Accessing Protection at the Border: Pointers on Credible Fear and Reasonable Fear Interviews
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Protection of asylum seekers subject to expedited removal and reinstatement has been a serious concern from the creation of the credible fear and reasonable fear interview process. These concerns have come to the forefront with the administration’s reaction to the increase in unaccompanied children and their families fleeing violence in Central American and Mexico. An important and extremely informative account – really required reading for advocates – is Stephen Manning’s report “Ending Artesia.”¹ This practice advisory provides updates on recent changes to the credible and reasonable fear process and practice pointers for advocates assisting persons in these interviews.

CHANGES TO THE ASYLUM OFFICER LESSON PLAN

Last February, the U.S. Citizenship and Immigration Services (USCIS) updated its lesson plan addressing credible fear for the Asylum Division Officer Training Course.² The amendments received wide criticism.³ Advocates expressed concern that the Lesson Plan as amended was intended to reduce the number of asylum seekers in the system, rather than as a safeguard to prevent removal of valid refugees. The amendments as a whole appear to raise the standard for what may constitute a “significant possibility” of persecution, and the overall tone has shifted to require a full evaluation of the claim rather than a screening. In light of these changes, attorneys can expect heightened scrutiny from asylum officers (AO) in credible and reasonable fear interviews. Some key changes include:

Past Persecution\(^4\): The 2014 Lesson Plan greatly expands guidance on past persecution, providing detailed guidance on each prong of the past persecution analysis. The Lesson Plan now includes a non-exhaustive list of types of harm and in what circumstances they might constitute persecution, guidance on persecutor’s motive, and guidance on government action. Whereas previous lesson plans explicitly instructed officers that factors such as changed country conditions or internal relocation were “generally not relevant to the credible fear determination” where possible past persecution had been established, the 2014 Lesson Plan eliminates this instruction.\(^5\)

Well-founded fear of future persecution\(^6\): The 2014 Lesson Plan also greatly expands guidance on the well-founded fear analysis, including guidance on issues such as internal relocation, return to country of persecution, remaining in the country of persecution, treatment of family members, and the Board of Immigration Appeals’ (BIA) Matter of Moharrabi test.

Particular Social Group\(^7\): Whereas previously novel or complicated particular social group (PSG) issues were largely reserved for the immigration judge (IJ), the 2014 Lesson Plan includes expanded guidance regarding the PSG analysis. It requires that “where there are no precedent decisions on point, AOs must analyze facts using the BIA test for evaluating whether a group meets the definition” of a PSG.\(^8\) Circuit courts, however, may reject certain aspects of BIA PSG analysis. The Lesson Plan also requires officers to look to DHS guidance on certain PSG analysis.\(^9\)

Establishing a Credible Fear of Torture\(^10\): The 2014 Lesson Plan makes significant changes to the Convention Against Torture (CAT)\(^11\) analysis. While previously most CAT factors were irrelevant for the credible fear interview (CFI) interview, it now requires full screening of all elements. It also includes new elements including the

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\(^4\) 2014 Lesson Plan at 23–27.
\(^5\) The lesson plan does still include a general statements that “a finding that there is a significant possibility that the applicant experienced past persecution on account of a protected characteristic is sufficient to satisfy the credible fear standard.” Id. at 22. The Lesson Plan also maintains the language that “if there is evidence so substantial that there is no significant possibility of future harm or other serious harm, or that there are no reasons to grant asylum based on the severity of the past persecution, a negative credible fear determination may be appropriate.” Id.
\(^6\) 2014 Lesson Plan at 27–33.
\(^8\) 2014 Lesson Plan at 25, 29.
\(^9\) Note that DHS guidance has been, on certain PSG constructions, more favorable than the BIA. For example, DHS has long recognized that women in domestic relationships (whether married or not), who are unable to leave or viewed as property, constitutes a valid social group. The Board only recently recognized a narrow construction of this PSG in Matter of A–R–C–G–, 26 I&N Dec. 388 (BIA 2014).
\(^10\) 2014 Lesson plan at 34–41.
requirement of specific intent to harm and that the applicant have been in the torturer’s custody or control.

Reviewing and understanding the 2014 Lesson Plan will help you prepare your claim. Remember, however, that the regulations require an officer assessing credible fear to “consider whether the alien’s case presents novel or unique issues that merit consideration in a full hearing before an IJ.”\(^\text{12}\) Where circuit court or other case law conflicts with the Lesson Plan, be prepared to argue that the issue needs to be presented to the IJ in light of the novel issue.

**PREPARE YOUR CLIENT TO TELL HIS OR HER STORY;**

Asylum officers are currently under an intense amount of pressure to complete interviews within certain time tables. In only a few hours, they need to elicit the essential facts from your client and determine if they support any valid claim for relief under the law. Of course, it usually takes time and a relationship of trust to elicit the whole story from an asylum applicant who may suffer trauma, PTSD, cultural and language differences. The more you are able to prepare your client, the more detailed, relevant facts will come out in the interview.

Before delving into your client’s history, you first want to prepare him or her for the process. You will want to warn your client if you will not be there in person, and that the officer could possibly conduct the interview over the phone or telephonically as well. You will also want to warn him or her that the officer might not give you notice, meaning they might have to ask for a continuance of the interview to have you present. Prepare your client for the realities of speaking through an interpreter present telephonically. Finally, give your client a realistic expectation regarding how long the interview and hearing process may take.

Once you understand your client’s history, the first step is to develop a legal theory of the claim, keeping in mind the officer training above. Keeping this legal theory in mind, help your client by drawing out the facts that are most essential to that claim. Some common key areas include:

- **Past Harm.** Clients often do not realize how much detail is important to share with the AO, or what information is relevant. In situations involving past domestic violence, for example, women may minimize or generalize long histories of violence by saying “he beat” or “he hit” me. By talking with your client in advance, you can get them comfortable telling their story, and draw out important details they might not otherwise volunteer. Ask, for example, what she means by “beat” or “hit.” Often more is involved, such as kicking, burning, or rape. “How” or “with what” may also be important. “Beat” may not mean with hands, it may include, for example, a belt or a machete. “How often” and “how long” are also important questions. For those suffering abuse for decades, memories may blur. In these cases it is important for the client to be able to explain that while she can provide examples, the abuse was for such a long duration and so repetitive that she simply can’t recall or recount everything. These questions are clearly of an

\(^{12}\) 8 CFR §208.30(e)(4).
extremely sensitive nature. Building a relationship of trust is therefore key to successful case development.

- **Nexus.** Many claims will turn on whether or not nexus can be established. These cases are very fact sensitive, especially for claims based on a particular social group analysis like domestic violence or fear of gangs.\(^{13}\) Applicants in these situations are often unable to articulate why they are targeted for harm. Whether your client is able to articulate the nexus, however, is not determinative. Review the case law related to your nexus theory and elicit the relevant information from your client. For example, when you ask your client why her spouse or partner hurt her on a given occasion, she may say that she doesn’t know, or focus on the immediate motivating factor on that occasion (his food wasn’t hot, etc.). Deeper questions about her relationship with her husband, and the reactions of their family, community, and society at large to her abuse, and violence against women generally, may reveal a nexus. It is helpful here to focus on eliciting the facts that demonstrate nexus, even if your client herself cannot articulate the nexus.

- **Government Involvement or Inaction to Protect:** As often is the case in particular social group claims such as those involving gangs or gender based violence, the harm inflicted is by a private party rather than the government. Common problems arise when there was no government action, and no obvious failure to protect because your client did not report the abuse to the police. As noted above, the 2014 Lesson Plan includes expanded guidance on this issue. While country conditions evidence is important, the AO will want your client to explain why they did not report the abuse. General statements citing what the applicant saw on the TV or in the paper may not be enough. Officers are looking for more direct experiences from your client to establish that authorities in their town or locality would not offer protection. Help your client by looking beyond the immediate facts of their specific case. That is, even if they had no interaction with the police regarding their own past harm, they may have had other experiences in their lifetime that led them to believe that the police do not protect certain kinds of victims from certain kinds of harm. A transgender victim of violence, for example, might not have reported the abuse she suffered herself, but know of other transgendered women who did so to no avail. Police corruption may be such a norm in her community that she never thought critically about why she did not trust police. Help your client think critically about where distrust of police comes from in her community.

- **Ancillary or Concurrent Motivations to Flee:** You may confront a case where a client has multiple motivations to flee from their home country for the United States. Your client may have more than one source of fear – one that constitutes a valid claim, and one that perhaps does not. Or you client may desire to reunite with family in the United States, or have economic motivations to flee. Help your client develop the cognizable claim, but do not ignore these other motivations. To try to put them aside would negatively impact credibility. Equally as important, they may complement the theory of

\(^{13}\) Visit the Center for Gender and Refugee Studies’ website at www.cgrs.uchastings.edu for excellent articles, analysis, case law, and advice regarding litigation of particular social group issues throughout the country.
your case as, for example, “other serious harm” or a reason why internal relocation would be unsafe or unreasonable.

As basic as it may seem, learning your client’s case, and drawing out the relevant details, is possibly the most important role you play in the credible and reasonable fear process.

**PREPARE FOR CREDIBILITY ISSUES**

An AO is required to assess an applicant’s credibility. The officer will not be making a final determination on credibility, but must assess whether there is a “substantial and realistic possibility” that he will be found credible in a full hearing before an IJ. This includes confronting the applicant with any inconsistent statements and giving the applicant the opportunity to explain. Officers “must” probe “inconsistencies between the applicant’s initial statement to the U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE) official and his or her testimony before the AO.” This means that a formal record will be created on the issue of the alleged inconsistent statement, one that may be in front of the IJ making the full credibility assessment. Asylum Officer training acknowledges some of the reasons such statements may be unreliable. Remember, however, that a U.S. Department of Homeland Security (DHS) attorney or IJ may be more skeptical. It is important, therefore, that you flesh out reasons for any inconsistencies. Your client’s answer should not change upon further reflection between the interview and the merits hearing.

In addition to statements to CBP, there may be other official records that impact credibility. If there is a possibility that such records exist, you may attempt to obtain a copy and review them with your client in advance of the hearing.

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14 INA §235(b)(1)(B)(v).
15 See 2014 Lesson Plan at 17–19.
16 Id.
17 Your motivation in preparing your client for a credible or reasonable interview is really two fold. You want to persuade the asylum officer that your claim meets the standard for a credible or reasonable fear finding. At the same time, however, you want to set a record that will help, not hurt, your full litigation of the claim before an Immigration Judge. Your client’s interview will be memorialized in a sworn statement, which may be in the record before the Immigration Judge in proceedings. Careful preparation of your client’s claim will ensure that this sworn statement is a helpful document with accurate facts, consistent with those presented in your full claim, rather than a tool for impeachment.
18 The Lesson plan notes that “a number of federal courts have cautioned adjudicators to keep in mind the circumstances under which an alien’s statement to an inspector is taken when considering whether an applicant’s later testimony is consistent with the earlier statement.” 2014 ADOT Lesson Plan at 20-21. These include the nature of the questioning, whether the alien was afraid, and whether there was an interpreter if there was a language barrier. The Lesson Plan also notes the statement taken by a CBP officer when an individual expresses fear (recorded on Form I-867A/B) is not intended to record detailed information, but rather the mere fact that he or she asserted fear.
19 CBP Statements are recorded on Form I-867A/B. These can be obtained by means of a FOIA request to USCIS, and failing that to CBP. See https://help.cbp.gov/app/answers/detail/a_id/1163/~/how-to-get-a-copy-of-my-i-867-or-i-877-record-of-incident. You may also make a request directly to the asylum or deportation officer. See, e.g., Dent v. Holder, 627 F.3d 365 (9th Cir. 2010). For transcripts of prior
• **Prior Asylum Claims.** This is more likely if your client has lived in the United States for a substantial amount of time. In some cases, your client may not even be fully aware that they filed an I-589, or that such application was false, if they were the victims of notario fraud. You may want to ask if your client ever had someone file paperwork to receive a work permit, a common factor in notario fraud cases. In addition to reviewing prior claims with your client, you may want to obtain independent evidence to confirm your client’s current claim in light of the credibility issue.

• **Prior Expedited Removal.** Ask your client if they tried to enter previously, but were caught and removed before coming in again. In those cases, there may exist a sworn statement in which your client allegedly stated they were not afraid of removal before the removal was effectuated.

• **Prior removal Proceedings.** If your client was previously in removal proceedings, it may be prudent to request and review the transcripts of those proceedings, or the recording.

• **Records in Criminal Illegal Re-Entry Proceedings.** Particularly in reasonable fear claims, your client may have been prosecuted on illegal re-entry. In these cases, you may contact the federal defense attorney that represented your client to see if fear was ever addressed in the proceedings.

If any of the above exist, there may be a credibility issue and the officer may confront your client in the interview. You should prepare your client, but also consider additional, independent evidence to confirm your client’s case and credibility.

**WHAT TO SUBMIT TO THE ASYLUM OFFICER**

Supporting documentation can be important to confirm your client’s claim and credibility. A short brief can also be helpful, particularly in a claim where you know certain issues will be a concern for the officer, or where the legal theory is not obvious. Asylum officers are under immense pressure to complete these cases quickly. They may not have the time that you do to research and develop an argument in your client’s favor. Doing this for them may increase the possibility of a positive determination.

proceedings where there was an appeal lodged, refer to section 13.2 of the BIA Practice Manual. Where no appeal was lodged, contact the EOIR where proceedings concluded for either copies of tapes or the audio CD.

20 Make sure that the frivolous asylum application bar does not apply. See 8 USC 1158(d)(6). This may turn, in part, on your client’s knowledge of the false statements and opportunity to correct them. Strategies to address notario fraud include investigating the attorney or notario to see if they were disbarred, disciplined, or criminally prosecuted; having your client file a complaint with the appropriate state agency for practice of law without a license; preparing an expert witness on the issue of notario fraud; and submitting case law and articles documenting the practice of notario fraud. See e.g. Alvarez-Santos v. INS, 332 F.3d 1245, 1254 (9th Cir. 2003); Aldana v. Ashcroft, 113 Fed. Appx. 817, 818 (9th Cir. 2004).
Getting your evidence to the officer and into the record may be a challenge. Attorneys frequently report that evidence submitted in advance does not reach the interviewing officer, especially in those states serviced by officers on detail from another state. Note that officers generally will not accept documentation on the day of the interview. Each office has its own requirements in terms of manner and timing of submitting documents. You will need to comply with the local rules, and check numerous times to ensure that the documents are in fact received.

**HOW TO MAXIMIZE YOUR ROLE IN THE INTERVIEW**

An attorney in a credible or reasonable fear interview “may be permitted, in the discretion of the AO, to present a statement at the end of the interview.”

The officer “may place reasonable limits” on the length of the statement. In some jurisdictions, attorneys are permitted only to appear by telephone. While your role may thus appear limited, your presence is of key importance in: 1) safeguarding procedure and documenting the interview; 2) alerting the officer to miscommunications; 3) alerting the officer to facts that have been missed; and 4) providing the legal framework to allow the officer to make a positive finding.

- **Documenting the Interview.** Your first role is to observe and listen, and take notes. The credible and reasonable fear interviews are not recorded. The officers take notes and create a record of the interview which will be read back for accuracy at the end of the interview, but there is no exact transcription. Your notes may assist in a later proceeding or review to evidence an inaccuracy or procedural defect that does not appear on the face of the interview and determination.

- **When to Interrupt.** Generally, an attorney should not interrupt the officer but should wait until the end of the interview to address concerns and make a statement. However, if you note a miscommunication – either because of inaccurate translation or otherwise – you can and should interrupt to alert the officer. If it appears your client doesn’t understand the interpreter, or that the interpreter is not fully or correctly translating, the officer can usually change interpreters (who are present telephonically) without having to reschedule the interview.

- **Drawing Out Facts the Officer Has Missed.** If there are facts important to the claim that have been missed, you should alert the officer. Do not simply state the missing facts, but ask the officer if you can ask a few questions to help draw out facts that have been missed. Best practice is to wait until the officer has concluded his or her questions.

- **Statement in Conclusion of the Interview.** This is your opportunity to connect the facts to a legal theory, giving the AO a legal hook to grant your case. Remember that an officer is required to “consider whether the alien’s case presents novel or unique issues that merit consideration in a full hearing before an IJ.” Address the weakest points in the case, explain what you will do in a full merits hearing to address those issues, and cite to the

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21 8 CFR §208.30(d)(4); 8 CFR §208.31(c).
22 Id.
23 8 CFR §208.30(e)(4).
legal authority that will support your position. You may refer to evidence you will obtain or experts who may testify. If case law appears against you, explain how it is a live (potentially novel) issue that you intend to litigate to the Judge. Remember also that officers are short on time and case law changes rapidly. Giving them the case law will save them time and make it easier to grant your case.

WHAT IF THE ASYLUM OFFICER MAKES A NEGATIVE FINDING?

If an AO makes a negative credible or reasonable fear determination, he or she must provide written notice. An applicant is entitled to review by an IJ, but such review is limited. The IJ’s decision on review is “final and may not be appealed.” The IJ is to review the claim de novo. Approaches to the review of a negative credible or reasonable fear finding vary greatly between Immigration Judges. Because appellate review is limited, there is scant guidance on the scope and nature of such reviews. The best practice would be to consult local practitioners to learn your particular IJ’s approach.

A common and consistent problem lies in what evidence may be submitted or considered by the IJ on review. Pursuant to the regulations, an IJ may receive into evidence “any oral or written statement” that is material or relevant. Some IJs may allow for the submission of new supporting documentation. Some IJs, however, see their role on review as strictly appellate in nature, and will only consider that which was submitted to the AO or referenced in the AO referral.

According to regulations, records that must be provided by the asylum office to the Immigration Judge include “the AO’s notes, summary of material facts, and other materials upon which the determination was based.” In practice, supporting documentation is rarely submitted to the Judge or cited to in the AO determination. To ensure the IJ’s ability to review the documentation, make efforts as early as possible to have the AO refer to the documentation and include it in the referral to the IJ.

RECONSIDERATION OF THE AO’s DECISION

While an IJ’s denial on review of a negative credible or reasonable fear determination may not be reviewed, the regulations provide that the asylum office may reconsider a negative finding once the IJ has concurred with that finding. Particularly if there is a significant error in law or due process, a request for reconsideration directly to the asylum office may prove successful in securing a positive determination or a new interview. Remember also that the asylum office can also provide a new interview if there is “compelling new information concerning the case.”

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24 8 CFR §208.30(f); 8 CFR §208.31(g);
25 8 CFR §1208.30(g)(2)(iv); 8 CFR §208.31(g);
26 8 CFR §1003.42(d).
27 8 CFR §1003.42(c);
28 8 CFR §1208.30(g)(2)(ii)(emphasis added); 8 CFR §208.31(g);
29 8 CFR §1208.30(g)(2)(ii).

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MEETING THE ONE-YEAR DEADLINE AND ELIGIBILITY FOR EMPLOYMENT AUTHORIZATION

While the credible fear and reasonable fear interview process is supposed to be expedited at the border, in practice advocates are sometimes seeing applicants released from detention to await an interview at a later date. Whether due to a lack of capacity by the asylum office, or bureaucratic issues with intra-agency communication and tracking, it is not unheard of for applicants to be waiting months, and sometimes even more than a year, to have a credible or reasonable fear interview. Such delays raise issues regarding the one-year filing deadline for asylum, as well as eligibility for work authorization.31

- **Practice Tip** In non-detained cases, consider filing or lodging an I-589 asylum application while waiting for a credible or reasonable fear interview.

When an individual is not detained, and waiting for an interview, best practice may be to file or lodge the I-589 asylum application in order to meet the one-year deadline, and possibly to start the clock for asylum EAD eligibility.

**When to File the I-589 Affirmatively**

An I-589 can arguably be filed affirmatively if the applicant was paroled in, or released from detention, and no Notice to Appear (NTA) has been filed with the Immigration Court.32 Note that in many cases, an applicant may have been served with an NTA, but that NTA has not yet been filed. Call the EOIR at 1-800-898-7180 to confirm whether the NTA is on file. If not, consider filing the I-589 affirmatively. While the AO will likely administratively close the case once an NTA is filed, there is a good argument that the affirmative filing should preserve the one-year deadline, and perhaps even start the asylum employment authorization document (EAD) clock. Just because an applicant has been served with an NTA does not necessarily mean that the agency will ultimately file it.

**When to Lodge the I-589**

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31 While persons who pass a reasonable fear interview, by regulation, not eligible to apply for asylum, there is an argument that the regulation is ultra vires. See “AILA Amicus Brief on Asylum and Reinstatement” (July 26, 2013), AILA InfoNet Doc. No. 13080204. There is also an argument that withholding applicants are eligible for an employment authorization document (EAD) under the regulations. See 8 CFR §274a.12(c)(8) (eligibility for applicant who has filed a “complete application for asylum or withholding”). The agency also has discretion to place applicants otherwise subject to the reinstatement and the reasonable fear interview into INA §240 removal proceedings, which would permit them to have asylum applications considered. For these reasons, it can be important to preserve the one-year deadline for reasonable fear cases.

32 See 8 CFR 208.2(b) (IJ has jurisdiction after NTA is filed with the immigration court).
If the NTA has been filed with the Executive Office for Immigration Review (EOIR), then lodge an I-589, particularly if the one year deadline is approaching. In cases where the NTA was served, but has not been processed by the immigration court, it may be worthwhile to attempt to lodge an I-589, protectively, at the same time as filing the asylum application affirmatively. This preserves all arguments that the applicant timely proffered an I-589, even if the immigration court rejects the lodging of the I-589.

- **Practice tip**: If a year has already passed, file as soon as possible after passing a CFI or reasonable fear interview.

If an applicant did not file for asylum within the one-year deadline, but is still waiting for a credible or reasonable fear interview, an argument can be made that they fall within an exception to the one-year deadline. While it cuts against the point above, arguably a person awaiting a credible or reasonable fear interview is ineligible to apply for asylum. After all, the point of the credible and reasonable fear interviews is to determine whether the person will be permitted to apply. Therefore, the argument is that an asylum application should be timely if filed within a reasonable period of time after a positive credible or reasonable fear.

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33 The lodging process is described in the *Immigration Court Practice Manual* (ICPM), as well as the OPPMs. See ICPM at 74–75; OPPM 13-02 (The Asylum Clock) and OPPM 13-03 (Guidelines for Implementation of the ABT Settlement Agreement). For a detailed description of lodging and the ABT Settlement, see the American Immigration Council’s FAQ at http://legalactioncenter.org/sites/default/files/FAQ%202-5-14%20FIN.pdf.

34 8 CFR §§ 208.4(a)(4), (5).

35 8 CFR § 208.30(f), 208.31(e) (providing that the person is put in proceedings only after passing the credible or reasonable fear interview).

36 8 CFR §§ 208.4(a)(4), (5).