format.

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the applicant always sent the same amount to his or her relatives, for what purpose the money was intended, whether the applicant's relatives used the money the applicant sent to enter the U.S. illegally, and whether the applicant knew his or her money was being used to help another individual enter the U.S. illegally.

NOTE: The statutory exception and waiver categories related to this inadmissibility ground do not apply to NACARA applicants because they are limited to LPRs and applicants seeking admission as immediate relatives.

I. Persecution of Others (Nazi Persecution, Genocide, Torture, Extrajudicial Killing, Severe Violations of Religious Freedom) — INA §212(a)(3)(E).

Any applicant, who, at any time, has committed, ordered, incited, assisted or otherwise participated in Nazi persecution, genocide, torture, or extrajudicial killing, is precluded from establishing good moral character pursuant to INA section 101(f)(9), as amended by Title E of the National Intelligence Reform Act of 2004. — INA section 212(a)(3)(E)

In addition, any applicant, who, while serving as a foreign government official, at any time was responsible for or directly carried out severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402), is precluded from establishing good moral character. — INA §212(a)(2)(G).

NOTE: Asylum Officers generally consider only the seven-year period preceding the decision on the NACARA 203 application when determining whether an applicant has established good moral character. However, if the applicant has committed any of the aforementioned acts of persecution, at any time (i.e., within or outside of the seven-year good moral character period) he or she is precluded from establishing good moral character under INA section 101(f)(9).

J. Other Factors to Consider – Good Moral Character Balancing Test

The fact that an applicant is not within any of the above categories does not compel a finding that the applicant is a person of good moral character. INA section 101(f) permits

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USCIS to consider every aspect of the individual's life in determining whether the person is a person of good moral character.

1. If the applicant does not fall in one of the specifically enumerated categories in INA section 101(f), the asylum officer must consider any relevant negative factors outside of the statutory definition along with all positive factors relating to good moral character. The asylum officer must weigh all counterbalancing positive factors against any potentially negative factors.

   Examples of possible positive factors that should be considered are:

   a. school record
   b. family background
   c. employment history
   d. financial status
   e. lack of criminal record
   f. volunteer work
   g. involvement in religious activities
   h. rehabilitation or other self-improvement actions, such as successfully completing court-ordered counseling sessions

2. Examples of negative factors that have been considered in evaluating good moral character include the following:

   a. Failure to file income taxes

      The fact that an applicant does not file income taxes may be a negative factor, but it is not, in itself, determinative of a person's moral character. An individual may have legitimate reasons for not filing income taxes, and the failure to file may be remedied.

      Torres-Guzman v. INS, 804 F.2d 531 (9th Cir. 1986).

   b. Falsifying tax returns

      Matter of Locicero, 11 I&N Dec. 805 (BIA 1966).

      An applicant who files an income tax return but knowingly provides fraudulent

      See Gambino v. Pomeroy, 562 F.Supp.

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	information on the tax return may fall into one of the statutory categories of a person lacking good moral character; that is, an individual who commits a crime involving moral turpitude.	974 (D.C.N.J. 1983) (good moral character in application for naturalization).
c.	Participation in illegal activities such as illegally selling liquor in a restaurant even though the law is not enforced, or knowingly consorting with and aiding criminals	Matter of L, 8 I&N Dec. 389 (BIA 1959); see also Petition of Orphanidis, 178 F. Supp. 872 (N.D.W.Va. 1959).
d.	Neglect of family responsibilities such as willful failure to comply with a court decree requiring child support	See Petition of Dobric, 189 F. Supp. 638 (D. Minn 1960); see also Petition of Huymaier, 345 F.Supp 339 (E.D. Penn. 1972) (Failure to make all required child support payments does not in and of itself show absence of good moral character on petition for naturalization; must look at circumstances behind the failure).
e.	Several convictions for driving under the influence or while intoxicated if within the period of time needed to establish good moral character If there is a significant period of time with no repeat behavior, it would be reasonable to consider an alien's good faith efforts at sobriety in determining whether the alien has been rehabilitated.	
f.	Probation - There is no bar to establishing good moral character based solely on the fact that an applicant is on probation. If an applicant is on probation at the time of the NACARA interview, the interviewing	

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officer should consider the underlying crime that led to the probation, the likelihood the applicant will successfully complete probation (taking into account prior arrests, any previous violations of probation, any successful completion of rehab-type programs, etc.), and the potential consequences of violating probation.

If the applicant is likely to violate his or her probation, and violation of probation could lead to a term of imprisonment that would preclude the applicant from establishing good moral character (confinement of 180 days or more), the officer should refer the case as not clearly eligible.

Otherwise, the asylum officer examines the totality of the conduct (including the underlying violation and the fact that the applicant has not yet successfully completed probation) to determine whether the applicant has established good moral character.

An asylum officer should not grant the case of an applicant who is on probation for conviction of a CIMT, if there is a likelihood the applicant will violate probation, and violation of probation would result in confinement to a penal institution of 180 days or more (hence the applicant would no longer qualify for the mild-penalty exception).

K. Failure to Establish Good Moral Character

All cases in which the asylum officer finds a lack of good moral character during the requisite time period must be referred to the Immigration Court.

If an applicant is unable to establish good moral character, he or she is ineligible for a grant of NACARA relief by USCIS. It is not necessary to consider whether the applicant meets the remaining basic eligibility criterion of extreme hardship or merits a favorable exercise of discretion.

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Review Questions

1. How long must the applicant have been a person of good moral character?

2. Identify 5 of the factors that by statute define a person as lacking good moral character.

3. Can factors other than those listed in INA section 101(f) be considered when determining good moral character? If so, under what conditions?

4. Does a person who fails to file income taxes lack good moral character? What should be considered?

5. Does a person convicted of driving under the influence of alcohol lack good moral character? What should be considered?

6. Does a person convicted of passing bad checks lack good moral character? What should be considered?

7. Should an asylum officer refer the case of an applicant who is on probation at the time of the NACARA interview? What factors should the officer consider?

8. What is required for a finding that an applicant engaged in or procured prostitution?

X. EXTREME HARDSHIP

At the conclusion of this section, the asylum officer will be able to identify appropriate factors to consider in evaluating whether the applicant has established extreme hardship for purposes of establishing eligibility for suspension of deportation or special rule cancellation of removal.

A. General Principles

1. The removal of the applicant must result in extreme hardship to:

   - the applicant himself or herself, or

   - to his or her spouse, parent, or child who is a U.S. citizen or lawful permanent resident

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2. Factors relevant to the evaluation of hardship identified in case law have been codified in regulation; however,

   - there is no requirement that an applicant establish that each of the identified factors apply
   - the list of factors codified in regulation and cited in case law is not exclusive
   - factors must be considered in the aggregate

     Example: An applicant may experience hardship as a result of one factor that, alone, is not considered extreme. However, when added to the hardship the applicant will experience as a result of another factor or factors, the cumulative effect may be extreme hardship.

   - an adjudicator is not required to articulate an independent analysis of each hardship factor listed in the regulation when rendering a decision.

   8 CFR § 240.58, redesignated as 8 CFR § 1240.58.

3. Decisions are made on a case-by-case basis, taking into account the applicant's particular circumstances.

   Matter of Ige, 20 I&N Dec. 880 (BIA 1994).

4. ABC class members who registered for ABC or applied for asylum on or before April 1, 1990 are entitled to an evidentiary presumption of extreme hardship. (This is discussed in section VIII.C below.)

5. In general, the Principal applicant has a presumption of extreme hardship that is difficult to overcome. Individuals from the Former Soviet Bloc and qualified family members do not have the same presumption of hardship. They must be able to articulate the hardship they would suffer if they were returned to their home country.

B. Relevant Factors to Consider

   8 CFR § 240.58(a), redesignated as 8 CFR § 1240.58(a).

The BIA has held that the factors listed below are relevant in evaluating extreme hardship. These factors have also been

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codified in the regulation implementing section 203 of NACARA.

8 CFR § 240.64(d).

Adjudicators should weigh all relevant factors presented and consider them in light of the totality of the circumstances, but are not required to offer an independent analysis of each listed factor when rendering a decision.

1. Age – both at the time of entry and at the time of application for relief

   For example, a person who came to the US when he or she was 13, as opposed to an individual who came to the U.S. when he or she was 25, may experience greater hardship if returned to his or her country, depending on the specific facts of the case.

   An applicant who has been in the U.S. since he or she was a child may be more integrated socially, culturally, and economically into a community in the U.S.

   Matter of Anderson, 16 I&N Dec. 596 (BIA 1978); Matter of Ige, 20 I&N Dec. 880 (BIA 1994); Matter of Pilch, 21 I&N Dec 627 (BIA 1996); 8 CFR § 240.58, redesignated as 8 CFR § 1240.58.

   Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996.

2. Applicant's children – the age, number, and immigration status of the applicant's children and their ability to speak the native language and adjust to life in another country

   This provision reflects the factors relied upon to establish the presumption of extreme hardship for ABC class members. Its inclusion in the regulation recognizes that this grouping of factors may create the probability of extreme hardship in a given case.

   USC/LPR children – In evaluating whether the applicant's removal would cause extreme hardship, it is important to note that, although an applicant cannot gain a favored status by the birth of a citizen child, the hardship to a USC/LPR child may be sufficient to warrant a finding that the applicant has established the basic eligibility criterion of extreme hardship. The asylum officer must consider the hardship the applicant's removal would cause to the applicant's

   Matter of Pilch, 21 I&N Dec. 627 (BIA 1996).

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USC/LPR child.

Mere inconvenience to a citizen child is insufficient to constitute extreme hardship.

If the child is to accompany the applicant to the country of removal, the normal problems associated with relocation, such as differences in educational opportunities and standards of living, or the difficulty in leaving friends behind, generally do not rise to the level of extreme hardship.

Salcido-Salcido v. INS, 138 F.3d 1292 (9th Cir. 1998); Perez v. INS, 96 F.3d 390 (9th Cir. 1996); Ravancho v. INS, 658 F.2d 169 (3d Cir. 1980 Villena v. INS, 622 F. 2d 1352 (9th Cir. 1980).

However, a totality of factors may constitute extreme hardship. Factors that should be considered include the age of the child, whether the child will be separated from other close relatives, language ability, psychological trauma, or serious illness.

If the USC/LPR child will stay in the U.S., the potential separation of the family and the hardship to both the child and the parent applicant resulting from the separation may be taken into consideration when such evidence is presented.

Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986); Ramirez-Gonzalez v. INS, 695 F.2d 1208 (9th Cir. 1983); Matter of Ige, 20 I&N Dec. 880 (BIA 1994).

Noncitizen/LPR children – Hardship to the applicant's noncitizen or non-LPR children should not be considered in most cases.

Jimenez v. INS, 116 F.3d 1485 (9th Cir. 1997)(unpublished); Ravancho v. INS, 658 F.2d 169 (3d Cir. 1980); Biggs v. INS, 55 F.3d 1398 (9th Cir. 1995).

However, the asylum officer may consider the hardship the parent may experience because his or her noncitizen/non-LPR children are harmed by the parent's removal from the U.S.

3. Health conditions – health conditions of the applicant, the applicant's child, spouse, or parent

Urban v. INS, 123 F.3d 644 (7th Cir. 1997); Marquez-Medina v. INS, 765 F.2d 673 (7th Cir 1985); Carnalla-Munoz v. INS, 627

The health of the applicant or the applicant's child, spouse, or parent, particularly when tied to the unavailability of suitable medical care in the country

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to which the applicant would be returned, is a relevant factor in evaluating hardship. Likewise the health of the applicant's USC/LPR parent, child, or spouse is relevant to an evaluation of hardship, if the applicant is the person responsible for the family member's well-being and support.

F.2d 1004 (9th Cir. 1980); Biggs v. INS, 55 F.3d 1398 (9th Cir. 1995).

The asylum officer should elicit information regarding the applicant's or his or her family member's medical condition. If it appears that the applicant or family member has a significant medical condition, the applicant should provide documentation regarding the condition (e.g., hospital or doctor's records).

The asylum officer should take into account the kind of medical facilities the applicant or the applicant's qualified relative would have access to, if any, in the country to which the applicant would be returned. This information may be obtained from the applicant and through country condition research.

4. Employment – the applicant's ability or inability to obtain employment in the country to which he or she would be returned

Tukhowinich v. INS, 64 F.3d 460 (9th Cir. 1995).

Economic detriment alone does not constitute extreme hardship. However, the economic conditions of the country to which the applicant would be returned and the financial impact of deportation are relevant to the extreme hardship analysis and should be considered in conjunction with other hardship factors. Further, total inability to find work can result in more than mere economic injury.

Marquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985); Santana Figueroa v. INS, 644 F. 2d 1354 (9th Cir. 1981).

5. Length of presence – the length of the applicant's presence in the U.S. over the minimum required time of 7 years

The longer an applicant has remained in the U.S., the stronger his or her ties to the U.S. may become, and the weaker his or her ties to the home country may become.

Santana Figueroa v. INS, 644 F. 2d 1354 (9th Cir. 1981); Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996).

As with any factor, this factor must be considered in light of all the circumstances of the case. The fact that an applicant has been in the U.S. for just over 7

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years does not mean that he or she has failed to form significant ties to the U.S.

For example, a ten-year old who has been in the U.S. for only 7 years would have spent his or her formative years in the U.S. and would likely experience extreme hardship upon removal.

6. Family members legally residing in the U.S. – An applicant's ties to family members living in the U.S., or lack of any such ties, must be considered in evaluating hardship.

The separation of the applicant from his or her family living in the U.S. may be the most important single hardship factor when evaluating whether removal would result in extreme hardship to the applicant. Included in the evaluation of hardship to the applicant is the suffering an applicant may experience at seeing his or her child, spouse, or parent suffer as a result of the separation.

The removal of an applicant who has a USC/LPR parent, spouse, or child might also result in hardship to the USC/LPR parent, spouse, or child.

For example, the BIA has found that the deportation of an applicant who contributed to the support and care of a disabled USC father would cause extreme hardship to that father and thus the applicant satisfied the extreme hardship criteria. The asylum officer should ask the applicant about other means of support, such as other relatives who might provide support for the USC/LPR family member.

While the lack of an applicant's ties to family members residing in the U.S. is relevant, it is not, in itself, determinative. There may be other factors that, when considered together, establish that the applicant would experience extreme hardship if returned, even though he or she has no or few family ties in the U.S.

Gutierrez-Centeno v. INS, 99 F.3d 1529 (9th Cir. 1996); Mejia-Carrillo v. INS, 656 F.2d 520 (9th Cir. 1981); Salcido-Salcido v. INS, 138 F. 3d 1292 (9th Cir. 1998); Matter of Ige, 20 I&N Dec. 880 (BIA 1994).

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For example, it has been held that an applicant who had no significant family ties in the U.S. but supported her parents and siblings in Thailand established that she would experience extreme hardship if she returned to Thailand, because she would no longer be able to support her family. In this particular case, the applicant's inability to support her family in her home country constituted extreme hardship to her.

Tukhowinich v. INS, 64 F.3d 460 (9th Cir. 1995).

7. Financial impact of departure from the United States

Adverse financial impact generally is not, in and of itself, sufficient to establish extreme hardship. The asylum officer should consider the degree of any adverse financial impact.

Davidson v. INS, 558 F.2d 1361 (9th Cir. 1977); Matter of Ige, 20 I&N Dec. 880 (BIA 1994); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972).

However, an individual who would become destitute and unable to survive if returned to his or her country may be found to face extreme hardship should he or she be removed from the U.S.

Matter of Louie, 10 I&N Dec. 223 (BIA 1963)(In this case the applicant also established extreme hardship to himself); Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996).

In addition, while economic detriment, such as the loss of a job, may not be enough alone to constitute extreme hardship, it is still a factor to consider in evaluating extreme hardship.

Tukhowinich v. INS, 64 F.3d 460 (9th Cir. 1995).

8. Irreparable harm as a result of disruption of educational opportunities

The lack of educational opportunities for the applicant's USC/LPR children is an important factor to consider when evaluating the hardship to the child, though the fact that educational opportunities are better in the U.S. than in the applicant's homeland does not alone establish extreme hardship.

Example: The Ninth Circuit found an applicant's USC child would suffer extreme hardship if the applicant were returned because the child had a medical disability that would prohibit or greatly delay learning the applicant's native language, and thus

Watkins v. INS, 63 F. 3d 844 (9th Cir.1995).

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would result in a loss of education.

However, the emotional and psychological impact of readjustment should be considered when assessing hardship. An individual deprived of his or her livelihood and uprooted from a community to which he or she has belonged and contributed may experience extreme hardship.

Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981); Matter of Ige, 20 I&N Dec. 880 (BIA 1994).

The psychological harm an applicant may experience upon return to a country he or she left amidst the turmoil of civil war or persecution must also be considered. For instance, individuals who have lost relatives because of civil war may experience psychological trauma upon return.

10. Political and economic conditions in the country of return

Political unrest in the country of origin should be considered in assessing hardship.

Violence and threats that fail to establish the political, religious, or ethnic motivation necessary to establish eligibility for asylum may nonetheless be important factors to consider in evaluating whether the applicant would experience extreme hardship.

A case in which a claim of persecution is raised must be examined from the perspective of extreme hardship rather than on the basis of the criteria used to identify a refugee under asylum law.

Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996); Gutierrez-Centeno v. INS, 99 F.3d 1529 (9th Cir. 1996).

Depressed economic conditions and volatile political situations are additional factors to consider in evaluating extreme hardship.

Blanco v. INS, 68 F.3d 642 (2d Cir. 1995); Ordonez v. INS, 137 F.3d 1120 (9th Cir 1998).

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11. Ties to the country to which the applicant would be returned

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An applicant's lack of strong family ties in the country to which he or she would be returned is an indication that the applicant might find it more difficult to re-integrate in the country of origin.

Conversely, an applicant who has strong family ties in the country to which he or she would be returned may find his or her re-integration into the country's culture eased.

12. Ties to the United States

Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996).

Contributions and ties to a community in the U.S., including integration into the society and culture of the U.S., are factors that should be considered in assessing extreme hardship.

Extensive community and charitable activities in which an applicant is engaged in his or her community provide evidence of a high degree of integration into the community and support a finding of extreme hardship.

Matter of Anderson, 16 I&N Dec. 596 (BIA 1978).

13. Immigration history

Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996).

An applicant who has been authorized to reside in the U.S. without fear of deportation may have relied on the authorization to reside in the U.S. and, as a result, put down ties to the community.

An applicant who has obtained work authorization and remained in the U.S. under the color of law is more likely to have assimilated into U.S. society.

In evaluating extreme hardship, the asylum officer may consider DHS's actions with respect to enforcing a final order of deportation, including decisions to defer or stay a removal order or policy decisions to limit enforcement of an order. Cases in which DHS affirmatively permitted the applicant to remain in the U.S. weigh more heavily in favor of an extreme hardship determination than those cases in which DHS declined to enforce the order. On the other hand, immigration history that suggests the applicant delayed return to his or her country to deliberately

Salmeda v. INS, 70 F. 3d 447 (7th Cir. 1995); Gutierrez-Centeno v. INS, 99 F.3d 1529 (9th Cir. 1996).

Matter of Pena-Diaz, 20 I&N Dec. 841 (BIA 1994).

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avoid or frustrate lawful orders can serve as a negative factor when evaluating extreme hardship.

14. Absence of other means to adjust status

Because suspension of deportation and cancellation of removal are considered extraordinary forms of relief, immediate or short-term availability of adjustment of status (for instance through a USC spouse) has been considered relevant to the degree of long-term hardship an applicant may face. An asylum officer should not base a determination on speculative relief that may be available in the future, nor should this factor be determinative. The fact that an applicant has an asylum application pending should not be considered a negative factor in evaluating hardship.

Matter of M-, 4 I&N Dec. 707 (BIA 1952); Matter of T-F-, 4 I&N Dec. 711 (BIA 1952); see also Gutierrez-Centeno v. INS, 99 F.3d 1529, fn. 6 (9th Cir. 1996).

C. Rebuttable Presumption of Extreme Hardship

8 CFR § 1240.64(d).

The Department of Justice concluded that sufficient evidence exists to support an evidentiary rebuttable presumption of extreme hardship for ABC class members who are eligible to apply for relief under NACARA. This conclusion is based on a determination that the ABC class shares certain characteristics that give rise to a strong likelihood that an ABC class member or qualified relative would suffer extreme hardship if deported or removed.

The regulations designate two categories of NACARA applicants who are eligible for the presumption of extreme hardship – 1) Salvadorans and Guatemalans who applied for asylum by 4/1/90, and 2) ABC class members who registered for ABC benefits and have not been apprehended at time of entry after 12/19/90. The presumption means that an asylum officer must find that an ABC class member who 1) is eligible to apply for NACARA benefits under either of these two categories and 2) completes the NACARA application has established extreme hardship, unless a preponderance of the evidence establishes that neither the applicant nor a qualified family member would suffer extreme hardship if the class member is removed.

1. Shared characteristics of the ABC class

a. Significant ties to the United States

An ABC class member is a Guatemalan national who entered

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	A prolonged stay in the U.S. without fear of deportation and with benefit of work authorization is a strong predictor of extreme hardship.	the U.S. on or before 10/1/90 or a Salvadoran who entered the U.S. on or before 9/19/90. 8 CFR § 240.60.
i.	As noted above, the longer an individual has lived in the U.S. beyond the requisite 7 years, the more likely it is that he or she will have developed significant ties to the U.S.	8 CFR § 240.64(d)(1) Please refer to the Supplementary Information portion of the interim regulation governing section 203 of NACARA for a more detailed discussion of the decision to establish a rebuttable presumption of extreme hardship. 64 FR 27856, 27864-67 (May 21, 1999) (section titled "Rebuttable Presumption of Extreme Hardship for Certain NACARA Beneficiaries").
ii.	Similarly, the longer an applicant has lived in the U.S. under protection from deportation, the more likely it is that he or she will develop long-term ties to the U.S.	
iii.	Because ABC class members have had work authorization, for the most part, they were more likely to have access to steady employment, career opportunities, and reasonable wages and could openly contribute to the economy and form ties to the U.S.	

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b. The unique immigration history and circumstances of the ABC class has given rise to other predictors that are unique to the class. Matter of O-J-O-, 21 I&N Dec. 381 (BIA 1996).

i. Financial impact of departure/employment

For those class members who have had steady employment, the possibility of extreme hardship if removed from the U.S. is compounded by the significant underemployment in Guatemala and El Salvador.

ii. Psychological impact of return Matter of L-O-G-,21 I&N Dec. 413 (BIA 1996).

Many of these individuals fled circumstances of civil war and political violence in their homelands during the 1980s.

iii. Another shared characteristic is the difficulty many of the NACARA-eligible Salvadorans and Guatemalans might have faced if they had returned home permanently during the early 1990s. The U.S. government recognized this by giving Salvadorans TPS and DED even after the Peace Accords were signed. Guatemalan peace accords were not signed until 1996.

2. The presumption of extreme hardship is rebuttable.

a. Because of the shared characteristics leading to the creation of the presumption, Guatemalan and Salvadoran ABC class members who 1) filed for asylum by 4/1/90 or 2) registered for ABC benefits and have not been apprehended at entry after 12/19/90, generally will be considered to have established extreme hardship upon submission of a completed application.

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b. The presumption of extreme hardship is not a blanket finding that all ABC class members will experience extreme hardship if returned. Instead, it is an evidentiary tool designed to address the significant likelihood that individual ABC class members will experience extreme hardship if returned to their native countries.

c. The asylum officer must still review the applicant's responses to questions regarding extreme hardship and evaluate the applicant's particular circumstances to determine whether a preponderance of the evidence establishes that neither the applicant nor the applicant's qualified relatives, if any, would suffer extreme hardship if the applicant is returned. 8 CFR § 240.64(d)(2).

3. Operation of the presumption 8 CFR § 240.64(d)(1).

a. The creation of the presumption shifts the focus of inquiry such that an adjudicator will evaluate whether there is sufficient evidence in the record to disprove extreme hardship. However, the creation of the presumption does not eliminate the necessity of examining the evidence of extreme hardship in each case. The adjudicator may ask additional questions or request additional documentation at the interview or hearing, if necessary. 8 CFR § 240.64(d)(2) and (3).

b. An applicant is required to submit a completed application that includes answers to questions relating to extreme hardship and to answer questions regarding hardship at the interview or hearing.

4. Overcoming the presumption The presumption shifts the burden of proof with respect to the hardship element. 8 CFR § 240.64(d)(1) and (2).

a. When the evidence in the record shows no factors associated with extreme hardship (no family in the U.S., no work history, no ties to

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the community, no serious medical condition or any other hardship factors) the presumption may be overcome.

b. When the evidence in the record significantly undermines the basic assumptions on which the presumption is based, the presumption may be overcome.

Example: An individual who has amassed great wealth and invested it in his home country may be able to return to his country without experiencing extreme hardship. However, the asylum officer must still consider whether there are any other hardship factors present in the case (such as a serious medical condition for which there is no treatment in the home country) such that return would result in extreme hardship.

Non-Presumption Cases

1. Applicants eligible to apply under section 203 of NACARA only as nationals of the former Soviet Bloc or as NACARA qualified family members are not eligible for an evidentiary presumption of extreme hardship.

2. The Department of Justice concluded that the immigration history of these groups was too disparate to predict the likelihood of extreme hardship for these individuals.

3. However, the regulations specifically recognize that those characteristics which led to the creation of the presumption may be present and should be given appropriate weight in individual cases.

4. Evidence of an extended stay in the U.S. without fear of deportation and with the benefit of work authorization, when present in a particular case, shall be considered relevant to the determination of whether deportation will result in extreme hardship.

5. For a NACARA qualified family member who has a sponsor who has been granted suspension of

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deportation or special rule cancellation of removal, an important factor in determining extreme hardship is the new status of the sponsor. The applicant would now have a lawful permanent resident parent or spouse. As noted earlier, a very important factor when evaluating whether removal would result in extreme hardship is the separation of the applicant from his or her family in the U.S.

In addition, the adjudicator now also has to evaluate whether the applicant's removal would result in hardship to the new LPR spouse or parent.

D. Failure to Establish Extreme Hardship

If an applicant is unable to establish extreme hardship, or, in the case of an ABC class member, the presumption of extreme hardship has been overcome, the applicant is ineligible for a grant of NACARA 203 relief by USCIS. It is not necessary to consider whether the applicant merits a favorable exercise of discretion.

Review Questions

8 CFR § 240.58(a), redesignated as 8 CFR § 1240.58(a); This includes a FSB national with an asylum application pending in USCIS backlog.

1. Briefly state 3 general principles that apply in making a determination of extreme hardship.

2. Identify the relevant factors that must be considered when making a determination of extreme hardship. Offer a brief explanation of each factor.

3. What type of evidence would overcome the presumption that an ABC class member or his or her qualified relative would suffer extreme hardship if the applicant were removed?

XI. DISCRETION

Once an applicant has been found to meet the basic eligibility criteria for suspension of deportation or special rule cancellation of removal, the asylum officer should consider all of the circumstances of the case to decide if the statutorily eligible applicant merits a favorable exercise of discretion.

Please refer to the adjudication worksheets found at found at Appendices AM and AN of the ABC-NACARA Procedures Manual for a more complete understanding of the step-by-step process of NACARA

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adjudication.

The decision whether to exercise discretion to grant suspension of deportation or special rule cancellation of removal may not be arbitrary, irrational, or contrary to law. As in an asylum adjudication, once the applicant has been found eligible for relief, discretion should be exercised in favor of the applicant unless there are clearly defined reasons that support a referral.

In determining whether to exercise discretion in the applicant's favor, the officer must weigh all positive factors against any negative factors. The factors to be considered are often similar to those used when determining good moral character but sometimes may be different. For example, the fact that an applicant has a serious medical condition or has lived in the U.S. for a very long time and is integrated into the community are factors that weigh in favor of exercising discretion to grant but may say little about the applicant's character. In addition, the factors considered in determining discretion do not need to be within the 7-year good moral character period.

Matter of F-, 5 I&N Dec. 163 (BIA 1953); Ramirez-Gonzalez v. INS, 695 F.2d 1208 (9th Cir. 1983); Vaughn v. INS, 643 F.2d 35 (1st Cir. 1981).

The adjudicator may also consider that Congress chose to create a statutory persecutor bar when it reformulated suspension of deportation as cancellation of removal. Therefore, in suspension of deportation cases, evidence that the applicant participated in the persecution of others is treated as a negative factor in evaluating discretion. See section VIII.A.9 above.

Example: In a suspension of deportation case, the evidence indicates that the applicant assisted in the persecution of civilians on account of imputed political opinion when he was a soldier in El Salvador in 1985, and the applicant failed to clearly establish otherwise. The applicant is not barred from being granted suspension of deportation, and the action occurred long before the good moral character period. However, the officer should consider the persecution a significant negative factor, to be weighed against any positive factors in the case, in determining whether the applicant warrants a favorable exercise of discretion.

XII. SUMMARY OF CLAIMS THE ASYLUM OFFICER MUST REFER TO THE IMMIGRATION COURT

INA section 240B(c).

The asylum officer shall refer the application for suspension of deportation or special rule cancellation of removal to the Immigration Court for adjudication in deportation or removal

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proceedings, and will provide the applicant with written notice of the statutory or regulatory basis for the referral, if:

1.	The applicant is not clearly eligible for suspension of deportation under former section 244(a)(1) of the Act as in effect prior to April 1, 1997, or for cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by NACARA	8 CFR § 240.70(d)(1).
2.	The applicant does not appear to merit relief as a matter of discretion	8 CFR § 240.70(d)(2).
3.	The applicant appears to be eligible for suspension of deportation or special rule cancellation of removal but does not admit deportability or inadmissibility	8 CFR § 240.70(d)(3). See ABC-NACARA Procedures Manual for discussion of this requirement.
4.	The applicant failed to appear for a scheduled interview with an asylum officer or failed to comply with fingerprinting processing requirements and such failure was not excused by the USCIS, unless the application is dismissed, or	8 CFR § 240.70(d)(4).
5.	The applicant is requesting suspension of deportation or special rule cancellation of removal under the Victims of Trafficking and Violence Protection Act (VTVPA). This act allows spouses and children who have been battered and abused by a spouse or parent who is or was USC, LPR, or NACARA beneficiary to qualify for suspension of deportation or special rule cancellation of removal without maintaining continuous physical presence for 7 years.	Please refer to sections I.F and II.E above.

XIII. EVIDENCE

At the conclusion of this section, the asylum officer will be able to identify the types of evidence an applicant should present to establish continuous physical presence, good moral character, and extreme hardship.

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A. Burden of Proof

The burden of proof to establish eligibility for suspension of deportation or special rule cancellation of removal is on the applicant.

Reminder: The extreme hardship element is considered established in presumption cases as soon as the applicant submits a completed application and testifies regarding his or her written responses at the time of interview. The AO must then evaluate whether the preponderance of the evidence overcomes the presumption.

B. Types of Evidence

The asylum officer should elicit testimony regarding physical presence, good moral character, and extreme hardship. The applicant may also present witnesses to substantiate his or her testimony. In addition, the applicant may offer documentary evidence. 8 CFR § 240.64(a).

a. Necessity of documentation – continuous physical presence

The asylum officer should review the applicant's A-file(s) and relevant DHS databases to collect information from INS or DHS records on the applicant's continuous physical presence.

i. Issuance of an EAD on a yearly basis may establish physical presence for each year.

If there is evidence that the applicant applied for and received an EAD each year for the 7 years prior to the date of the application, and the applicant provides credible testimony that he or she did not depart the U.S. during that time, or any departures did not break continuous physical presence, the applicant may be found to have established continuous physical presence.

ii. Documentation required

If INS or DHS records do not establish that the applicant has been continuously physically

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present in the U.S., the applicant should provide documentation demonstrating he or she was in the US each year of claimed physical presence.

If the applicant departed the U.S. and the asylum officer has questions about the applicant's testimony regarding the duration of the time the applicant spent outside the US, the asylum officer may require the applicant to provide documentation confirming presence in the U.S. after the date of departure.

b. Necessity of documentation – good moral character

Absence of arrest or conviction records based on the background security checks is strong evidence the applicant has good moral character.

Testimony and affidavits from employers or U.S. citizens corroborates the good moral character.

In the event FBI fingerprint checks cannot be completed because of inability to obtain good fingerprints, the applicant should submit police clearances for each jurisdiction lived in during the required 7 years of continuous physical presence.

c. Necessity of documentation – extreme hardship

See ABC-NACARA Procedures Manual.

i. Salvadorans and Guatemalan ABC class members who either 1) filed for asylum by 4/1/90 or 2) registered for ABC and have not been apprehended at entry after 12/19/90 are not initially required to present documentary evidence demonstrating that removal would result in extreme hardship. The asylum officer may ask for evidence on the issue of extreme

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hardship at the interview. If there is evidence in the record that would allow USCIS to overcome the presumption of extreme hardship, the applicant must be allowed to present evidence that would demonstrate extreme hardship.

In some cases, particularly where credibility is an issue, it may be reasonable to require documentation, such as relevant medical records, or a reasonable explanation as to why important documentation is unavailable.

ii. Individuals who have not been accorded a presumption should submit documentation demonstrating that removal would result in extreme hardship.

2. Types of documentary evidence 8 CFR § 240.67(b)(6).

The following is a list of documents that may be helpful in establishing the statutory criteria. This list is not exclusive. Nor is the applicant required to submit any particular documents, as the applicant may be able to substantiate his or her claim with testimony, either testimony of the applicant or of the applicant's witnesses. Nonetheless, it is generally reasonable to expect an applicant to corroborate a claim with supporting documents. Other documents not listed here may also be submitted by the applicant and may be relevant.

a. Physical Presence

- Bankbooks
- Leases, Deeds
- Licenses
- Receipts
- Letters
- Birth, church or school records

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- Employment records
- Medical records
- Evidence of tax payments
- INS or DHS records
- Photographs with electronic date

b. Good Moral Character

- Affidavits from witnesses, preferably U.S. citizens or lawful permanent residents
- Affidavits from the applicant's employer
- Police records from the jurisdictions in which the applicant has lived, only if fingerprint results are inconclusive

c. Extreme Hardship

- School records of applicant and/or applicant's children
- Medical records, if relevant
- Records of participation in community organizations, for example, churches, PTA, social or other clubs
- Records of volunteer work
- Documents showing the number of people the applicant employs, if self-employed
- Contributions made by applicant to his or her family, either in the US or in his or her native country
- Country condition information showing high crime rate, political and economic instability of the country to which the applicant would be returned

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- Evidence of difficulties of similarly situated returnees
- Affidavits of individuals who have first-hand knowledge of applicant's circumstances
- Affidavits regarding intent to leave USC child in the U.S.

3. Witnesses

The applicant is entitled to call witnesses to appear on his or her behalf. However, applicants may be encouraged to submit affidavits of witnesses, rather than bringing witnesses to the interview. The following is not an exhaustive list.

a. To establish physical presence:

- The applicant's past and present employers
- The applicant's family members
- School or church officials/leaders
- Neighbors
- Relatives lawfully residing in the U.S.

b. To establish good moral character:

- The applicant's past and present employers
- The applicant's family members
- School or church officials/leaders
- Neighbors
- Relatives lawfully residing in the U.S.
- Other credible third party witnesses

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c. To establish extreme hardship:

- The applicant's family
- Relatives of the applicant who are lawfully residing in the U.S.
- The applicant's employer, if the employment is deemed extremely necessary
- Psychiatrists who will testify to the psychological problems the applicant or his or her U.S. or lawful permanent resident parent, spouse or child will suffer if the applicant is returned
- Medical doctors who will testify as to any special medical conditions
- Neighbors and friends of the applicant and his or her family
- Church or school officials/leaders.

C. Weight of Evidence

The asylum officer must give substantial weight to the applicant's testimony. Credible testimony alone may, in some instances, be sufficient to establish continuous physical presence, good moral character, and extreme hardship. For most cases, however, corroborating information in the form of documentation and/or witnesses will be necessary for the applicant to establish eligibility for suspension of deportation or special rule cancellation of removal. Otherwise, a reasonable explanation will need to be provided as to why certain documentary evidence cannot be produced.

Review Questions

1. Who carries the burden of proof to obtain relief under NACARA?
2. What types of evidence can the applicant present to establish eligibility?

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

DETECTING POSSIBLE VICTIMS OF TRAFFICKING

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

DETECTING POSSIBLE VICTIMS OF TRAFFICKING

Training Module

MODULE DESCRIPTION:

This module provides guidelines for adjudicating requests for benefits by victims of trafficking. Issues addressed include indicators that may demonstrate an individual is a victim of trafficking, specific assistance and benefits available to victims of trafficking as well as guidelines for sensitive interview techniques.

TERMINAL PERFORMANCE OBJECTIVE(S)

You will be able to assess whether an interviewee is a victim of trafficking and articulate whether the trafficking-related experience relates to the benefit being sought, and where appropriate, provide trafficking-specific information and/or assistance to the interviewee.

ENABLING PERFORMANCE OBJECTIVES

1. Define the components of human trafficking.
2. Distinguish between human trafficking and human smuggling.
3. Discuss factors that may indicate that an interviewee has been or is currently a victim of human trafficking.
4. Summarize the rights and forms of immigration relief that may be available to a trafficking victim.
5. Identify factors that may inhibit a victim's ability to fully present his or her claim for protection.
6. Analyze substantive issues related to the past persecution and well – founded fear of persecution specific to victims of trafficking.
7. Describe possible issues affecting benefit eligibility for trafficking victims and traffickers.

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INSTRUCTIONAL METHODS

- Interactive Presentation
- Practical Exercises

METHOD(S) OF EVALUATION

Written exam
Practical exercise exam

REQUIRED READING

1.

2.

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1.

2.

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR12	Knowledge of polices and procedures for processing claims from victims of trafficking (3)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
ITK5	Knowledge of strategies and techniques for communicating with survivors of torture and other severe trauma (4)
RI6	Skill in identifying information trends and patterns (4)
DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5)
IR2	Skill in interacting with individuals who have suffered trauma (e.g., considerate, non-confrontational, empathetic) (4)
IR5	Skill in persuading others and gaining cooperation (4)
IR7	Skill in collaborating and coordinating with external stakeholders (4)
SCM1	Skill in maintaining professional demeanor in stressful situations (e.g., potentially dangerous encounters, emergency situations, threats to personal safety) (4)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
12/12/12	Entire Lesson Plan	Lesson Plan published	RAIO Training
6/16/14	3.4.3 Human Trafficking Distinguished from Smuggling	Changed "illegal alien" to "undocumented alien" and added three hyperlinks to the footnote on page 24	LG
6/5/15	Asylum supplement	Removed outdated sample assessment	RAIO Training
11/27/15	Throughout document; section 2.2.2, TVPA/TVPRA, section 3.5.2, T visa, section 3.5.3, U visas, ASM supplement	Corrected links; updated references to TIP report for 2015; added references to confidentiality protections for T/U visa applicants and changes from 2013 VAWA/TVPRA reauthorization; updated AAPM language in ASM supplement	RAIO Training

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION & OVERVIEW

"This year's Report places a special emphasis on human trafficking in the global marketplace. It highlights the hidden risks that workers may encounter when seeking employment and the steps that governments and businesses can take to prevent trafficking, including a demand for transparency in global supply chains.

The bottom line is that this is no time for complacency. Right now, across the globe, victims of human trafficking are daring to imagine the possibility of escape, the chance for a life without fear, and the opportunity to earn a living wage."

John F. Kerry, U.S. Secretary of State[1]

As an officer in the RAIO Directorate, you may come in contact with interviewees who are victims of human trafficking and individuals who have engaged in the trafficking of human beings. It is crucial that you understand the relevant laws and regulations related to the trafficking of human beings, as well as the procedures for interviewing and adjudicating benefits for both trafficking victims and perpetrators.

Although sometimes incorrectly used interchangeably, the terms "trafficking" and "smuggling" are actually two distinct crimes governed by different bodies of law. While a great deal of international law has been developed regarding trafficking, smuggling continues to remain primarily under domestic jurisdiction, making it easily adaptable to different criminal justice capacities in countries of origin, transit and destination.

[1] U.S. Dep't of State, Trafficking in Persons Report 2015, July 2015.

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TRAFFICKING VS. SMUGGLING—THE PRIMARY DIFFERENCES[2]

The distinctions between smuggling and trafficking are often very subtle and at times the two crimes overlap. A situation that begins as migrant smuggling may develop into a situation of human trafficking. There are four primary differences between trafficking and smuggling:

1. Consent – migrant smuggling, while often undertaken in dangerous or degrading conditions, involves consent. Trafficking victims, on the other hand, have either never consented or if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive action of the traffickers.

2. Exploitation – migrant smuggling ends with the migrant's arrival at his or her destination, whereas trafficking involves the ongoing exploitation of the victim.

3. Transnationality – smuggling is always transnational, whereas trafficking may not be. Trafficking can occur regardless of whether victims are taken to another state or moved within a state's borders.

4. Source of profits – in smuggling cases profits are derived from the transportation or facilitation of the illegal entry or stay of a person into another country, while in trafficking cases profits are derived from exploitation.

This module focuses on trafficking and:

- Provides a general overview of international and U.S. human trafficking legislation and policy.
- Discusses the elements of a human trafficking crime, trends in trafficking, and rights and benefits accorded to identified victims in the United States.
- Describes how you may encounter a potential victim or perpetrator of trafficking during the course of your work and how it may impact the outcome of the final adjudication.

2 INTERNATIONAL AND DOMESTIC LAWS & GUIDELINES REGARDING TRAFFICKING

[2] Migrant Smuggling FAQs, United Nations Office on Drugs and Crime, located at http://www.unodc.org/unodc/en/human-trafficking/faqs-migrant-smuggling.html

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Concern about human trafficking, both internationally and domestically, has led to the development of a globally coordinated response aimed at combating the practice. One of the first international treaties to address trafficking was the International Agreement for the Suppression of the White Slave Traffic signed in 1904. As the first comprehensive international agreement on the subject, the agreement contained several key provisions reflected in current legislation, including:

- identifying trafficking victims at ports of entry and transportation stations
- collecting information from trafficked women
- providing protection and care of indigent victims pending repatriation[3]

2.1 International Agreements & Conventions

Since the enactment and implementation of the International Agreement for the Suppression of White Slave Traffic in 1904, countries throughout the world have entered into and adopted various treaties and agreements, as well as developed and implemented new policies and legislation related to human trafficking. The most significant agreement to which the United States is a party is the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children—also known as the Palermo Protocol.

United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol, 2000)

The establishment of the Palermo Protocol in 2000 brought the issue of trafficking to the forefront of governmental discourse and global consciousness. Calling for a comprehensive international approach to the issue of trafficking in countries of origin, transit, and destination, the Palermo Protocol utilized the "three P" strategy to combat trafficking (prevention, protection, prosecution).[4] The United States subsequently used this approach as the foundation of federal trafficking legislation including the Victims of Trafficking and Violence Protection Act of 2000 (TVPA).

To date, there are 133 parties to the Palermo Protocol, of which 117, including the United States, are signatories. Additional policies and legislation related to trafficking are discussed in further detail below.

2.2 United States Laws Related to Human Trafficking

[3] International Agreement for the Suppression of the White Slave Traffic (1904), May 18, 1904, reprinted at http://www1.umn.edu/humanrts/instree/whiteslavetraffic1904.html.

[4] United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49 at 60, U.N. Doc A/45/49 (Vol. I)(2001), entered into force Dec. 5, 2003 [Palermo Protocol], preamble, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

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2.2.1 Thirteenth Amendment & Related Criminal Federal Statutes

Domestic trafficking statutes in the United States are rooted in the prohibition of slavery and involuntary servitude as guaranteed by the Thirteenth Amendment, which states in pertinent part that:

> Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Title 18 of the U.S. Code (U.S.C.) houses the specific criminal statutes related to trafficking.

2.2.2 Trafficking Victims Protection Act (TVPA) and Trafficking Victims Protection Re-authorization Act (TVPRA)

On October 28, 2000, Congress enacted The Trafficking Victims Protection Act (TVPA), affording certain rights and protections to victims of severe forms of trafficking, including:

- Protection and assistance to trafficking victims;
- Punishment of traffickers; and
- Prevention of trafficking domestically and internationally.

In 2003, 2005, 2008, and 2013 Congress re-authorized the TVPA. Since its re-authorization, the TVPA is now referred to as the Trafficking Victims Protection Re-Authorization Act (TVPRA).

2.2.3 Mandate for federal immigration officials

The TVPA (2000) and its subsequent re-authorizations and accompanying regulations specifically outline a mandate for federal immigration officials as part of the U.S. Government-led anti-trafficking efforts and more clearly define our legal responsibilities. For example, the 2008 TVPRA significantly impacted asylum field policy and procedures when the Asylum Division was accorded initial jurisdiction on unaccompanied minor cases, a particularly vulnerable demographic within the U.S. immigrant population.[5]

In July 2010, the Department of Homeland Security (DHS) launched the Blue Campaign – a first-of-its-kind campaign to coordinate and enhance the Department's anti-human trafficking efforts. The Blue Campaign harnesses and leverages the varied authorities and resources of DHS to deter human trafficking by increasing awareness, protecting victims, and contributing to a robust criminal justice response. The campaign is led by an innovative cross-component steering committee, chaired by the Senior Counselor to the

[5] For additional information, please refer to RAIO module, Children's Claims.

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Secretary of Homeland Security, and comprised of representatives from seventeen operational and support components from across DHS. The Blue Campaign mandates that all USCIS and other DHS personnel receive training on human trafficking issues.

As an officer within the RAIO Directorate, you are responsible for identifying potential victims of trafficking and reporting your findings so that data on such individuals can be tracked. If you are working domestically, your responsibilities may, where appropriate, include providing victims of trafficking with mandated informational materials about the benefits which may be accorded to them as potential victims, and making referrals to the closest law enforcement official charged with investigating and prosecuting trafficking-related crimes within your jurisdiction.

3 Severe Forms of Trafficking in Persons

In order for a victim of trafficking to qualify for trafficking-related immigration relief and other benefits, services, and protections in the United States, she or he must meet the definition under the TVPRA of an individual who has been a victim of a "severe form of trafficking in persons." The term "severe form of trafficking" implies a legal determination that you, as an officer, are not responsible for making. Rather, as an officer you are responsible for familiarizing yourself with the definition of trafficking to the extent that it will assist you in recognizing when an interviewee may be involved in a trafficking-related situation so you can take appropriate next steps to protect that individual and/or ensure the interviewee receives a fair adjudication.

In addition to this definition, the T visa (trafficking-related immigration relief which is discussed below) has additional eligibility requirements. As an officer within RAIO, you will not need to analyze whether an interviewee meets the criteria for a T visa when you are assessing whether an interviewee is a potential victim of trafficking for RAIO adjudication or protection purposes.

3.1 Definition

Under the TVPRA, the following are listed as severe forms of trafficking in persons:

- Sex trafficking, which is defined as the "recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act," in which the commercial sex act is induced by
  - force, fraud, or coercion, or
  - in which the person induced to perform such act has not attained 18 years of age

or

- Labor trafficking, which is defined as the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through

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- the use of force, fraud, or coercion
- for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery

A simple way to define human trafficking is all of the activities involved in obtaining or maintaining a person in forced labor or sex service.

Three categories of trafficking victims emerge from this legal definition. They include:

- Minors (under 18) induced into commercial sex
- Individuals age 18 or over involved in commercial sex via force, fraud or coercion
- Children and adults forced to perform labor or other services in conditions of involuntary servitude, peonage, etc. by force, fraud or coercion

This definition applies to any individual who is subjected to trafficking, whether she or he is a foreign national or U.S. citizen.

No Movement Necessary

Despite popular misconception to the contrary, the movement or transportation of an individual is not a required element of the crime of "trafficking."

Trafficking is a process comprised of many actions that may occur over a long period of time. During the course of your work with USCIS, you may encounter foreign national interviewees who were trafficked via a range of diverse methods, and who come before you at different points in the spectrum of exploitation. These individuals may have been trafficked in the past, be in a situation of ongoing trafficking/exploitation in the United States or in the third-country where she or he is:

- being interviewed for resettlement
- at-risk for trafficking in the United States or a third country, and/or
- at-risk for being trafficked upon return to his or her home country

3.2 Components[6]

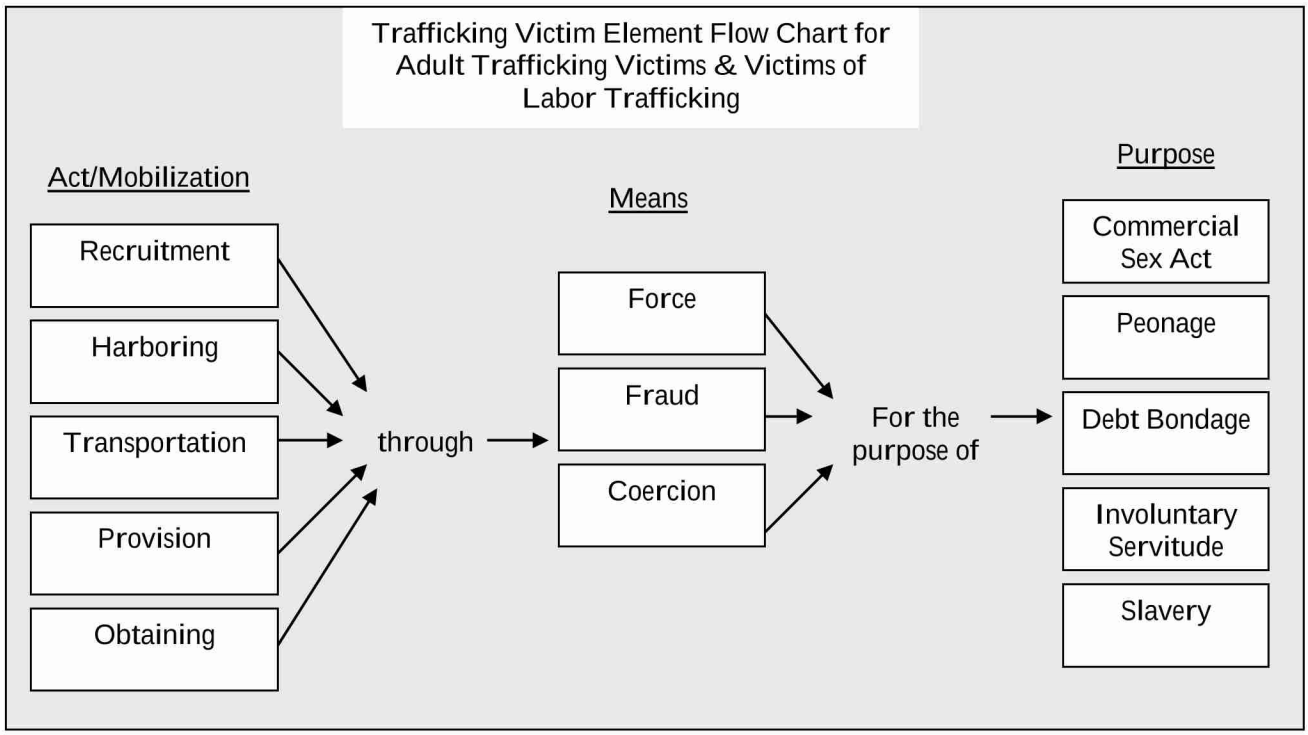
In order to better understand what constitutes a trafficking crime and how to recognize whether an interviewee is involved in a trafficking-related situation, it is helpful to look at the component parts of the definition individually. The chart below provides a visual

[6] The framework used in the following sections is derived from International Organization for Migration (IOM) Counter-Trafficking Training Modules.

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framework for you to understand the process of human trafficking. The three components include:

- Act/Mobilization
- Means
- Purpose



3.2.1 Act/Mobilization

What act initiated the trafficking process? Was the person recruited, transported, transferred, harbored, or received? Certain acts by the victim or the perpetrator in the initial stages of the human trafficking process may not be self-evident as trafficking acts. Further, the trafficking victim may initially appear to be complicit in the arrangement. An example of this would be if someone responded to an employment advertisement posted by a local employment agency advertising positions abroad ("recruitment") or voluntarily contracted a smuggler to arrange travel to the United States ("transport").

It is important to remember that an individual is not excluded from consideration as a victim of trafficking if she or he was initially complicit in their own mobilization into trafficking.

3.2.2 Means

What techniques such as force, fraud, or coercion (including non-physical inducements) were employed by the third party in order to induce the individual into trafficking?

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Some examples of means of force, fraud, or coercion that traffickers may use to control the victim include but are not limited to: debt bondage from a smuggling agreement; confiscation of passports or other identity documents; use of or threat of violence toward the individual and/or his or her family; the threat of shaming the individual; threats of imprisonment or deportation; control of a victim's money; psychological manipulation; and/or isolation from the public and/or the individual's family.

Collusion, a commonly used method of control, is used where the victim may initially have been complicit in an illegal act but then was subjected to trafficking against his or her will, through force, fraud, or coercion. In these situations, the victim may feel responsible for his or her own situation and believe that she or he will be punished for illegal acts in which she or he participated, resulting in a feeling of hopelessness and a reluctance to break free from the trafficking situation.

Under U.S. law, minors cannot consent to providing commercial sex services. Accordingly, in cases where a victim of sex trafficking was under 18 years of age at the time of the crime, the means through which she or he became a victim need not be analyzed. As long as a third party induced the minor's involvement in the exploitation, a determination of the particular means utilized by a third party to traffic the minor is not required.

3.2.3 Purpose

What was the end result? Was the individual exploited or was there intent to exploit? If the individual was exploited, was it through sexual exploitation, forced labor, debt bondage, slavery, or another form of qualifying activity?

As the examples that follow demonstrate, a person may be a trafficking victim "regardless of whether they were born into a state of servitude, were exploited in their hometown, were transported to the exploitative situation, previously consented to work for a trafficker, or participated in a crime as a direct result of being subjected to trafficking.."[7]

3.3 Common Forms of Human Trafficking[8]

In order to fully understand the conditions facing a victim of trafficking, you must bear in mind the full range of potential activities that could constitute trafficking. In the U.S. asylum context, interviewees have disclosed a range of trafficking-related experiences, including forced prostitution, domestic servitude, and child sexual exploitation.

[7] U.S. Dep't of State, Trafficking in Persons Report 2015, July 2015.

[8] Derived from U.S. Dep't of State, Trafficking in Persons Report 2015, July 2015.

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Trafficking: Not Just a Sex Crime

Although trafficking is most often associated with the sex trade, RAIO officers should keep in mind that trafficking includes various forms of labor and/or services.

3.3.1 Sex Trafficking

Activities that may constitute sex trafficking:

- pornography: If the individual is induced by force, fraud or coercion to perform the commercial sex act for the purpose of producing the pornography
- sex tourism: An individual who engages in illicit sexual conduct in foreign places[9]
- prostitution: If the individual is induced by force, fraud or coercion to perform commercial sex acts
- military prostitution: Under U.S. law, it is illegal for anyone to engage in, aid or abet, or procure or solicit prostitution in the vicinity of a military or naval camp. In some instances, individuals may be brought to military camps to engage in sex acts against their will[10]

Participation in these activities does not necessarily mean an individual is a victim of trafficking. When the victim is over 18, a third party must be employing fraud, force or coercive techniques to compel a person into sexual services in order for the person to be a victim of trafficking.

3.3.2 Labor Trafficking

Activities that may constitute labor trafficking:

- forced labor
- peonage/bonded labor/debt bondage
- involuntary domestic servitude

Labor trafficking may involve sexual violence being inflicted on the victim but the end result in these forms of exploitation is the labor service.

[9] 18 U.S.C. § 2423.

[10] 18 U.S.C. § 1384.

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Sheldon — From Seasonal Worker to Bonded Laborer[11]

A recruiter in Jamaica promised Sheldon a visa through the U.S. federal H-2B seasonal worker program. The processing fee was hefty, but the prospect of working in America seemed worth it. Sheldon arrived in Kansas City eager to work, but ended up at the mercy of human traffickers. Along with other workers from Jamaica, the Dominican Republic, and the Philippines, Sheldon cleaned rooms at some of the best-known hotels in Kansas City. The traffickers kept Sheldon in debt, constantly charging him fees for uniforms, transportation, and rent in overcrowded apartments. Often, his paychecks would show negative earnings. When Sheldon refused to work, the traffickers threatened to cancel his immigration status, making him illegal. In May 2009, a federal grand jury indicted the leaders of this trafficking ring, including eight nationals of Uzbekistan, on charges related to forced labor in 14 states.

Forced labor or involuntary servitude

Involuntary servitude is defined as:

> [a] condition of servitude induced by means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of the legal process.[12]

In other words, forced labor or involuntary servitude is labor provided against an individual's will. She or he may be obligated to work long hours, under inhumane conditions with little or no pay. The entity exacting the forced labor may use methods such as physical force or the threat of physical force, death threats against the victim or the victim's family, threats to denounce the victim to the police or immigration or another entity that may have authority over the victim (e.g., village elders or parents who have sold the victim), debt repayment obligation (the victim's, the victim's family or ancestors), or other financial obligation scheme.[13]

Because immigrants may be undocumented and may be unfamiliar with the language, culture, authorities, rights and protections afforded to them in a new country, they are particularly vulnerable to these forms of coercion.

Peonage (Bonded labor, Debt bondage)

[11] Derived from the U.S. Dep't of State, Trafficking in Persons Report 2010, June 2010.

[12] 8 C.F.R. § 21.11 (a).

[13] International Labor Organization, "The Cost of Coercion," supra.

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"A status or condition of involuntary servitude based on real or alleged indebtedness."[14]

Peonage is when a bond or debt is used to force or coerce an individual to remain in involuntary servitude. Workers around the world fall victim to debt bondage when traffickers or recruiters unlawfully exploit an initial debt the worker assumed as part of the terms of employment.

In the refugee and asylum context, interviewees often assume the initial cost of employment or cost of passage/entry into the third country. Then, upon arrival, once the individuals are isolated and/or restricted in their ability to control their own circumstances, the traffickers may exacerbate the existing debt by charging exorbitant prices for food, clothing, or other basic life or work-related necessities.

You may also see debt bondage amongst legal, documented immigrants. As many foreign nationals enter the country as temporary guest workers (migrant agricultural workers, domestic servants, teachers, nurses, etc.), they are required to remain with their employers as a condition of their legal status. This has the potential to engender a situation where peonage may be easily created or maintained.

Interviewees may also have a fear of harm based on a debt they absconded from in their home countries. For example, in South Asia, in particular, it is estimated that there are millions of victims working to pay off their ancestors' debts.[15]

Involuntary Domestic Servitude

Amita — From Domestic Service to Slavery[16]

Amita came to London from the Middle East as a domestic servant for a family that treated her well and paid her decently. When her employer moved into a high-level job that provided house staff, the family no longer needed Amita. They helped her find work with another family. Amita's new employers took her passport as soon as she arrived and made her sleep on the floor in the living room to prevent her from stealing things and hiding them in her room. They did not pay her or allow her out of the house, and they threatened to report her to the police as an illegal if she tried to run away. Amita worked in the family's house from 6a.m. to 8p.m. After that, she was taken to clean various office buildings until midnight or early morning. One night, the employer's son and his friends were in the house and attempted to rape Amita. After that she decided to run away and managed to escape with the help of a security guard.

[14] 8 CFR § 214.11 (a)

[15] U.S. Dep't of State, Trafficking in Persons Report 2015, July 2015

[16] Derived from the U.S. Dep't of State, Trafficking in Persons Report 2010, June 2010.

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Domestic workers are vulnerable to exploitative conditions because of the nature of their informal work environment. The victim may work as a household servant or as a caretaker of children and live in the employer's house or in adjoining living quarters.

Victims of such exploitation may voluntarily enter into employer/employee arrangements but their situations may evolve over time, or upon arrival in their new country. They may be forced to remain in situations where they become victims of trafficking through force, coercion and sexual exploitation.

Domestic servants may be subjected to verbal abuse, untreated illnesses, deprivation of food, long hours, and, especially in the case of women and girls, sexual abuse and exploitation.[17] As the exploitation occurs in a private residence and the domestic worker is often secluded from outside observation, this type of trafficking would not easily come to the attention of police or other governmental authorities.

3.3.3 Child Trafficking

The age and gender of the trafficking victim are often closely related to the type of trafficking to which they are subjected. Male children are often trafficked to be exploited in forced labor, and illicit activity such as petty crimes and drug trafficking, whereas girls tend to be subjected to sexual exploitation and as forced domestic servants.[18]

A child may become involved in trafficking through any of the following means: the child may have been kidnapped; taken from the street (where the child is homeless); legally or illegally adopted; bought from the parents or caretakers; or been given to the traffickers by the parents or caretakers in order to obtain employment.[19] The victims of such trafficking include the child trafficked, the parents or caretakers (where the child was taken or where false pretenses were used), and even the community from which the child was taken if the traffickers were perceived as legitimate job brokers.[20]

Vipul — A Childhood Lost[21]

Vipul was born into extreme poverty in a village in Bihar, the poorest state in India. His mother was desperate to keep him and his five brothers from starving, so she accepted $15 as an advance from a local trafficker, who promised more money once 9-year-old Vipul started working many miles away in a carpet factory. The

[17] U.S. Dep't of State, Trafficking in Persons Report 2015, July 2015.

[18] Id.

[19] It is important to note that a fraudulent intercountry adoption would only constitute trafficking if it resulted in the child becoming a victim of sex trafficking or labor trafficking.

[20] U.S. Dep't of State, Trafficking in Persons Report 2015, July 2015.

[21] Example derived from the Derived from the U.S. Dep't of State, Trafficking in Persons Report 2010, June 2010.

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loom owner treated Vipul like any other low-value industrial tool. He forced Vipul and other slaves to work for 19 hours a day, never allowed them to leave the loom, and beat them savagely when they made a mistake in the intricate designs of the rugs, which were sold in Western markets. The work itself tore into Vipul's small hands, and when he cried in pain, the owner stuck Vipul's finger in boiling oil to cauterize the wound and then told him to keep working. After five years, local police, with the help of NGO activists, freed Vipul and nine other emaciated boys.

Types of exploitation[22] to which children in particular might be subjected include the following:

- Labor Exploitation – examples include farming, fishing, domestic servitude, mining, market or street vending, begging, camel jockeying, textile industry, restaurant/hotel work, and shop keeping.
- Sexual Exploitation/Child Sex Trafficking
  - Induced into performance of commercial sex acts.
- Military Conscription/Child Soldiers
  - Victims are often forcibly abducted or "recruited" by government forces, paramilitary organizations, or rebel groups.
  - Victims may be used as combatants, human shields, porters, cooks, guards, servants, messengers, or spies. Young girls may be subjected to forced marriage or forced to have sex with male combatants.
  - Child soldiers of either gender are often sexually abused and are at high risk of contracting sexually transmitted diseases.
- Forced marriage
  - Forced or coerced marriages are used by parents and families for a variety of reasons, such as:
    - to settle debt, receive compensation/dowry, create social ties among families, obtain residency permits, display status, provide inheritance, or to counteract promiscuity.
  - The existence of a forced marriage does not necessarily present a case of human trafficking. When you encounter a case where a minor is married or when an

[22]U.S. Dep't of State, Trafficking in Persons Report 2015, July 2015.

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individual testifies that she or he was married against their will, you should inquire into the terms of the marriage, if there was a bride price and whether conditions of exploitation coupled with one of the three means (force, fraud, or coercion) has been or is being employed. The common forms of exploitation seen in forced marriages may include slavery-like conditions in the form of domestic or sexual servitude.

- Delinquent behavior – carrying out criminal activities for others
  - This may arise in the context of homeless or street children and/or children who live in territories controlled by gangs who are compelled to provide services to local gangs, criminal entities or other third parties in order to survive.

3.3.4 "Re-Trafficking"

The term re-trafficking was coined to describe a situation in which a trafficked individual falls victim to further trafficking upon return to his or her home country. Individuals may be re-trafficked by the same trafficker that initially exploited them or another individual. In the refugee and asylum context, the issue of "re-trafficking" may arise in an interviewee's discussion of their persecutor and fear of future harm if she or he returns to the home country.

Traffickers often target individuals from families, communities and/or countries which are suffering from socioeconomic and other forms of instability. The individual may have been homeless, sold by his or her family or kinship network, or come from a particularly disadvantaged or disfavored group. The government in the victims' countries may also be unable or unwilling to protect these individuals from the traffickers for a range of reasons, including its own antagonism to a specific population, apathy, lack of resources, and/or general lawlessness and corruption of the security and political authorities in their country.

The same conditions that initially rendered individuals and their communities vulnerable to traffickers likely still exist. After the individual has been trafficked, she or he may suffer from physical and psychological trauma (including shame and humiliation) which left unaddressed could render her or him vulnerable to further manipulations and coercive tactics of the traffickers.

At the practical level, once a trafficker has victimized an individual, it is relatively easy for the trafficker to locate the victim again. The trafficker is likely to have knowledge of or access to the victim's personal biographical information, his or her family, and even relationships with the authorities in the individual's home locality and/or country.

3.4 Differentiating Human Trafficking from Other Crimes

3.4.1 Trafficking Victim Liability for Criminal Activities

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Through the course of being trafficked, an individual may be induced to participate in activities which in and of themselves, constitute crimes under U.S. law. The TVPRA absolves trafficking victims of criminal liability for crimes resulting from their being trafficked.

Examples of this include the following: An individual trafficked in the United States for the purpose of sexual exploitation would not be held criminally liable for the sex acts she or he performed while she or he was trafficked. An individual who was transported into the United States and then exploited would not be criminally liable for his or her illegal entry and/or use of invalid documents.

An interviewee with a criminal record involving certain crimes could raise a red flag to you that she or he may be a victim of trafficking.

3.4.2 Fraudulent Intercountry Adoption Does Not Constitute Human Trafficking

"Over the past few years, the term 'trafficking' has often been used as informal shorthand to refer to any type of inappropriate movement of people across international borders."[23] This is incorrect and often leads to certain fraudulent intercountry adoptions being mislabeled as child trafficking. In many African countries, including Ethiopia, Sierra Leone, Liberia, Madagascar, and Lesotho, fraudulent intercountry adoptions are officially referred to as trafficking.

However, under U.S. law there is a clear distinction between trafficking in persons and illicit intercountry adoption practices, including child-buying and fraud. Human trafficking is the exploitation of a person for the purposes of forced labor or commercial sex. (Please see Section 3 above for the complete definition of human trafficking.) Children undergoing intercountry adoption may be victims of bad actors engaged in criminal practices or other questionable procedures, but a fraudulent intercountry adoption would only constitute trafficking if the adoption was completed for the purposes of forced labor or commercial sex.

One type of illicit intercountry adoption practice that is most often confused with trafficking is "child-buying."[24] Since trafficking and child-buying can both involve the giving/receiving of unlawful payments/benefits, many assume that child-buying for adoption is a form of human trafficking. However, that is not always the case. Whereas child-buying is an unacceptable, illegal practice that can occur in the context of an intercountry adoption, it does not necessarily constitute human trafficking under U.S. law. Cases where child-buying occurs during an intercountry adoption, but is not for the purposes of commercial sex or forced labor, would not meet the criteria for trafficking as

[23] Fraudulent Intercountry Adoption Does Not Constitute Trafficking in Persons, Department of State cable 11 STATE 64500 (Jun. 27, 2011)

[24] See 8 C.F.R. § 204.3(i) for non-Hague cases and §§ 204.304 and 204.309(b)(3) for Hague cases.

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defined by TVPRA, and under U.S. law would solely be classified as illicit adoption practices.

> **Trafficking v. Child-buying**
>
> If prospective adoptive parents adopt and emigrate a child to the United States using the correct immigration process, there would be no element of child trafficking unless the adoption was for the purpose of forced sex or labor. This is true even if there were concerns of fraud and/or child-buying in connection with the adoption.
>
> For example, if a businessman from Costa Rica paid money to obtain custody of a local villager's daughter, then formally adopted her and moved the child to El Salvador to work in a factory, this may constitute trafficking. Alternatively, if a person connected to an orphanage paid a birth mother in Vietnam to release her child and that child was in turn adopted by a U.S. family, this may meet the definition of child-buying but would not in itself constitute trafficking.

3.4.3 Human Trafficking Distinguished from Smuggling

The terms human trafficking and human smuggling are often used interchangeably when they are, in fact, distinct crimes. Under U.S. law, the crime of smuggling is generally defined as: "the importation of people into the United States involving deliberate evasion of immigration laws." This offense includes bringing undocumented aliens into the United States illegally, as well as the unlawful transportation and harboring of aliens already in the United States. The end result of a smuggling agreement is that the individual arrives in the destination country, and after having paid the smuggler the previously-agreed upon fee, the relationship between the two parties ends. Individuals who have been smuggled may have experienced or witnessed violence, including murder, kidnapping, rape and other crimes, but the presence of these aggravating factors alone does not constitute human trafficking.[25]

> **U.S. v. Jimenez-Calderon et al.—Smuggled Into Trafficking**
>
> Between October 2000 and February 2002, Antonia Jimenez-Calderon, Librada Jimenez-Calderon, and their brothers conspired to recruit underage girls from Mexico to perform acts of prostitution in the United States. The brothers would target young girls from poverty-stricken areas in Mexico, and lure them away from their families and communities with false promises of love, marriage, and a better

[25] INA § 274; ICE Office of Investigations Memo "Definitions of 'Human Smuggling' and 'Human Trafficking'", dated December 13, 2004.

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life. Once smuggled into the United States the girls were held captive and forced into prostitution in a brothel in New Jersey.[26]

Human trafficking involves an act of compelling or coercing an individual to perform labor services or commercial sex acts. These two crimes are often mistaken for one another. As discussed above (3.2.1 Acts/Mobilization), under the TVPA definition of trafficking, one of many methods a trafficker may use to mobilize an individual to be trafficked is to transport him or her. A trafficker may "smuggle" an individual into another country against his or her will in order to exploit him or her upon arrival, or the trafficker may misrepresent him or herself as a smuggler and then change the terms of the agreement once the individual arrives in the destination country. However, the act of smuggling an individual and/or being smuggled has no direct relationship to the crime of trafficking itself.

Complicity is not Always a Crime

An individual's willingness to be smuggled into another country does not minimize the victimization he or she may experience at the hands of a trafficker.

The chart below highlights the factors that distinguish the crime of smuggling from human trafficking:[27]

	Smuggling	Trafficking
Purpose	Obtain illegal entry into the United States	Recruiting, transporting, harboring or receiving persons by force or coercion for the purpose of exploitation
Consent	Consented to be smuggled	May or may not have consented, or initial consent rendered meaningless by coercive or abusive actions

[26] U.S. v. Jimenez-Caleron, Criminal Section Selected Case Summaries, U.S. Department of Justice, located at http://www.justice.gov/crt/about/crm/selcases.php#humantrafficking.

[27] INA § 274; ICE Office of Investigations Memo "Definitions of 'Human Smuggling' and 'Human Trafficking'", dated December 13, 2004.

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		of the traffickers
Result	Ends with arrival into the United States	Involves ongoing exploitation

3.5 Rights and Immigration Relief for Victims of Human Trafficking

With each re-authorization of the TVPRA, the U.S. Government response to trafficking has become more comprehensive, as has its ability to extend protection to victims and to more aggressively investigate and prosecute these crimes.

Victims of trafficking who are present in the United States, especially undocumented foreign nationals, will likely not be aware that the crimes being committed against them are punishable under U.S. law, and that they have rights and could be eligible for benefits in the United States because of the crimes committed against them. Human traffickers also often use the threat of reporting the victim to immigration authorities as a way of keeping the victim under their control.

In order to provide protection to those who are undocumented and to enable these individuals to participate in law enforcement investigations, immigration law provides specific forms of relief from removal for such victims of severe forms of trafficking and benefits from the U.S. Department of Health and Human Services, similar to the benefits granted to refugees. Trafficking victims may also qualify for other forms of relief available to all qualifying aliens under immigration law, such as asylum or withholding of removal.

During the course of your work, you may encounter interviewees who have received or have pending applications for trafficking-related immigration benefits. It is important for you to understand the significance of these documents only so far as it furthers your understanding of the interviewee's claim during their adjudication.

The forms of immigration relief available to victims of severe forms of human trafficking include:

- Continued Presence
- T Visa
- U Visa
- Asylum/Withholding of Removal

3.5.1 Continued Presence (CP)

CP is a temporary immigration status provided to individuals identified by law enforcement as victims of human trafficking. In order to qualify, the individual must be an identified victim of trafficking who is a potential witness in the investigation or prosecution of the trafficker.

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This status allows such victims to remain in the United States temporarily during the ongoing investigation into the human trafficking-related crimes of which they were victims. CP is initially granted for one year and may be renewed in one-year increments. It provides victims a legal means to temporarily live and work in the United States for the duration of the investigation of the trafficking case and/or the adjudication of another form of immigration relief.[28]

Only federal law enforcement officials are authorized to apply for CP on a victim's behalf and applications are submitted to ICE HQ for consideration. If granted, the victim becomes eligible for a work permit and U.S. Department of Health and Human Services benefits.[29]

3.5.2 T Visa

The T visa provides a victim of trafficking with four years of legal status in the Unites States, which can be extended, and the possibility of becoming a Lawful Permanent Resident (LPR). T visa recipients receive work authorization, and may also request advance parole and may seek derivative status for their relatives (spouse, children, and, if the recipient is under age 21, parents and unmarried siblings under age 18).[30] A trafficked person may meet the requirements for T visa eligibility if he or she:

- is or was a victim of trafficking, as defined by law
- is in the United States or its territories, or at a port of entry due to trafficking
- complies with any reasonable request from law enforcement for assistance in the investigation or prosecution of the human trafficker
- demonstrates that he or she would suffer extreme hardship involving unusual and severe harm if removed from the United States
- is admissible to the United States or, if inadmissible, qualifies for a waiver

An application for a T Visa is completed on a Form I-914, Application for T Nonimmigrant Status. Click on the link below for more detailed information about eligibility requirements for T visas.

- T Visa Eligibility Requirements

[28] 22 U.S.C. § 7105(c)(3)

[29] ICE Information Pamphlet, "Continued Presence: Temporary Immigration Status for Victims of Trafficking," http://www.dhs.gov/xlibrary/assets/ht-uscis-continued-presence.pdf.

[30] INA § 1101(a)(15)(T)(ii)

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The requirements for a T visa, specifically the need to be physically in the United States on account of said trafficking, should not be confused with the definition of a trafficking victim. If you come across a file which contains a T visa application, you should only use the information it contains to elicit more nuanced testimony that substantiates or discredits the interviewee's claim to the extent it is relevant to your adjudication. DHS employees are prohibited by statute from disclosing information related to T visa applicants to anyone outside the Department.[31]

3.5.3 U Visa

The U visa provides immigration status to victims of twenty-eight specified serious crimes including trafficking, domestic violence, involuntary servitude, and kidnapping.[32] The U visa affords similar benefits as the T visa, including four years legal status, with the possibility of extension, LPR status after three years if the alien qualifies, work authorization, and advance parole. The individual may also seek derivative status for his or her relatives (spouse, children, and, if the recipient is under age 21, parents and unmarried siblings under age 18). Eligibility for a U visa requires that an individual:

- is or was the victim of qualifying criminal activity
- is or has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity
- has information about the criminal activity
- is, was, or is likely to be helpful to law enforcement in the investigation or prosecution of the crime
- was involved in a crime that occurred in the United States or violated U.S. laws
- is admissible, or if inadmissible, able to qualify for a waiver

An application for a U-Visa is completed on a Form I-918, Petition for U Nonimmigrant Status. Click on the link for below for more detailed information about U-visas.

- U Visa Eligibility Requirements

As with the T visa, if you come across a file which contains a U visa application, you should only use the information it contains to elicit more nuanced testimony to the extent that it substantiates or discredits the interviewee's claim and is relevant to your adjudication. Also as with T visa applicants, DHS employees are prohibited by statute

[31] 8 U.S.C. § 1367(a)(2).
[32] INA § 1101(a)(15)(U)(iii)

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from disclosing information related to U visa applicants to anyone outside the Department.[33]

The fact that an individual's legal advocate made the strategic and discretionary decision to apply for a U visa on an individual's behalf in lieu of a T visa is in no way determinative as to whether an individual is a victim of trafficking.

> **Two Visas for Trafficking?**
>
> The "T" nonimmigrant status, also known as the "T" visa, was created to provide immigration protection to victims of a severe form of human trafficking. The "U" nonimmigrant status, or "U" visa, is designated for victims of certain crimes who have suffered mental or physical abuse because of the crime and who are willing to assist law enforcement and government officials in the investigation of the criminal activity.
>
> Congress created the "T" and "U" nonimmigrant classifications with passage of the TVPA in October 2000. The legislation was intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of persons and other crimes while, at the same time, offering protection to victims of such crimes.[34]

3.5.4 Refugee/Asylum/Withholding of Removal/Credible Fear

A victim of trafficking or an individual who fears being trafficked in his or her country of origin may be eligible for refugee or asylum status or withholding of removal as would any other individual who meets the definition of a refugee. The United Nations Office of the High Commissioner for Refugees recognizes that not all victims or potential victims of trafficking fall within the scope of the refugee definition. However, on occasions where trafficking victims do fall within the refugee definition, the international protection community has a responsibility to recognize it as such and afford the corresponding international protection.[35] Click on the link below for specific information about asylum and refugee eligibility for trafficking victims.

- Eligibility requirements for asylum or refugee status

[33] 8 U.S.C. § 1367(a)(2).

[34] Fact Sheet: USCIS Publishes New Rule for Nonimmigrant Victims of Human Trafficking and Specified Criminal Activity.

[35] Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, UN High Commissioner for Refugees (UNHCR), 7 Apr 2006, 17 p.

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4 ENCOUNTERING VICTIMS OF HUMAN TRAFFICKING

The officers and agents of the three DHS front-line agencies, U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP), are most likely to encounter potential victims of trafficking during the course of their daily work. An ICE agent may encounter a trafficking victim during an investigation or operation, whereas a CBP officer may intercept someone who is being smuggled or who is attempting entry into the United States through a port of entry. Officers within one of the three RAIO divisions may encounter a potential victim of trafficking in the context of the adjudication of a request for an immigration benefit.

Indicators that an interviewee may be a victim of trafficking may surface prior to, during, and/or after the interview adjudication.

4.1 "What Does a Human Trafficking Victim Look Like?"

Trafficking victims can include individuals from any country, of any age, gender, nationality, educational background and immigration status. Trafficking may take place in "underground" operations, like illegal brothels, sweatshops, factories, mines, agriculture fields, fishing vessels or private homes. However, trafficking is often carried out in public establishments such as bars, restaurants, nightclubs, casinos, hotels and massage parlors, or in street vending and/or begging.

While a trafficking victim's experience may be quite unique, there are certain risk factors, patterns and trends in trafficking among different demographics in the population that you interview (within ethnicities, countries of origin, age, and gender) of which you should be aware. This knowledge will assist you in detecting and discerning indicators of trafficking from other concerns for a particular interviewee.

Addressing the Myths about Trafficking Victims

- Trafficking is not equivalent to smuggling. It does not require forced movement or border crossing.
- Trafficking does not require physical force, kidnapping, restraint or abuse.
- The consent of the victim is considered irrelevant, as is payment.
- Not all trafficked people have been trafficked for the purposes of sexual exploitation.
- Those who migrate legally can be victims of trafficking.

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- Women and children are not the only victims of trafficking.
- Trafficking is not only a problem in Eastern Europe and Southeast Asia.
- Trafficking is not only a problem amongst the uneducated and poor.

4.2 Detecting Indicators of Human Trafficking

As discussed above, as an officer in the RAIO directorate you are responsible for detecting indicators that the interviewee before you may have been trafficked or may be at ongoing risk of trafficking, and following appropriate procedures within your division depending on the circumstance.

4.2.1 Pre-Adjudication File Review

Prior to the adjudication of a benefit, you may have the opportunity to review the case file.

Documents or database notations that may indicate that the interviewee may be a victim of trafficking include:

- Notations within database records from other agencies regarding investigations, encounters, or contact with informers that indicate that the person has been or is being trafficked. Please keep in mind that such notations may be entered post-USCIS interview but prior to final adjudication.
- Documents from other federal agencies such as DOS, ICE, CBP, etc. that indicate a past encounter with the interviewee indicative of a possible trafficking or smuggling situation.
- Documents from other federal agencies that indicate a past or ongoing investigation or operation regarding trafficking or smuggling.
- Documents or applications for continuing presence or T or U visas present in file.
- Criminal court documents/Database hits that show that the interviewee was arrested for a type of crime in which a trafficking victim might be subjected to exploitation.
- Letters from informants or "snitches."
- Unusual travel patterns indicated in application documents. Such patterns may indicate possible trafficking or smuggling routes.

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- Travel from foreign countries that are known for being a source area for trafficking victims.[36]

- Employment in the United States or abroad that may indicate that interviewee has been or is being exploited.

- School-age children who have not listed attendance in school (minor principal interviewees),

- Background information on the application indicates that the interviewee is from a group in society that would be particularly vulnerable to trafficking and the interviewee's presence in the United States or the country from which he is requesting the benefit does not appear to be logical given that background. An example of this may be an unaccompanied minor with uncertain ties in the United States.

If there are indicators that the interviewee before you has been trafficked, you must still maintain your focus on trying to elicit sufficient testimony related to his or her eligibility for the particular benefit you are adjudicating. You may also provide the interviewee with informational pamphlets to fulfill the TVPRA mandate, as appropriate, taking care to note the circumstances of the interviewee as she or he may be endangered if such pamphlets are provided in the presence of the trafficker. If there are indicators that the interviewee is currently in a trafficking situation, you should advise your supervisor as soon as possible. This may be prior to adjudicating the benefit or even during pre-interview file preparation or during the interview, if appropriate.

> Depending on the nature of the evidence and the nature of the situation, your supervisor or Office Trafficking Coordinator may need to contact local ICE or other agents, who may have additional information or desire to be present in the event that you interview the individual. Remember that the necessity to contact law enforcement can arise at any stage of the adjudication process.

4.2.2 Screening for Potential Victims of Trafficking: Suggested Lines of Inquiry

Individuals who have been or are in the process of being trafficked or exploited experience a significant loss of control over their lives and activities. During their testimony, such interviewees may testify regarding an area of their life being controlled by another person. Additionally, human trafficking victims may have visible signs of abuse or exhibit behaviors that are associated with people who have been victimized. Such "red flags" may alert you to the fact that the interviewee is or has been a victim of human trafficking.

[36] Such as countries designated as "Tier 2," "Tier 2 watch list" or "Tier 3" in the DOS TIP reports. See: http://www.state.gov/j/tip/rls/tiprpt/2011/index.htm

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The information in the links below was designed to assist you in eliciting further information from interviewees in interviews where a red flag has been raised, so that you can determine with more certainty whether the interviewee is a victim of human trafficking. These lines of inquiry will improve your ability to articulate your concerns about the interviewee's current situation to your office management and in office referrals to law enforcement. You should keep in mind that the lists are not all-inclusive and only serve as a framework for questioning. Every interview will be different as your questions will be tailored to the interviewee based on his or her answers to the questions.

You are not expected to indiscriminately run through lists of questions. You are expected to select a few choice questions that directly relate to the red flag that has been raised in the interview and which would not appear unusual in the course of the interview. You are expected to proceed with questioning in an extremely sensitive manner, taking into account that any individuals accompanying the interviewee may be affiliated with the trafficker.

Suggested Lines of Inquiry by Subject Matter

- Understanding Asylum Benefits and Process
- Physical health/behavior
- Recruitment/Migration
- Identification
- Working Conditions
- Debt Questions
- Living Environment/Transportation
- Social Ties/Conditions
- Force, Fraud, Coercion
- Minor: Under 18
- Safety Assessment (if interviewee alone and expresses fear)

4.2.3 Other Indicators of Trafficking

If during the interview you discover indicators that the interviewee is currently in a trafficking situation, you should advise your supervisor prior to concluding the interview. In all cases, follow the procedure for such cases in your particular office.

4.2.4 Interviewing Where the Victim is Accompanied by a Third Party

If your interviewee is accompanied by a third party who appears potentially suspicious, such as an interpreter, representative, or (in the case of a minor child) a parent or trusted

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adult, you do not want to alert them to your suspicions as he/she may be working with the trafficker. Whenever possible, the interviewee should be questioned in regard to the trafficking concerns apart from such persons, preferably using a trusted person who speaks the interviewee's language. Because of the complicated nature of interviewing individuals in these circumstances, you should consult your division's procedures for specific instructions.

4.3 Other Adjudication Considerations

In a case where the trafficking-related experience that an interviewee testifies to relates to the basis of a protection claim, the interviewee is forthcoming about his or her claim, and does not appear to be at ongoing risk, officers apply the facts of the case, including the trafficking-related elements, to the protection-related legal analysis. Identifying and understanding the type of trafficking the victim suffered can inform the questions you ask to elicit more complete testimony.

If an interviewee is not forthcoming about a trafficking experience and you suspect she or he is currently being trafficked, his or her testimony may arouse suspicions as to his or her credibility when, in fact, there may be reasons other than abject fraud for this behavior. For further guidance and considerations, see RAIO Training modules, Children's Claims, Evidence Assessment, and Interviewing–Interviewing Survivors of Torture and Other Severe Trauma.

4.4 Issues Affecting Benefit Eligibility for Trafficking Victims and Traffickers

The Immigration and Nationality Act (INA) has various legal provisions that are applicable to interviewees who have committed or been convicted of a crime related to human trafficking. Additionally, sometimes the victim of the trafficking crime may have been forced or coerced into committing acts such as theft, drug trafficking, or prostitution that constitute crimes that might be impediments to obtaining immigration status.

Positive results from a background check and/or police or criminal court documents found in the file regarding criminal offenses such as the ones described above, in addition to being evidence of a possible impediment to an immigration benefit, may be an indication that the person is or has been a victim of human trafficking.

4.4.1 Trafficking Victim

A victim of trafficking may have been forced to engage in or have been convicted of a criminal act, such as larceny, drug carrier, prostitution, or other illegal vice, and this activity may render him or her subject to criminal or security inadmissibility grounds under INA § 212 (a)(2) and (a)(3)(b). These interviewees may be eligible for exemptions or waivers. If you interview such an individual, be sure to elicit full testimony as to the nature and type of coercion involved in securing the interviewee's participation or support of the criminal activities as this information may not only assist law enforcement, but also may establish the victim's eligibility for an exemption or waiver if necessary.

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4.4.2 Trafficker

If your interviewee has demonstrated participation in criminal behavior that indicates she or he has colluded in trafficking crimes, you must review this activity to determine if it is a bar to eligibility for the benefit you are adjudicating, or if a ground of inadmissibility applies.

In addition to being subject to a mandatory bar in the asylum context, an alien who is found to have persecuted others on account of a protected ground may not be considered a refugee under the refugee definition and therefore would not be eligible for refugee status or asylum status within the United States.[37]

4.4.3 Additional Resources

Department of State, Trafficking in Persons Report (TIP)

- An annual report produced by DOS to evaluate foreign governments' responses to trafficking. The TIP report is the premier U.S. Government resource on trafficking trends and includes country-specific narratives that describe the specific at-risk populations and types of trafficking in each country. For the most current report visit DOS TIP Report.

National Human Trafficking Resource Center (NHTRC)

- A Department of Health and Human Services (HHS) funded hotline providing comprehensive resources for victims, government and NGO practitioners on all trafficking-related issues. Hotline number: 1-800-3737-888.

UNHCR Report "Refugee Protection and Human Trafficking"

- A December 2008 report analyzing the interaction of refugee protection and human trafficking. The resource list at the end is a very comprehensive list of legal documents and country-specific reports that have been published on trafficking. http://www.unhcr.org/publ/PUBL/4986fd6b2.pdf.

[37] INA § 101 (a)(42).

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PRACTICAL EXERCISES

Practical Exercise # 1

- Title:
- Student Materials:

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OTHER MATERIALS

Other Materials – 1

Definition of Terms

Coercion: Threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process. [return]

Commercial sex act: Any sex act on account of which anything of value is given to or received by any person. [return]

Debt bondage: The status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined. [return]

Involuntary servitude: A condition of servitude induced by means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of the legal process. [return]

Peonage: A status or condition of involuntary servitude based on real or alleged indebtedness. [return]

Slavery: (according to Art. 1, Slavery Convention, 1926 as amended by 1953 Protocol) The status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised. [return]

Smuggling: (according to Article 3(a) of the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air): The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident. Smuggling contrary to trafficking does not require an element of exploitation, coercion, or violation of human rights.

Trafficking in persons (according to Article 3 of the Palermo Protocol): The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery,

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servitude or the removal of organs. [return]

Other Materials - 2

T visa Eligibility Requirements

The eligibility requirements for the T visa can be found at INA § 101(a)(15)(T) and at 8 CFR § 214.11. To be eligible for a T visa, the alien:

- Is or has been a victim of a severe form of trafficking in persons;
- Is physically present in the United States, American Samoa, Northern Mariana Islands, or at a port of entry on account of such trafficking;
- Has complied with a reasonable request for assistance in the investigation or prosecution of acts of trafficking or is under 18 years old or is unable to cooperate with a request for assistance due to physical or psychological trauma;
- Would suffer extreme hardship involving unusual and severe harm upon removal;
- Must be admissible, or if inadmissible under any ground of inadmissibility applicable to T visa applicants, must be eligible for a waiver of inadmissibility; and
- Must merit a favorable exercise of discretion.

Exemptions and waivers exist for T visa applicants and can be found at INA § 212(d)(13)(A) & (B). T visa applicants are not subject to the public charge ground under INA § 212(a)(4) and may be granted a waiver of any other inadmissibility ground, except provisions regarding terrorist activity (212(a)(3)) and miscellaneous grounds such as child abduction and renunciation of U.S. citizenship to avoid taxation (212(a)(10)(C) & (E)), if the activities rendering the alien inadmissible were caused by or incident to the victimization and if the Secretary of Homeland Security considers a waiver grant to be in the national interest.

Other Materials – 3

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U Visa Eligibility Requirements

The eligibility requirements for the U visa can be found at INA §101 (a)(15)(U) and at 8 CFR § 214.14. To be eligible for a U visa, the alien must establish that:

- The alien has suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity, which includes trafficking;
- The alien possesses information concerning that qualifying criminal activity (or in the case of an alien child under the age of 16, the parent, guardian or next friend of the alien);
- The alien has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement investigating or prosecuting one of the qualifying criminal activities (or in the case of an alien child under the age of 16, the parent, guardian or next friend of the alien);
- The criminal activity described violated the laws of the United States or occurred in the United States;
- The alien must be admissible, or if inadmissible under any ground of inadmissibility applicable to U visa applicants, must be eligible for a waiver of inadmissibility;
- The alien merits a favorable exercise of discretion.

With the exception of INA § 212(a)(3)(E) (participants in Nazi persecution, genocide, and/or torture), all inadmissibility grounds may be waived under INA § 212(d)(14) if the Secretary of Homeland Security considers that it would be in the public or national interest to do so.

Qualifying Criminal Activities

- Abduction
- Abusive Sexual Content
- Blackmail
- Domestic Violence
- Extortion
- False Imprisonment
- Female Genital Mutilation
- Felonious Assault
- Fraud in Foreign Labor Contracting

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- Hostage
- Incest
- Involuntary Servitude
- Kidnapping
- Manslaughter
- Murder
- Obstruction of Justice
- Peonage
- Perjury
- Prostitution
- Rape
- Sexual Assault
- Sexual Exploitation
- Slave Trade
- Stalking
- Torture
- Trafficking
- Witness Tampering
- Unlawful Criminal Restraint
- Other Related Crimes

Other Materials – 4

Eligibility Requirements for Asylum or Refugee Status

Harm

Victims of trafficking are widely known to have experienced harm (physical and emotional coercion, severe forms of labor and sexual exploitation, threats to their life) to a level of severity that would constitute persecution. This harm may be inflicted or condoned by the government of their country, those closely affiliated with branches of their government, or by individuals and/or groups that the government of the country they are fleeing cannot or

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does not control.

Protected Characteristics

A central part of the analysis will focus on whether the persecutor selected the individual indiscriminately and then trafficked him or her for purely opportunistic criminal reasons or if the persecutor was motivated to harm the victim on account of one of the five protected grounds possessed by or imputed to the victim. In some countries, traffickers may target members of particular ethnic or political minorities, which would fit under the traditional rubric of the nationality and political opinion protected characteristics.

Victims may be targeted on account of their status as members of a particular social group, which would require evidence from country conditions reports and a proper legal analysis. See RAIO Training module, Nexus and the Five Protected Grounds. Traffickers associated with organized crime or insurgent groups may also have authority or influence over a particular area in a given country such that sub-groups within that area may be considered members of a particular social group. A potential particular social group may be based on an interviewee's status as a victim of trafficking (e.g. "formerly-trafficked COUNTRY females/children/ males") if country conditions reports indicate that trafficking victims who return to their country of origin may be targeted and suffer harm.

Immediately below are sample inquiries relevant to particular social groups that might be used to elicit a possible nexus to a protected ground from a trafficking victim:

- Does the interviewee possess a protected characteristic or could a protected characteristic be imputed to the interviewee?
- Was the perpetrator aware of any such actual or imputed characteristic?
- Does the interviewee know any other persons that were victimized by the feared perpetrator? Did any such victims share common characteristics with the interviewee?
- Did the interviewee know the perpetrator before the harm was committed?
- Is the perpetrator or feared perpetrator a person of power or connected with persons of power in the area in which the interviewee lived?
- Was interviewee targeted as punishment for the protected characteristic? E.g., the interviewee belonged to a rival political group, belonged to particular tribe, minority nationality, minority religion, etc.?
- Does or did the interviewee have shared, immutable or fundamental characteristics that are sufficiently visible within her or his society that facilitated or made trafficking of the victim advantageous?
- Do country conditions indicate that the interviewee is similarly situated to groups that

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are selected for harm within her or his country or country of last habitual residence?

- Does the interviewee come from a city/region/country where human trafficking is prevalent? Do populations targeted for trafficking in that country share common characteristics?
- Is the interviewee aware of human trafficking victims who have been returned to their country? Have they had any problems?

Country Conditions Evidence

The Department of State Annual Trafficking in Persons Report (and other country conditions reports) outline the demographic groups at risk for trafficking in each country and monitor and evaluate individual government's efforts to prevent trafficking crimes, protect victims of such crimes, and prosecute those responsible for trafficking others. These resources should be consulted to assist you in making a determination and substantiating your position as to whether the interviewee suffered past persecution or has a well-founded fear of persecution on account of one of the protected characteristics, and whether she or he was targeted by the government or by an entity that the government remains unable or unwilling to control.

NOTE: As mentioned above, the following lines of suggested inquiry are meant to serve as a guide and not an exhaustive list of interview questions. RAIO officers should always tailor interview questions to the specific facts of each interview.

Other Materials – 5

Understanding Benefits and Application Process

Indicators	Suggested Questions
• Interviewee does not understand/ know what she or he is applying for • Interviewee has inconsistencies in his or her story • Interviewee is accompanied by someone who is speaking on his or her behalf • Interviewee uses false identification papers	• Do you know why you are here? • What will happen if you receive the benefit? • Who prepared your application? • Was it read back to you? • Were you given any materials to help you during your interview?

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	• If you are granted the benefit, will you be in debt to anyone? • What is your relationship to the person accompanying you? • How did you meet the person accompanying you/interpreter/ preparer/attorney/ representative? • Where did you get these documents?

Other Materials – 6 Physical Health/Behavior[38]	
Indicators	Suggested Questions
• Interviewee exhibits paranoia, fear, anxiety, depression, tension, nervous behavior • Interviewee displays heightened emotionality that in some way is inconsistent with the benefit request being presented • Submissive, tense, nervous behavior and/or avoids eye contact[39] • Reluctance to speak in front of people of shared background • Reluctance to speak with someone of	• Do you have any mental or physical health issues? How long? Cause? • Do you feel uncomfortable speaking about any issues in your claim with a male/female officer? Or with me for any particular reason? • How many meals/day do you eat? • Can you eat anytime you want? Is your food locked up? • Do you have to pay for food? • If you pay your employer for food, could you also buy food from anyone else if you want?

[38] Officers should keep in mind that most, if not all, of these indicators are fairly common in victims of torture/trauma/abuse in the asylum/refugee context.

[39] Although these might be indicators of trafficking, officers should keep in mind that all of these behaviors may be appropriate/expected depending on the culture of the interviewee and be unrelated to trafficking concerns.

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opposite or same gender • Signs of poor health/ malnourishment. • Visible physical injuries (scars, cuts, bruises, burns) • Tattoos or other marks	• Were you ever hungry? • Do you have to ask permission to eat? • Do you eat together with the people you are living with? Do you eat the same food as the people you are living with? • How did you receive your injuries? Have you seen a doctor for your injuries? • Where did you receive those tattoos or markings? What do they mean?

Other Materials – 7 Recruitment/Migration	
Indicators	Suggested Questions
• Interviewee was recruited for one purpose and forced to engage in another job • Interviewee was brought to the United States against his or her will • Interviewee did not know his or her destination was the United States • Interviewee did not arrange his or her own travel • Interviewee is not informed about means and method of travel from home country	• Why did you come to the United States? • How did you get here? • Who did you come with? • How did you get your passport? • Who arranged your travel? • Who paid for your ticket to come? • Do you owe money for your trip? • Did you incur a debt before you left your country? • If so, how did you pay it?

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	• How much did you pay the smuggler? • Who picked you up from the airport? • How did you find out about the job? • What did you expect when you came? • What was it like when you started to work? • What did you end up doing? • Were you scared?

Other Materials – 8 Identification	
Indicators	Suggested Questions
• Interviewee is not in possession and/or control of his or her documents • Employer is holding interviewee's identity and/or travel documents	• When you traveled to the United States were you able to keep your identification documents with you or did someone take them from you? • Do you have any papers? • Do you have your passport and identity documents? If not, who has them? • Do you have access to them? • Where are they kept?

Other Materials – 9 Working Conditions

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Indicators	Suggested Questions
• Interviewee is not in control of his or her own money • Interviewee expresses lack of freedom to leave working conditions • Interviewee was forced to perform sexual acts as part of employment • Interviewee was forced to work extensive hours without fair compensation	• Are you in school? • Are you working? • What kind of work do you do? • How did you get this job? • Are you paid? How much? • How often? • What are your work hours? • How much do you make per hour? • Do you get overtime pay? • Were you able to discuss how much you were getting paid with your employer? • Do you owe money to your boss or someone else? • What would have happened if you didn't give that person your paycheck? • If you were sick, could you take a day off or stop working? • Can you take days off work? • How much time could you take off? • Has your boss told you that you owe money? • Did anyone ever take your income? • Can you keep your money? • Can you leave your job if you want? Did

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	you ever? Why or why not? • Were you able to take breaks when you wanted to? • What happens if you make a mistake at work? • Are there guards at work or video cameras that monitor and ensure no one leaves? • What did you fear would happen if you left? • Are you ever forced to do something you don't want to do? • Did anyone ever threaten to hurt you or your family if you did not work? • Are you afraid of your employer? Why? • Did anyone force you to cook or clean the house? • If you worked outside the home, were you lied to about the type of work you would be doing when you accepted the job? • Did your employer tell you what to say to immigration officials or law enforcement? • Did your employer ever threaten to have you arrested?

Other Materials – 10 Debt Questions	
Indicators	Suggested Questions

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• Interviewee's salary is being garnished to pay off debt (Paying off smuggling fee alone is not trafficking but is a red flag.)	• How much money did you have left over after you paid everything you need to pay? • Could you spend your money the way you want to? • Did the person who pays you ever "save" or "hold" money for you? • Do you owe anyone money? If so, who is it and why? • How did you incur the debt? • How long have you had your debt? • Is it increasing? If so how is it increasing and why? • Do you feel it's difficult to pay off your debt and why? • What do you think will happen to other people in your life if you don't pay? • Do you have weekly/monthly expenses to your employer? What are they?

Other Materials – 11 Living Environment/Transportation	
Indicators	Suggested Questions
• Interviewee exhibits lack of knowledge of his or her own whereabouts (jurisdiction) • Interviewee has been harmed or deprived of food, water, sleep, medical care or other life necessities	• Where do you live? (inability to clarify address = indicator) • Who else lives there? • Where do you sleep?

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• Interviewee is living at workplace or with employer • Lack of freedom to leave living conditions • Interviewee is always escorted, is never alone	• Can you leave as you wish? • Are you scared to leave? • Do you live in the place where you work? • Do you go to the grocery store by yourself? • What city did you first live in the United States? • How do you get around from place to place? • How much do you usually pay for transportation? • Do you drive? Where did you learn to drive? • Do you go places by yourself?

Other Materials – 12 Social Ties/Conditions	
Indicators	Suggested Questions
• Interviewee cannot contact friends and family freely • Interviewee is isolated from their community	• Do you have family or friends in the United States? • Do you spend time with them? • Do you have time to spend with your friends/family? • What do you do with them? • Can you bring friends home? • Do you buy food and clothes on your

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	own? • If you are in trouble, who are you most likely to call?

Other Materials – 13 Force, Fraud, Coercion	
Indicators	Suggested Questions
• Interviewee does not have freedom of movement • Interviewee's friends or family have been threatened with harm if interviewee escapes. • Interviewee has been threatened with deportation or law enforcement action • Unusual distrust of law enforcement • Interviewee was forced to perform acts against his or her will • Interviewee was forced to perform sexual acts against his or her will • Evidence of abuse (physical, mental, sexual)	• Has anyone ever threatened you to keep you from running away? • Has anybody ever hurt you to make you stay? • Has your family been threatened? • Did you ever feel pressured to do something that you didn't want to do or felt uncomfortable doing? How did you feel pressured? • Did your employer ever take photos of you? What (if anything) did he/she say he/she would do with those photos? • How safe do you feel right now? • Were you allowed to leave the location/building where you live, where you work? • Do you feel like your movement is controlled by someone else? • Was there ever a time you wanted to leave somewhere and you felt you couldn't? Why did you feel that way? • What do you think would have happened if

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	you left without telling anyone? • Were you ever physically hit and/or slapped by your employee/manager or anyone else? • Did you ever see anyone else get hit or slapped by your employer? • Do you feel you were deceived about anything having to do with your current job? • How did you find your job? • What were you told about your job before you started? • Were you ever promised something that did not happen? • Did conditions on your job change over time?

Other Materials – 14 Minor: Under 18	
Indicators	Suggested Questions
• Interviewee is a child and not in school or has significant gaps in schooling • Interviewee does not live with her or his parents • Interviewee provides insufficient information about parental knowledge of benefit application • Interviewee provides insufficient or contradictory information about the	• Are you in school? • How does your parent/guardian/caregiver treat you? • Are there rules/conditions that your caregiver has set? • Are you responsible for obtaining your food or purchasing other items?

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relationship to guardians and/or trusted adults accompanying her or him to the interview • Interviewee may be hungry or malnourished or have not reached their full height • Interviewee may have poorly formed or rotten teeth • Interviewee may be attending school sporadically or provides vague testimony on schooling • Interviewee may refer to non-family members with family titles (uncle, aunt, cousin) • Interviewee may display symptoms of disorientation and confusion	• How do you get money to purchase items? • Where do you sleep? • How many people live in the same house? • Who are the other people? • What would happen if you left your caregiver /work without permission?

Other Materials – 15 Safety Assessment (if interviewee alone and expresses fear)	
Indicators	Suggested Questions
• Interviewee displays heightened general sense of fear • Interviewee reveals having been physically harmed • Interviewee shares having been deprived of: Food, water, sleep, medical care and/or other life necessities • Interviewee shares having been threatened with harm to him or herself or their family • Interviewee has been threatened with removal or reporting to immigration/ police	• Do you feel safe right now? • Is there anyone you are concerned about? • Anyone who is making you feel uncomfortable or stressed? • What is your understanding of why you are here right now? • How did you get here today?

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officials	

• Other Materials – 16 • Stages of Trafficking • Four sets of circumstances through which RAIO officers may detect indicators of trafficking and initiate component specific trafficking procedures:	
• Ongoing trafficking/At risk	• Officer detects indicators of ongoing trafficking from interviewee in interview and believes the interviewee is currently being exploited.
• Past trafficking • Unrelated to claim • Not in imminent danger in U.S.	• Officer detects indicators of trafficking-related violations from interviewee's testimony and/or application, trafficking circumstances are unrelated to interviewee's immigration benefit request, and interviewee is no longer in exploitative situation.
• Past trafficking • Related to claim • Not in imminent danger in U.S.	• Officer detects indicators of trafficking–related violations from interviewee's testimony and/or application, these violations relate directly to the immigration benefit the interviewee is seeking, and interviewee is no longer in exploitative situation.
• Return to field office/r (Trafficking POC) for follow-up	• Supervisory, Quality Assurance, and/or Headquarters review detects indicators of trafficking through intra-office or HQ case review.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

RAD Supplement

Module Section Subheading

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. All Supplemental Materials
2.

ADDITIONAL RESOURCES

1.
2.

SUPPLEMENTS

ASM Supplement – 1

The TVPRA and Asylum

As noted earlier, the 2008 TVPRA significantly impacted asylum field policy and procedures when the Asylum Division was accorded initial jurisdiction on unaccompanied minor cases, a particularly vulnerable demographic within the U.S. immigrant population.[40] Further, in the asylum context, USCIS responds to the TVPRA mandate to provide victims of trafficking information on the rights and services afforded to them, by providing informational pamphlets regarding these benefits to interviewees. Asylum Officers will not be trained nor expected to "identify" a victim of trafficking for the purpose of determining his or her eligibility for other forms of immigration relief. Officers may provide potential victims, who are not in imminent risk, with specific, authorized, informational pamphlets that apprise individuals of benefits for which they may be eligible. Officers should not give advice or provide any other information about the interviewee's situation or claim for asylum outside of giving them these informational materials.

[40] For additional information, please refer to RAIO module, Children's Claims.

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The following informational pamphlets are available for dissemination: Department of Justice pamphlet, Office for Victims of Crime – Funded Grantee Programs to Help Victims of Trafficking, and USCIS pamphlet, Immigration Options for Victims of Crime.

ASM Supplement – 2

Trafficking in the Credible and Reasonable Fear Process

In the Credible and Reasonable Fear Context, officers will have the opportunity to question the interviewee alone, without a third party present, and may be able to elicit more information from an individual at-risk of ongoing trafficking, without compromising the victim's safety.

ASM Supplement – 3

Trafficking Experiences and One-Year Filing Deadline

An interviewee may apply for asylum or refugee status with one basis of claim, e.g. political opinion, but may describe a trafficking-related experience, either in his or her country of origin or in the United States. that materially relates to his or her asylum eligibility. One example of this would be an individual who flees persecution in the home country, arrives in the United States without resources, and finds employment as a domestic servant with an employer who controls and exploits them. This individual may become freed several years after arrival in the United States and pursue an asylum benefit at that time. If the adjudicating officer elicits relevant testimony and applies the appropriate trafficking lens to analyze the conditions the interviewee faced upon arrival in the United States, depending on the circumstances, the officer may find an extraordinary circumstance exception to the one-year filing deadline

ASM Supplement – 4

Affirmative Asylum Procedures Manual

Section III.B.14. Trafficking Victims[41]

[41] The language in this supplement was preliminarily cleared by OCC in March 2012.

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The Trafficking Victims Protection Act (TVPA) guarantees certain rights, services, and protections to victims of severe forms of trafficking.

The TVPA defines a victim of a severe form of trafficking as a person subject to:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age OR

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

While Asylum Officers are not responsible for making a determination as to an applicant's status as a victim of trafficking, Asylum Officers can play a key role in the protection of victims and in the prosecution of traffickers by detecting indicators of trafficking during an applicant's testimony and bringing cases of possible trafficking victims to the attention of ICE officials.

If the potential victim is a child filing for asylum as a principal applicant, the Asylum Officer should consult Section III.B.1, Children Filing as Principal Asylum Applicants, for additional guidance.

Each Asylum Office Director must designate a Supervisory Asylum Officer (SAO) as the point of contact (POC) for human trafficking matters for their office. This POC will serve as the principal liaison between the asylum field office and the ICE POC during the trafficking referral process outlined below. In the event that the SAO Trafficking POC is unavailable when a trafficking-related situation arises, all SAOs must be trained and prepared to serve as back-up POCs.

The Asylum Officer must differentiate between a suspected current trafficking situation, where the applicant may be in immediate danger because he or she is a possible or self-declared victim of current trafficking, and a possible or self-declared victim of past trafficking.

Asylum Officers encountering possible victims of human trafficking during the course of an asylum adjudication must follow this five step process: 1) detection, 2) notification, 3) referral, 4) information providing, and 5) tracking.

Step 1- Detection:

In the course of an asylum interview, an AO should be aware of the indicators of human trafficking. For a reminder of possible indicators of trafficking, please

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consult the RAIO Combined Training Trafficking Lesson Plan.

Once an Asylum Officer suspects that an applicant has been or is currently being trafficked, he or she should ask follow-up questions to elicit more information without alerting the applicant or any individuals accompanying the applicant of the concern.

Facts related to the suspected trafficking should be documented in the interview notes. The AO should specifically annotate whether he or she thinks the applicant is currently a victim of trafficking who may be in imminent danger and/or has been trafficked in the past and is no longer in imminent danger.

If the applicant is a minor, the AO should consult Section III.B.1, Children Filing as Principal Asylum Applicants, to ensure that his or her inquiry is child sensitive and that it includes questions concerning the minor applicant's care and custody situation, as well as whether the parents are aware of and approve of the asylum application.

Step 2- Notification:

Once the Asylum Officer has identified through line of inquiry indicators that an applicant has been or continues to be a victim of trafficking, the Asylum Officer must alert and discuss the suspicion and indicators of trafficking with the designated SAO POC.

The AO should complete the "Victims of Trafficking Memo to File," located at the end of the RAIO Combined Training Trafficking Lesson Plan, and provide an electronic copy to the SAO POC.

If the potential victim is a minor principal applicant, Asylum Office management must be alerted and the case must be reported to the HQASM QA mailbox. See Section III.B.1, Children Filing as Principal Asylum Applicants. HQASM will instruct on whether the Asylum Office should proceed with drafting an assessment and, if necessary, submitting a QA referral packet or whether the Asylum Office should postpone such action while issues related to the minor's care and custody situation are being addressed.

Step 3- Referral:

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The Asylum SAO POC will determine the timing and method of a referral to ICE in the case of a possible victim of trafficking based on whether he or she believes the applicant is currently being trafficked and faces any imminent danger.

In instances where the AO and SAO POC believe the applicant is currently a victim of trafficking and is possibly in danger, referral to ICE is immediate.

The SAO POC makes a referral to ICE by phone while the applicant is still in the Asylum Office.

The SAO POC relays the indicators of trafficking to the ICE agent and together they form a plan for action.

The applicant should not be alerted to the fact that an ICE agent is being called, unless the SAO POC can confirm that the applicant is not in danger and is not accompanied by anyone who poses a risk to the applicant. The timing and method of the ICE response will vary based on the AO's and SAO POC's perception of the imminent risk faced by the applicant. Further, the overall accessibility of ICE units may vary nationwide.

The SAO POC must use the following means, in the order listed below, to ensure an immediate verbal referral to an ICE agent in these situations.

Call the individual field office's pre-established ICE POC, the Supervisor of an ICE Human Trafficking and Smuggling Unit, located in the proximity of the Asylum Office.

If the ICE POC is not responsive, call the ICE National Directory (X- Sector) at 1-800-XSector and ask to speak with the supervisor of the Human Trafficking and Smuggling Unit in that city. If X-Sector does not have that information, the SAO POC should request the duty agent in the closest ICE field office.

If the SAO POC is unable to reach an agent through either of these mechanisms, he or she should contact the Trafficking POC at HQASM.

Note: If the potential applicant is a minor, ICE's internal policy dictates that they respond immediately regardless of whether the individual is in a dangerous situation.

In instances where the AO and the SAO POC do not believe that the applicant is currently being trafficked and is not in imminent danger, the referral to ICE will involve the SAO POC sending the local ICE Assistant Special Agent in Charge (ASAC) a copy of the memo to file via email or fax for his or her records.

If the applicant's case has already been investigated by ICE, there would be no need to refer the case, unless the affirmative asylum interview revealed information

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that raised new or additional concerns.

In addition to notifying ICE, the Trafficking Victims Protection Act (TVPA) requires that federal, state, and local officials notify the Department of Health and Human Services (HHS) within 24 hours of the discovery of a person who is under 18 years of age (whether accompanied or not) who may be a victim of a severe form of trafficking in persons. (TVPA § 107(b)(1)(G); 22 USC 7705(b)91)(G)) This is so that HHS can provide interim assistance to any such individual. If Asylum Officers encounter an asylum applicant under 18 years of age whom they discover may be a victim of a severe form of trafficking in persons, they should inform their office's POC for unaccompanied alien children's issues (UAC POC). The UAC POC must send an e-mail to the HHS Office of Refugee Resettlement (ORR) at ChildTrafficking@acf.hhs.gov or call 202-205-4582. An e-mail should contain as much of the following information as possible:

Standard subject line: USCIS Notification to HHS of Discovery of a Person Who is under 18 Years of Age Who May Be a Victim of a Severe Form of Trafficking in Persons

Body:

Pursuant to section 107(b)(1)(G) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), this e-mail serves as notification to the Department of Health and Human Services that U.S. Citizenship and Immigration Services has discovered the following person who is under 18 years of age who may be a victim of a severe form of trafficking in persons:

1. Alien number:
2. Name:
3. Date of birth:
4. Country of citizenship:
5. Residence address:
6. Location of exploitation:
7. Suspected form of trafficking:
8. Represented by:
9. USCIS contact information:
10. Additional notes

An ORR Child Protection Specialist will respond to each notification during regular business hours, Monday through Friday, and will follow up with the reporting official as appropriate. Follow-up will involve facilitating interim and long-term eligibility, where applicable, and providing technical assistance as needed.

Step 4- Providing Information to Possible Victims of Trafficking:

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Asylum Officers must provide possible victims of trafficking with the following informational pamphlets. These pamphlets outline the trafficking-specific immigration benefits and the contact information of service providers who assist victims of trafficking.

These pamphlets must only be given to an applicant if the AO and the SAO POC are certain that the applicant is no longer at risk of trafficking and/or that the providing of this information to the applicant (who may be accompanied by persons involved in the trafficking) would not put the applicant in danger.

The AO will provide the applicant with the following:

1) USCIS "Immigration Remedies for Victims of Violence" brochure;

2) DOJ Office of Victims of Crime list of federally funded anti-trafficking non-governmental organizations that operate across the United States;

3) HHS National Human Trafficking Resource Center hotline number (National Directory for all trafficking-related referrals): [redacted] (b)(6)

Step 5- Tracking:

The AO completes the "Victims of Trafficking Memo to File," located at the end of the RAIO Combined Training Trafficking Lesson Plan, places a copy on the right-hand side of the A-file, and provides an electronic copy to the SAO POC.

Once this has been done, the AO processes the asylum case as usual.

ASM Supplement – 5

Sample Victims Of Trafficking Memo To File

Alien number:

Interview Date:

Asylum Officer (name, no.):

Consulted with (SAO, Trafficking POC):

Location:

Adjudication: Affirmative Asylum

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Attorney name:

Preparer name:

Preparer address:

Interpreter name:

Applicant full name:

Gender: F

Country: Ethiopia

Age: 45

I. BIOGRAPHIC/ENTRY INFORMATION

Applicant was employed by a Saudi Arabian Family (NAME) as a domestic servant from 19xx until she came to the United States on ARRIVAL DATE. Applicant used an agency in Ethiopia to contract with this employer as a maid. Applicant entered the United States at Washington D.C. with this family. She told her supervisor that she wanted her passport. When he refused, she told him that she would call the police; so, he gave it to her. While the family rested, she left the house, called her friend in California, and never returned to this family.

II. SOURCE OF TRAFFICKING SUSPICION

Is this a past or present, ongoing trafficking concern? Past trafficking concern

III. WHAT FORMS OF TRAFFICKING DOES THE AO SUSPECT?

Applicant was contracted as a maid to clean the house and help raise the children. However, she was forced to work at any hour of the day and at multiple people's homes. Applicant stated she was not allowed to leave the house alone and could only go with the family. Applicant was also raped repeatedly by a supervisor who was hired to watch over Applicant and the other maids. If Applicant fought back, she stated she would be deported to Ethiopia. At one point she became pregnant as a result of the rapes, and made an excuse to return to Ethiopia to have an abortion. Applicant stated she could not have an abortion in Saudi Arabia, as they would find her at fault for being raped and pregnant.

IV. WHAT ACTIONS HAS THE ASYLUM OFFICE TAKEN?

Applicant was given the brochure of DHS/CIS information about trafficking and a packet of resources of NGOs that may be able to help her. Applicant was also represented by an attorney.

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Please include copy of memo to file in A file and send electronically to Office Trafficking POCs NAMES.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

There are no supplemental materials for the International Operations Division.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

IO Supplement
Module Section Subheading

AMERICAN OVERSIGHT
DHS-19-1398-F-000963

UNHCR
The UN Refugee Agency

OVERVIEW OF UNHCR AND CONCEPTS OF INTERNTAIONAL PROTECTION

These UNHCR training materials were written in collaboration with the

United States Citizenship and Immigration Services' (USCIS) Refugee, Asylum, and International Operations Directorate (RAIO)

for use in training RAIO officers

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UNHCR OVERVIEW

Training Module

MODULE DESCRIPTION:

This module describes the development of international protection of refugees and other individuals over the course of the 20th century and explains the role of the Office of the United Nations High Commissioner for Refugees (UNHCR) and other international actors in providing this protection. The module describes the elements of international protection, who is in need of international protection, and who provides international protection. Lastly, this module explains the role UNHCR plays in relation to the United States regarding U.S. refugee resettlement, asylum, and other protection issues.

TERMINAL PERFORMANCE OBJECTIVE(S)

You, the officer, will be able to summarize the principles of international refugee protection and distinguish between the roles that the UNHCR and other international actors play in the protection of refugees around the world.

ENABLING LEARNING OBJECTIVES

1. Summarize the origin and core principles of refugee protection.
2. Identify the key provisions of the 1951 Convention and 1967 Protocol relating to the Status of Refugees.
3. Summarize the roles and responsibilities of the main actors in refugee protection.
4. Describe the goals of international refugee protection.
5. Identify the groups in need of international protection.
6. Discuss the challenges that particular refugee situations pose to providers of international protection.

INSTRUCTIONAL METHODS

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- Presentation by UNHCR with discussion, Q and A

METHOD(S) OF EVALUATION

REQUIRED READING

Matter of A-G-G-, 25 I&N Dec. 486 (BIA 2011), pp. 488-490.

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. United Nations High Commissioner for Refugees. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (December 2011)(contains the 1951 Convention and 1967 Protocol relating to the Status of Refugees), 200p.

2. United Nations General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, (14 December 1950), A/RES/428(V), 16p.

3. United Nations High Commissioner for Refugees (UNHCR). Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 1 (1975) to present.

4. United Nations High Commissioner for Refugees. Guidance Note on Refugee Claims relating to Victims of Organized Gangs, (31 March 2010), 24p.

5. United Nations High Commissioner for Refugees, Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, (7 April 2006), HCR/GIP/0607, 17p.

6. United Nations High Commissioner for Refugees, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(FZ) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, (22 December 2009), HCR/GIP/09/08, 28 pp.

7. United Nations High Commissioner for Refugees. Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, (4 September 2003), HCR/GIP/03/05, 9p.

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8. United Nations High Commissioner for Refugees. Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), (10 February 2003), HCR/GIP/03/03, 8 p.

9. United Nations High Commissioner for Refugees, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, (7 May 2002) HCR/GIP/02/01, 11p.

10. United Nations High Commissioner for Refugees, Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, (23 July 2003), HCR/GIP/03/04, 8p.

11. United Nations High Commissioner for Refugees, Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, (7 May 2002) HCR/GIP/02/02, 6p.

12. United Nations High Commissioner for Refugees, Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 28 April 2004, HCR/GIP/04/06, 12p.

13. United Nations High Commissioner for Refugees, Guidelines on the Protection of Refugee Women (Geneva: July 1991), 31p.

14. United Nations High Commissioner for Refugees, Refugee Children: Guidelines on Protection and Care (Geneva: 1994), 182p.

15. United Nations High Commissioner for Refugees UNHCR, Guidelines on Determining Best Interests of the Child, (May 2008), 100pp.

16. United Nations General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII), 1p.

17. United Nations High Commissioner for Refugees UNHCR Protection Policy Paper, Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing, (Nov. 2010), 17pp.

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

The purpose of this module is to explain the role of the Office of the United Nations High Commissioner for Refugees (UNHCR) and other international actors in the protection of refugees, asylum-seekers, and other groups in need of international protection around the world. Please note that when the term "refugee" is used in this module regarding the work of UNHCR or the protections afforded refugees under international instruments, the term encompasses refugees, asylees, and asylum-seekers. This module provides an overview of the history, mandate, endeavors, and objectives of UNHCR. The issues of international human rights law and the definition of the term "refugee" are covered in greater detail in the RAIO Training Modules, International Human Rights Law, Sources of Authority, Refugee Definition, and Definition of Persecution and Eligibility Based on Past Persecution.

2 ORIGINS OF INTERNATIONAL PROTECTION FOR REFUGEES

2.1 Early Twentieth Century Responses to Refugee Situations

The first concerted effort by the international community to address a refugee situation arose in the aftermaths of World War I, the Russian Revolution, and the collapse of the Ottoman Empire. The League of Nations created the position of High Commissioner for Russian Refugees in 1921. At the time, the League of Nations defined refugees as specific groups that were deemed to be at risk if returned to their countries of nationality. In later years, additional national categories included Assyrians, Turks, Greeks, Armenians, and German Jews.

Over time, the League of Nations developed comprehensive measures to protect refugees, beginning with a standardization of refugee travel documents, regularization of legal status, access to employment, and protection against expulsion.

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In 1947, the United Nations, as the successor to the League of Nations, established the International Refugee Organization (IRO), adding to its mandate refugees resulting from World War II. Today's definition of refugee has its roots in the reaction of the IRO to the unique refugee crisis of the mid-1940s. The IRO looked beyond repatriation and local integration as the sole solutions to the refugee situation. It allowed the option of resettlement for those refugees who expressed "valid objections" to returning to their countries of nationality because of "persecution, or a fear of future persecution because of race, religion, nationality or political opinion."[1]

2.2 Creation of the United Nations High Commissioner for Refugees (UNHCR)

In 1949, the General Assembly of the United Nations voted to replace the IRO with the Office of the United Nations High Commissioner for Refugees (UNHCR). On December 14, 1950, the General Assembly adopted the Statute creating UNHCR. The Statute serves as UNHCR's constitution and defines its dual mandate to provide protection to refugees and to seek durable solutions to refugee problems. UNHCR began its work on January 1, 1951.[2]

2.3 1951 Convention relating to the Status of Refugees

Following the establishment of UNHCR, members of the international community drafted the 1951 Convention relating to the Status of Refugees (Convention), a legally binding treaty that defines who is a refugee and the rights and legal obligations of States towards refugees.[3] The Convention contains the following key elements:

2.3.1 Refugee Definition

Article 1 defines a refugee as a person who, "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence…". , as a result of such events [occurring in Europe or elsewhere before January 1, 1951] is unable or, owing to such fear, is unwilling to return to it." The geographic and time limitations were removed in the 1967 Protocol, as noted below.

2.3.2 Geographic and Time Limitations

---

[1] UNHCR. The State of the World's Refugees 1993: The Challenge of Protection, "Introduction: The Challenge of Protection" (New York: 1993), p. 12.

[2] UNHCR's statute was drafted simultaneously with the 1951 Refugee Convention, as a result the key international legal instrument and the organization designed to monitor it are well synchronized.

[3] United Nations General Assembly, Convention Relating to the Status of Refugees, (28 July 1951), United Nations, Treaty Series, vol. 189, p. 137, also found in United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (December 2011), Annex II.

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Article 1 requires a refugee to have a fear of persecution "[a]s a result of events occurring before 1 January 1951."[4] In addition, signatories are allowed the option of further limiting the definition of a refugee to those whose fear of persecution resulted from events occurring in Europe.[5]

2.3.3 The Principle of *Non-refoulement* or Non-return

Article 33 of the Convention requires that no contracting State shall expel or return (refouler) a refugee, in any manner whatsoever, to a territory where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

2.3.4 Supervision by UNCHR

Article 35 of the Convention assigns to UNHCR the global mandate of supervising the application of the Convention's provisions. Article II of the Protocol contains the same obligation of States parties to cooperate with UNHCR in the fulfillment of its responsibilities, including its supervisory role, as is delineated in Convention Article 35.

2.4 1967 Protocol relating to the Status of Refugees

With the passage of time, it became evident that refugee movements were not a result unique to World War II. Newly emerging refugee populations highlighted the need for a more flexible and universal mechanism to address refugee issues.

The 1967 Protocol relating to the Status of Refugees ("1967 Protocol") removed the 1951 time limitation and the focus on Europe so that the definition of refugee applies regardless of the time or location of events. The 1951 Convention refugee definition, as amended by the 1967 Protocol, defines a refugee as a person who, "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it."

Although related to the Convention, the 1967 Protocol is an independent instrument that States must accede to separately to be bound by its terms even if they have acceded to the Convention.[6] A few States, including the United States, have acceded to the Protocol, but not to the Convention. The Protocol incorporates Articles 2 through 34 of the

[4] Id. at Art. 1(A)(2).

[5] Id. at Art. 1(B)(1).

[6] United Nations General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, also found in United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (December 2011), Annex III.

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Convention, thus making those provisions binding on those countries, such as the United States, that have ratified the Protocol alone.

2.5 U.S. Definition of Refugee

The United States enacted a definition of refugee similar to the 1967 Protocol's definition. The Immigration and Nationality Act (INA) defines "refugee" as:

> (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or
>
> (B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[7]

The INA definition of refugee was amended to clarify that a person forced to abort a pregnancy or to undergo voluntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program has faced persecution on account of political opinion.

Paragraph B, above, allows for overseas resettlement of refugees to the United States even if they are within their country of nationality or, if stateless, their country of last habitual residence.

The INA excludes from the definition of refugee any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. In contrast, the 1951 Convention and 1967 Protocol exclude from protection individuals who have committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime.[8]

2.6 Regional Expansions of the Refugee Definition

[7] INA § 101(a)(42)

[8] Art. 1(F) of the 1951 Convention.

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As a result of changing migration patterns that threatened the political stability of many countries in Africa and Central America, intergovernmental regional bodies adopted agreements broadening the scope of protection afforded to persons covered by the agreements. These instruments apply only to nations in the region who are signatories to them.

2.6.1 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa

The 1969 OAU Convention expanded the refugee definition to include those who fled their countries because of "external aggression, occupation, foreign domination, or events seriously disturbing public order."[9]

2.6.2 Cartagena Declaration on Refugees

In 1984, the Central American countries and Mexico met to address their concerns regarding the large flow of refugees fleeing civil wars across the region. These countries adopted a declaration, the Cartagena Declaration on Refugees, built upon the refugee definition of the OAU Convention adding to it those who are fleeing on account of "generalized violence" and "massive violation[s] of human rights."[10]

2.7 Evolving Role of UNHCR and its Expanded Mandate

In the years following the break-up of the Soviet Union and the ensuing civil strife in such countries as Armenia, Azerbaijan, Georgia, Russia, Tajikistan, Turkmenistan, and Uzbekistan, UNHCR increasingly was called on to provide protection to individuals not covered by the Convention, the 1967 Protocol, or the expanded regional definitions. These groups of "persons of concern" are typically internally displaced people (IDPs).[11] These are individuals who are forced to flee their home but who, unlike refugees, remain within their country's borders. IDPs legally remain under the protection of their own government, but are in need of assistance because their home government may not have the means, or the inclination, to protect them. UNHCR's original mandate does not specifically address IDPs, but because of the agency's expertise on displacement, it has

[9] Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45. Note that the heads of state of the countries of the OAU dissolved the organization on July 8, 2002. The African Union was established as its successor. The complete list of countries that have signed, ratified or deposited the OAU Convention is found at the African Union website.

[10] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, (22 November 1984), Section III.3.

[11] United Nations High Commissioner for Refugees, "Introduction: The Challenge of Protection, Box 2--The Evolution of Refugee Protection," The State of the World's Refugees 1993: The Challenge of Protection (New York: 1993), p. 13-14.

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increasingly been called upon to respond to IDP situations and has assisted millions of IDPs. [12]

In recent years, IDPs have greatly outnumbered refugees, creating a crisis in international protection. Though UNHCR is not legally responsible for the protection of those who do not fit within its mandate, UNHCR has stepped in on many occasions to meet the needs of IDPs. UNHCR determines on a case-by-case basis whether it will be able to undertake a mission to protect IDPs. In determining whether it can intervene, UNHCR considers the following factors:

- the political will of the host country to grant UNHCR access to the territory and to the displaced populations
- the ability of the host country to fund the mission
- the commitment of the international community to support the effort
- the risk of harm to IDPs and UNHCR protection personnel

UNHCR is currently active in IDP operations in countries such as Afghanistan, the Central African Republic, Chad, Colombia, the Democratic Republic of Congo, Kenya, Pakistan, and Uganda.

3 ELEMENTS OF INTERNATIONAL PROTECTION

3.1 What is International Protection?

Protection is, first and foremost, the responsibility of States. It is the responsibility of each State to offer its citizens a number of rights and privileges, for example, security, access to its courts, the right to vote in national elections, and access to its social service structures. When a State is unwilling or unable to protect the human rights and security of some of its citizens, other nations, either through charity or international obligation, may assume the responsibility of protecting those in need. An individual can benefit from international protection only when:

- The country of origin is not capable or willing to provide care, and
- The individual has crossed an international border.

International protection is meant to be a temporary safeguard of the refugee's rights. States provide international protection until the government of the country of origin or nationality can resume providing protection, or until the situation has changed so that international protection is no longer needed.

[12] United Nations Commission on Human Rights, Further Promotion and Encouragement of Human Rights and Fundamental Freedoms including the Question of the Programme and Methods of Work of the Commission Questions of Human Rights, Mass Exoduses and Displaced Persons, (Feb. 11, 1998), E/CN.4/1998/53/Add.I. See also UNHCR, Protecting Refugees the Role of UNHCR, (March 2009), p. 8-9.

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UNHCR and other actors in international protection seek durable solutions to refugee problems. There are three possible solutions: voluntary repatriation, local integration, and third-country resettlement. This module provides information below on each of these durable solutions.

3.2 Who Needs International Protection?

The following categories of refugees need international protection.

3.2.1 Mandate Refugees

Mandate refugees are those that UNHCR recognizes as refugees according to its Statute, the 1954 or 1961 Conventions on Statelessness,[13] the OAU Convention, or other regional instruments. These refugees may receive the protection of UNHCR regardless of whether the country of first asylum is a party to the 1951 Convention or the 1967 Protocol or has recognized them as refugees. Though UNHCR protects their rights, these refugees do not receive the benefits that States, who are parties to the Convention or Protocol, give to refugees.[14]

Example

Eritrea is not a party to either the 1951 Convention or the 1967 Protocol. If individuals fearing persecution in Djibouti flee to Eritrea, UNHCR will assess their protection needs, recognize them as refugees as appropriate and provide protection. Because Eritrea has no asylum system, these refugees will not have any status under the laws of Eritrea. UNHCR has the mandate to protect these individuals despite the fact that the country in which they are situated does not hold any responsibility to protect them.

3.2.2 Convention Refugees

Convention refugees are those that a State party to the 1951 Convention or 1967 Protocol recognizes as refugees. Under these instruments, these individuals are entitled to certain benefits, such as work permission, the right to remain lawfully in the country of asylum, the right to freedom of religion and expression, property rights, and the right to seek and be granted citizenship, which the State is obligated to confer to them. There are no "Protocol refugees," per se. Under the refugee definition, as amended by the Protocol, these individuals are more accurately termed "Convention refugees."

Example

[13] Addressed below under Sources of International Protection.

[14] United Nations General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V).

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On June 16, 2010, Monaco became the most recent country to become party to the 1967 Protocol. If individuals fearing persecution flee to Monaco, they can take advantage of the legal structures in place and apply for asylum.[15] If granted asylum, these individuals are Convention refugees. UNHCR would not play a role in their protection unless a problem arose.

3.2.3 Refugees under Regional Instruments

This category of refugees includes individuals fleeing their countries of origin for reasons other than those enumerated in the Convention definition of refugee, such as the reasons contained in the OAU Convention and Cartagena Declaration. Not all countries recognize these individuals as refugees. UNHCR, however, typically finds these individuals to be in need of protection. It is UNHCR's long-held position that people fleeing conflicts should be more generally considered refugees if their own country is unwilling or unable to protect them.[16] At times, States and UNHCR will conduct prima facie refugee status determinations on a group basis. UNHCR finds this group-based approach appropriate in mass influx situations and also where there is objective information related to the circumstances in the home country.[17]

3.2.4 Special Classifications under National Law—Complementary Forms of Protection

Many countries have provisions for protecting individuals who do not meet the Convention definition of refugee, but for whom the option of return home is not feasible. Though not entitled to the benefits accorded to refugees, such as permanent resettlement or citizenship rights, they may be allowed to work in the country of "refuge" and are protected from deportation for a prescribed period of time.

One example of a special classification is Temporary Protected Status (TPS). The United States provides TPS to foreign nationals residing in the United States whose homeland conditions have been determined to be temporarily unsafe to return to because of war, earthquakes, floods, droughts, or other extraordinary and temporary conditions.[18] During their country's designation period, which can vary greatly in length, TPS beneficiaries may remain in the United States and obtain work authorization. TPS, however, does not lead to permanent resident status. TPS designated countries have included, for example, Haiti, El Salvador, Nicaragua, Honduras, Somalia, Sudan, and South Sudan.

3.2.5 Returnees

[15] As of January 2012, Monaco had one asylum-seeker residing on its territory. UNHCR, 2012 Regional Operations Profile: Monaco.

[16] See Regional Expansions of the Refugee Definition, above.

[17] UNHCR, Refugee Status Determinations, Self Study Module 2, (1 September 2005).

[18] See INA § 244; 8 U.S.C. 1254.

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The heart of UNHCR's mandate concerning the voluntary repatriation of refugees is its responsibility to ensure that for each individual the return is voluntary and that the existing conditions are conducive to voluntary return in safety and with dignity.

Ordinarily, the country of nationality is responsible for protecting the human rights of returning refugees. The unique circumstances of the return and reintegration into community life, however, often demand closer attention than unstable national governments may be able to provide. In these cases, the international community may assist refugees with the reintegration into and the development of their country of origin. This prevents returnees from becoming a destabilizing force.

UNHCR manages numerous large scale voluntary repatriation programs that have brought large numbers of refugees home. In Afghanistan, millions of refugees have returned with UNHCR's assistance. UNHCR also facilitates small scale and, at times, individual repatriations of refugees and internally displaced people on a routine basis. For example, UNHCR has facilitated the repatriation of Congolese refugees from Burundi and Zambia, Burundi refugees from the Congo, and Sri Lankan refugees from India.[19]

3.2.6 Internally Displaced People (IDPs)

Unlike refugees, internally displaced people have not crossed an international border. Instead, they have sought safety within their home countries. Like refugees, they have fled similar circumstances, such as armed conflict, human rights violations, and generalized violence. As mentioned above, UNHCR's original mandate did not specifically cover IDPs. Article 9 of UNHCR's Statute, however, allows the High Commissioner to work with non-refugees "as the General Assembly may determine, within the limits of the resources placed at his [or her] disposal." Over the last several decades, the General Assembly has expanded UNHCR's mandate to include the protection of IDPs. Providing protection to IDPs is complicated because it requires the necessary cooperation from the very country that has demonstrated that it is unable or unwilling to protect these individuals.

3.3 Organizations and Entities involved in International Protection

Several organizations and entities work together to protect the legal rights and physical safety of refugees. They include:

3.3.1 States (Countries)

State signatories to the 1951 Convention, the 1967 Protocol, or the aforementioned regional instruments, are bound by international obligations to provide for the protection of refugees whether such States are countries of first asylum or of resettlement.

[19] See UNHCR Refworld, UNHCR resumes repatriation of Congolese refugees from Burundi, 1 November 2010; UNHCR News Stories, Repatriation of Congolese from Zambia reaches 40,000; camps to close (28 September 2010); Repatriation of Burundians from Congo launched with convoy of 240 (October 2010); and UNHCR Briefing Notes, Ferry returns of Sri Lankan refugees from India due to start Wednesday (11 October 2011).

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3.3.2 Other Agencies within the United Nations

While UNHCR has primary responsibility for ensuring the protection and care of refugees, other U.N. agencies, such as the World Food Programme (WFP), the World Health Organization (WHO), UNICEF, United Nations Relief and Works Agency (UNRWA), and the International Labor Organization (ILO) also participate in refugee assistance efforts.

3.3.3 International Organizations

International organizations, such as the International Committee of the Red Cross (ICRC), respond to refugee crises along with UNHCR. Their global presence allows them to respond immediately to emergencies. Their global perspective and their lack of affiliation with any nation makes it more likely that the needs of all refugees and displaced people will be met regardless of the political situation surrounding the crises or the visibility of the problem in foreign media.

3.3.4 Intergovernmental Organizations

Intergovernmental organizations (IGOs) are organizations made up primarily of sovereign or member States. IGOs are established by treaty. They promote a unified, and often regional, approach to refugee protection among nations who have an interest in maintaining a stable environment for refugees and their own citizens.

The International Organization for Migration (IOM), established in 1951, is the leading intergovernmental organization in the field of migration and works closely with governmental, intergovernmental, and non-governmental partners to provide humanitarian assistance to migrants in need, including refugees and internally displaced people. IOM has 132 member States and offices in more than 100 countries. It provides key services to refugees, including providing transportation for refugees who are fleeing conflict situations or who are being resettled to third countries. IOM also provides other services and advice to governments and migrants.[20]

3.3.5 Non-governmental Organizations

Non-governmental organizations (NGOs), which include international, national, and local entities, play a crucial role in all aspects of refugee crises, such as prevention, emergency response, provision and maintenance of protection, and resolution. The international community relies heavily on NGOs already on the ground in areas of potential unrest as well as in places where refugees or IDPs are found. NGOs often provide information on the situation and are often able to respond immediately as events unfold. In addition, NGOs, especially those that are local and national within the country of return, are in a

[20] More detailed information about IOM can be found its website.

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unique position to assist returnees in the resolution and reintegration phases of an operation, as well as to monitor the success of implementation plans.[21]

3.3.6 Refugee Resettlement Voluntary Agencies

Non-governmental voluntary agencies or "volags," contribute significantly to the protection of refugees. Volags are primarily funded by the U.S. State Department's Bureau of Population, Refugees, and Migration (PRM) and private sources. They provide refugees with a wide range of services including case file preparation, family history documentation, and travel coordination. To assist with integration in the country of resettlement, they also provide initial housing, food and clothing, cultural orientation, and counseling. Volags may also contract with the Office of Refugee Resettlement (part of the U.S. Department of Health and Human Services) to provide job placement, English language training, and other social services. Examples of voluntary agencies that work with UNHCR and the United States government include the International Catholic Migration Commission, World Relief, and the Hebrew Immigrant Aid Society.

3.3.7 Local Population

The support of the local population is essential to providing refugees with the stability required to move forward with their lives. A welcoming attitude from the local population, in both the countries of first asylum and the resettlement countries, goes a long way to heal the emotional wounds of having to flee a country fearing for one's life. Furthermore, the local population may be in a position to provide refugees with jobs, shelter, and community support if repatriation is not a viable solution.

3.3.8 Other Refugees

Refugees can improve their situation in a refugee camp or in their local community in the country of asylum. Refugees lend each other moral support and encouragement and can develop organizational structures to aid in the administration of camp life.

3.3.9 Media

The media plays an important role in bringing the issues of refugee protection to the attention of individuals around the world. More importantly, in exposing human rights abuses in countries of origin, the media challenges the international community and national governments to address violations before mass flights of refugees begin.

3.4 What are the Goals of International Protection?

The most important goals of the international protection of refugees are as follows.

[21] UNHCR. "The Role of NGOs in the Field," The State of the World's Refugees. Chapter 5: Responding to Refugee Emergencies. (New York: 1993) pp. 13.

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3.4.1 Admission to Safety

In order for the international community to have access to those individuals who are fleeing their home countries, refugees must cross an international border. This requires that UNHCR or other members of the international community be present at entry locations to ensure refugees are not refused entry into the country of asylum.

3.4.2 Respect for the Principle of *Non-refoulement*

Once refugees have been allowed safe passage into the country of asylum, the international community must ensure that refugees are not in danger of being returned to a country where their lives or freedom would be threatened.

3.4.3 Physical Security

Despite the best efforts of the international community to meet the needs of refugees, refugee camps are unstable environments. In certain situations, refugees can be especially vulnerable to physical harm even in a refugee camp. Camps may be composed of individuals of different ethnic or religious groups, some of whom might have been on opposite sides of a conflict in the country of origin. As noted below, there may also be others who could put the refugees' physical safety at risk, such as criminals or human rights abusers. In addition, members of the local population working in and around the camp may harbor anger or frustration with the refugees' presence in the country of asylum. It is the responsibility of the country of asylum and the international community to do everything possible to prevent physical attacks on refugees and to prosecute those who violate the law.

3.4.4 Protection of Basic Human Rights

Basic human rights, spelled out in instruments such as the Universal Declaration of Human Rights and the International Covenants on Human Rights, apply to all individuals regardless of their legal status in any country. When individuals become refugees, it is crucial that their rights are protected in the country of first asylum. Once the physical safety of the refugees has been provided for, the next immediate human right to safeguard is the right to seek asylum under Article 14 of the Universal Declaration of Human Rights.

4 INTERNATIONAL PROTECTION STANDARDS

4.1 Sources of International Protection Standards

The earliest developments in international human rights law focused on establishing standards for the protection of refugees. As noted above, these standards are the core of the 1951 Convention and the 1967 Protocol, to which all signatories are bound.

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Non-binding texts also speak to refugee issues and provide guidance to member States. The Executive Committee of the High Commissioner's Programme, an intergovernmental body comprised of States, has issued Executive Committee (Ex Com) Conclusions on an annual basis dating back to 1975.[22] These Ex Com Conclusions are non-binding, serve as an expression of the body of its members, and typically are statements of concern or identification of priority for action in a coming year. The Executive Committee also evaluates and approves the assistance programs that UNHCR proposes to undertake each year.

In addition to the refugee treaties, other international instruments dealing with issues of stateless individuals and displaced people provide guidance in certain situations. These instruments include:

- The Convention relating to the Status of Stateless Persons (1954) mandates that those individuals who are stateless be accorded the same standards of treatment as refugees.[23]
- The Convention on the Reduction of Statelessness (1961) develops measures designed to reduce the number of individuals who live entire lifetimes without citizenship in any country. Provisions address granting citizenship to those who are born to stateless parents and preventing the deprivation of nationality on the basis of one of the protected grounds.
- The Fourth Geneva Convention Relative to the Protection of Civilian Person in Time of War (1949) protects refugees and displaced people forced to flee their homes and/or countries as a result of war (Article 44).[24]
- The United Nations Declaration on Territorial Asylum (1967) reaffirms the principle of nonrefoulement and emphasizes the obligation of States not to turn away those refugees who present themselves at their borders seeking protection. It also clarifies that a grant of asylum by a particular State is a humanitarian act and is not to be interpreted as hostile by any other State, especially the country of origin of the refugee.[25]

Individual States build on the standards of refugee protection as they create domestic legislation for the treatment of migrants in refugee-like situations. Though domestic legislation varies around the world, all signatories to the 1951 Convention and/or the

[22] See, e.g., United Nations High Commissioner for Refugees, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR, No. 110 (LXI) - 2010, 12 October 2010.

[23] The United States is not a party to the Convention Relating to the Status of Stateless Persons or to the Convention on the Reductions of Statelessness as of January 17, 2012.

[24] The United States is a party to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949.

[25] United Nations General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII)

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1967 Protocol, are bound by law to uphold all of their principles of protection, especially nonrefoulement. Those States that have ratified other protection instruments, such as regional treaties, are bound by those documents as well.

4.2 Standards Derived from Human Rights Instruments

The international community's general standards for the treatment of refugees are found in international human rights instruments. These human rights apply to all individuals, regardless of their immigration status. Many of these rights are explicitly incorporated into the 1951 Convention and 1967 Protocol.

4.2.1 Universal Declaration of Human Rights (UDHR)

Countries of first asylum and international organizations working in refugee protection must pay particular attention to the following rights enshrined in the Universal Declaration of Human Rights:[26]

- the right to seek asylum from persecution (Article 14)
- the right to have access to the courts and legal system (Article 10)
- the right to equal protection of the law and freedom from discrimination (Article 7)
- the right to cultural expression (Article 27)

4.2.2 Article 4 of the International Covenant on Civil and Political Rights (ICCPR)

This provision requires that all States respect and ensure certain fundamental and internationally-accepted human rights without exception, such as:

- the right to life
- freedom from torture, or other cruel, inhuman or degrading treatment or punishment
- freedom from slavery or servitude
- recognition as a person before the law
- freedom of thought, conscience, and religion[27]

These fundamental rights are considered non-derogable. This means that countries have no legal basis, even in a state of emergency, to refuse to honor these human rights. For more information on the specific human rights protected by the ICCPR and other international law instruments, please see the RAIO Training Module, International Human Rights Law.

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[26] United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

[27] United Nations General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. The United States signed the ICCPR on October 5, 1977 and ratified it on June 8, 1992.

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5 THE ROLE OF INTERNATIONAL ACTORS IN PROTECTION

5.1 States (Countries)

Individual States, not the international community as a whole, have the primary responsibility to provide protection to refugees present on their soil. International treaties and covenants require States parties to those instruments to abide by their provisions. The international community holds States accountable if they violate the rights of refugees, although there is no clear mechanism for enforcement.

Article 14 of the Universal Declaration of Human Rights recognizes the right to seek asylum from persecution as a basic human right. Further, countries of first asylum have an obligation to protect all basic human rights, including the right of an individual not to be returned to a country where his or her life would be threatened on account of one of the protected grounds.[28] This nonrefoulement provision is reinforced by a similar nonrefoulement provision in Article 3 of the United Nations Convention Against Torture, although Article 3 does not have an "on account of" requirement and differs in other respects.[29]

The international community sometimes joins in the protection of refugees when a country of first asylum cannot adequately address a particular refugee situation on its soil. In all situations, the international community cannot begin its operations unless authorized by the host country.

The obligation of a country not to return refugees to countries where their lives or freedom would be threatened (nonrefoulement), coupled with the lack of an obligation of third countries to accept refugees for resettlement, places a burden on the shoulders of some countries of first asylum that is too heavy to bear. The 1967 U.N. Declaration on Territorial Asylum and other regional instruments provide for burden-sharing. This doctrine asserts that any country that is host to a population of refugees that it cannot support can call upon other countries for assistance and, in the spirit of collaboration and cooperation, these countries are expected to provide such assistance.

Example

In 1999, a massive influx of refugees from Kosovo threatened the stability of Macedonia. In order to lighten its burden and ensure that the rights of the Kosovars continued to be protected, the Macedonian government, with the support of the United States, initiated a humanitarian evacuation program. Close

[28] United Nations General Assembly, Convention relating to the Status of Refugees (28 July 1951), United Nations, Treaty Series, vol. 189, p. 176.

[29] United Nations General Assembly, Convention Against Torture (10 December 1984), United Nations Treaty Series, vol. 1465, p. 85.

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to 100,000 Kosovar refugees were evacuated to third countries (the United States, Germany, Turkey, and other countries) after appropriate screening.

5.2 UNHCR

There are three basic needs that UNHCR fulfills during a refugee crisis.

5.2.1 Protection

The first step in dealing with a refugee crisis is to be certain that the physical safety of refugees is safeguarded. UNHCR monitors the situation and works with the interior ministry officials of the host country to ensure that refugees are allowed into the country. Ensuring the protection of refugees also requires UNHCR to intervene when the country of asylum is contemplating refoulement as an option for either individual refugees or large groups.

5.2.2 Assistance

UNHCR assists refugees by providing for their daily needs. For example, a refugee camp often develops into a small community with healthcare facilities, schools, agricultural projects, recreation, and more. Most of these services are not provided directly by UNHCR, but by non-governmental organizations or voluntary agencies funded by UNHCR contracts.

5.2.3 Durable Solutions

UNHCR also seeks ways to find durable solutions to the plight of refugees by helping them to repatriate to their homeland, to integrate in their countries of asylum, or to resettle them in third countries. Each is discussed in greater detail below.

5.3 Other Actors in International Protection of Refugees

Many organizations and entities play a role in providing protection for refugees. As noted above, these groups include: international organizations, inter-governmental organizations, non-governmental organizations (NGOs), voluntary agencies (volags), media, local populations, and other refugees. These organizations and/or entities meet specific needs of refugees that UNHCR and the host countries may not be equipped or authorized to provide. For example, these entities:

- Gather information on emerging refugee crises (media, non-governmental organizations, international organizations)
- Provide for the safety and welfare of refugees (international organizations, intergovernmental organizations, voluntary organizations, non-governmental organizations, refugees, and the local population)
- Raise awareness of the public in support of the refugee cause (media, non-governmental organizations, international organizations)

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- Provide legal advice or social counseling to individual refugees (voluntary agencies, non-governmental organizations)
- Process applications for resettlement (inter-governmental organizations, voluntary agencies)

5.4 U.S. Refugee Admissions Program (USRAP)

The U.S. Refugee Admissions Program (USRAP) consists of a number of governmental and non-governmental partners, both overseas and domestically, whose mission is to resettle refugees in the United States. The U.S. Department of State's Bureau of Population, Refugees and Migration (PRM) has overall management responsibility for the USRAP and has the lead in proposing admissions numbers and processing priorities. The DHS component, U.S. Citizenship and Immigration Services (USCIS), has responsibility for interviewing refugee applicants abroad and adjudicating applications for refugee status. The Office of Refugee Resettlement (ORR) in the Department of Health and Human Services is responsible for funding integration programs once refugees arrive. Resettlement Service Centers (RSCs), such as Church World Service (CWS), the International Organization for Migration (IOM), the International Catholic Migration Commission (ICMC), the International Rescue Committee (IRC), or other NGOs, handle the intake of refugee referrals from UNHCR, U.S. embassies, and certain NGOs, as well as the prescreening of cases and the out-processing of individuals for travel to the United States.[30]

6 PROTECTION NEEDS OF REFUGEES

6.1 General Protection Issues

Beyond the most basic and immediate issues of both protecting the individual's right to seek asylum and monitoring the States parties' adherence to their obligations under the 1951 Convention and1967 Protocol, UNHCR and its partners often face additional challenges, many of which may further threaten the safety and well-being of refugees. Among these are:

- rape and other forms of sexual violence
- abusive arrest and detention
- forced recruitment of minors into combat
- recruitment of individuals into the armed services or militias
- military attacks on refugees

[30] USCIS, "Refugees: The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities."

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- presence of bandits or intimidators in refugee camps or urban refugee settings
- diversion or theft of humanitarian assistance by the host government, paramilitary groups, or criminals
- discrimination
- denial of the right to work
- conflicting local laws

6.2 Specific Protection Issues

There are a number of circumstances, outlined below, in which unique protection issues arise.

6.2.1 Refugee Women

The protection of refugee women requires careful and sensitive planning and action. Physical and sexual abuse of refugee women occurs frequently. When planning refugee protection missions, UNHCR and other international and local actors consider the structure and management of the camp with an eye to the special needs of refugee women. UNHCR and other actors also include the active participation of women in camp planning and decision-making, as well as in leadership roles within the community. Features that maximize the protection of women include better lighting, more private areas, and special accommodations for single women and women heads of households. When abuses occur, UNHCR responds by identifying the individuals responsible, protecting the victims from reprisals, and providing counseling and medical care.[31]

6.2.2 Refugee Children

Children in refugee camps, particularly those who are unaccompanied, require special care. Typically, a small percentage of a refugee population is comprised of unaccompanied minors. UNHCR works with other agencies such as UNICEF, ICRC, and Save the Children to identify these children and try to trace their families. UNHCR has established a database to track the location of families who may have been separated from their children. All children, regardless of whether they are accompanied by relatives, require special care when in a refugee situation. UNHCR, together with the volags and NGOs that provide services to refugees, design healthcare, educational, and recreational services geared to the development needs of children.[32]

UNHCR has developed specialized protections for children not living with their parents who are unaccompanied or separated children (UASC). UASCs should always receive

[31] See United Nations High Commissioner for Refugees, Guidelines on the Protection of Refugee Women (Geneva: July 1991) 31 pp.

[32] See United Nations High Commissioner for Refugees, Refugee Children: Guidelines on Protection and Care (Geneva: 1994).

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special attention because of the particular risks they face. While they are under UNHCR supervision, children's best interests are assessed through a formal process—a "Best Interest Determination." Tracing for parents and other relatives takes place throughout the process and children are reunited with family members when possible.

UNHCR makes recommendations and decisions for these children during different periods of their displacement. When making a recommendation or decision regarding durable solutions for those children who remain unaccompanied or separated, UNHCR follows its Guidelines on Determining the Best Interests of the Child.[33] These Guidelines require that a child welfare expert examines the child's options for durable solutions (return to home country, integration into host society, or resettlement) and recommends a solution that would be in the child's best interest. The recommendation is reviewed by a committee comprised of UNHCR, NGOs, and host country members. If the committee accepts the recommendation of the child welfare expert, the committee signs the recommendation. The final document, the Best Interest Determination (BID) for the child, is intended to prescribe the most appropriate course of action for the State and other actors to undertake on behalf of the child.

6.2.3 Mixed Refugee Camp Populations

When a civil conflict divides a country or a community along ethnic, religious, or tribal lines, individuals from both sides may flee the country and find themselves in the same refugee camp. In such situations UNHCR must tread carefully to keep the peace within the refugee camp.

7 REFUGEE SOLUTIONS

UNHCR and other actors in international protection seek durable solutions to refugee problems. There are three possible solutions: voluntary repatriation, local integration, and third-country resettlement.

7.1 Voluntary Repatriation

This durable solution, preferred by most refugees, allows refugees to return home in safety and with dignity. Voluntary repatriation may require a political solution that addresses the issues that brought about the refugee's flight. Furthermore, attention must be paid to the economic and social development of the community of origin to prevent a resurgence of violence and/or tensions.

The primary goals of UNHCR-sponsored voluntary repatriation are:

- Re-establishing communities;
- Creating conditions for reconciliation; and

[33] United Nations High Commissioner for Refugees, Guidelines on Determining Best Interests of the Child (May 2008).

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- Protecting the basic human rights of returnees.

Before individuals return to the country of origin, UNHCR must ensure that refugees have all the relevant information to make a fully-informed decision and that their decision is voluntary. UNHCR often provides transportation and a start-up package which may include cash grants, income-generation projects, and practical assistance such as farm tools and seeds. In the case of a large-scale repatriation, UNHCR may also be involved in the political dialogue prior to the repatriation and in monitoring the situation after it has occurred.

7.2 Local Integration

Voluntary repatriation may not be an option for refugees when a complex and volatile political situation continues to exist in their country of origin. Local integration provides the next best solution because in many instances, it allows the refugees to live close to their country of origin while providing the opportunity to settle into a secure environment and contribute to the development of their new community.

The government of the country of first asylum must be willing to accept the refugees and offer them a secure status in the country. In some countries, a combination of a state-supported welfare system and the resources of NGOs offer the assistance required to integrate refugees into the society. When the host country cannot provide the necessary funds to sustain local integration, UNHCR lends assistance.

7.3 Third Country Resettlement

Resettlement is generally considered when refugees have particular needs or vulnerabilities in a country of first asylum. Generally these are needs that cannot be addressed in the country of first asylum, and voluntary repatriation is not feasible. The only solution then is to seek resettlement to a third country. Only a small number of countries, however, have established programs that provide resettlement places for UNHCR-referred refugees and less than one percent of the world's refugees are resettled in third countries.

UNHCR recommends for resettlement individuals who fall within one or more of the seven categories discussed below.34 These categories are separate and apart from the protected grounds in the Convention definition of a refugee that serve as the basis for granting the protection of asylum and relate to the refugee's experience in the country of origin. The resettlement categories refer specifically to the situation of refugees in the country of first asylum.

7.3.1 Legal and/or Physical Protection Needs

[34] United Nations High Commissioner for Refugees, Resettlement Handbook, Chapter 6 (July 2011), pp. 243-296.

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This category includes individuals who are under a threat of refoulement or expulsion and individuals who face arrest, detention, physical harm, or a threat to their fundamental human rights in the country of refuge.

7.3.2 Survivors of Torture and/or Other Violence

This category refers to individuals who have experienced torture or other violence in their home country or country of refuge and who may have lingering effects requiring medical or psychological care.

7.3.3 Medical Needs

This category includes individuals who have a life-threatening health condition with no adequate treatment available to them and who face the likelihood that their condition will worsen without treatment. To qualify under this category, there must be a favorable prognosis that the medical condition will improve with treatment.

7.3.4 Women and Girls at Risk

This category refers to women and girls with protection concerns related to their gender and who lack effective protection normally provided by male family members. The protection risks include, among others, expulsion, physical violence, rape, particular economic hardship, and community hostility.

7.3.5 Family Reunification

To qualify under this category, at least one member of a family unit to be reunited must be a refugee under the UNHCR mandate, or be a person of concern to UNHCR, and the family member with whom they are reuniting must be already in the resettlement country. UNHCR considers family reunification to include: parents with minor or dependent children, spouses, and other relatives who lived with the family and are economically and psychologically dependent on the family unit. UNHCR also promotes family reunification for common-law spouses and same-sex or domestic partners.

7.3.6 Children and Adolescents at Risk

This category refers to individuals less than 18 years of age who may or may not be unaccompanied; who have compelling protection needs in their country of refuge; and for whom UNHCR has determined that resettlement is the best solution.

7.3.7 Lack of Foreseeable Alternative Durable Solutions

This category is generally relevant when other solutions are not possible in the foreseeable future. Referrals under this category balance the quality of protection in a country of resettlement against prospects of local integration or voluntary repatriation in the near future.

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8 UNHCR Resettlement Referral Process to the United States

Facilitating the resettlement of refugees from a country of first asylum is the responsibility of both UNHCR and the international community. There are a number of countries that accept refugees for resettlement, such as Canada, Australia, Norway, and Sweden. The United States accepts the largest number.

Access to resettlement in the United States through the U.S. Refugee Admissions Program (USRAP) is limited to those of special humanitarian concern as required by Section 207 of the Immigration and Nationality Act. Given that the number of refugees around the world far exceeds the capacity of the refugee program, the U.S. Government has established a worldwide processing priority system which sets guidelines for the orderly management and processing of refugee applications for admission to the United States. These processing priorities, designated each fiscal year during refugee admissions consultations,[35] identify the nationalities and groups of individuals who are eligible to access the USRAP. Only those individuals who qualify for one of the processing priorities are eligible for a refugee status interview with USCIS.

FY2012 Processing Priorities[36] include:

- P-1: Individual referred by U.S. Embassy, UNHCR, or designated NGO
- P-2: Groups of special humanitarian concern
- P-3: Family reunification for designated nationalities

UNHCR annually conducts and publishes an assessment of global resettlement need projections. This information is used in the context of the annual consultation process. The USRAP and UNHCR also work closely together throughout the year to discuss potential new populations in need of resettlement who may be referred to the U.S. program. UNHCR referrals to the U.S. may be either on an individual basis (P-1) or be done as part of a group referral process (P-2). UNHCR does not play a role in the referral of family reunification cases that qualify for P-3, but in some instances UNHCR may assist with P-3 processing (e.g., helping to obtain exit permission).

In the case of individual referrals (P-1), UNHCR field or branch offices will prepare

[35] Section 207(e) of the INA requires "discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest…" The Secretary of State traditionally serves as the Cabinet member presenting the President's proposal at the Consultations. This proposal is developed by DOS with input from several federal agencies, state governments and private sector organizations interested/involved in U.S. refugee resettlement. Following the consultations, and after receipt of congressional concurrence with the President's proposal, the Department of State (DOS) drafts a Presidential Determination for signature by the President, which establishes the overall admissions levels and regional allocations.

[36] Presidential Determination No. 2011-17

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individual Resettlement Referral Forms (RRFs) for each case that will be submitted to the USRAP. A UNHCR field or branch office may submit the RRF directly to the USRAP, or in some regions, the submissions is through a UNHCR Regional Resettlement Hub (e.g., the Nairobi Hub). For group submissions (P-2), UNHCR and the USRAP agree in advance as to the specific format and process for making referrals. While group referrals procedures can vary substantially from population to population, most UNHCR group submissions include at minimum UNHCR biographic information, such as name, family members, date of birth, and place of birth.

9 OTHER UNHCR FUNCTIONS

9.1 Research

UNHCR has available at its disposal a comprehensive range of country of origin information to assist those working in refugee protection and resettlement. UNHCR's "Refworld," an online database, is a leading source of information necessary for making decisions on refugee status. Refworld contains a vast collection of reports relating to situations in countries of origin, policy documents and positions, and documents relating to international and national legal frameworks.[37] The information has been carefully selected and compiled from UNHCR's global network of field offices, governments, international, regional and non-governmental organizations, academic institutions, and judicial bodies.[38]

9.2 Interpretive Guidance

UNHCR also plays an important legal role in refugee protection. As is evident from the "Additional Resources" section at the beginning of this module, UNHCR issues interpretive guidance on the meaning and application of the refugee definition. This guidance ranges from the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, first published in 1979, to the many Guidelines on International Protection, Guidance Notes, Protection Policy Papers, Handbooks, and training modules on a myriad of topics. USCIS has relied on UNHCR materials as persuasive authority when adjudicating refugee and asylum claims.

9.3 Refugee Status Determination

In some situations, UNHCR makes the initial refugee status determination. This occurs when States, both signatories and non-signatories to the Convention and/or Protocol, do not have a protection structure in place and invite UNHCR to make such determinations. UNHCR also conducts refugee status determinations prior to referring cases for resettlement to the United States under Priority 1.

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[37] Refworld may be accessed through the UNHCR website.

[38] For additional information regarding Refworld, see RAIO Training Module, Country Conditions Research and the RAIO Research Unit.

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9.4 Cooperation

Another UNHCR function is to foster cooperation with and among other U.N. agencies, regional organizations, NGOs, and scientific and research institutions to ensure quick, coordinated responses to refugee problems, as well as to provide protection (both physical and legal) to refugees.

9.5 Training

UNHCR develops training programs for its staff, government officials, and NGOs to sensitize them to fundamental protection issues, to promote effective dialogue, to provide practical knowledge and skills, and to disseminate information on the laws and principles governing protection of refugees and the proper recognition of their rights.

9.6 UNHCR's Mission in the United States

UNHCR has a regional office in Washington, DC that covers the United States and the Caribbean. The regional office comprises several units, including:

- Resettlement – This unit works closely with government officials on Federal, State, and local levels, as well as with non-governmental organizations, to help refugees in need of resettlement come to the United States. The unit actively participates in state and national conferences and training workshops for U.S. resettlement partners. It also gives ongoing support and assistance to UNHCR offices around the world, which are working with operational issues related to the U.S. resettlement program. UNHCR works closely with U.S. counterparts to promote appropriate support systems for refugees with special needs, such as women and children, and medical cases.
- Protection – This unit informs government officials, attorneys, and NGOs in the United States about international standards of refugee protection. The unit meets regularly with governmental and non-governmental partners on refugee protection matters within the United States, provides comments on proposed legislation and regulation, monitors compliance with international standards, and conducts training sessions for government components and non-governmental organizations. The protection unit also assists asylum seekers and their representatives with information on laws, policies, and procedures pertaining to refugees, and may issue advisory opinions or amicus briefs in cases of significant impact.
- Caribbean – This unit covers twenty-seven island states and territories in the Caribbean region and provides support to UNHCR offices located in Haiti and the Dominican Republic. The unit promotes refugee protection through training, advocacy, humanitarian assistance, and long-term solutions on behalf of asylum-seekers, refugees, and stateless people in the Caribbean region. The unit advises regional governments on refugee issues and obligations under international law and supports governments in meeting their obligations towards refugees. The unit also conducts refugee status determinations on behalf of many of the governments in the region that are lacking national protection legislation or the means to effectively

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implement such protection. A network of non-governmental Honorary Liaisons in the region assists UNHCR in meeting its objectives.

10 CONCLUSION

UNHCR has played a fundamental role in the development of international protection throughout the world. The 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees have created flexible and universal mechanisms to address refugee issues. More recently UNHCR has been called on to provide protection to other individuals, including internally displaced people, not covered by the Convention, the Protocol, or any expanded regional instruments.

States, not the international community, have the primary responsibility to provide protection of refugees present on their soil. The 1951 Convention and the 1967 Protocol relating to the Status of Refugees, along with other documents listed in this module establish the standards of international protection. The categories of refugees who require international protection include:

- Mandate Refugees
- Convention Refugees
- Refugees under Regional Instruments
- Individuals with Special Classifications under National Law
- Returnees
- Internally Displaced People

UNHCR provides protection and assistance to refugees and seeks durable solutions to their problems. The durable solutions to refugee problems include: voluntary repatriation, local integration, and resettlement. In addition, UNHCR safeguards other groups of people who have unique protection issues.

11 SUMMARY

11.1 Origins of International Protection for Refugees

Since World War I, the international community has worked together to set standards for the protection of refugees. In 1950, UNHCR was created to protect refugees and find durable solutions to their problems. The 1951 Convention and 1967 Protocol provide a universal definition of a refugee, establish that all signatories are bound by the principle of nonrefoulement, require State signatories to facilitate and cooperate in the supervisory role of UNHCR, and grant to UNHCR the responsibility for managing the protection of refugees.

11.2 Elements of International Protection

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The international community steps forward to care for the citizens of another country when the government of that country cannot or will not protect its citizens. Traditionally, the international community did not provide protection unless the country of nationality was unable or unwilling to protect its citizens, and those citizens had crossed an international border.

In recent years, however, returnees, victims of war, stateless individuals, and internally displaced people have joined Convention refugees as beneficiaries of international protection. Individual countries, the agencies of the United Nations, international and intergovernmental organizations, voluntary agencies, non-governmental organizations, the local population, media, and refugees themselves all contribute greatly to the protection of Convention refugees and other vulnerable populations. In refugee protection, the ability of refugees to enter safely into a country of asylum without the threat of return (refoulement) to the country of feared persecution is of primary importance. Once entry occurs, attention turns to maintaining the safety of the refugees and treating them in accord with human rights standards.

11.3 International Protection Standards

The standards of refugee protection are rooted in international instruments, to which all signatory States must adhere. All individuals are entitled to respect for their basic human rights, regardless of immigration status. Some universally accepted basic rights are considered non-derogable and some are considered principles of customary international law. UNHCR and the international community monitor the actions of countries of asylum to ensure that the protection needs and human rights of refugees are respected.

11.4 Roles of Providers of International Protection

States, as signatories to international conventions and instruments, have the primary responsibility to protect refugees on their soil. The international community joins in the protection efforts when a particular country does not have the resources or the will to ensure the safety of refugees on its soil. UNHCR and the international community fulfill three basic needs of refugees: protection, assistance, and durable solutions. UNHCR does not provide for the needs of refugees alone. International, intergovernmental, and non-governmental organizations, along with voluntary agencies, the local community, and the media, gather information on refugee crises, provide for the safety of refugees, offer legal advice and social counseling, and assist in resettlement of refugees.

11.5 Protection Needs of Refugees

Agencies and entities face significant challenges in the protection of refugees. Threats to safety include discrimination, abusive arrest and detention, rape and sexual violence, forced recruitment into armed services or militias, and denial of the right to work. Furthermore, there are specific groups of refugees who are especially vulnerable to harm. These groups include women, children, and individuals residing in refugee camps of

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mixed populations. Mixed populations include economic migrants, combatants, and criminals within a camp, in addition to the refugee population.

11.6 Refugee Solutions

The three durable solutions for refugees are voluntary repatriation, local integration, and third country resettlement. The solution preferred by most refugees is their voluntary return to their country, when conditions permit. This solution requires close monitoring of the repatriation process. The solution of local integration requires the willingness of the country of asylum to take over from the international community in protecting the rights of refugees. Local integration succeeds when refugees are offered a secure status in the country of asylum and allowed to participate fully in the new society. Resettlement, the solution of last resort, offers an option for refugees when the first two solutions are not feasible. In determining whether a refugee is an appropriate candidate for resettlement, UNHCR must evaluate the degree of harm the individual faces, the humanitarian needs of individuals, and family reunification considerations, among other factors.

11.7 Other UNHCR Functions

UNHCR enhances its operations through research into conditions in countries of origin and first asylum, cooperation with other entities involved in human rights monitoring and refugee protection, and training its staff, government officials, and NGO personnel on issues of refugee protection.[39]

[39] United Nations High Commissioner for Refugees, "UNHCR Washington: Resettlement."

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PRACTICAL EXERCISES

Practical Exercise # 1

- Title:
- Student Materials:

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OTHER MATERIALS

There are no Other Materials for this module.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1. United Nations High Commissioner for Refugees, Resettlement Handbook (Geneva, 2011), Chapter 6: UNHCR Resettlement Submission Categories, 55p.

2. United Nations High Commissioner for Refugees, Resettlement Handbook (Geneva, 2011), Chapter 5: Protection Considerations, and the Identification of Resettlement Needs, Section 5.2.2. Children and Adolescents, pp. 184-194, 10p.

3. United Nations High Commissioner for Refugees, Resettlement Handbook (Geneva, 2011), Chapter 7: Basic Procedures to Follow in Processing Resettlement Submissions, 84p.

SUPPLEMENTS

RAD Supplement – 1

Module Section Subheading

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

SUPPLEMENTS

ASM Supplement – 1

Module Section Subheading

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. 9 FAM Appendix O, Processing Individual Refugee Cases, 5p. This Foreign Affairs Manual link describes the Department of State procedures for individual refugee processing.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

IO Supplement – 1

Module Section Subheading

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

WELL-FOUNDED FEAR

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

WELL-FOUNDED FEAR

Training Module

MODULE DESCRIPTION:

This module discusses the definition of a refugee as codified in the Immigration and Nationality Act and its interpretation in administrative and judicial case law. The primary focus of this module is the determination as to whether an applicant has established a reasonable possibility of suffering future harm in the country of nationality or last habitual residence.

TERMINAL PERFORMANCE OBJECTIVE(S)

During an interview you (the Officer) will be able to elicit relevant information to correctly determine if an applicant has a well-founded fear of future persecution.

ENABLING PERFORMANCE OBJECTIVES

1. Explain the legal standard required to establish a well-founded fear of persecution.
2. Distinguish between the subjective and objective elements of well-founded fear.
3. Summarize the four basic criteria necessary to establish a well-founded fear of future persecution.
4. Analyze factors to consider in determining whether internal relocation is reasonable.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Practical Exercises

METHOD(S) OF EVALUATION

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- Observed Practical Exercises
- Multiple Choice Exam

REQUIRED READING

1. Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).
2. United Nations High Commissioner for Refugees, Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses). HCR/GIP/03/03 (10 February 2003).
3. United Nations High Commissioner for Refugees, Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees. HCR/GIP/03/04 (23 July 2003).

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

Task/ Skill #	Task Description
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR4	Knowledge of the relevant sections of the 8 Code of Federal Regulations (CFR) (4)
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ILR17	Knowledge of who has the burden of proof (4)
ILR18	Knowledge of different standards of proof (4)
ILR20	Knowledge of the criteria for refugee classification (4)

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ILR21	Knowledge of the criteria for establishing a well-founded fear (WFF) (4)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
IRK3	Knowledge of the procedures and guidelines for establishing an individual's identity (4)
RI1	Skill in identifying issues of claim (4)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

The refugee definition at INA § 101(a)(42) states that an individual is a refugee if he or she establishes past persecution or a well-founded fear of future persecution on account of a protected characteristic. An applicant can establish eligibility for refugee resettlement or asylum even if he or she has not actually suffered persecution in the past. The requirements for an applicant to establish eligibility based on past persecution are discussed in the RAIO Training Modules, Refugee Definition and Definition of Persecution and Eligibility Based on Past Persecution. The requirements needed to establish that persecution or feared persecution is "on account of" any of the five protected grounds in the refugee definition are discussed in the RAIO Training Module, Nexus and the Five Protected Grounds.

This module discusses the elements necessary to establish a well-founded fear of future persecution and how to elicit testimony regarding each of these elements.

To correctly determine whether an applicant's fear is well-founded, you must have a firm understanding of: 1) the subjective and objective elements of well-founded fear; 2) the four-part Mogharrabi test;[1] and 3) the reasonable possibility standard of proof.

2 WELL-FOUNDED FEAR: BURDEN OF PROOF[2]

The burden of proof is on the applicant to establish that he or she is a refugee as defined in the refugee definition. Credible testimony alone may be sufficient to meet the

[1] Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (BIA 1987).

[2] For information on establishing a well-founded fear based on Coercive Population Control, see ASM Supplement – Coercive Population Control.

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applicant's burden. As such, you, the officer, have a duty to elicit sufficient testimony to make the determination whether the applicant is eligible for asylum or refugee status.

An applicant for asylum or refugee status may qualify as a refugee either because he or she suffered past persecution or because he or she has a well-founded fear of persecution on account of a protected ground.

In asylum processing, if an applicant establishes past persecution, he or she shall be presumed to have a well-founded fear of future persecution on the basis of the original claim.[3] The burden of proof then shifts to the officer to rebut the presumption that the applicant has a well-founded fear of future persecution. That presumption may be rebutted if an Asylum Officer finds that there has been a fundamental change in circumstances to such an extent that the applicant no longer has a well-founded fear of persecution or the applicant could avoid future persecution by relocating to another part of his or her home country. See ASM Supplement – Presumption Raised By Past Persecution.

The same is not true in overseas refugee processing. In refugee processing, an applicant may be admitted as a refugee if he or she establishes past persecution on account of a protected ground, regardless of changed circumstances or the possibility of internal relocation.[4]

An applicant who is claiming a well-founded fear of persecution based on coercive population control must establish more than a generalized fear that he or she will be persecuted. As this scenario is not often seen in the overseas refugee context, information regarding this issue is located in the ASM Supplement – Coercive Population Control.

In either the asylum or refugee context, an applicant can show he or she is a refugee based solely on a well-founded fear of future persecution without having established past persecution.

3 Elements of Well-Founded Fear

To establish a well-founded fear of persecution within the meaning of the refugee definition, an applicant must show that he or she has: 1) a subjective fear of persecution; and, 2) that the fear has an objective basis. [5]

3.1 Subjective Element

[3] 8 C.F.R. § 208. See ASM Supplement –Presumption Raised By Past Persecution.

[4] INA § 101(a)(42).

[5] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, para. 38 (2011).

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The applicant satisfies the subjective element if he or she credibly articulates a genuine fear of return.[6] As the UNHCR Handbook notes, when evaluating whether an applicant's fear is subjective, it is important to keep in mind the applicant's background, personal beliefs, sensitivities, societal status, and personality:

> since psychological reactions of different individuals may not be the same in identical situations. One person may have strong political or religious convictions, the disregard of which would make life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape, another may carefully plan his departure.[7]

Fear has been defined as an apprehension or awareness of danger.[8] Fear of famine or natural disaster, without more, fails to meet this element as does general dissent, disagreement with a government, the desire for more personal freedom, or an improved economic situation.[9]

A genuine fear of persecution must be the applicant's primary motivation in seeking refugee or asylum status.[10] However, it need not be the only motivation.[11] An applicant may fear persecution and desire more personal freedom or economic advantage.

It is important to remember that just because an applicant exhibits courage in the face of danger this does not negate his or her genuine fear of persecution.[12]

Examples

> An applicant continued to protest against the government after an arrest, despite a lengthy detention.
>
> An applicant returned to her country after fleeing, in the hopes that the situation had improved, even though she was tortured there in the past.

Relevant Questions

Would the applicant be able to go back to his or her country? Why? Why not? Has the applicant ever gone back to his or her country? Why? Why not? (As a last resort, if

[6] See Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985).

[7] UNHCR Handbook, para. 40.

[8] Matter of Acosta, 19 I. & N. Dec. 211, 221 (BIA 1985); UNHCR Handbook, para. 39.

[9] UNHCR Handbook, para. 39; Matter of Acosta, 19 I. & N. Dec. 211, 221 (BIA 1985).

[10] Matter of Acosta, 19 I. & N. Dec. 211, 221 (BIA 1985).

[11] UNHCR Handbook, para. 39.

[12] Smolniakova v. Gonzales, 422 F.3d 1037, 1050 (9th Cir. 2005), citing Singh v. Moschorak, 53 F.3d 1031, 1034 (9th Cir. 1995).

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applicant does not respond) Is the applicant afraid to go back? Why? Why not? What does the applicant think would happen if he or she were to return to his or her country?

3.2 Objective Element

In Cardoza-Fonseca, the Supreme Court concluded that the standard for establishing the likelihood of future harm in asylum is lower than the standard for establishing likelihood of future harm in withholding of deportation: "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."[13]

Cardoza-Fonseca points to the following example to illustrate:

> In a country where every tenth adult male is put to death or sent to a labor camp, "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." [14]

The determination of whether a fear is well-founded does not ultimately rest on the statistical probability of persecution, which is almost never available, but rather on whether the applicant's fear is based on facts that would lead a reasonable person in similar circumstances to fear persecution.[15]

An applicant must establish the likelihood of future persecution by the reasonable possibility standard of proof, i.e., that a reasonable person in the applicant's circumstances would fear persecution upon return to his or her country of origin. The reasonable possibility standard is more generous than a "more likely than not" standard.[16]

4 THE *MOGHARRABI* TEST

[13] INS v. Cardoza-Fonseca , 480 U.S. 421, 431(1987); see also INS v. Stevic , 467 U.S. 407 (1984).

[14] INS v. Cardoza-Fonseca, at 431, citing to 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966).

[15] See Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (BIA 1987); Guevara Flores v. INS, 786 F.2d 1242 (5th Cir. 1986); M.A. v. U.S. INS, 899 F.2d 304, 311 (4th Cir. 1990). See also Lolong v. Gonzales, 484 F.3d 1173, 1178 (9th Cir. 2007) (en banc) (to establish that her fears are objectively reasonable the applicant must provide evidence that is credible, direct, and specific); Zheng v. Gonzales, 475 F.3d 30 (1st Cir. 2007) (the applicant's fears found not objectively reasonable, despite her personal opposition to China's coercive population control policies, because her circumstances were no different from those of other Chinese women of marriageable age and she intended to abstain from sex until marriage).

[16] I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987).

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Matter of Mogharrabi lays out a four-part test for determining well-founded fear. To establish a well-founded fear of future persecution, the applicant must establish the following elements:[17]

1. Possession (or imputed possession of a protected characteristic)
2. Awareness (the persecutor is aware or could become aware the applicant possesses the characteristic)
3. Capability (the persecutor has the capability of punishing the applicant)
4. Inclination (the persecutor has the inclination to punish the applicant)

This is sometimes referred to as "PACI" (pronounced "pah'-chee") for the first letter in each element.

4.1 Possession (or Imputed Possession) of a Protected Characteristic

The applicant must establish that the characteristic falls within one of the protected grounds listed in the refugee definition. For additional information, see RAIO Training module, Nexus and the Five Protected Grounds. The applicant must establish that he or she possesses or is believed to possess the characteristic the persecutor seeks to overcome.[18] Although Mogharrabi states that the applicant must establish that the persecutor seeks to overcome the characteristic by means of punishment, more recent case law holds that the persecutor need not intend to punish or have any malignant intent toward the applicant.[19]

Relevant Questions

Why is the applicant afraid of returning to his or her country? What does the persecutor not like about the applicant? Why would someone want to harm the applicant in his or her country? If harmed in the past, why did the persecutor harm applicant? What is the applicant's protected characteristic? How are others with the applicant's protected characteristic treated? What did the persecutor say to the applicant? Why would the persecutor think the applicant has a protected characteristic?

4.2 Awareness

The applicant must establish that the persecutor is aware or could become aware that the applicant possesses (or is believed to possess) the characteristic.

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[17] Matter of Mogharrabi , 19 I. & N. Dec. 439 (BIA 1987) modifying Matter of Acosta , 19 I. & N. Dec. 211 (BIA 1985).

[18] Matter of Mogharrabi , 19 I. & N. Dec. 439 (BIA 1987).

[19] See Matter of Kasinga, 21 I. & N. Dec. 357 (BIA 1996); see also Pitcherskaia v. I.N.S. , 118 F.3d 641 (9th Cir. 1997).

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The applicant must establish that there is a reasonable possibility that the persecutor could become aware that the applicant possesses the characteristic; mere speculation that the persecutor could become aware is insufficient.[20]

The applicant is not required to hide his or her possession of a protected characteristic in order to avoid awareness.

Relevant Questions

How would someone know that the applicant had the protected characteristic? How could someone recognize the applicant as someone with the protected characteristic? If you were in the applicant's country, how would you know the applicant was someone with the protected characteristic? How would the persecutor know that the applicant had returned to his or her country?

4.3 Capability

The applicant must establish that the persecutor has the capability to persecute the applicant because he or she possesses a protected characteristic, or because the persecutor believes the applicant possesses a protected characteristic. Some factors to consider in evaluating capability include:

- whether the persecutor is a governmental entity and, if so, the extent of the government's power or authority
- whether the persecutor is a non-governmental entity, and if so, the extent to which the government is able or willing to control it21
- the extent to which the persecutor has the ability to enforce his or her will throughout the country

Relevant Questions

Who is the persecutor? If the persecutor is a part of a government, what role does the persecutor play within the government? How much authority does the persecutor have? If the persecutor is part of the government, can the applicant seek protection from another government entity within the country? Why or why not? If the persecutor is a non-government actor, would the government be able to or want to protect the applicant? Did the applicant report the non-governmental actor to the police? Would the police or government offer any protection to the applicant?

[20] See Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985); Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

[21] For additional information, see RAIO Training modules, Refugee Definition and Definition of Persecution and Eligibility Based on Past Persecution (section on Entity the Government is Unable or Unwilling to Control).

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During the interview, you will need to ask the applicant questions about the persecutor's capability to persecute him or her. You may use country of origin information[22] to help you determine the capability of the persecutor to harm the applicant if the applicant is having difficulty answering your questions regarding capability.

4.4 Inclination

The applicant must establish that the persecutor has the inclination to persecute him or her. Note that the applicant does not need to establish that the persecutor is inclined to punish the applicant, i.e., that the persecutor's actions are motivated by a malignant intent.[23]

Relevant Questions

If many months or years have passed, does the applicant think the persecutor would still want to harm him or her? Why? Why not? Does the applicant know anyone with his or her protected characteristic who has returned to the home country? What happened to the person who returned? Does the applicant know anyone in the same circumstances who remained in the home country? If so, what, if anything, has happened to that person in the home country? What does the applicant hear about the treatment of others possessing the applicant's protected characteristic in the home country now?

Similar to documenting the capability of the persecutor, you will need to ask the applicant questions about whether the persecutor would be inclined to persecute the applicant. If the applicant is unable to answer questions regarding whether the persecutor is inclined to persecute him or her, you may use country of origin information to help you determine the persecutor's inclination to persecute the applicant.[24] Factors to consider when evaluating inclination include any previous threats or harm from the persecutor and the persecutor's treatment of individuals similarly situated to the applicant. The motive of the persecutor is discussed in detail in the RAIO Training Module, Nexus and the Five Protected Grounds.

5 Pattern or Practice

5.1 General Rule

The applicant need not show that he or she will be singled out individually for persecution, if the applicant shows that:

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[22] For additional information, see RAIO Training module, Country of Origin Information.

[23] Matter of Kasinga, 21 I. & N. Dec. 357 (BIA 1996); Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997).

[24] As noted above, although Mogharrabi states that the applicant must establish that the persecutor seeks to overcome the characteristic by means of punishment, more recent case law holds that the persecutor need not intend to punish or have any malignant intent. See Matter of Kasinga, 21 I. & N. Dec. 357 (BIA 1996) and Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997).

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- There is a pattern or practice of persecution on account of any of the protected grounds against a group or category of persons similarly situated to the applicant.[25]

- The applicant belongs to or is identified with the persecuted group, so that a reasonable person in the applicant's position would fear persecution.[26]

5.2 "Pattern or Practice" of Persecution

There is no established definition of "pattern or practice." You must evaluate claims of well-founded fear based on a pattern or practice of persecution on a case-by-case basis. The Court of Appeals for the Eighth Circuit has interpreted "pattern or practice" to mean something "on the order of organized or systematic or pervasive persecution," but held that it does not require a showing of persecution of all the members of the group.[27]

The Ninth Circuit has held that even if there is no systematic persecution of members of a group, persecution of some group members may support an applicant's fear of being singled out in the future, if the applicant is similarly situated to those members. The court explained:

> if the applicant is a member of a 'disfavored' group, but the group is not subject to systematic persecution, this court will look to (1) the risk level of membership in the group (i.e., the extent and the severity of persecution suffered by the group) and (2) the alien's individual risk level (i.e., whether the alien has a special role in the group or is more likely to come to the attention of the persecutors making him a more likely target for persecution).[28]

The Ninth Circuit went on to state, "[t]he relationship between these two factors is correlational; that is to say, the more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution needs to be."[29]

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[25] 8 C.F.R. § 208.13(b)(2)(iii)(A).

[26] 8 C.F.R. § 208.13(b)(2)(iii)(B).

[27] See Makonnen v. INS, 44 F.3d 1378, 1383 (8th Cir. 1995); Feleke v. INS, 118 F.3d 594 (8th Cir. 1997); see also Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005) (adopting Eighth Circuit's definition of "pattern or practice" of persecution), Matter of A-M-, 23 I& N Dec. 737, 741 (BIA 2005) (applying the Eighth Circuit standard in upholding the IJ's finding that the applicant failed to establish a pattern or practice of persecution in Indonesia against Chinese Christians). See also Meguenine v. INS, 139 F.3d 25, 28 (1st Cir. 1998) (to establish a pattern or practice of persecution the applicant must submit evidence of "systematic persecution" of a group); Mitreva v. Gonzales, 417 F.3d 761, 765 (7th Cir. 2005)(citing case examples, and noting that "courts have interpreted the regulation to apply only in rare circumstances").

[28] Sael v. Ashcroft, 386 F.3d 922, 925 (9th Cir. 2004); Mgoian v. INS, 184 F.3d 1029, 1035 n. 4 (9th Cir. 1999); citing to Kotasz v. INS, 31 F.3d 847, 853 (9th Cir. 1994); see also Singh v. INS, 94 F.3d 1353 (9th Cir. 1996).

[29] Mgoian at 1035: see also Kotasz and Singh.

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The First, Third, and Seventh Circuits have rejected the Ninth Circuit's use of a lower "disfavored group" standard where there is insufficient evidence to establish a "pattern or practice" of persecution.[30]

5.3 Group or Category of Individuals Similarly Situated

There is no established rule regarding the type of group or category with which the applicant must be identified. The group could include a few individuals or many. However, the members of the group or category must share some common characteristic that the persecutor seeks to overcome and that falls within one of the protected grounds in the refugee definition.[31]

Relevant Questions

How were others similarly situated to the applicant treated in the applicant's home country? How were others treated, with whom the applicant was associated? How would the applicant be seen as connected with this group? How does the persecutor treat people who are seen as belonging to this group? Have other people in this group who also fled returned to the home country? How have they been treated? What has happened to them?

You should also consult country conditions reports to determine whether the applicant belongs to a group at risk of harm and the extent to which that group is at risk.

6 Persecution of Individuals Closely Related to the Applicant

6.1 Objective Evidence Supporting Fear

The persecution of family members or other individuals closely associated with the applicant may provide objective evidence that the applicant's fear of future persecution is well-founded, even if there is no pattern or practice of persecution of such individuals. On the other hand, continued safety of individuals similarly situated to the applicant may, in some cases, be evidence that the applicant's fear is not well-founded.[32]

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[30] Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005) (finding that violence against Chinese Christians in Indonesia is not sufficiently widespread to constitute a "pattern or practice" of persecution); Firmansjah v. Gonzales, 424 F.3d 598, 607 n.6 (7th Cir. 2005) (noting that the court has not recognized a lower threshold of proof based on membership in a "disfavored group" where the evidence is insufficient to establish "pattern or practice"); Kho v. Keisler, 505 F.3d 50, 55 (1st Cir. 2007) (noting that the disfavored group analysis is creates a threshold for relieving applicants of the need to establish individualized persecution that is not found in the regulations).

[31] See, Meguenine v. INS, 139 F.3d 25 (1st Cir. 1998) (Applicant failed to establish well-founded fear based on pattern or practice of individuals similarly situated to him, because evidence indicated that those targeted were not persecuted because of the characteristic they shared with the applicant, but rather a characteristic the applicant did not possess – prominent opposition to Islamic fundamentalists).

[32] See Matter of A-E-M-, 21 I. & N. Dec. 1157 (BIA 1998); but see Cordero-Trejo v. INS, 40 F.3d 482 (1st Cir. 1994) (remanded to the BIA, in part, for the Board to consider evidence that others similarly situated to the applicant were also being subjected to violence by government forces).

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6.2 Connection Must Be Established

The applicant must establish a connection between the persecution of the family member or associate and the harm that the applicant fears.[33]

Example

> An applicant's sister was arrested because she was a member of the same opposition party as the applicant. The sister and the applicant lived in the same city. The applicant learned of the arrest through continued contact with family in the home country. The sister's arrest must be considered in evaluating the applicant's claim. On the other hand, if the facts were different and the applicant did not live in the same city as her sister, had little contact with her, and had no association with her political party, the sister's arrest must still be considered, but might not be enough to establish a well-founded fear.

7 Threats May Be Sufficient Without Harm

Serious threats made against an applicant may constitute past persecution even if the applicant was never physically harmed.[34] A threat (anonymous or otherwise) may also be sufficient to establish a well-founded fear of persecution, depending on all of the circumstances of the case. There is no requirement that the applicant be harmed in the past or wait to see whether the threat will be carried out. The fact that an applicant has not been harmed in the past is not determinative of whether his or her fear of future persecution is well founded. However, the evidence must show that the threat is serious and that there is a reasonable possibility the threat will be carried out.[35]

Threats must be evaluated in light of the conditions in the country and the circumstances of the particular case. Anonymous threats could be a result of personal problems unrelated to any of the protected characteristics in the refugee definition. On the other hand, death squads may use anonymous threats to terrorize those over whom they seek control. The fact that a threat is anonymous does not necessarily detract from the seriousness of the threat. Further inquiry should be made regarding the circumstances and content of the threat to evaluate whether it provides a basis for a well-founded fear. In

[33] See Matter of A-K-, 24 I. & N. Dec. 275, 277-78 (BIA 2007) (the applicant was not eligible for withholding of removal, based on a fear that his daughters would be subjected to FGM, as he did not establish a pattern of persecution tied to him personally).

[34] Salazar-Paucar v. INS, 281 F.3d 1069, 1074 (9th Cir. 2002), amended by Salazar-Paucar v. INS, 290 F.3d 964 (9th Cir. 2002). For additional information, see RAIO Training modules, Refugee Definition and Definition of Persecution and Eligibility Based on Past Persecution.

[35] Matter of Villalta, 20 I&N Dec. 142 (BIA 1990); Kaiser v. Ashcroft, 390 F.3d 653, 658 (9th Cir. 2004); Arteaga v. INS, 836 F.2d 1227 (9th Cir. 1988); Sotelo-Aquije v. Slattery, 17 F.3d 33 (2d Cir. 1994); Cordero-Trejo v. INS, 40 F.3d 482 (1st Cir. 1994).

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many cases, the content of an anonymous threat sheds light on the identity of the source of the threat.[36]

In determining whether a threat or threats establish a well-founded fear of persecution, you should elicit information from the applicant about all of the circumstances relating to the threat. Factors to consider may include:

- whether others have received similar threats, and what happened to those individuals
- the authority or power of the individual or group that made the threat
- any activities that may have placed the applicant at risk
- country of origin reports

8 Significant Lapse of Time Between Occurrence of Event(s) and Flight

8.1 General Rule

A significant lapse of time between the occurrence of incidents that form the basis of the claim and an applicant's departure from the country may be evidence that the applicant's fear is not well-founded.[37] The lapse of time may indicate that:

- the applicant does not possess a genuine fear of harm
- the persecutor does not possess the ability or the inclination to harm the applicant

8.2 Possible Exceptions

There may be valid reasons why the applicant did not leave the country for a significant amount of time after receiving threats or being harmed, including:

- lack of funds to arrange for departure from the country
- time to arrange for the safety of family members

[36] See, e.g., Aguilera-Cota v. INS, 914 F.2d 1375 (9th Cir.1990); Cordero-Trejo v. INS, 40 F.3d 482 (1st Cir. 1994); Gailius v. INS, 147 F.3d 34 (1st Cir. 1998); Kaiser v. Ashcroft, 390 F.3d 653, 658 (9th Cir. 2004); Canales-Vargas v. Gonzales, 441 F.3d 739, 744-745 (9th Cir. 2006) (finding that the timing of threats – two or three weeks after the applicant publicly denounced the Shining Path guerrillas – was circumstantial evidence sufficient to establish the Shining Path as the source of the threats).

[37] See Castillo v. INS, 951 F.2d 1117 (9th Cir. 1991); Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005) (upholding BIA's determination that applicant did not establish a subjective fear of future persecution when she had remained in Indonesia for two years after the robbery that formed the basis of her claim to asylum).

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- belief that the situation would improve
- promotion of a cause within the home country
- temporary disinclination or inability by the persecutor to harm the applicant

8.3 Factors to Consider

To evaluate the weight to be given to this issue, it is important to consider all circumstances,[38] including:

The amount of time the applicant remained

A relatively short period, such as weeks or months, may not be significant, whereas years could be significant, depending on the circumstances. You must ascertain whether the length of time has a significant impact on the applicant's claim.

The reason for the delay

There may have been a lack of opportunity to escape or the applicant may have had other legitimate reasons for deciding to remain in the country. On the other hand, an applicant may provide reasons that are not consistent with his or her alleged reasons for leaving the country.

The applicant's location during that time

Whether the applicant remained near the place of persecution, or went into hiding, or moved to a distant location within the country, may have a bearing on the issue. If an applicant remained in the area where the persecutor could easily locate the applicant, you must elicit additional testimony as to why the applicant did so, as well as reasons why the persecutor did not continue his or her activities against the applicant.

The applicant's activities during that time

It may be relevant to determine whether the applicant went into hiding or assumed his or her normal routine. If the applicant made attempts to reduce his or her vulnerability to persecution, and believed that those attempts would be effective, this could explain the delay. If the applicant did not change his or her daily routine, you should explore whether the applicant continued to remain vulnerable to the possibility of persecution.

The persecutor's activities during that time, if known

[38] See Gonzales v. INS, 82 F.3d 903, 909 (9th Cir. 1996) (finding that the applicant's stay in Nicaragua for 3 years after the first threat did not undermine her claim of a well-founded fear where the threats were repeated, applicant took steps to protect herself, and a pattern of violence against her family members made her fear well-founded).

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If the persecutor suspends persecutory activities during the time in which the applicant remained in his or her country, this could explain the delayed departure.

9 RETURN TO COUNTRY OF FEARED PERSECUTION

9.1 Effect on Well-Founded Fear Evaluation

Depending on the circumstances, an applicant's return to the country of feared persecution may indicate that the applicant does not possess a genuine (subjective) fear of persecution or that the applicant's fear is not objectively reasonable. However, return to the country of feared persecution does not necessarily defeat the claim.[39]

The regulations at 8 C.F.R. § 208.8(b) address the effect of return to the home country in the context of an asylum seeker. Please see the ASM Supplement – Return to Country of Feared Persecution for further information on this topic. While there is no equivalent regulation governing overseas refugee adjudications, return to the country of feared persecution in this context may affect whether the applicant has a well-founded fear of persecution. RAD Supplement – Return to Country of Feared Persecution. For additional information, see RAIO Training modules, Refugee Definition and Definition of Persecution and Eligibility Based on Past Persecution.

In the overseas refugee context, an applicant need only establish either past persecution or a well-founded fear of future persecution.

9.2 Factors to Consider

Why Did Applicant Return?

In evaluating the weight to be given to an applicant's return, you must consider the reason the applicant returned. There may be one or more compelling reasons for an applicant to return. For example, the Ninth Circuit held that the fact that applicant returned to the country of feared persecution to get her child, whose custodian had died, did not undercut the genuineness of her fear.[40]

What Happened Upon Return?

[39] Procedurally, an applicant with a pending asylum application who leaves the United States without advance parole is presumed to have abandoned his or her asylum claim, regardless of the country he or she travels to. 8 C.F.R. § 208.8(b). The presumption is generally overcome by the applicant's appearance at the asylum office. Return to country of feared persecution is also addressed in the RAIO Training module, Refugee Definition and Past Persecution. In this section, you should focus on how the applicant's return factors into the analysis of well-founded fear.

[40] Rodriguez v. INS, 841 F.2d 865 (9th Cir. 1987); see also Damaize-Job v. INS, 787 F.2d 1332 (9th Cir. 1986) (Applicant's return to country of feared persecution because he wanted to help his uncle and sister who had been arrested was not inconsistent with a well-founded fear).

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It is also important to consider what happened to the applicant after he or she returned to the country of feared persecution. Threats or harm experienced upon return would strengthen the applicant's claim that he or she faces a reasonable risk of persecution. However, the ability to return to and remain safely in the country of feared persecution would undercut the reasonableness of the applicant's fear, particularly if the applicant remained there a significant amount of time and lived openly (not in hiding).

Examples

- An applicant returned to his home country of Lebanon to attend to his dying father. Out of fear of persecution, he cut short his visit and returned to the United States before his father's funeral. Four years later, he returned to Lebanon to attend to his dying mother. Because a fear of persecution, the applicant delayed this visit and by the time he arrived in Lebanon his mother had already died. The court concluded that these two return visits were not substantial evidence that the applicant's fear of persecution was not well-founded.[41]

- A Rwandan applicant provided "reasonable explanations" for remaining in school in her home country and several return trips to her home country after she fled, according to the First Circuit Court of Appeals.[42] The court noted that all members of her immediate family had been killed and she returned at the urging of a close friend, a nun, who was not aware that she had been raped in Rwanda and who believed that the applicant would no longer be a target after her father's death. The court also relied on the fact that the applicant had no means of financial or emotional support, except for the nun, and her only means of obtaining an education was through the free education offered at the National University of Rwanda. Upon return, the applicant changed her name, but was soon discovered. She also returned later to obtain her transcript so that she might be able to attend school in the United States. The court concluded that "[f]aced with no viable means of support otherwise, people take risks in the face of their fears."[43]

10 Possession of Travel Documents

10.1 General Rule

Possession of a valid national passport and other official travel documents is not a bar to refugee status. However, possession of such documents may be considered in evaluating whether the applicant is at reasonable risk of harm from the government, because it may be evidence that the government is not inclined to harm the applicant. This would only be relevant when the government is the persecutor.

[41] Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005).

[42] Mukamusoni v. Ashcroft, 390 F.3d 110, 125 (1st Cir. 2004).

[43] Mukamusoni v. Ashcroft, 390 F.3d at 126.

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10.2 Factors to Consider

To evaluate the weight to be given to the applicant's possession of travel documents, the circumstances surrounding the acquisition of the documents should be elicited and considered. Factors to consider include:

- Whether the passport-issuing or exit control agency is separate from the branch of government that seeks to harm the applicant and whether that agency is aware of the applicant's situation44
- Whether the applicant obtained the documents surreptitiously (e.g., through a bribe or with the help of a friend)
- Whether the government issued the documents so that the applicant would go into exile
- Whether the applicant obtained the documents prior to the incidents that gave rise to the applicant's fear

11 REFUGEE SUR PLACE

11.1 Definition

UNHCR defines a "refugee sur place" as a "person who was not a refugee when he left his country, but who becomes a refugee at a later date."[45] An individual may become a refugee due to circumstances arising in the country of origin after the individual left, or due to actions the individual took while outside his or her country.[46]

11.2 Analysis

To evaluate a claim, you should apply the Mogharrabi four-pronged test, just as in any other claim of well-founded fear. A common issue that arises in such cases is whether there is a reasonable possibility the persecutor could become aware that the applicant possesses a characteristic that the persecutor seeks to overcome, or might impute the characteristic to the applicant.

11.3 Factors to Consider

[44] See Khup v. Ashcroft, 376 F.3d 898, 905 (9th Cir. 2004) (finding that IJ erred in failing to consider Khup's explanation that he obtained the passport through a broker to whom he paid a large sum of money and IJ failed to explore how the applicant was able to renew the passport).

[45] UNHCR Handbook, para. 94.

[46] UNHCR Handbook, paras. 94-96: Refugees "sur place;" See Kyaw ZwarTun v. INS, 445 F.3d 554 (2d Cir. 2006) (finding error where the IJ failed to consider whether the applicant's political activities since coming to the US, even if not motivated by actual political beliefs, established a well-founded fear of persecution).

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- The visibility of the applicant's activities outside the country of feared persecution (e.g., does the applicant attend or speak at small and large rallies, give money to an organization, is the applicant active online or in social media, or has the applicant been exposed by the press?)

- The extent of the feared persecutor's network outside the country of feared persecution (e.g., does the applicant's government closely monitor nationals abroad?)

- The persecutor's opinion of those who have resided in other countries (e.g., is the applicant's government suspicious of those who have resided in countries viewed as political opponents?)

Examples

An Iranian national had an altercation with an Iranian official at the Iranian Interests Section of the Algerian Embassy in the United States. The applicant accused the official of robbing Iran and being a religious fascist. In response, the official pulled a gun and threatened the applicant. The BIA found that a reasonable person in the applicant's situation would fear persecution on account of political opinion, because the applicant's opposition to the authorities was known to an Iranian official, and it was not disputed that the Iranian regime persecutes its opponents.[47]

12 INTERNAL RELOCATION

12.1 Countrywide Scope of Feared Persecution

The threat of feared persecution must exist throughout the country where persecution is feared, unless it is unreasonable for the applicant to relocate within the country. If the applicant can reasonably relocate to another part of the country to avoid future persecution, then the applicant's fear of persecution is not well-founded.[48] When determining whether internal relocation is an option, apply the reasonableness test explained below.

A countrywide threat of persecution is not required to establish past persecution. It is not logical to state that a person was or was not harmed countrywide in the past. If an applicant suffered persecution on account of a protected ground, then the applicant is a refugee, irrespective of whether the persecutor would have had the ability to harm the applicant if the applicant had relocated within the country.

In assessing an applicant's well-founded fear and internal relocation, apply the following two-step approach:

[47] Matter of Mogharrabi, 19 I. & N. 439 (1987); see also Bastanipour v. INS, 980 F.2d 1129 (7th Cir. 1992).

[48] 8 C.F.R. § 208.13(b)(3)(i)

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1. Determine if an applicant could avoid future persecution by relocating to another part of the applicant's home country.[49] If you find that an applicant will not be persecuted in another part of the country, then,

2. Determine if an applicant's relocation, under all circumstances, would be reasonable[50]

Examples

- In some countries, it would be unreasonable to require a single woman to relocate to areas where she has no family or social safety net.

- For an applicant with a disability, it would be unreasonable to expect the applicant to relocate to an area that lacks appropriate medical care.

- Where relocation is inconvenient because the applicant lacks social connection such as family and friends, it may nonetheless be reasonable to expect the applicant to relocate if the applicant has sufficient funds, the applicant could obtain employment, and where he or she could integrate into the new area without difficulties.

- It could be reasonable to expect an applicant to relocate to a safe area of his country, even though he does not fluently speak the dialect used in that location.

12.2 Government or Government-Sponsored Persecutor

In cases in which the feared persecutor is a government or is government-sponsored, you must presume that there is no reasonable internal relocation option. This presumption may be overcome if you show by a preponderance of the evidence that the applicant could avoid future persecution by relocating to another part of the applicant's country and that it would be reasonable to expect the applicant to relocate.[51]

12.3 Non-Governmental Persecutor or Entity

If the persecutor is a non-governmental entity, the applicant must demonstrate that there is no reasonable internal relocation option. Analyze the facts according to the two-step test for internal relocation. First, determine if the applicant could avoid future persecution by relocating to another part of the country. If the applicant would not face persecution in another part of the country, then determine if, under all circumstances, it would be reasonable to expect the applicant to relocate.

Examples

[49] 8 C.F.R. § 208.13(b)(2)(ii).

[50] 8 C.F.R. § 208.13(b)(2)(ii).

[51] 8 C.F.R. § 208.13(b)(3)(ii)

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- If the persecutor is a rebel group that has control of, and access to, a substantial part of the country, then the applicant could not avoid future persecution by relocating. On the other hand, if the persecutor is a local rebel group whose scope of power is limited to a remote area of a country, the applicant might not have a well-founded fear in another part of the country. In addition, if the applicant has the support of family in an area where the rebels are inactive, or the government has effectively protected individuals from rebel threats in other parts of the country, it might be reasonable to expect the applicant to relocate.

- If the persecutor is a nationally known religious leader that has de facto power and access to large parts of the country, then the applicant could not avoid persecution by relocating to another part of the applicant's home country and your inquiry would end there. On the other hand, if the persecutor is a local religious leader whose scope of power is limited to a remote area of the country, the applicant might not have a well-founded fear in another part of the country. In this situation, you should move on to the second step of the test and determine if it would it be reasonable, under all circumstances, to expect the applicant to relocate.

12.4 Considerations in Evaluating When Internal Relocation Is Reasonable

If the fear of persecution is not countrywide, you must determine whether it would be reasonable for the applicant to relocate within the country of feared persecution. In determining reasonableness, you should consider the following factors. These are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

Whether the Applicant Would Face Other Serious Harm

Other serious harm means harm that may not be inflicted on account of one of the five protected grounds in the refugee definition, but is so serious that it equals the severity of persecution. Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as other serious harm.

This factor may overlap with the other factors described below

Any Ongoing Civil Strife

There may be a civil war occurring in parts of the country, making it unreasonable for the applicant to relocate.

Example

> The only place where the persecutor has no authority is within the war-torn area; or the applicant would have to travel through unsafe areas to try to get to a place not controlled by the persecutor.

Administrative, Economic, or Judicial Infrastructure

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There may be circumstances under which aspects of the infrastructure may make relocation difficult. Depending on the circumstances, such infrastructure may make it very difficult for an individual to live in another part of the country.

Example

In certain situations, the fact that women may not have the same legal rights as men may hinder an applicant's ability to relocate; or a member of a particular tribe may be unable to live safely among other tribes because of social and cultural constraints in the country.

Geographical Limitations

There may be situations in which geographical limitations, such as mountains, deserts, jungles, etc., would present barriers to accessing a safe part of a country. Or, there may be cases in which the only safe places in a country are places in which an individual would have difficulty surviving due to the geography (e.g., an uninhabitable desert).

Social and Cultural Constraints

You may consider factors such as age, gender, health, and social and familial ties. The applicant may also possess a characteristic that would readily distinguish the applicant from the general population and affect his safety in the new location. The applicant may speak a dialect or have a physical appearance unique to a minority group or to a certain part of the country that would make it difficult for the applicant to integrate into the new area. An applicant's high or low profile status may also affect his or her ability to safely relocate to another part of the country. There may be other social or cultural constraints that make it unreasonable for the applicant to relocate.

Example

In some countries a woman may be unable to live safely or survive economically without a husband or other family members.

Other Factors

Any other factors specific to the case that would make it unreasonable for the applicant to relocate should be considered.

12.5 Applicant Relocated before Leaving the Country of Feared Persecution

There is no requirement that an applicant first attempt to relocate in his or her country before flight. However, the fact that an applicant lived safely in another part of his or her country for a significant period of time before leaving the country may be evidence that the threat of persecution does not exist countrywide, and that the applicant can reasonably relocate within the country to avoid future persecution. It is important to consider the applicant's circumstances in the place the applicant relocated. Considerations include

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whether the applicant was able to live a relatively normal life in that location or was forced to live in hiding; whether the persecutor knew of the applicant's relocation; and the length of time the applicant lived in the new location.

13 COUNTRY OF ORIGIN INFORMATION[52]

Information regarding the conditions in an applicant's country is critical in evaluating whether the applicant's fear of future persecution is well-founded. You are required to keep abreast of country of origin information and to research available information in evaluating claims.

14 CONCLUSION

The main component of determining whether an applicant's fear is well-founded is the 4-part Mogharrabi test. In order to establish that a well-founded fear exists, the applicant must establish that the likelihood of future persecution on account of a protected ground is a reasonable possibility.

15 SUMMARY

Elements of a Well-Founded Fear

To establish a well-founded fear of persecution, the applicant must show that the fear is genuine (the subjective basis) and that it has an objective basis in fact.

No Requirement of Past Harm

There is no requirement that the applicant have suffered harm in the past to establish a well-founded fear of future persecution.

Objective Basis for Fear

The requirement of an objective basis is met if the applicant establishes that the fear of persecution is reasonable; i.e., that there is a reasonable possibility of suffering persecution in the future.

The Mogharrabi Test

If an applicant establishes all four prongs of the Mogharrabi test, as modified by Matter of Kasinga and Pitcherskaia v. INS53, the fear of persecution is well-founded. The elements of the four-prong test are 1) applicant possesses (or is believed to possess) a

[52] For additional information, see RAIO Training module, Country of Origin Information.

[53] See Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996); see also Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997)

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protected characteristic; 2) persecutor is aware or could become aware that applicant possesses the characteristic; 3) persecutor is capable of persecuting applicant; and 4) persecutor is inclined to persecute applicant.

Pattern or Practice

An applicant does not need to show that he or she will be singled out if there is 1) a pattern or practice of persecution of a group or category of individuals similarly situated to the applicant, and 2) the applicant belongs to or is identified with the group or category of persons such that a reasonable person in the applicant's position would fear persecution.

Persecution of Family Members or Close Associates

Persecution of family members or others associated with the applicant may be objective evidence that the applicant's fear is well founded. However, the applicant must establish some connection between such persecution and the persecution the applicant fears.

Threats

Threats (anonymous or otherwise) may be sufficient to establish a well-founded fear if the applicant establishes that there is a reasonable possibility the threats will be carried out. If the threat is anonymous, you should consider all possible sources of the threat, the content of the threat, circumstances surrounding the threat, and country conditions information.

Applicant Remains in Country after Threats or Harm

A significant lapse of time between the incidents that give rise to the claim and the applicant's departure from the country may indicate that the fear is not well-founded. However, the reasons and circumstances for delayed departure must be considered.

Return to Country of Persecution

An applicant's return to the country of feared persecution generally weakens the applicant's claim of a well-founded fear of persecution. Consideration must be given to the reasons the applicant returned and what happened to the applicant once he or she returned. Return to the country of feared persecution does not necessarily defeat an applicant's claim.

Possession of Travel Documents

Possession of valid travel documents does not preclude eligibility for refugee or asylum status, but may indicate that the applicant's government does not have the inclination to harm the applicant. All of the circumstances surrounding acquisition of such documents must be considered.

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Refugee Sur Place

An applicant may become a refugee due to events that occur while the applicant is outside his or her country. These events may be changed circumstances in the applicant's country, or actions the applicant takes while outside of his or her country that put him or her at risk if the applicant returns to the country.

Internal Relocation

A fear is not well-founded if the applicant could avoid future persecution by relocating to another part of his or her country, and, under all the circumstances, it would be reasonable to expect the applicant to do so. You must consider whether the persecutor is the government or is government-sponsored; the extent of the authority of the persecutor; and any factors that may make it unreasonable for the applicant to relocate. In the Asylum context, the burden of proof shifts to the officer to show that the applicant could reasonably relocate to avoid future persecution if past persecution has been established or if the persecutor is the government or is government-sponsored.

Country of Origin Information

You must consider current conditions in the applicant's country to evaluate whether an applicant's fear of future persecution is well-founded.

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PRACTICAL EXERCISES

Practical Exercise # 1

- Title:
- Student Materials:

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OTHER MATERIALS

There are no Other Materials for this module.

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SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

RAD Supplement – Return to Country of Feared Persecution

Returns in the Iraqi Context

Response to Query

Date: May 15, 2009

Subject: Returns Guidance

Keywords: Returns, Iraq, Well-Founded Fear, Objective Fear

Query: To what degree do voluntary returns to Iraq (or other countries of claimed persecution) undercut claims of a well founded fear of future persecution?

Response:

While the voluntary return to the country of claimed persecution may indicate that an alien is willing and able to return, it does not in and of itself preclude the establishment of eligibility for refugee status. The reasons motivating the

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temporary return, including the intent and circumstances surrounding such, are the most critical factors in determining if an applicant is unable or unwilling to return or if his/her return calls into question the credibility of the applicant's past persecution or well-founded fear claim. In all of these cases, you should weigh the reasons for the applicant's return, with what happened to the applicant previously and the circumstances of the return (why they returned, what activities they engaged in upon return, what happened during the return, the length of the return).

According to the April 2009, UNHCR Eligibility Guidelines for Assessing the International Protection needs of Iraqi Asylum-Seekers, "the situation in Iraq has further evolved, with important improvements in the overall security situation in many parts of the country." This improvement in conditions may help to explain why we're seeing so many applicants traveling back and forth frequently. UNHCR goes on to say that "the developments and improvements all have to be seen in context. Conditions can still be unpredictable, with several set-backs occurring, and there are major uncertainties and risks remaining." "It is UNHCR's assessment that the improvement of the situation in Iraq does not yet constitute fundamental changes sufficient to allow a general application of the cessation clauses of Articles 1C(5) or (6) of the 1951 Convention." Therefore, the UNHCR believes that the conditions/reasons that made these individuals refugees still exist.

Here are some factors to consider when addressing the return issue:

1) Has the applicant suffered past persecution?

The refugee definition requires an applicant to demonstrate either actual past persecution or a well-founded fear of future persecution. An applicant may also establish both actual past persecution and a well-founded fear of persecution; however, it is only required that one or the other be established to be eligible for refugee status.

Regarding returns, if past persecution is established, you would want to look at whether the return calls into question the credibility of the past persecution.

For example: the applicant returns to the same place the past persecution took place.

Some sample questions to ask would be: Did he/she live openly? How long did he/she return for? Why did he/she return? Did any incidents of harm occur during the return?

Based on these responses, you would want to evaluate if it is plausible that the applicant would return. Does it call into question the past persecution?

For example: The applicant responds that he/she returned to Iraq every 3 months for a 1 month period to continue operating his/her business. The applicant's claim

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is that he was threatened and beaten at his place of business, and told he would be killed if he continued to sell his goods to the Americans. The return calls into question whether the past persecution claim is credible, particularly, if no incidents occurred during his/her regular returns. In such cases, the credibility issue should be well documented in the Assessment.

If the applicant returned but did not go to the same place/undertake same activities/live openly, the act of returning is less likely to call into question the past persecution.

2) Why did the Applicant Return? What are the Conditions of the Return/Stay in Iraq?

Family: In general, returns for family or personal reasons such as picking up a child whose custodian died, visiting an old or sick parent, or some other family emergency will not be cause for concern. You should, nevertheless, briefly ask about the circumstances surrounding return: length of stay, if applicant went back to the same area, if so, were they in hiding, were there any incidents upon return. These cases should be adjudicated on a case-by-case basis.

Economic reasons: Consider whether the applicant went back to his/her old job or are running the same business as before—this could be problematic because it seems the alleged persecutor could easily identify/find the applicant. Look at where the applicant's job is – for example, if it is in the Green Zone where there may be more protection, such a return may not be cause for concern. Would want to consider how destitute the family is in country of asylum. We know that applicants are struggling to make ends meet, so this should be taken into account. If an applicant goes back numerous times to pick up checks, etc, may want to ask if anyone else could pick it up for them, how it is they continue to get paid if not working, if they have sought assistance or work in country of asylum, etc. Then evaluate based on those responses.

Education: Would want to determine if the student could study in country of asylum. (Refugee children generally receive basic schooling.) For return, how long did the applicant stay? Is the educational institution the same they always attended? Is it near the place from which they claim a fear or at a more distant location? Where did the applicant live during the return? How did they manage to stay safe? Did they go and take exams and immediately flee again? Did they go to pick up their diploma?—couldn't anyone else have done that for them? If other members of the family experienced past persecution, how was applicant able to stay and study? Did any incidents of harm occur during the return/stay in Iraq?

Certain scenarios that will generally undermine a well-founded fear claim: returns for vacation or to establish new business contacts. NOTE: If the applicant has a credible past persecution claim, such a return generally will not adversely

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affect his/her eligibility.

3) Who has returned?

If it is the derivatives that are traveling back and forth, they are not the ones that need to establish well founded fear, rather it is the PA. As such, a return by a derivative is generally not problematic, but you should consider if their travel calls into question any claimed persecution of the PA.

Is the PA returning on his/her own or with the whole family? Does the whole family remain in Iraq except for the PA? How are they surviving? Did any incidents of harm occur during the return/stay in Iraq?

4) Have the most Concrete Reasons for Denial been Addressed/Documented?

In general, if making a denial for Returns it should be a strong denial, because this is the kind of denial that someone reviewing an RFR might review and given country conditions think the applicant does have a WFF, thus overturning or sending for reinterview. If the returns signal a credibility issue with the applicant, it's probably better to deny on credibility.

Also, if there are multiple cross-referenced cases with this issue being denied on credibility issue, the credibility issue should be referenced on each, in case they are reviewed separately by someone doing RFRs. You can always say, "see SY-xxxxx for credibility analysis" to alert a future reviewer that this person was part of a family unit and more information is available. This would be useful for the x-refed cases SY-107144-147, in which an entire family was denied, although the major reasons for the denial are in the mother's case. If any of the adult children's cases was reviewed without the mother's case on hand, the reviewer might be inclined to send the case for reinterview. However, when looked at as a family unit, there would be much less of this tendency since the mother's denial is described most fully

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SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

ASM Supplement – Coercive Population Control

Establishing an Objective Fear Based on Violation of Coercive Population Control Policies

An applicant claiming a well-founded fear of persecution under China's coercive family planning policy as a result of the birth of two or more children, or any other violation, must demonstrate more than a generalized fear that he or she will be persecuted. To demonstrate that his or her fear is objectively reasonable the applicant needs to establish a personal risk of being singled out for persecution or that there is a pattern or practice of persecution of those similarly situated to him or her in the area where he or she resides.[54]

In Matter of J-H-S- the Board found that because there are so many provincial and local variations in the application and enforcement of China's national family

[54] Matter of J-W-S-, 24 I. & N. Dec. 185 (BIA 2007).

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planning program that, to meet his or her burden of proof, the applicant must show:

1. the details of the applicable family planning policy in the locality where he or she resides [55]

2. that he or she is in violation of the local policy

3. that the violation of the policy would be punished in the local area where he or she lives in a way that would give rise to an objective fear of future persecution[56]

The three part analysis elaborated in Matter of J-H-S- must be applied on a case-by-case basis and is to be used to determine whether the applicant has a well-founded fear of persecution in all instances involving the birth of a second or subsequent child, regardless of whether the applicant's children were born in China or abroad.[57]

Use of Country Conditions Specific to Applicant's Local Area of Residence

You must consult country conditions reports for the local area (provincial or municipal) where the applicant resides in order to determine the specific policies that apply to each case.[58]

Relevant considerations that may be used to determine whether there has been a

[55] Matter of J-H-S-, 24 I. & N. Dec.196 (BIA 2007).

[56] Matter of J-H-S-, 24 I. & N. Dec. at 199. See also, Matter of J-W-S-, 24 I. & N. Dec. 185 (BIA 2007) (evidence did not establish a national policy requiring forced sterilization upon birth of second child overseas, and evidence was insufficient to show that in Fujian Province, any sanctions for out of plan births would rise to the level of persecution); Matter of J-H-S- (evidence did not demonstrate that the birth of a second child would violate family planning policy in Fujian province); see also Huang v. U.S. INS, 421 F.3d 125 (2d Cir. 2005) (well-founded fear of persecution not established where country conditions show that local Fujian province authorities are lax in the enforcement of the one-child policy and frequently allow the birth of a second child in situations such as the applicant's where the firstborn child is a girl.); Matter of C-C-, 23 I. & N. Dec. 899 (BIA 2006) (Violation of policy not established where Chinese policy allows individuals to apply for the birth of a second child four years after the birth of the first child, and the applicant's second child was born six years after her firstborn).

[57] See Matter of J-H-S- at 202 (the evidence did not demonstrate that in Fujian province enforcement mechanisms would be triggered after the birth of a second child to someone, such as the applicant, whose first child was female).

[58] Matter of J-W-S- at 194 (well-founded fear not established where country conditions evidence did not support the applicant's claim that he would be sterilized upon return to Fujian province with two children born in the US. The evidence showed that, at most, the applicant and his wife would be subjected to 'sanctions and penalties' the severity of which would not rise to the level of persecution.). See Matter of C-C-, at 900-903 (the affidavit of demographer John Aird, submitted by the applicant as a source of country conditions evidence, was insufficient to show that the Chinese government has an established national policy of sterilizing returning Chinese citizens who have had more than one child while living abroad because the affidavit was generalized, not based on personal knowledge, did not specifically address situations of individuals similarly situated to the applicant, and the 2005 State Department country report contradicted the affidavit); Yu v. US Att'y Gen., 513 F.3d 346 (3d Cir. 2008) (affirmed Matter of C-C- regarding the Aird affidavit).

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violation of the local coercive planning policy include:

1. the gender of the children
2. the spacing between the children's births
3. the parents' marital status
4. whether or not the parents are government employees

For example, in Matter of S-Y-G-, the BIA denied a motion to reopen asylum proceedings based on the birth of a second child in the U.S.[59] The BIA held that the applicant's reproductive behavior may not be viewed as violating the family planning policies in Fujian Province because she was not a government employee, and there was a seven-year interval between the birth of her two children. The BIA also found that even if the applicant did violate the local family planning policy, any sanctions would likely be economic sanctions that would not rise to the level of persecution.

ASM Supplement – Return to Country of Feared Persecution

As a procedural matter, the regulations provide that an asylum applicant who returns to the country of feared persecution with a grant of advance parole is presumed to have abandoned his or her claim. This presumption is overcome if there are compelling reasons for the applicant's return to that country. In addition, even if the presumption of abandonment is not overcome by compelling reasons for the return, events that occurred during the time that the applicant was in his country could be the basis for a new claim. Procedurally, the applicant whose experiences upon return provide the basis for a new claim would not be required to submit a new I-589, but would be required to testify about events that occurred during the return to the country of feared persecution.[60]

An applicant's return to the country of feared persecution, and the events that occur during that return, may not lead to a procedural finding that the asylum application was abandoned; however, the return to the country of persecution raises substantive questions regarding whether or not the applicant has a well-founded fear of return to that country.

[59] Matter of S-Y-G-, 24 I. & N. Dec.247 (2007).

[60] For additional information, see RAIO Training module, Refugee Definition and Past Persecution.

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ASM Supplement – Presumption Raised by Past Persecution

General Rule

If past persecution on account of a protected characteristic is established, then the applicant is a refugee and

1. it is presumed that the applicant has a well-founded fear of future persecution on the basis of the original claim

2. unless it is established by a preponderance of the evidence that

   i. there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or

   ii. the applicant could avoid future persecution through internal relocation and under all the circumstances it would be reasonable for the applicant to do so[61]

Explanation (Burden Shift)

This means that once the applicant has established past persecution, the Asylum Officer must presume that the applicant's fear of future persecution is well founded. This is a presumption that may be rebutted. In order to rebut the presumption, however, the burden of proof shifts to the officer to establish by a preponderance of the evidence that the fear of future persecution is no longer well-founded.

The officer must weigh all available evidence to determine whether a preponderance of the evidence shows that there has been a fundamental change in circumstances such that the applicant's fear of persecution is no longer well-founded, or the applicant could reasonably avoid future persecution through internal relocation. This will require a thorough knowledge and understanding of current country conditions in the applicant's country and the circumstances of the individual applicant.[62]

Consideration Regarding Source of Persecution

The presumption raised by a finding of past persecution applies only to a fear of future persecution based on the original claim of persecution and does not apply to

[61] 8 C.F.R. § 208.13(b)(1). For additional information, see RAIO Training module, Evidence Assessment.

[62] The Asylum Officer should consider not only country conditions, but other aspects of the applicant's circumstances, as well, to evaluate whether a preponderance of the evidence establishes that the applicant's fear of persecution is not well founded. See section XI.D., Fundamental Changes Must Affect Applicant's Situation, below.

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fear of persecution on account of a different basis, unrelated to the past persecution.[63]

As the Attorney General clarified in Matter of A-T-, "on the basis of the original claim" means that the future persecution feared is "on account of the same statutory ground" on which the applicant suffered past persecution. In other words, the presumption applies when a fear of future persecution arises from the same protected characteristic on account of which applicant was targeted for past persecution.[64]

The applicant does not have to fear that he or she will suffer the identical type of harm in the future that he or she suffered in the past in order to retain the presumption of future persecution so long as the fear of any future harm is on account of the original basis for persecution.

The BIA has made clear that a change in regime does not automatically shift the burden of proof back on an applicant to show well-founded fear of persecution from the changed regime or its successor. (See discussion below regarding what constitutes a change in circumstances sufficient to overcome the presumption.)[65]

Fundamental Changes Must Affect Applicant's Situation

The fundamental change in circumstances may relate to country conditions in the applicant's country or to the applicant's personal circumstances. However, the change must directly affect the risk of harm the applicant fears on account of the protected ground in order to overcome the presumption.

The BIA has emphasized that simply demonstrating a change, such as a change in regime, cannot substitute for careful analysis of the facts of each applicant's individual circumstances.[66] Similarly, the First Circuit has held that the "abstract" materials indicating fundamentally changed circumstances "do not automatically trump the specific evidence presented by the applicant."[67]

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[63] 8 C.F.R. § 208.13(b)(1); See Matter of A-T-, 24 I. & N. Dec.617 (A.G. 2008) (vacating Matter of A-T-, 24 I. & N. Dec.296 (BIA 2007)), Matter of N-M-A-, 22 I. & N. Dec. 312 (BIA 1998); see Hasalla v. Ashcroft, 367 F.3d 799, 804 (8th Cir. 2004).

[64] See Matter of A-T- at 622; cf., Hassan v. Gonzales, 484 F.3d 513 (8th Cir. 2007) (finding that the presumption of well-founded fear does not operate only as to the exact same harm experienced in the past.); Bah v. Mukasey, 529 F.3d 99, 115 (2d Cir. 2008) (identical harm not required to rebut the presumption, "the government must show that changed conditions obviate the risk to life or freedom related to the original claim, e.g. persecution on account of membership in [the] particular social group.")

[65] Matter of N-M-A-, 22 I. & N. Dec. 312, 320 (BIA 1998).

[66] Matter of N-M-A-, 22 I. & N. Dec. 312 (BIA 1998).

[67] Fergiste v. INS, 138 F.3d 14, 19 (1st Cir. 1998); See also Rios v. Ashcroft, 287 F.3d 895, 901 (9th Cir. 2002) (DHS "is obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant's specific grounds

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For example, a despot may be removed from a seat of government, but still wield enough influence to pose a threat to an applicant, or a new government may harbor the same animosities towards an applicant as the old regime.[68] Those types of changes would not rebut the presumption of well-founded fear. The determinative issue is whether the changes are such that the particular applicant's fear of persecution is no longer well-founded.

Evidence that an applicant may still be at risk despite a change in circumstances includes, but is not limited to, evidence that the applicant or individuals similarly situated to the applicant continued to be threatened on account of the protected characteristic after circumstances have changed.[69]

Forced Sterilization Does Not Constitute a Change in Circumstances

In Matter of Y-T-L- the BIA considered whether the fact that an asylum applicant had been forcibly sterilized could constitute a change in circumstances such that the applicant's fear of future persecution would no longer be well founded.[70] The BIA found that the intent of Congress in amending the definition of a refugee, coupled with the "permanent and continuing" nature of the harm suffered by one forcibly sterilized, prevents finding a fundamental change in circumstances based on an act of forced sterilization, even when a long period of time has passed since the sterilization.

Female Genital Mutilation and Fundamental Change in Circumstances

1. Attorney General Decision: Matter of A-T-

The Attorney General (AG) vacated the BIA's decision which held that female genital mutilation was a fundamental change in circumstances.[71] The AG found that the BIA had made several errors of law and fact. As in all cases in which the applicant demonstrates past persecution, in claims involving FGM the government has the burden of rebutting the presumption of well-founded fear by establishing evidence of fundamental change in circumstances (or that the applicant can relocate). The AG noted in Matter of A-T-, that the applicant was subjected to FGM on account of membership in a particular social group, not on account of FGM; FGM was the harm suffered not the original basis on account of which the

for his well-founded fear of future persecution. Information about general changes in the country is not sufficient."); Berishaj v. Ashcroft, 378 F.3d 314, 327 (3d Cir. 2004); Bah v. Mukasey, 529 F.3d 99 (2d Cir. 2008).

[68] See Mihaylov v. Ashcroft, 379 F.3d 15, 23 (1st Cir. 2004).

[69] See e.g., Gailius v. INS, 147 F.3d 34 (1st Cir. 1998).

[70] Matter of Y-T-L-, 23 I. & N. Dec. 601 (BIA 2003); see also Qu v. Gonzales, 399 F.3d 1195, 1203 (9th Cir. 2005) (adopting Matter of Y-T-L); Zhang v. Gonzales, 434 F.3d 993, 1001-1002 (7th Cir. 2006) (same).

[71] Matter of A-T-, 24 I. & N. Dec. 617, 622-623 (A.G. 2008) (vacating in part Matter of A-T-, 24 I. & N. Dec. 296 (BIA 2007).

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applicant was persecuted. Hence, to rebut the presumption of well-founded fear the government had to show that there had been a fundamental change of circumstances such that the applicant no longer had a well-founded fear of suffering any other harm, including the possible repetition of FGM, on the basis of membership in the particular social group for which she was persecuted.

For most claims based on the infliction of FGM the protected characteristic asserted is membership in a particular social group, and the particular social group is often defined as some subset of women who possess (or possessed) the trait of not having undergone FGM as required by the social expectations under which they live. In many cases, after having been subjected to FGM in the past, the applicant will no longer be a member of the particular social group on account of which she was persecuted. Therefore, having undergone FGM removes the applicant from the particular social group for which she was targeted, and will often constitute a fundamental change in circumstances such that the applicant's fear of harm on the basis of the original claim no longer will be well-founded.

The Attorney General's decision in Matter of A-T- makes it clear that the fact that a woman has been subjected to FGM in the past does not preclude a valid claim that she retains a well-founded fear of future persecution if it is established that she would be subject to additional FGM (for example, it may be the practice of a woman's tribe to subject her to a second infibulation after she has given birth; or it may be that the first time she was subject to FGM the procedure was not performed to the extent required by her culture).[72] The possibility of re-infibulation should be considered in determining whether there has been a fundamental change in circumstances.

The Attorney General's holding in Matter of A-T- controls in all jurisdictions. Note that the Attorney General decision is consistent with and relies in part on the Second Circuit's holding discussed below.

2. The Federal Courts:

i. Second Circuit: Bah v. Mukasey

In Bah v. Mukasey, the Second Circuit court held that the infliction of FGM does not, without more, relieve the government of the burden of establishing a fundamental change in circumstances.[73] First, women could be subjected to the repetition of FGM and, additionally, the woman could be subjected to other forms of harm on account of the protected characteristic for which she was subject to FGM. The court stated that "Nothing in the regulations suggest that the future

[72] United States Department of State, Office of the Under Secretary for Global Affairs, Office of the Senior Coordinator for International Women's Issues, Female Genital Mutilation (FGM), p.6 (Washington, DC: Feb. 1, 2000, updated June 27, 2001).

[73] Bah v. Mukasey, 529 F.3d 99 (2d Cir. 2008).

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threats to life or freedom must come in the same form or be the same act as the past persecution." (Emphasis in the original.)

The Second Circuit's finding in Bah v. Mukasey is precedent law for the Second Circuit; all other circuits need to apply the Attorney General's decision in Matter of A-T-.

ii. Ninth Circuit: Mohammed v. Gonzales

In its decision in Matter of A-T-, the BIA rejected the Ninth Circuit's finding in Mohammed v. Gonzales, 400 F.3d 785 (9th Cir., 2005) that female genital mutilation constituted a permanent and continuing act of persecution, such that "the presumption of well-founded fear in such cases cannot be rebutted." Mohammed v. Gonzalez, at 801. The Attorney General's decision vacating the Board's decision in Matter of A-T- did not specifically address the "permanent and continuing" persecution theory. His analysis, however, makes clear that past FGM can be part of a fundamental change in circumstances that rebuts the presumption of well-founded fear, implicitly rejecting the Ninth Circuit's theory that such a presumption can never be rebutted. Moreover, as the Attorney General's opinion sets forth a comprehensive analysis of such claims that has never been rejected by the Ninth Circuit or other Circuit courts, it remains the controlling precedent for cases involving past FGM. Accordingly, officers should not rely upon a "permanent and continuing" persecution theory in FGM cases as such reliance would be inconsistent with the controlling precedent set forth by the Attorney General in Matter of A-T-. The severity of any ongoing harm to an applicant, however, may be considered in determining whether to grant asylum based on the severity of the past persecution.

iii. Rebuttal of well-founded fear and consideration of granting asylum in the absence of a well-founded fear

If it is found that there has been a fundamental change in circumstances such that the presumption of well-founded fear is rebutted in a case where the applicant was subjected to FGM, you then need to consider whether it is appropriate to grant asylum in the absence of a well-founded fear either based on the severity of the past persecution or because of a reasonable possibility that the applicant would suffer other serious harm upon return.[74] This issue was addressed by the BIA in Matter of S-A-K- and H-A-H-.[75]

For discussion of factors to consider in determining whether past is harm sufficiently severe as to provide compelling reasons to grant asylum in the absence of a well-founded fear, and discussion of Matter of S-A-K- and H-A-H- where the

[74] 8 C.F.R. 208.13(b(1)(iii).

[75] Matter of S-A-K- and H-A-H, 24 I. & N. Dec. 464 (BIA 2008). See also Matter of N-M-A-, 22 I. & N. Dec. 312 (BIA 1998).

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BIA found that discretion should be exercised to grant asylum based on the severity of the persecution to a mother and daughter who were subjected to FGM, see RAIO Training module, Refugee Definition and Past Persecution.

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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

IO Supplement

Module Section Subheading

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CAT Eliciting Testimony Exercise – ADOTP

Facts for class:

Actor Notes: (b)(6)

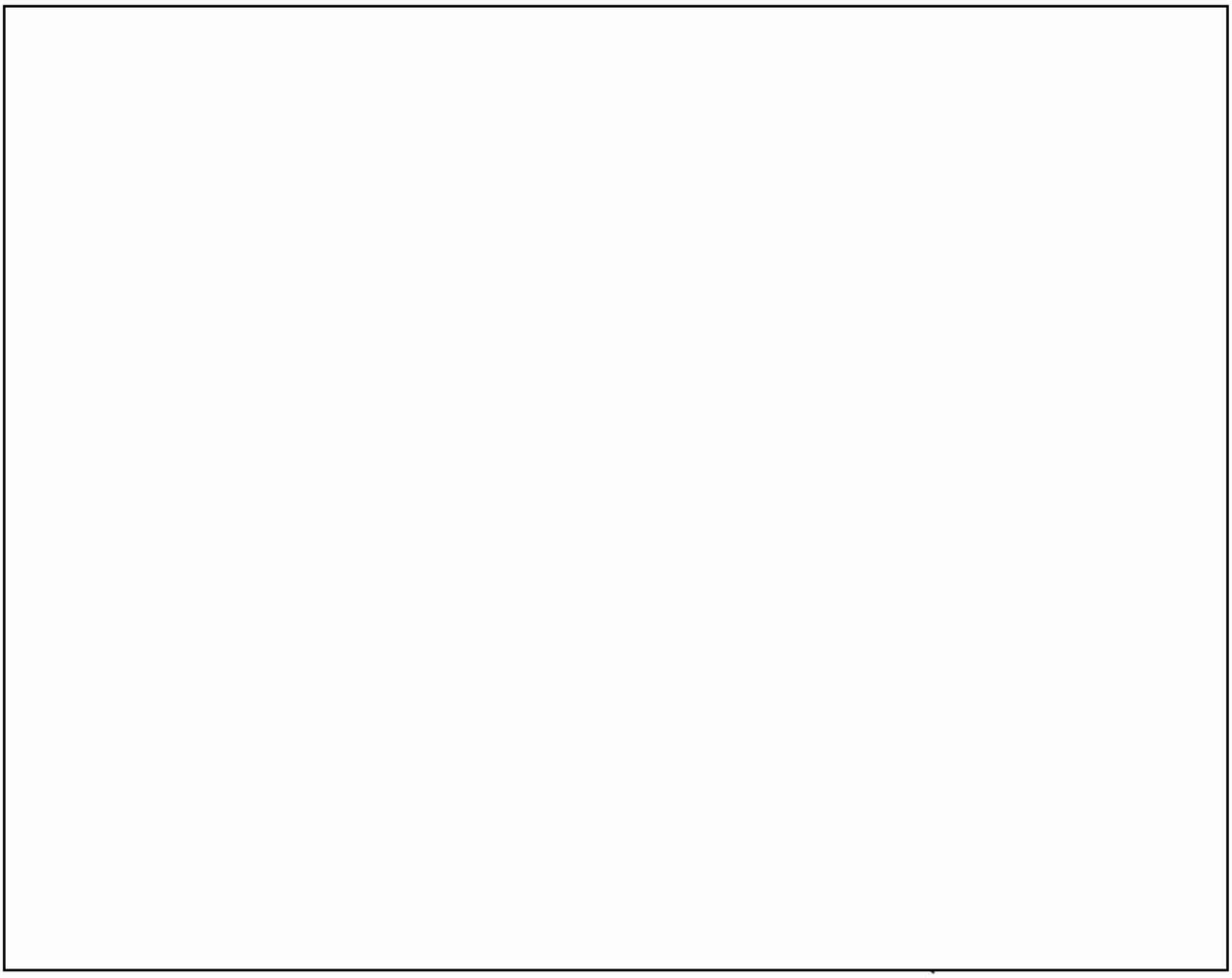
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Instructor Notes:

- Case taken from a recent Fourth Circuit case remanding to BIA because BIA only considered COI.
  - This is why it's important to elicit testimony about specific facts. COI alone is not, for most applicants, specific enough or clear enough to establish state action for CAT
  - This was a positive CAT CF
- What do we think of first police interaction?
  - Important to elicit what the applicant reported – here, not clear that the applicant had received death threats and could identify the perpetrator
  - Asking for more evidence is not normally showing refusal
- What about second police interaction?
  - Refusal
  - Indicates that the request for evidence was not a genuine law enforcement need because did not even accept the evidence.
- No past torture because no physical harm and never imminent threats, but only need to analyze in RF, not CF
- Future torture
  - Severe harm – death (knows of people killed by gang)
  - Specific intent – yes, intend consequences of their actions
  - State action – acquiescence. The police are ACTUALLY AWARE + breach their legal duty. Support for this is refusal to take police report, look at evidence, dismissing her fear by laughing.
  - Would be in custody control, and not lawful sanctions.

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CAT/Relocation/Future Harm



(b)(6)

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Convention Against Torture (CAT)

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U.S. Citizenship and Immigration Services

CAT Article 3: Non-Refoulement

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to **torture**.

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Convention Against Torture

As a signatory to the *Convention Against Torture* the United States has an obligation to provide protection where there are substantial grounds to believe that an individual would be in danger of being subjected to…

TORTURE

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What is TORTURE?

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Article 1 of the Convention defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions

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Definition of Torture: 8 C.F.R. 208.18(a)

(1) Severe Harm

(2) Specific Intent

(3) State Action

(4) Custody or Physical Control

(5) Not From Lawful Sanctions

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Difference between Refugee Convention and CAT

- CAT does not require that the torture be connected to any of the five protected characteristics identified in the definition of a refugee

- No nexus ("on account of" a protected ground) requirement in for CAT

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(1) Severe Harm

- Torture requires severe pain or suffering, whether physical or mental
- Torture is an extreme form of cruel and inhuman treatment
- Certain forms of harm that may be considered persecution may not be considered severe enough to amount to torture

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(1) Severe Harm: Physical

Types of harm that may be considered torture include, but are not limited to, the following:

- Death
- Rape and other sexual violence
- Sustained, systematic beating
- Burning with cigarettes
- Application of electric shocks to sensitive parts of body

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(1) Severe Harm: Mental Pain or Suffering

Must be prolonged mental harm resulting from :

- Severe physical pain or suffering (or threat thereof)
- Threats of imminent death
- Intentional infliction of mind altering substances
- Threat of any of the above to another person

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(1) Severe Harm

- What questions would you ask?

  - How did the perpetrator harm you?
  - What did the perpetrator say they would do to you?
  - Did you suffer injuries?
  - Did you require treatment?
  - Do you still think about what happened? How often? How does it make you feel?
  - What do you fear will happen to you in the future?

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(2) Specific Intent

- For an act to constitute torture, the act must be specifically intended to inflict severe pain or suffering.

- An act that results in unanticipated or unintended severity of pain and suffering is not torture.

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(3) State Action

Torture is pain or suffering inflicted: by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

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(3) State Action

Who or what is a public official?

- Police officers
- Soldiers or the military
- Elected, appointed, local government, regional government, national government
- Can be any public official from "low level" officials to those in the "upper echelons of power"

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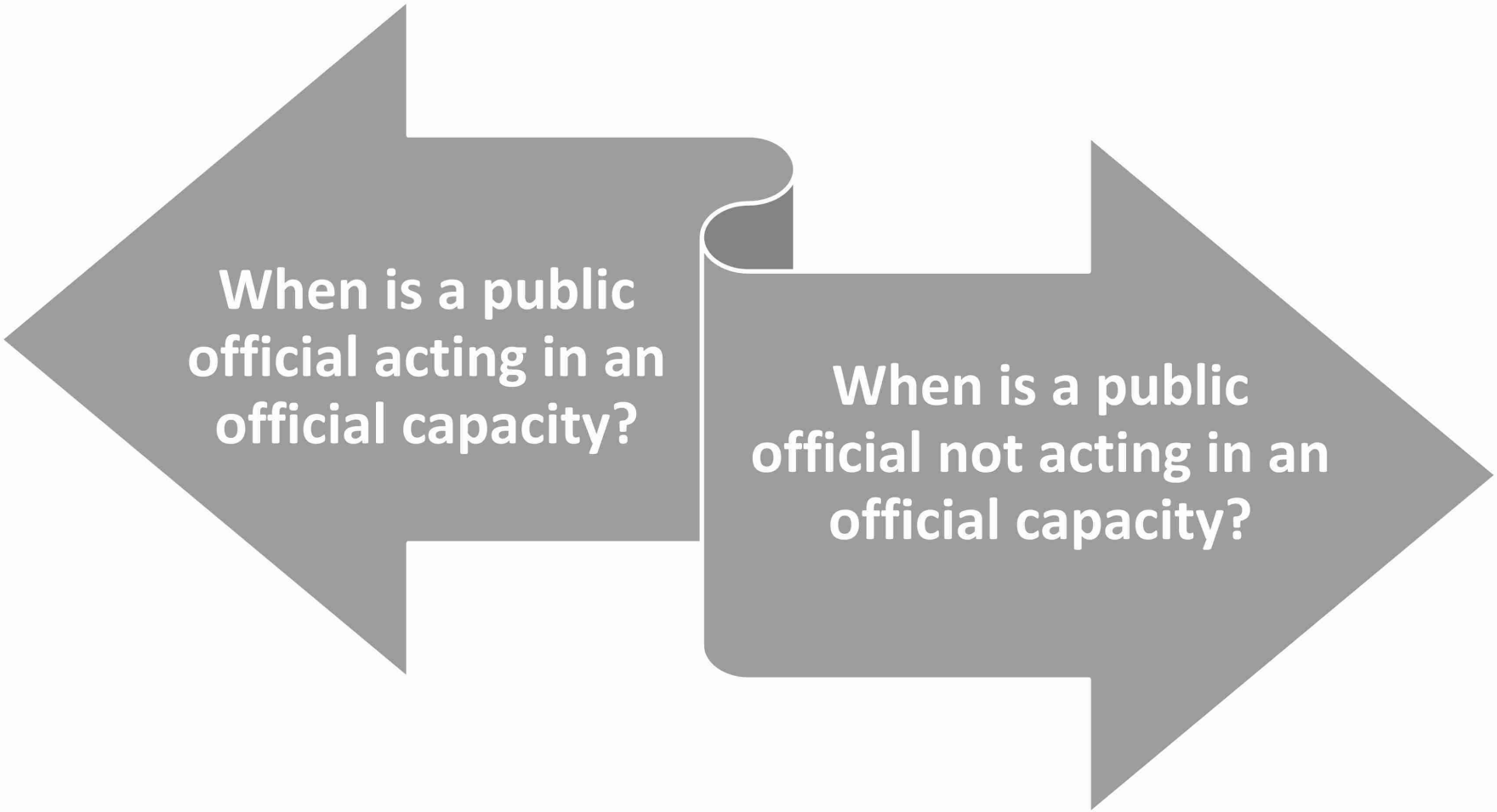
(3) State Action: Identity of the Torturer

- Was official on duty?
- Was official in uniform?
- Did official have access to the victim b/c of his/her position as a public official?
- Did the public official invoke their status when harming the victim?
- Did the official threaten future harm with the authority given to him as an official?
- Was the public official in a place where only other officials have the authority to be?
- What was the motivation(*) to harm?

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(3) State Action

In Official Capacity



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U.S. Citizenship and Immigration Services

FOUO/LES

(3) State Action

In Official Capacity

Acting in an Official Capacity or Under the Color of Law

- May include a public official acting **within** or **outside** of official duties
- Requires **connection** between the official position and harmful conduct

A public official acts under color of law when he misuses power possessed by virtue of law and made possible only because he was clothed with the authority of law.

Ramirez Peyro v. Holder, 574 F.3d 893 (8th Cir. 2009) (internal citations omitted)

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(3) State Action

In Official Capacity

We have recognized on numerous occasions that acts motivated by an officer's personal objectives are 'under color of law' when the officer uses his official capacity to further those objectives.

Garcia v. Holder, 13-60381, (5th Cir. 2014) (internal citations omitted)

…when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons.

Khouzam v. Ashcroft, *361 F.3d 161, 171 (2d Cir. 2004)*

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(3) State Action

In Official Capacity

Barajas- Romero v. Lynch 846 F.3d 351 (9th Cir. 2017)

- Ninth Circuit case
- "Acting in an official capacity" does not modify "public official"

[Applies nationwide for CF; 9th Circuit Jurisdiction Only for RF] adjudicator does not need to determine whether public official is acting in an official capacity

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(3) State Action

Private Actor

If harm inflicted by private actor OR public official not acting in an official capacity then determine if harm inflicted:

- at the instigation of;
- with the consent of; or
- with the acquiescence of

a public official acting in an official capacity

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(3) State Action

Acquiescence

A finding of acquiescence requires that prior to the activity the public official was

1) "Aware" of such activity *and*
2) "Breached" a legal duty to intervene

"Awareness" can be established by evidence of

1) Actual knowledge *or*
2) **Willful blindness (**Imputes knowledge to a public official)

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(3) State Action

Acquiescence

(1) Actual knowledge + breach of duty OR
(2) Willful blindness +breach of duty

Examples:

(1) A police officer witnesses applicant being beaten up by a MS-13 gang members and drives away
(2) A police officer believes that MS-13 members bring people to a certain corner to kill them. The police officer avoids going near that corner or purposely looks the other way while driving by the corner.

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(3) State Action

Acquiescence

Who must acquiesce?

- Public official acting in an official capacity
- Includes low level actors such as police officers

Consider:

- Prior breach of duty by law enforcement
- Country conditions
- Whether harm or acquiescence by public officials is routine

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(3) State Action

Acquiescence – Breach of Duty

- Was public official aware of the past act of harm?
- Should they have been aware?
- How did they act? What were they required to do? Did the public official breach a legal duty to intervene?

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(3) State Action

Acquiescence – Breach of Duty

- Was public official aware of the past act of harm?
- Should they have been aware?
- How did they act? What were they required to do?
- Will a public official be aware of the future act of harm?
- Should they be aware or will they deliberately avoid knowledge?
- How will they act? What are they required to do?

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(3) State Action

Acquiescence – breach of duty

Elicit testimony:

If the applicant testifies that they have firsthand experience

reporting incidents or harm to law enforcement	What else they have seen or heard

If the applicant knows <u>someone in a similar situation</u>

If the applicant is aware of <u>corruption</u>

If none of the above, then what is underpinning the <u>applicant's belief</u> in the future behavior of law enforcement

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(3) State Action

Acquiescence – breach of duty

- Did you report any crimes to law enforcement?
- Do you know any friends or family members who have reported any crimes to law enforcement?
- Have you seen or heard anything that makes you think the torturer and the authorities are working together?
- Have you seen or heard anything that makes you think the police would not help you if they were aware you were being harmed?

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(3) State Action

Acquiescence – breach of duty



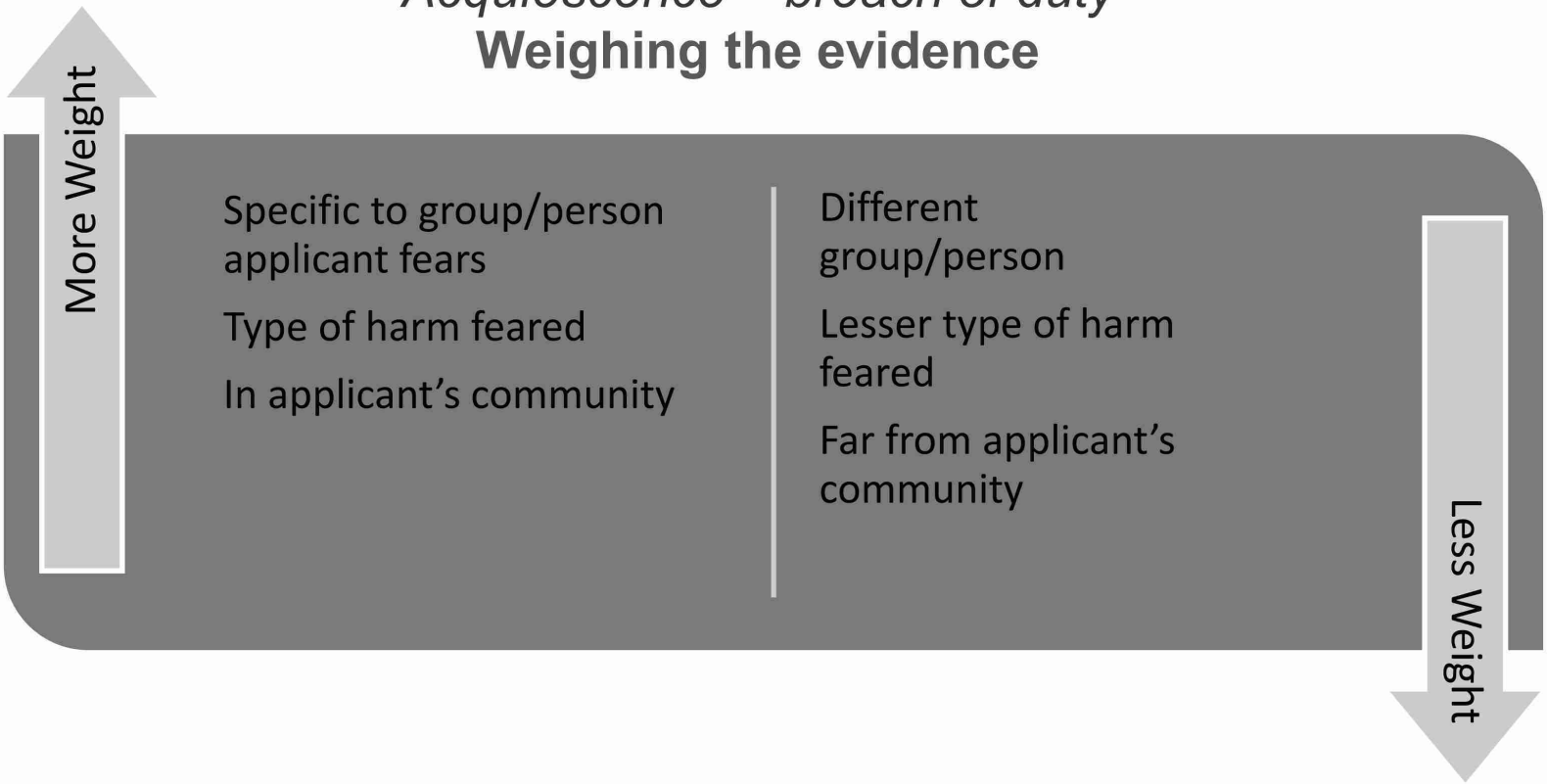
Duty to elicit: applicant must support statements of belief with specific facts

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(3) State Action

Acquiescence – breach of duty

Weighing the evidence



Remember, we are assessing if a public official will acquiesce to the individual or group the applicant fears following through with the harm the applicant fears.

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(3) State Action: CAT vs. Refugee Convention

Determination of acquiescence is distinct from the "unable or unwilling" to control standard used in the definition of a refugee.

…A gov't does not acquiesce in torture of its citizens merely b/c it is aware of torture but is powerless to stop it. It does cross the line into acquiescence when it shows willful blindness toward the torture of citizens by a 3rd party.

Ramirez Peyro v. Holder, 574 F.3d 893 (8th Cir. 2009)

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(4) Custody and Control

In order to constitute torture an act must be directed against a person in the *offender's* custody or physical control.

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(5) Lawful Sanctions

- Pain or suffering arising only from, inherent in or incidental to lawful sanctions does not constitute torture.
- Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty.
- A State Party cannot through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

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RECAP
Definition of Torture: 8 C.F.R. 208.18(a)

- (1) Severe Harm
- (2) Specific Intent
- (3) State Action
- (4) Custody or Physical Control
- (5) Not From Lawful Sanctions

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CAT and the APSO Screening Process

Is there a significant possibility (CF) that the applicant can establish eligibility for relief under CAT (more likely than not) in a full hearing before an IJ or is there a reasonable possibility (RF) of torture?

CREDIBLE FEAR	REASONABLE FEAR
Significant Possibility	*Reasonable Possibility*

If the answer is "YES" it is a positive determination.

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Mandatory Bars

- The mandatory bars to withholding of removal do not apply in credible fear and reasonable fear of torture determinations.
- However, must elicit all information relevant to whether or not a bar to asylum or withholding might apply

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Additional Evidence to Consider

8 C.F.R. 208.16(c)(3) - *All evidence relevant to the possibility of future torture shall be considered, including, but not limited to:*

- (i) Evidence of past torture inflicted upon the applicant;
- (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
- (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
- (iv) Other relevant information regarding conditions in the country removal

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Past Torture:

Evidence of past torture inflicted upon the applicant



No presumption of future torture where there is finding of past torture

BUT CF/RF = evidence of past torture usually enough

Unless

CF: substantial change = no significant possibility
RF: evidence to the contrary = no reasonable possibility

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Internal Relocation

Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured

- **In looking at future torture, asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country**

- **Asylum officers should apply the same reasonableness inquiry articulated in the persecution context to the CAT context**

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Country Conditions

YOU MUST CONSIDER:

- Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
- Other relevant information regarding conditions in the country of removal

COI may be part of "other facts" that are known to the officer

But remember – APSO has duty to elicit relevant testimony

- **Specific**
- **Persuasive**

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About this presentation

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