



U.S. Citizenship
and Immigration
Services

HQRAIO 120/12a

Memorandum

MAY 28 2013

TO: All Asylum Office Staff

FROM: Ted Kim
Acting Chief, Asylum Division

SUBJECT: Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children

I. Purpose

This memorandum provides updated guidance and procedures to U.S. Citizenship and Immigration Services (USCIS) Asylum Offices on determining jurisdiction in applications for asylum filed by unaccompanied alien children (UACs) under the initial jurisdiction provision of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110-457, which was signed into law on December 23, 2008, and became effective on March 23, 2009. These procedures modify the current procedures found in Section III.C of the March 25, 2009, memorandum Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children. These procedures are effective on June 10, 2013, and apply to any USCIS decision issued on or after that date. These updated procedures will be incorporated into the Affirmative Asylum Procedures Manual. The decision letters used by Asylum Offices in UAC cases will not change with the exception of the UAC Decision Notice for Non-Eligibility (updated version attached). All Asylum Offices will receive train-the-trainer instruction from Headquarters and are responsible for conducting field training prior to June 10.

II. Determination as to whether the applicant is a UAC

USCIS typically does not have jurisdiction to accept a Form I-589, *Application for Asylum and for Withholding of Removal*, filed by an applicant in removal proceedings. Section 235(d)(7)(B) of the TVPRA, however, places initial jurisdiction of asylum applications filed by UACs with USCIS, even for those UACs in removal proceedings. Therefore, USCIS must determine whether an applicant in removal proceedings is a UAC.

Prior to the issuance of this guidance, Asylum Offices made independent factual inquiries under the UAC definition to support their determinations of UAC status, which was assessed at the time of the UAC's filing of the asylum application. In most of these cases another Department of Homeland Security entity, either U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE), had already made a determination of UAC status after apprehension, as required for the purpose of placing the individual

in the appropriate custodial setting. Effective June 10, in those cases in which either CBP or ICE has already made a determination that the applicant is a UAC, and that status determination was still in place on the date the asylum application was filed, Asylum Offices will adopt that determination without another factual inquiry. Unless there was an affirmative act by HHS, ICE or CBP to terminate the UAC finding before the applicant filed the initial application for asylum, Asylum Offices will adopt the previous DHS determination that the applicant was a UAC. In cases in which a determination of UAC status has not already been made, Asylum Offices will continue to make determinations of UAC status per current guidance.

A. Cases in which a determination of UAC status has already been made

In cases in which CBP or ICE has already determined that the applicant is a UAC, Asylum Offices will adopt that determination and take jurisdiction over the case. Asylum Offices will see evidence of these prior UAC determinations in A-files or in systems on the Form I-213, *Record of Deportable Alien*; the Form 93 (the CBP UAC screening form); the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) Initial Placement Form¹; the ORR Verification of Release Form; and the encounters tab in the ENFORCE Alien Removal Module (EARM) (see attached samples). In these cases the Asylum Office will no longer need to question the applicant regarding his or her age and whether he or she is accompanied by a parent or legal guardian to determine UAC status. If CBP or ICE determined that the applicant was a UAC, and, as of the date of initial filing of the asylum application, that UAC status determination was still in place, USCIS will take initial jurisdiction over the case, even if there appears to be evidence that the applicant may have turned 18 years of age or may have reunited with a parent or legal guardian since the CBP or ICE determination. Generally, an Asylum Office should not expend resources to pursue inquiries into the correctness of the prior DHS determination that the applicant was a UAC.

Although Asylum Offices will no longer need to make independent factual inquiries about UAC status in cases in which another DHS entity has already determined the applicant to be a UAC, these cases will still receive headquarters quality assurance review as juveniles per the Quality Assurance Referral Sheet. Upon receiving headquarters concurrence, Asylum Offices should follow the guidance in the March 25, 2009, memorandum referenced above regarding handling the case upon entry of a final decision.

B. Cases in which a determination of UAC status has not already been made

1. UACs not in removal proceedings

For applicants not in removal proceedings who apply for asylum with USCIS via the affirmative asylum process, who have not been determined previously to be a UAC by CBP or ICE, and who appear to be UACs, Asylum Offices will continue to make UAC determinations not for the purpose of determining jurisdiction but for the purposes of determining whether the applicant is subject to the 1-year filing deadline² and whether the Asylum Office must notify HHS that it has discovered a UAC³. Asylum Offices should examine whether the applicant was a UAC at the time of filing the asylum application for purposes of determining whether the 1-year filing deadline applies and whether the applicant was a UAC at the time of the interview (i.e., when "discovery" takes place) for purposes of notifying HHS. Previously issued guidance on examining an applicant's age and unaccompanied status continue to apply to these determinations.

¹ After apprehending an individual and determining that he or she is a UAC, CBP or ICE transfers him or her to a facility run by the Office of Refugee Resettlement (ORR), which is part of the Department of Health and Human Services (HHS).

² See section 235(d)(7)(A) of the TVPRA.

³ See section 235(b)(2) of the TVPRA.

2. UACs in removal proceedings

For applicants in removal proceedings where CBP or ICE has not already made a determination that the applicant is a UAC,⁴ Asylum Offices will need to make UAC determinations for the purpose of determining whether USCIS has jurisdiction over the case. Asylum Offices should examine whether the applicant was a UAC on the date of initial filing of the asylum application for the purpose of determining USCIS jurisdiction.

If the Asylum Office is the first federal government entity to make a determination that the individual is a UAC and the individual remains a UAC at the time of the asylum interview, then the Asylum Office will notify HHS that it has discovered a UAC. This obligation to notify HHS upon "discovery" of a UAC is separate from the issue of jurisdiction over the asylum application. Where another federal government entity has already made a UAC determination, that entity is the one that "discovered" the UAC, and it is not therefore USCIS's obligation to notify HHS in those cases. Previously issued guidance on examining an applicant's age and unaccompanied status continue to apply to these determinations.

III. Credible and reasonable fear screening processes

In the credible and reasonable fear screening processes Asylum Offices will generally accept CBP and ICE determinations that individuals were not UACs, unless the Asylum Office discovers evidence indicating that the individual is currently a UAC, in which case the Asylum Office will make a new determination of UAC status and communicate such determination to CBP or ICE as appropriate.⁵ If the Asylum Office is the first federal government entity to make a determination that the individual is a UAC and the individual remains a UAC at the time of the credible fear or reasonable fear interview, then the Asylum Office will notify HHS that it has discovered a UAC.

If you have any questions concerning the guidance contained in this memorandum, please contact Kimberly Sicard at 202-272-1623 or kimberly.r.sicard@uscis.dhs.gov.

Attachments (9):

1. UAC Decision Notice for Non-Eligibility (updated decision letter, internal use only)
2. DHS UAC Instruction Sheet
3. Form I-213, *Record of Deportable Alien* (internal use only)
4. Form I-213, *Record of Deportable Alien* (internal use only)
5. Form 93, the CBP UAC Screening Form (internal use only)
6. Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) Initial Placement Form (internal use only)

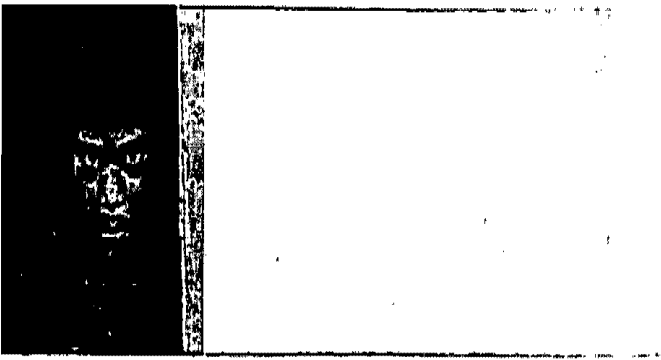
⁴ This situation would most likely occur when a child was accompanied at the time of service of the charging document but later became unaccompanied. If the child appeared or claimed to be a UAC in immigration court and expressed an interest in applying for asylum, the ICE trial attorney would give the child a UAC Instruction Sheet so that the child could file an asylum application with USCIS. The Asylum Office would then need to make a determination of UAC status in order to determine whether USCIS has jurisdiction over the case. The ICE trial attorney giving the applicant the UAC Instruction Sheet does not constitute a determination by DHS of UAC status.

⁵ Section 235(a)(5)(D) of the TVPRA provides that any UAC whom DHS seeks to remove, except for a UAC from a contiguous country subject to certain exceptions, shall be placed in removal proceedings; therefore, Asylum Offices generally should not encounter UACs in the credible and reasonable fear screening processes.

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7. Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) Verification of Release Form (internal use only)
8. Screen shot of the encounters tab in EARM (internal use only)
9. Screen shot of the encounters tab in EARM (internal use only)



Updated Procedures for Determining Initial Jurisdiction Over UAC Asylum Applications



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Photograph by Hiram A. Ruiz, courtesy of the US Committee for Refugees,

OBJECTIVES

1-Understand the updated procedures for determining whether USCIS has jurisdiction over an asylum application filed by a UAC.

2-Identify where to locate evidence of prior CBP or ICE UAC determinations.

3-Understand what to do in cases in which CBP or ICE has not made a previous UAC determination.



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BACKGROUND

- CBP and ICE determine whether a minor is a UAC upon apprehension to determine who will have physical custody over the minor.
- UACs are issued NTAs and placed in removal proceedings.
- ICE directs UACs who wish to apply for asylum to file Form I-589 with USCIS and gives them UAC Instruction Sheet.



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BACKGROUND

- Up until now, Asylum Officers have been making independent factual inquiries under the UAC definition to determine whether an asylum applicant was a UAC at the time of filing their asylum application, even where DHS had already made a UAC determination.
- Under the current procedures, AOs spend time during the asylum interview asking questions about the applicants' age and making difficult inquiries into the availability of a parent or legal guardian.





NEW PROCEDURES

- Effective June 10, 2013, USCIS will adopt a previous CBP or ICE determination that an applicant is a UAC and take jurisdiction over the asylum case.
- USCIS will accept a previous UAC status determination and take jurisdiction, as long as that UAC status determination was still in place at the date of initial filing of the asylum application.
- USCIS will accept this previous determination even if there is evidence that would not support a new determination applicant is a UAC (e.g., turned 18 years old or reunited with a parent) after being deemed a UAC by CBP or ICE.
- AOs will adopt the previous DHS determination that the applicant was a UAC unless there was an affirmative act by HHS, ICE or CBP to terminate the UAC finding before the applicant files the initial application for asylum.



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NEW PROCEDURES

- This change in procedure will save valuable time and resources for Asylum Officers and minimize the number of cases returned to EOIR. This change will also allow AO's to focus on the asylum eligibility part of the determination.
- By taking jurisdiction over the case, the UAC will get a non-adversarial interview and a decision by USCIS on the merits.
- All UAC cases will still require HQ review as juveniles in accordance with the Quality Assurance Referral Sheet.



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PENDING CASES

- This change applies to all asylum applications in which USCIS has not issued a final decision as of June 10, 2013.
- All pending cases where we found no jurisdiction must be re-examined for jurisdiction based on a previous CBP or ICE UAC status determination.
- If USCIS finds jurisdiction, the case must be re-evaluated based on the merits and revised from a memo-to-file into an assessment.
- Asylum Offices should schedule a follow-up interview if the record is not adequately developed to decide the case on the merits.



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REFERRED CASES

- If USCIS already referred a case based on lack of jurisdiction before June 10th, we will not accept motions to reopen or reconsider the case based on the new procedures.
- AAPM Section III.M, Motions to Reopen and Reconsider, states:

“An Asylum Office Director, or his or her designee, need only consider a motion to reopen or reconsider for a case that has received a *Final Denial* from an Asylum Office. Because referred cases have not received a final decision, they are not entitled to reconsideration”.



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WHERE TO FIND A PREVIOUS UAC DETERMINATION

- Form I-213: Record of Deportable Alien
- Form 93: CBP UAC Screening Form
- ORR UAC Initial Placement Referral
- ORR Verification of Release Form
- EARM: Encounters Tab

****The ICE UAC Instruction Sheet is NOT by itself
evidence of a prior UAC determination****



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WHERE TO FIND A PREVIOUS UAC DETERMINATION

Form I-213: Record of Deportable Alien

UNACCOMPANIED JUVENILE:

.....
2.5.5.....

FUNDS IN POSSESSION:

.....

Mexican Peso 20.00

2.5.5

RECORDS CHECKED:

.....

CIS Negative

CLAIM Negative

IAPIS Negative

NARRATIVE:

.....

NOTE:

Subject is an unaccompanied juvenile.

ENCOUNTER/ALIENAGE:

Subject, [REDACTED] (A# [REDACTED]), DOB: [REDACTED], was encountered by McAllen Border Patrol Agents on December 4, 2010, near Hidalgo, Texas. Subject was



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WHERE TO FIND A PREVIOUS UAC DETERMINATION

Form I-213: Record of Deportable Alien

TRAVEL INFORMATION:

[REDACTED] stated that she traveled from her home in El Salvador to Chiapas, Mexico then to Altar, Sonora, Mexico by bus. She then crossed the U.S./Mexico International Boundary illegally on foot.

DISPOSITION:

[REDACTED] is being served with a Warrant of Arrest/Notice to Appear, and placed in removal proceedings, per Section 212(a)(6)(A)(i) of the INA. She is an unaccompanied juvenile.



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WHERE TO FIND A PREVIOUS UAC DETERMINATION

Form 93: CBP UAC Screening Form

DEPARTMENT OF HOMELAND SECURITY
U.S. Customs and Border Protection

UNACCOMPANIED ALIEN CHILD SCREENING ADDENDUM

Trafficking Victim Protection Act (8 U.S.C. 1232)

Alien's Name:

A NUMBER (if any)

A

Credible Fear Determination

Why did you leave your home country or country of last residence?

Do you have any fear or concern about being returned to your home country or being removed from the United States?

Would you be harmed if you were returned to your home country or country of last residence?

Do you have any questions or is there anything else you would like to add?

Human Trafficking

Definition: Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion or in which the person induced to perform such an act is under 18; or the recruitment, harboring, transporting, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion, for the purpose of subjecting that person to involuntary servitude, peonage, debt bondage, or slavery.

Below are examples of trafficking indicators. If one or more of these indicators is present, the interviewer should pursue age appropriate questions that will help identify the key elements of a trafficking scenario. If required, ensure that follow up questions are asked based on the answers given. Answers from these questions will assist an interviewer in determining if the Unaccompanied Alien Child may be a victim of trafficking. In all cases, use your training and experiences to be alert for indicators of human trafficking.



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WHERE TO FIND A PREVIOUS UAC DETERMINATION

ORR UAC Initial Placement Referral Form

UAC Initial Placement Referral Form

See Footer for Instructions - Updated, 3/25/08

Processing Officer's Name	Email Address	Desk Phone	Cell Phone

UAC Information

First Name	Middle Name	Last Name	DOB	
Additional Names Used:				
Gender	Country of Birth	Immigration Status	A#	FINS #
	EL SALVADOR	NTA Issued		

Entry and Apprehension Information

	City and/or Location Code	ST	Date	Time	Type
Entry	SASABE	AZ	12/17/2010	10:00 AM	Entered Without Inspection
Apprehension	SASABE	AZ	12/18/2010	3:00 PM	N/A
Current Location	TUCSON	AZ	N/A	N/A	Processing Center

UAC apprehended with: (Choose more than one if applicable)	Please provide the following for all relatives apprehended with the AUC, if more space is needed, use the <i>Referral Notes</i> section at the bottom of the page.		
	Name	A#	Relationship to UAC
<input type="checkbox"/> Parent(s)			
<input type="checkbox"/> Other Related Adult(s)			
<input type="checkbox"/> Related Minor(s)			
<input type="checkbox"/> Smuggler(s)			
<input type="checkbox"/> Non-Related Individual(s)			
<input checked="" type="checkbox"/> Alone			



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WHERE TO FIND A PREVIOUS UAC DETERMINATION

EARM: Encounters Tab

Person	Encounters	Supporting Info	Case Summary	Actions/Decisions	ATD	Bonds	Comments	Scheduling	Print
Encounter Details EOIR Look Up									

Subject Information		
FINS:	Criminal Type: N/A	Role:
A-Number:	Agg Felon: N - Not an Aggravated Felon	Role Comment: N/A
Control Name:	Primary Citizenship: GUATEMALA	Processing Disposition: Warrant of Arrest/Notice to Appear
First Name:	Hair: BLK	INS Status: Inadmissible Alien
Middle Name: N/A	Eyes: BRO	POE: HIDALGO, TX
Maiden: N/A	Complexion: MED	Entry Date: 12/04/2010
Nickname: N/A	Race: W	Entry Class: PWA Mexico
Living?: N/A	Origin: N/A	Apprehension Date: 2010-12-04 05:40:00.0
Sex: M	Date of Birth:	Apprehension Location: HIDALGO, TX
Marital Status: Single	Age: 20	
SSN: N/A	Age at Encounter: 17	
Juvenile Verified: Y	Height: 64	
Occupation: CHILD	Weight: 130	
<p>I-213 Narrative NOTE: Subject is an unaccompanied juvenile. Subject made contact with [REDACTED] via phone [REDACTED] ENCOUNTER/ALIENAGE: Subject, [REDACTED] DOB: [REDACTED] was encountered by McAllen Border Patrol Agents on December 4, 2010, near Hidalgo, Texas. Subject was determined to be a citizen and national of Guatemala with no immigration documents. Subject entered the United States at a place not designated as a port of entry by the Attorney General of the United States and or the Secretary of Homeland Security, the successor, thus subject was not admitted, inspected, or named</p>		



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CASE EXAMPLE

- Juan was apprehended by CBP and is in removal proceedings. His asylum interview with USCIS was on May 23, 2013. The Asylum Officer found no jurisdiction based on the previous UAC determination guidelines and wrote a memo-to-file. QAT reviews the file on Monday, June 10, 2013 before sending it to HQ for review. What should QAT do with Juan's case?
- What happens if the record is not sufficient to decide the case on the merits?



CASE EXAMPLE

- Claudia was apprehended by CBP and placed in removal proceedings. Her asylum interview with USCIS is on June 16, 2013. When preparing for the interview, the Asylum Officer finds Form I-213, which states, “subject is an unaccompanied juvenile” and an ORR Initial Placement Referral Form in the file.
- Does USCIS have jurisdiction over Claudia’s asylum case?
- Does USCIS still have jurisdiction even if Claudia is 20 years old by the time she filed Form I-589?





CASE EXAMPLE

- Jaime was apprehended, placed into removal proceedings, and transferred to ORR custody when he was 17 years old. When Jaime turned 18, ICE took him into custody and affirmatively terminated the prior UAC determination.
- Does USCIS have jurisdiction over Jaime's asylum case?



IF NO PREVIOUS UAC DETERMINATION BY CBP OR ICE

IF APPLICANT IS IN REMOVAL PROCEEDINGS

- Asylum Officer determines if the applicant was a UAC on the date of the initial filing of the asylum application to establish if USCIS has jurisdiction and if the 1-year filing deadline applies.
- Asylum Officer determines if the applicant is a UAC on the date of the asylum interview for purposes of notifying HHS that it discovered a UAC.
- Asylum Officer makes UAC determinations using previous guidance on examining the applicant's age and unaccompanied status.



CASE EXAMPLE

- Leo and his father were apprehended at the border by CBP in 2012 and placed in removal proceedings. His father was removed to their home country shortly after. Leo tells the IJ that he wants to apply for asylum and that he is unaccompanied.
- Does USCIS have jurisdiction over Leo's asylum application if he was 16 years old when he filed Form I-589?
- What happens if the Asylum Officer finds out during the interview that Leo has been living with his mother in the United States since 2012?
- What happens if Asylum Officer finds that USCIS does not have jurisdiction?





IF NO PREVIOUS UAC DETERMINATION BY CBP OR ICE

IF APPLICANT IS NOT IN REMOVAL PROCEEDINGS

- Asylum Officer examines whether the applicant was a UAC on the date of the initial filing of the asylum application to determine if 1-year filing deadline applies.
- Jurisdiction is not at issue in these affirmative applications.
- Asylum Officer determines if the applicant is a UAC on the date of the asylum interview for purposes of notifying HHS that it discovered a UAC.
- Asylum Officer makes UAC determination using previous guidance on examining the applicant's age and unaccompanied status.



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CASE EXAMPLE

- Jenny entered the United States in 2009 and has been living with her teenage friends in Texas since then. She was never apprehended and has never been in removal proceedings. She files Form I-589 with USCIS in 2013 at the age of 17.
- Does USCIS have jurisdiction over Jenny's asylum case?
- Does the Asylum Officer need to determine if Jenny is a UAC? Why or why not?



CREDIBLE & REASONABLE FEAR

- UACs should be placed in Section 240 removal proceedings and should not be subject to expedited or administrative removal.
- If the evidence indicates that a UAC was mistakenly put through the APSO process, the officer must make a UAC determination and communicate the findings to ICE or CBP as appropriate.





SUMMARY

- The new procedures are effective June 10, 2013. All AOs in the field need to be trained by this date.
- USCIS will accept a previous CBP or ICE determination of an asylum applicant's UAC status and take jurisdiction over the asylum case if that determination was still in place on the date of filing.
- If CBP or ICE have NOT made a previous UAC determination, USCIS must determine whether the applicant is a UAC using previously issued guidance.





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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

- 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

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	<p>Ability to analyze complex issues.</p> <p>Knowledge of the relevant sections of the Immigration and Nationality Act (INA)</p> <p>Knowledge of the relevant sections of 8 Code of Federal Regulations (CFR)</p> <p>Knowledge of if you is case law that impacts RAIO</p> <p>Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening)</p> <p>Knowledge of who has the burden of proof</p> <p>Knowledge of different standards of proof</p> <p>Knowledge of the criteria for refugee classification</p> <p>Knowledge of the criteria for establishing a well-founded fear (WFF)</p> <p>Knowledge of the procedures and guidelines for establishing an individual's identity</p> <p>Skill in identifying issues of a claim</p>

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 PROOF²

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.

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).

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 *Smolnikova v. Gonzales*, 422 F.3d 1037, 1050 (9th Cir. 2005), citing *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995).

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 *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

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 RAI0 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.

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).

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 RAIIO 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*).

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 information²² 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:

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).

- 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

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 *Kotas 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 *Kotas* and *Singh*.

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

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 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).

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).

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); *Gajlius 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).

- 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).

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 RAI0 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 RAI0 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).

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.

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

⁴⁴See *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 Zwar Tun 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).

- 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)

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 reasonable⁵⁰

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).

- 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 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

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

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 INFORMATION⁵²

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. INS*⁵³, 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)

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.

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 un**rea**sonable for the applicant to relocate. In the Asylum context, the burden of proof **sh**ifts to the officer to show that **the** applicant could reasonably relocate to avoid future **per**secution if past persecution has **be**en 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 **eva**luate whether an applicant's fear of future persecution **is** well-founded.

PRACTICAL EXERCISES

Practical Exercise # 1

- Title:
- Student Materials:

OTHER MATERIALS

There are no Other Materials for this module.

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**

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

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

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

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).

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 resides⁵⁵
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 persecution⁵⁶

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).

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*.

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 so⁶¹

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 X1.D., *Fundamental Changes Must Affect Applicant's Situation*, below.

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

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. Mukasev*, 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

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 *Mihavlov v. Ashcroft*, 379 F.3d 15, 23 (1st Cir. 2004).

⁶⁹ See e.g., *Gallius 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)).

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).

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).

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*.

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

<p style="text-align: center;"><u>IO Supplement</u></p> <p style="text-align: center;">Module Section Subheading</p>
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Response to Query

Date: April 10, 2014

Subject: Offers of Firm Resettlement

Keywords: Firm Resettlement, Offer of Resettlement

Query: When does an offer of resettlement trigger the firm resettlement bar?

Response: The officer should follow the four-step analysis set forth by the Board of Immigration Appeals (BIA) in the Matter of A-G-G. The analysis will help the officer determine whether the firm resettlement bar has been triggered. Please note that the bar does not apply if the applicant did not enter the potential country of firm resettlement as a consequence of flight.

- 1) Officer Burden – It is the officer's burden to show direct evidence or, if direct evidence is not available, indirect evidence of an offer of permanent resettlement. Passports or permanent resident permits from the country of asylum are examples of direct evidence of an offer of permanent resettlement. Nationality or marriage laws suggesting a mechanism for citizenship may serve as indirect evidence of an offer of permanent resettlement in some cases.
- 2) Rebuttal – The applicant has the opportunity to rebut any direct or indirect evidence of an offer of permanent resettlement by showing that such an offer has not, in fact, been made or that he or she would not qualify for it. Additionally, the officer may find rebuttable evidence while reviewing country conditions, such as citizenship laws. An applicant may show, for example, that her potential path to citizenship (through marriage and nationality laws) includes legal requirements that she does not meet. Additionally, the examination of citizenship laws may show that the offer is not currently available even though the applicant may be eligible to apply for citizenship after a certain time period has passed.
- 3) Weigh the Totality of Evidence – The officer will consider the totality of the evidence presented and make a determination as to whether the applicant has received an offer of permanent resettlement. When considering the circumstances related to an apparent offer, the officer should keep in mind that the evidence of an offer must either be direct evidence or, in the absence of direct evidence, indirect evidence of sufficient clarity and force (not mere speculation).
- 4) Exception – If the totality of the evidence shows firm resettlement, the burden shifts to the applicant to show that an exception applies. The officer will need to consider whether the conditions of resettlement are overly restrictive. For example, if the applicant is unable to work, study, or move about the country freely, the officer may conclude that the

conditions of resettlement are overly restrictive. In such a case, the applicant would not be considered firmly resettled.

Analyses of recently encountered scenarios are provided below:

Scenario 1 – Iraqis in Jordan

- Example A (not resettled): An Iraqi refugee in Jordan married a Jordanian citizen 1 year ago. She does not have permanent residence in Jordan. In order to derive Jordanian citizenship through marriage, she must be married to a Jordanian citizen for 5 years. She is not firmly resettled now, because she is not even eligible to apply for citizenship for another four years. Thus, the citizenship law allowing for Jordanian naturalization through marriage, which is indirect evidence of an offer, was rebutted when the applicant showed that she is not actually eligible to apply for another four years. Under the totality of the circumstances analysis, she has not received an offer of permanent resettlement, so is not firmly resettled.
- Example B (resettled): An Iraqi refugee in Jordan married a Jordanian citizen 5 years ago. If there is no other rebuttable evidence (not related to the time requirement), she does have an immediate offer of permanent resettlement as she is eligible now to apply for citizenship. Unless she can demonstrate that an exception applies as described in paragraph 4 above, the firm resettlement bar would apply.

Scenario 2 – Iraqi Turkmen (Turcoman) in Turkey

- Example 1 (not resettled): An Iraqi citizen of Turcoman (Turkmen) ethnicity fled to Turkey 1 year ago. Country conditions show that the applicant is eligible to apply for Turkish citizenship on an expedited basis as an ethnic Turk. However, the applicant testifies that his arrest for the theft of a car makes him ineligible under the “good moral character” requirement for citizenship. Based on this rebuttable evidence, the applicant does not have an offer of permanent resettlement and, therefore, is not firmly resettled. His apparent criminal activity should be explored, as it could lead to an inadmissibility finding.
- Example 2 (resettled): An Iraqi citizen of Turcoman (Turkmen) ethnicity fled to Turkey 1 year ago. Country conditions show that the applicant is eligible to apply now for Turkish citizenship on an expedited basis as an ethnic Turk. Unless there is other rebuttable evidence, the applicant does have an offer of permanent resettlement. The applicant would need to show that an exception based on restrictive conditions of resettlement applies, as described in paragraph 4 above, in order to overcome the firm resettlement bar.

Scenario 3 – Congolese Tutsis in Rwanda

- Example 1 (not resettled): A Congolese refugee in Rwanda is of Tutsi origin. Rwanda's Nationality Law stipulates that a person with "Rwandan origin" has the legal right to acquire Rwandan citizenship. However, the UNHCR office in Rwanda indicates that grants of citizenship based on this heritage link are highly controlled in practice, making it very difficult even to file an application. Moreover, other Congolese Tutsi similarly situated to the applicant who have applied for citizenship under this law have been rejected. The applicant may have the legal right to apply for citizenship, but there is evidence which tends to show he is not able to access this right. Therefore, the applicant has not received an offer of permanent resettlement, so he is not firmly resettled.
- Example 2 (dual citizen): A Congolese refugee in Rwanda applies for Rwandan nationality based on his heritage. His application has been approved. In this scenario, the applicant has acquired a second nationality, so the case must be assessed as a dual national case. Accordingly, his refugee claim needs to be assessed vis-a-vis both DRC and Rwanda.



U.S. Citizenship
and Immigration
Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

FIRM RESETTLEMENT

TRAINING MODULE

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

Training Module

MODULE DESCRIPTION:

This module provides an overview of the firm resettlement bars for asylum and refugee resettlement. The module addresses the similarities and differences between these two bars and their exceptions. This module also includes an explanation of the BIA's four-step framework for analyzing evidence under the firm resettlement bar.

TERMINAL PERFORMANCE OBJECTIVE(S)

You (the officer) will be able to evaluate whether an asylum or refugee applicant is firmly resettled in a third country and articulate appropriate reasons supporting the firm resettlement determination.

ENABLING PERFORMANCE OBJECTIVES

1. Identify the three requirements of the asylum and refugee firm resettlement bars and their exceptions.
2. Distinguish between the exceptions to the firm resettlement bars for asylum and refugee adjudications.
3. Apply the firm resettlement bars to determine eligibility for asylum or refugee resettlement.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Class Discussion
- Practical Exercises

METHOD(S) OF EVALUATION

- Multiple Choice Exam
- Observed Practical Exercises

REQUIRED READING

1. *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011).

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
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)
ILR23	Knowledge of bars to immigration benefits (4)
IRK4	Knowledge of policies, procedures and guidelines for requesting and accepting evidence (3)
RI1	Skill in identifying issues in a claim (4)
RI9	Skill in identifying inadmissibilities and bars (4)
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)

SCHEDULE OF REVISIONS

Date	Section (Number and	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

An applicant is barred from asylum and refugee resettlement to the United States if the applicant was firmly resettled in a third country.¹ The definitions of firm resettlement for asylum and refugee resettlement are similar, but differ in several ways. This module provides an historical overview of the firm resettlement provision, the statutory and regulatory authority for the bars, the elements of and exceptions to the firm resettlement bars, the burden of proof, and the BIA's four-step framework for analyzing firm resettlement in *Matter of A-G-G*.²

2 HISTORICAL OVERVIEW

Firm resettlement as a bar to protection has its origins in the 1946 Constitution of the International Refugee Organization which excluded from the refugee definition individuals who had acquired a new nationality or who had become "firmly established" in another country. Later, the bar is found in two clauses of the 1951 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."³ The Convention also excludes from protection 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."⁴

¹ Refugee: INA § 207(c)(1); 8 C.F.R. § 207.1(b); Asylum: INA § 208(b)(2)(A); 8 C.F.R. 208.13(c), 208.15.

² *Matter of A-G-G*, 25 I. & N. Dec. 486 (BIA 2011).

³ United Nations Convention Relating to the Status of Refugees, art. 1C(3), adopted July 28, 1951, 189 U.N.T.S. 150 (entered into force April 22, 1954).

⁴ United Nations Convention Relating to the Status of Refugees, art. 1E.

The firm resettlement bar has been part of U.S. refugee law since the 1940s, beginning 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. Courts, however, continued to use firm resettlement as a negative discretionary factor. For example, § 203(a)(7) did not contain an explicit firm resettlement bar, but the Supreme Court held that it was a factor that could be considered in determining whether the applicant was seeking refugee status “as a consequence of his flight to avoid persecution.”⁵

The Refugee Act of 1980 made firm resettlement a statutory bar to refugee status, but not to asylum.⁶ Interim regulations were issued soon after that made firm resettlement a bar in affirmative asylum cases. When the final asylum regulations were adopted in 1990, firm resettlement was made a bar to asylum in both affirmative and defensive cases. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress codified firm resettlement as a statutory bar to asylum.⁷

3 SOURCES OF AUTHORITY

The firm resettlement bars in refugee and asylum adjudications are similar in many aspects, but have somewhat different statutory and regulatory language. The side-by-side comparison below will assist you in applying the law according to the type of case you are adjudicating.

3.1 Statutes

Both of these statutory provisions require that the firm resettlement have occurred prior to admission to or arrival in the United States.

<u>Refugee</u>	<u>Asylum</u>
<p>INA § 207(c)(1) Admission by Attorney General of Refugees</p> <p>“[T]he Attorney General may . . . admit any refugee who is not firmly resettled in any foreign country . . .”</p>	<p>INA § 208(b)(2)(A)(vi) Exceptions</p> <p>An applicant is ineligible for asylum if the applicant “was firmly resettled in another country prior to arriving in the United States.”</p>

3.2 Regulatory Definitions

⁵ *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56 (1971).

⁶ INA § 207(c)(1).

⁷ For a detailed history of the firm resettlement bar, see *Matter of A-G-G-*, 25 I. & N. Dec. 486, 489-94 (BIA 2011).

Both the refugee and asylum definitions of firm resettlement in the regulations require entry into a third country (i.e., a country other than the United States and the applicant's country of nationality or last habitual residence, if stateless). A refugee applicant, however, must have entered the country *as a consequence of flight* for the bar to apply. The asylum firm resettlement bar does not have this requirement.

<u>Refugee</u>	<u>Asylum</u>
<p>8 C.F.R. § 207.1(b) Firmly Resettled</p> <p>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.</p>	<p>8 C.F.R. § 208.15 Definition of Firm Resettlement</p> <p>An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement.</p>

Example

Applicant, a citizen of Country X, enters Country Z for business, and Country Z offers her permanent residency. For asylum purposes, Applicant is firmly resettled in Country Z if she entered into and received an offer of permanent residency there **after** becoming a refugee. For refugee purposes, she is not firmly resettled if she **did not** enter Country Z as a consequence of her flight from persecution from Country X. In this example, she entered Country Z for business purposes only.

Both definitions of firm resettlement require that the status offered or received must be permanent, not temporary.

3.3 Case Law

Throughout its history, the firm resettlement bar has had many variations. Courts have applied it as a mandatory bar, as a discretionary bar, and as a bar to refugee resettlement only. Courts have also applied this bar prior to and after the issuance of the current regulations. Not surprisingly, courts have applied several different, and at times conflicting, approaches for determining if an individual had been firmly resettled. In May 2011, the BIA addressed these differences in a precedent decision called *Matter of*

A-G-G.⁸ In this decision, the BIA announced a new four-step framework for deciding firm resettlement cases that first focuses exclusively on the existence of an offer.⁹ For this reason, you should not rely on case law issued prior to May 2011 that conflicts with the holding in *Matter of A-G-G* and does not follow the BIA's new approach.

This BIA's new four-step framework is described in the Analysis section, below. In brief, the steps are as follows:

1. The officer bears the burden of presenting prima facie evidence of an offer of firm resettlement, relying on direct or, if direct is not available, indirect evidence.
2. If there is prima facie evidence, the applicant must be given the opportunity to rebut such evidence.
3. The officer must weigh the totality of the evidence and make a determination whether the evidence of an offer of firm resettlement has been rebutted.
4. If the officer finds the applicant was firmly resettled, the burden shifts to the applicant to establish an exception applies.

4 THREE REQUIREMENTS OF FIRM RESETTLEMENT

As shown in comparison chart below, the asylum and refugee firm resettlement bars below have three common elements and one main difference. Both require entry into a third country, an offer or receipt of a status, and the status must be permanent (not temporary). The main difference is that the bar only applies to a refugee applicant if the entry into the third country was a consequence of flight from persecution.

In contrast, for an asylum applicant, the entry into the third country does not have to be as a consequence of flight from persecution. In the asylum context, the firm resettlement bar applies when, after becoming a refugee and prior to arriving in the United States, the applicant entered a third country with, or while in that country received, an offer of permanent resettlement.

<u>Refugee</u>	<u>Asylum</u>
1. Entry into a Third Country as a Consequence of Flight 2. Offer or Receipt of	1. Entry into a Third Country Prior to Arriving in the United States, (but only after events have occurred that would make the applicant a

⁸ *Matter of A-G-G*, 25 I&N Dec. 486 (BIA 2011).

⁹ *A-G-G*, 25 I&N Dec. at 501.

3. Permanent Status or Citizenship in Third Country	refugee) 2. Offer or Receipt of 3. Permanent Status or Citizenship in Third Country
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4.1 Entry into a Third Country

The first requirement of both firm resettlement bars is that the applicants must have entered the third country. An offer or receipt of a permanent status alone, without a physical entry into the third country while that status is available, would not meet the first element of the firm resettlement bar.¹⁰

For the firm resettlement bar to apply, refugee applicants must have entered the third country as a consequence of flight.¹¹ When interviewing a refugee applicant, you should ask the refugee applicant why he or she entered the third country.

For asylum applicants, the bar applies if the applicant became a refugee and either entered the third country with the offer, or if after entry to the third country the refugee received the offer, any time prior to their arrival in the United States.¹² If you are interviewing an asylum applicant, there is no requirement under the firm resettlement bar that the applicant have entered the third country as a consequence of his or her flight from persecution.¹³ The reason for entry into the third country is relevant, however, in determining whether the “no significant ties” exception applies. See Exceptions, below.

4.2 Offer or Receipt

The offer or receipt of a permanent (not temporary) status, such as permanent residency or citizenship can be a more complex determination. As explained below in the section on Analysis, you should look for direct evidence of an offer or receipt of a status. The most probative form of direct evidence would be objective documentation indicative of the applicant’s ability to stay indefinitely in the third country. You may look to circumstantial (or indirect) evidence, but *only if* direct evidence is not available.¹⁴

Example

¹⁰ 8 C.F.R. §§ 207.1(b); 208.15.

¹¹ 8 C.F.R. § 207.1(b).

¹² 8 C.F.R. § 208.15.

¹³ For additional information, refer to *Elements of Firm Resettlement*, above.

¹⁴ *Matter of A-G-G-*, 25 I. & N. Dec. 486, 502 (BIA 2011).

Applicant credibly testifies to you that he fled persecution from Iraq, his country of citizenship, was granted refugee status by the Danish government and subsequently entered Denmark. Applicant presents you with a permanent residence permit issued to him by the Danish government. The residence permit is direct evidence of an offer of permanent resettlement or some type of permanent resettlement.¹⁵

Example

Applicant credibly testifies to you that he fled persecution from Iraq, his country of citizenship, and moved to the Netherlands to reunite with his parents and other family members. Applicant has resided in the Netherlands for the past 7 years. He attended school and later worked as a translator there. He arrived in the United States through the assistance of a smuggler who kept his Iraqi passport and all other direct evidence of his status in the Netherlands. In this situation, you may rely on indirect evidence, such as length of stay and employment in determining whether this is evidence indicating an offer.

4.2.1 Acceptance of Offer *Not* Required

The existence of an “offer” of some form of permanent resettlement may establish that an applicant was firmly resettled.¹⁶ The regulations do not further require that the applicant actually accept the offer in order for the firm resettlement bar to apply.

4.2.2 Existence of Legal Mechanisms to Obtain Permanent Status

The existence of a legal mechanism to obtain permanent status in the third country may be sufficient evidence to establish an offer of firm resettlement, and is not contingent on whether the applicant applies for the status.¹⁷ You should give an applicant the opportunity to explain why he or she would not qualify for or be granted the permanent status.¹⁸

Example

Applicant credibly testifies that he fled his native Somalia due to persecution, entered South Africa and was granted asylum. The South African government issued him a Certificate of Exemption entitling him to asylum for a two-year period of exemption ending on 6/24/00 and a letter from South Africa’s

¹⁵ These are the basic facts of *Ali v. Reno*, 237 F.3d 591, 595 (6th Cir. 2001).

¹⁶ 8 C.F.R. §§ 207.1(b) and 208.15.

¹⁷ *Matter of A-G-G*, 25 I. & N. Dec. at 502-03, noting that *Matter of Soleimani*, 20 I. & N. Dec. 99 (BIA 1989), would be decided differently under the BIA’s new framework and that the Israel’s Law of Return would be indirect evidence of an offer of firm resettlement and that the applicant in that case would have to show that she would not have been eligible for or granted an offer, or that one of the exceptions applied.

¹⁸ *Matter of A-G-G*, 25 I. & N. Dec. at 502-03.

Department of Home Affairs. The letter indicates, "If by 6/24/00, you do not wish to leave South Africa, the onus rests on you to contact the Department for a review of your refugee status or to otherwise legalize your continued stay in South Africa before the expiry date of your Certificate. Failure to do so may render you liable to prosecution."¹⁹

Is this direct evidence of an offer of permanent resettlement or some type of permanent resettlement?

This example is from the Third Circuit case of *Abdille v. Ashcroft*. In this case, the BIA found that the Certificate of Exemption represented an offer of some type of permanent resettlement, reasoning that Abdille's refugee status "does not simply terminate" at the end of the two year period.²⁰ The Third Circuit disagreed with the BIA, finding that the offer of asylum status had an explicit expiration date and that the Department letter made clear Abdille would be subject to prosecution should he choose to remain in South Africa after the asylum status expiration date. The Third Circuit remanded for further evidence of South African immigration law and practice to determine whether there was an offer of some type of permanent resettlement. The Court reasoned that there might be evidence indicating that "provisions of the Aliens Control Act ease the burden on an alien applying for official permanent resident status if that alien has already received asylum, or that as a matter of immigration practice, two-year refugees like Abdille routinely receive a form of permanent status if they apply for such status prior to the expiration of the two-year exemption period."²¹ No such evidence, however, was presented.

4.2.3 Class-based Offers of Resettlement

A class-based, non-individual offer of resettlement, such as by operation of the law of the offering country, could trigger application of the firm resettlement bar, if the applicant has entered that country.²² The mere possibility that an individual might receive permanent refuge through a third country's asylum procedures, however, is not enough to constitute an offer of permanent resettlement.²³

4.2.4 Residence Permits

Residence permits are issued by governments on a variety of bases and may not necessarily be an offer of permanent residence or some type of permanent resettlement. For more on this topic, see section on Permanent Status, below.

¹⁹ These are the basic facts of *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001).

²⁰ *Id.* at 488.

²¹ *Id.* at 489.

²² *Matter of A-G-G-*, 25 I. & N. Dec. at 502, citing with approval *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004)(observing that "a third country's offer of permanent resettlement may consist of providing a defined class of aliens a process through which they are entitled to claim permanent refuge.")(emphasis added).

²³ *Elzour*, 378 F.3d at 1152.

direct evidence is not available, by circumstantial evidence of an offer of some type of permanent resettlement.

Examples

- Applicant is a citizen of Country A and fled to Country R as a result of persecution. Country R offered Applicant legal permanent resident status. Applicant lived in Country R for one day and then left Country R. She then went to Country S. Even though Applicant only lived in Country R for one day, her short time in Country R does not mean the firm resettlement bar does not apply to her. The pertinent issue is whether Country R offered her the right to stay indefinitely in that country.
- Applicant is a citizen of Country 1 and entered Country 2 illegally where he worked and lived illegally with his family for 30 years, sent his children to public school and rented an apartment. He resided in Country 2 without any legal immigration status, but was never arrested by the authorities for his illegal immigration status or deported from Country 2. Although a 30-year residence in a country is a long length of stay, this does not mean he is firmly resettled in Country 2.³¹ In this example, you must take into consideration that Applicant entered Country 2 illegally and resided there without any immigration status or offer of an immigration status.

Length of stay is also a factor to consider in determining whether the “no significant ties” exception applies to an asylum applicant. Under that exception, an asylum applicant is not firmly resettled if entry into the third country was a necessary consequence of flight, the applicant remained there only as long as needed to arrange onward travel, and the applicant did not establish significant ties there.³²

4.3.3 Minors

To determine whether an individual was firmly resettled when the individual was a minor, you must first determine whether there is any direct evidence of the individual’s status in the third country. If there is no direct evidence, you may consider indirect evidence, including whether the individual’s parents were firmly resettled and whether the individual, as a minor, lived with his or her parents in the country where the parents firmly resettled. If the individual resided with his or her parents, the parents’ firm resettlement would be evidence indicating (or *prima facie* evidence of) the individual’s firm resettlement. If the minor was not in his or her parents’ custody and control, then it would be unreasonable to use evidence of the parents’ firm resettlement to determine the

³¹ As the BIA noted in *Matter of A-G-G-*, only the host country can grant the right to lawfully and permanently reside there; thus, indirect evidence of an offer, such as length of residence, should only be examined when there is no direct evidence. 25 I. & N. Dec. at 501. Permanent resettlement is not a right that can be gained through adverse possession. *Id.* citing with approval, *Abdille v. Ashcroft*, 242F.3d 477, 487 (3d Cir. 2001).

³² For additional information, see *No Significant Ties* Exception, below.

child's situation.³³ Derivatives (children and spouses) of asylees and refugees are not subject to the firm resettlement bar. See the section, *Derivatives of Refugees and Asylees*, below.

4.3.4 Residence Permits

Residence permits are issued by governments on a variety of bases and may not necessarily be an offer of permanent residence or some type of permanent resettlement.

Example

Applicant is a citizen of Country A. He was persecuted on account of his religion in Country A and went to Country B on a work residency stamp in his passport which expired in 3 years. He lived with his brother in a house and worked in Country B for 2 years, and then he went to Country C. Is the work residency stamp an offer of permanent residence or some type of permanent resettlement? Though he lived in Country B for 2 years, had family ties to the country, had work authorization and housing, you must elicit testimony to determine whether the residency permit constitutes an offer of permanent residence, some other type of permanent resettlement, or the right to stay indefinitely in the country.

Here are sample questions:

- Does the document, on its face, indicate Applicant is able to stay in the country indefinitely?³⁴
- Did Applicant ever renew this permit?
- How difficult is it to renew? (or "What did he have to do to renew this permit?")
- If Applicant lost his job, what would happen?
- How long could Applicant work in the position he had? Is it a physically demanding job? Could he retire and remain in that country?
- What are the conditions of the permit?

³³ *Khoshfahm v. Holder*, 655 F.3d 1147, 1153 (9th Cir. 2011)(imputing a parent's intent to a child residing with a parent), citing *Saucedo-Arevalo v. Holder*, 636 F.3d 532, 532-33 (9th Cir. 2011)(listing cases); *Yang v. INS*, 146 F.3d 1114 (9th Cir. 1998). In *Yang*, the applicant, who fled Laos with his family when he was 4 years old, came to the United States as a tourist. When he was 19, he applied for asylum in the U.S. To determine whether the applicant was firmly resettled in France when he was a minor, the Court looked to the status of the applicant's parents when they lived in France. Note that *Yang* was decided prior to *Matter of A-G-G-*, which requires that you first must consider direct evidence and, only if there is no direct evidence, you may consider indirect evidence.

³⁴ If so, this would be direct evidence under *Matter of A-G-G-*, 25 I. & N. Dec. 486, 501 (BIA 2011). If not, you may consider indirect evidence.

- Could his employer terminate this permit?

Caveat: For both refugee and asylum interviews, you must first determine whether after the Applicant became a refugee, the Applicant was potentially firmly resettled. If the potential firm resettlement occurred and ended prior to the events that made the Applicant a refugee, the firm resettlement bar does not apply.

Caveat: For a refugee resettlement interview, you must first determine whether Applicant entered Country B as a consequence of flight. You should ask Applicant the reasons he went to Country B and not automatically assume his sole reason was for work. For an asylum interview, whether Applicant entered Country B as a consequence of flight is not relevant in determining if Applicant meets the definition of firm resettlement; it is relevant in determining if an exception to firm resettlement for asylum is met. In an asylum adjudication, you should consider whether Applicant entered Country B as a consequence of flight; if he remained only as long as necessary to arrange onward travel; and he did not establish significant ties there.³⁵

5 EXCEPTIONS TO FIRM RESETTLEMENT

If an applicant meets an exception to the firm resettlement bar, then the applicant is not barred from refugee or asylum status on this basis. The subsections below compare and contrast the exceptions that are available. There is one exception for refugee applicants and two for asylum applicants.

5.1 Restrictive Conditions

Both exceptions allow an applicant to establish that the conditions in the third country are so restrictive as to deny resettlement, and both definitions have the same factors to consider when determining restrictive conditions.

<u>Refugee</u>	<u>Asylum</u>
<p>8 C.F.R. § 207.1(b)</p> <p>Applicant must establish that the <i>conditions</i> of his/her residence in that country are <i>so restrictive</i> as to deny resettlement.</p>	<p>8 C.F.R. § 208.15(b)</p> <p>An applicant who establishes:</p> <p>(b) that the <i>conditions</i> of his/her residence in that country were so substantially and consciously <i>restricted by the authority</i> of the country of refuge that he or she was</p>

³⁵ See 8 C.F.R. § 208.15(a) and the section *Exceptions to Firm Resettlement*.

	not in fact resettled.
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Refugee	Asylum
<p>8 C.F.R. § 207.1 (b) lists these restrictive conditions factors:</p> <ul style="list-style-type: none"> • whether permanent or temporary housing is available to the refugee • the nature of employment available to the refugee in the foreign country; • other benefits offered or denied to the refugee by the foreign country which are available to other residents, such as <ul style="list-style-type: none"> ➤ right to property ownership ➤ travel documentation ➤ education ➤ public welfare ➤ citizenship 	<p>8 C.F.R. § 208.15 (b) lists these restrictive conditions factors:</p> <ul style="list-style-type: none"> • the type of housing, whether permanent or temporary made available to the refugee • the types and extent of employment available to the refugee • conditions under which other residents of the country live and, the extent to which the refugee: <ul style="list-style-type: none"> • received permission to hold property • to enjoy other rights and privileges, such as <ul style="list-style-type: none"> ➤ travel documentation that includes a right of entry or reentry ➤ education ➤ public relief ➤ naturalization

The restrictive conditions exception for refugee applicants is somewhat broader than the exception for asylum applicants. For the exception to apply to a refugee applicant, the applicant may show that either government or non-governmental actors in the third country created conditions “so restrictive as to deny resettlement.”³⁶ The asylum applicant is limited to showing “the authority of the country of refuge” substantially and

³⁶ 8 C.F.R. § 207.1(b). Unlike the asylum regulation, the refugee firm resettlement regulation does require that the government impose the restrictive conditions.

consciously restricts the conditions of his or her residence. In *Matter of D-X- & Y-Z-*, the BIA held that the Chinese asylum applicants failed to demonstrate any restrictive conditions in Belize.³⁷ The male applicant was working with his residence permit and the female applicant made no claim that she was ineligible to work with hers; both had also left Belize and legally reentered with their residence permits. The court noted that the female applicant also did not claim harassment, discrimination or persecution in Belize and that the male applicant was also not aware of any restrictions placed on his residence.³⁸

Restrictive conditions, which might establish an exception for both refugee applicants under 8 C.F.R. 207.1(b) and asylum applicants under 8 C.F.R. 208.15(b), include the following:

- Formal government policy to limit the rights of non-citizen residents, including refugees
- Inability of government to ensure that individuals receive the above benefits
- Withholding by government of refugee's travel documentation
- Threats or harm by a persecutor in the country of resettlement, causing the individual to fear for his or her safety (this "continuing fear" may so limit the individual's ability to function that he or she is unable to obtain the benefits of firm resettlement).

Note: **Continuing fear** by itself is not enough to show a lack of firm resettlement. The fear must be objective, must cause a restriction on the applicant's resettlement conditions (e.g., restriction of housing, employment, education), and the applicant must show that the government is responsible or that the host country is unable or unwilling to afford the applicant protection from the persecutor.

Indirect evidence of an offer tends to overlap with the factors considered to determine whether conditions of resettlement are so restrictive as to deny resettlement. Under the four-step framework in *Matter of A-G-G-*, you must divide your analysis into offer and post-offer components.

Example

Applicant is a citizen of Country 1 and flees from persecution to Country 2 where he is unable to get a job because prospective private employers hate people from Country 1 and discriminate against them by not hiring them. For a refugee resettlement interview, you would take this factor into consideration to determine if Applicant was firmly resettled. However, for an asylum interview, you would

³⁷ *Matter of D-X- and Y-Z-*, 25 I&N Dec. 664, 668 (BIA 2012).

³⁸ *Id.*

not take this into consideration because private actors, not the host government, discriminated against Applicant.

5.2 No Significant Ties

As mention above, the second exception applies only to asylum applicants and its requirements are displayed in the box below.

Asylum Only Exception

8 C.F.R. § 208.15(a) - An asylum applicant is not firmly resettled if the applicant establishes that:

- entry into country was a necessary consequence of his/her flight from persecution
- he or she *remained only as long as was necessary* to arrange onward travel
- he or she did *not* establish *significant ties* in that country

In a recent case interpreting this exception, the BIA found that two Chinese asylum applicants failed to show that they only remained in Belize as long as necessary to arrange for onward travel because both traveled in and out of Belize during their stay.³⁹ One applicant returned from Belize to China to marry and the other traveled to the United States on a visitor's visa. Both applicants then voluntarily returned to Belize for a time before applying for asylum in the United States.

6 ANALYSIS

In 2011, the BIA announced a new four-step framework for deciding firm resettlement cases which first focuses exclusively on the existence of an offer.⁴⁰ After reviewing the decisions of the circuit courts, the BIA found that there were two broad methods that the courts had been using to analyze firm resettlement; the "direct offer approach" and the "totality of the circumstances approach." The Board found that both approaches allowed for direct and indirect evidence to be considered. Notably, the BIA declined to give equal weight to direct and indirect evidence under the new framework. The Board noted that indirect evidence included evidence such as a country's residence laws, length of residence in the country, and the applicant's intent to remain there. The Board found that giving this kind of indirect evidence equal weight with direct evidence "was inconsistent with the fact that only the government of the country in question can grant a person the right to lawfully

³⁹ *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664, 667-68 (BIA 2012).

⁴⁰ *Matter of A-G-G-*, 25 I&N Dec. 486, 501 (BIA 2011).

and permanently reside there, and that such a right cannot be gained through adverse possession.”⁴¹

6.1 Four-Step Framework

Step One: Evidence Indicating (or *Prima Facie* Evidence of) an Offer

The officer bears the burden of presenting evidence indicating an offer of firm resettlement. You do this through first securing and producing direct evidence of governmental documents indicating the applicant’s ability to stay in a country indefinitely.

Direct evidence may include:

- evidence of refugee status
- a passport
- a travel document

You may next consider indirect evidence, but only if direct evidence is not available. The indirect evidence must have “a sufficient level of clarity and force” to establish that the applicant is able to “permanently reside” in the country.⁴² Indirect evidence may include:

- immigration laws or refugee process of the third country
- length of the individual’s stay
- individual’s intent to settle
- familial ties
- business or property connections
- social and economic ties
- receipt of government benefits
- education opportunities
- possession of rights given to people with an official status (right to work and enter and exit the country)
- access to permanent housing

⁴¹ *Matter of A-G-G-*, 25 I&N Dec. at 501, citing with approval, *Abdille v. Ashcroft*, 242 F.3d 477, 487 (3d Cir. 2001).

⁴² *Matter of A-G-G-*, 25 I. & N. Dec. 486, 502 (BIA 2011).

Best Practices:

The applicant may testify that he or she received asylum from a third country and present documentation to you. It is incumbent upon you to review the evidence carefully and determine whether the grant of asylum was an offer of permanent resettlement. You may elicit pertinent testimony and review country condition information. As illustrated in the example above, documentation of a grant of asylum status does not necessarily constitute direct evidence of an offer of permanent residence or some type of permanent resettlement.

Step Two: Rebuttal by Applicant

If there is evidence indicating an offer to stay in the third country indefinitely, the applicant can rebut the evidence of an offer by showing that such an offer has not, in fact, been made or that he or she would not qualify for it. The applicant must make this showing by a preponderance of the evidence.

Example

Applicant is a Peruvian national and entered Venezuela illegally where he lived and worked for 14 months. After one year of living in Venezuela, Applicant paid a man to place a Venezuelan resident stamp in his passport. Applicant explains to you that he needed this resident stamp in order to secure a U.S. visa. He received a U.S. tourist visa, entered the United States where he was admitted as a tourist, and then returned to Venezuela where he was admitted with his resident visa. In total, he entered the United States twice with a tourist visa and was readmitted to Venezuela with his resident stamp twice.

This is the fact pattern of *Salazar v. Ashcroft*.⁴³ The court held that the Government readily met its burden that Salazar's Venezuelan resident stamp was facially valid given that he was readmitted twice to Venezuela with this stamp. However, Salazar was unable to rebut the presumption of firm resettlement. "Salazar produced no evidence that, beyond mere payment for the stamp (to an unidentified man), the stamp was not valid or that any irregularities would result in the eventual invalidation of the stamp by the Venezuelan government."⁴⁴ The Court upheld the Immigration Judge's decision that Salazar had been firmly resettled in Venezuela.

Under the four-step framework of *Matter of A-G-G-*, such an applicant could have rebutted the evidence indicating that the residency stamp was fraudulent and that Venezuela had offered or given him permanent residency, but the applicant produced no

⁴³ *Salazar v. Ashcroft*, 359 F.3d 45 (1st Cir. 2004).

⁴⁴ *Id.* at 51.

rebuttal evidence. Similarly, in *Matter of D-X- & Y-Z-*, the applicants failed to show that their permits to reside in Belize, which they claimed were fraudulently obtained, were not issued by the Belize government, as they had successfully traveled outside of Belize and reentered using the permits.⁴⁵ As a result, the court held that they were unable to rebut the evidence indicating (or *prima facie* evidence of) firm resettlement.⁴⁶

Step Three: Totality of Circumstances

You must then weigh the totality of the evidence presented and make a determination as to whether the applicant has rebutted the evidence of firm resettlement. Keep in mind that the evidence of firm resettlement must either be direct evidence or, in the absence of direct evidence, indirect evidence of sufficient clarity and force (not mere speculation). If the applicant fails to rebut the evidence, the applicant should be found to have received an offer of permanent resettlement.

Step Four: Applicant's Burden to Show Exception

If the applicant is found to have received an offer of permanent residence, the burden shifts to the applicant to establish, by a preponderance of the evidence, that an exception to firm resettlement applies pursuant to 8 C.F.R. §§ 207.1(b), 208.15(a) and (b). See *Exceptions to Firm Resettlement*, above. If the applicant is able to meet his or her burden of proof that an exception applies, the applicant may be granted asylum or refugee status.

Restrictive conditions, which might establish an exception for both refugee applicants under 8 C.F.R. 207.1(b) and asylum applicants under 8 C.F.R. 208.15(b), include the following:

- Formal government policy to limit the rights of non-citizen residents, including refugees.
- Inability of government to ensure that individuals receive the benefits listed in Step One above.
- Withholding by government of refugee's travel documentation
- Threats or harm by a persecutor in the country of resettlement, causing the individual to fear for his or her safety (this "continuing fear" may so limit the individual's ability to function that he or she is unable to obtain the benefits of firm resettlement) The applicant must also show that the government is responsible or that the host country is unable or unwilling to afford the applicant protection from the persecutor.

6.2 Burden of Proof

⁴⁵ *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664, 666-67 (BIA 2012).

⁴⁶ *Id.*

It is always the applicant's burden to establish eligibility as a refugee, and your burden to elicit testimony. As the adjudicator, you bear the initial burden of producing evidence indicating (or *prima facie* evidence of) firm resettlement.⁴⁷

If you meet this initial burden, the burden shifts to the applicant to show by a preponderance of the evidence that an offer has not in fact been made or that he or she would not qualify for it.⁴⁸ Then, you will consider the totality of the evidence presented to determine whether the applicant has rebutted the evidence of an offer of firm resettlement.⁴⁹ If you find that the applicant was firmly resettled in a third country, the burden shifts to the applicant to show by a preponderance of the evidence that an exception applies.⁵⁰ The BIA has issued a decision with a new framework for adjudicating cases using these shifting burdens of proof. For more details, see Four-Step Framework, above.

The burden of proof required for the applicant to establish such facts is a preponderance of the evidence, meaning that the applicant must show that it is more likely than not that he or she rebutted the *prima facie* evidence or that he or she is eligible for an exception.⁵¹ Where the burden of proof has shifted to the applicant, but the applicant has no resources to produce the necessary evidence, it is still your duty to elicit testimony, request additional documentation which is reasonable for the applicant to obtain, and research pertinent country conditions.

BIA case law establishes that "foreign law is a matter to be proven by the party seeking to rely on it."⁵² In some instances, the applicant seeks the benefit of foreign law and consequently bears the burden of producing evidence of the foreign law.⁵³ In other instances, you bear this burden where you are relying on foreign law.⁵⁴

⁴⁷ *A-G-G*, 25 I&N Dec. at 501

⁴⁸ *A-G-G*, 25 I&N Dec. at 503.

⁴⁹ *A-G-G*, 25 I&N Dec. at 503.

⁵⁰ *A-G-G*, 25 I&N Dec. at 503.

⁵¹ For additional information about the burden of proof and standard of proof, see RAIO Training Module, *Evidence*.

⁵² *Matter of Soleimani*, 20 I&N Dec. 99, 106 (BIA 1989).

⁵³ *Sadeghi v. INS*, 40 F.3d 1139 (10th Cir. 1994).

⁵⁴ In *Matter of Soleimani*, 20 I&N Dec. 99, 106 (BIA 1989), legacy INS relied on the BHRHA's reference to Israel's Law of Return to establish the asylum applicant had been offered resettlement in Israel. The BIA rejected this, stating, "However, there is nothing in the record, beyond the BHRHA's perfunctory reference to its existence, documenting the nature and purpose of Israel's Law of Return or the specific provisions of that law. Absent any such documentation, the Board cannot find that the respondent had been offered permanent resettlement in Israel within the meaning of the firm resettlement concept. There exists no evidence that the respondent would be eligible for an offer of resettlement under any such law and no evidence regarding the extent of any restrictions or conditions that may be placed on offers of resettlement under that law. Foreign law is a matter to be proven by the party seeking to rely on it, and the INS has submitted nothing of record regarding Israel's Law of Return." *But see Matter of A-G-G*, 25 I&N Dec. 486, 502-03 (BIA 2011) (stating that *Matter of Soleimani* would be decided differently if considered under the new *A-G-G*- framework and noting that the Law of Return would be indirect evidence of an

Example

You are adjudicating a refugee resettlement application in Damascus, Syria. The applicant shows you his passport with the UAE residence stamp. There is sufficient evidence that as a consequence of his flight from persecution in Iraq, the applicant entered the United Arab Emirates with a UAE residence stamp. The burden of proof now shifts to the applicant to rebut the presumption of firm resettlement or to show that he meets one of the exceptions to firm resettlement. You should elicit testimony regarding the UAE residence stamp.

Here are some sample questions:

- How did you obtain this residence stamp from the UAE?
- Does it have any restrictions? Is there anything you must do, or must not do because you have this stamp?
- Did you use this resident stamp to travel?
- Does it have an expiration date?
- What do you have to do to renew this?
- Did you ever try to renew it?

6.3 Issues to Consider**6.3.1 Firm Resettlement and Dual Nationality**

Firm resettlement and dual nationality may overlap in your refugee or asylum adjudication. Here are a few points to keep in mind:

- Firm resettlement may include, but does not require, citizenship. Firm resettlement does require entry into the third country and an offer of permanent status.
- Dual nationality does require citizenship, but does not require entry or presence in the third country and may not be based on a mere offer of citizenship.
- An applicant who is a dual national must establish that he or she meets the definition of a refugee as to both countries of nationality in order to be eligible for refugee resettlement or asylum.
- An applicant who is found to be firmly resettled in a third country does not need to establish that he or she is a refugee as to the country of firm resettlement, but the

offer and that the applicant would have to present rebuttal evidence that she was ineligible for or would not have been granted an offer or that one of the exceptions applied.).

applicant must establish that he or she is eligible for an exception to the firm resettlement bar to be eligible for asylum or refugee status.⁵⁵

6.3.2 Derivatives of Refugees and Asylees and I-730 Beneficiaries

The firm resettlement bar does not apply to the spouse and children of refugees and asylees who are derivatives of the principal applicant. Such individuals are eligible for derivative asylum and refugee status, regardless of whether they are firmly resettled in a third country.⁵⁶

Example

Mohammad fled country X after he learned that he was sought by the police for attending an anti-government rally. He fled directly to the United States. While his application for asylum was pending, his wife Sharifa and their two children moved to country Y where Sharifa's family lived. Although they were not citizens of country Y, Sharifa and the children were offered the possibility of becoming citizens there. They did not accept the offer. Thereafter, Mohammad's application for asylum was approved by the United States, and he filed an I-730 for Sharifa and the children. The offer of firm resettlement for Sharifa and the children does not factor into the determination of their eligibility as beneficiaries under an I-730 petition.

7 CONCLUSION

Firm resettlement is a bar to both asylum and refugee resettlement. The definitions of firm resettlement for these two forms of protection are similar, but differ in several ways. In both, an applicant is not barred by firm resettlement where the potential firm resettlement in a third country ended prior to becoming a refugee. Both also require entry into a third country and an offer or receipt of permanent residency or some other type of permanent resettlement. The refugee bar requires that an applicant entered the third country as a consequence of his or her flight from persecution. There is no such requirement for asylum applicants.

Both firm resettlement bars have an exception for individuals who are subject to restrictive conditions in the third country either by the government or, for refugee applicants only, non-government actors. Asylum applicants have a second exception to the firm resettlement bar if they entered into the third country as a consequence of flight from persecution, stayed only as long as necessary to arrange for onward travel and established no significant ties to the third country.

⁵⁵ For additional information, refer to *Exceptions* section and *Applicant's Burden to Show Exception* section, above.

⁵⁶ 8 C.F.R. § 207.7; 8 C.F.R. § 208.21(a).

In response to conflicting decisions by courts, in 2011 the BIA established a four-step framework for adjudicating the firm resettlement bar which focuses first on the existence of an offer and gives greater weight to direct evidence of whether the applicant was offered or received a permanent status in the third country.

8 SUMMARY

8.1 Historical Overview

The firm resettlement bar has its origins in the 1946 Constitution of the International Refugee Organization and the 1951 Convention relating to the Status of Refugees. This bar appeared in U.S. law as early as 1948. It fluctuated between being a mandatory and a discretionary bar. Firm resettlement was added as a mandatory statutory bar to refugee resettlement in 1980 and as a mandatory statutory bar to asylum in 1996.

8.2 Sources of Authority and Requirements of Firm Resettlement

The statutory firm resettlement bars are found at INA § 207(c)(1)(refugee resettlement) and INA § 208(b)(A)(vi)(asylum). The regulations, found at 8 C.F.R. § 207.1(b)(refugee resettlement) and § 208.15 (asylum), define firm resettlement for each form of protection. Each definition requires entry into a third country and an offer or receipt of some type of permanent resettlement. The main difference between the two definitions is that for refugee resettlement applicants, the entry into the third country must be as a “consequence of flight” from persecution. The asylum firm resettlement bar does not have this requirement, but for the firm resettlement analysis to apply, the applicant must receive an offer of firm resettlement after becoming a refugee. Over the years, courts have interpreted the firm resettlement bar in different ways. To reconcile these differences, the BIA issued a precedent decision in 2011, *Matter of A-G-G-*, which sets forth a four-step framework for deciding firm resettlement cases.

An offer need not be accepted for the firm resettlement bar to apply. The existence of a legal mechanism, or a class-based offer, for obtaining permanent status may be sufficient evidence to establish an offer of permanent resettlement. The status must be permanent, not temporary. Loss of permanent status does not necessarily remove the firm resettlement bar. In the absence of direct evidence, if minors are under their parents’ custody and control, the parents’ firm resettlement is evidence indicating the minors’ firm resettlement in the third country.

8.3 Exceptions to Firm Resettlement

Both firm resettlement bars have an exception based on restrictive conditions in the country of resettlement. Under the restrictive conditions exceptions, you may consider the following factors: housing, employment, and rights to property ownership, travel documentation, education, welfare and citizenship. For asylum purposes, you may only consider the conditions imposed by the government in the third country. For refugee

resettlement, you may consider conditions imposed by both government and non-government actors.

Asylum applicants are also eligible for an exception based on the lack of significant ties in the third country. To meet this exception, asylum applicants must show they entered the third country as a consequence of flight, remained there only as long as necessary to arrange onward travel, and did not establish significant ties to that country.

8.4 Analysis and the Four-Step Framework of *Matter of A-G-G-*

In 2011, the BIA in *Matter of A-G-G-* established a four-step framework for adjudicating the firm resettlement bar which focuses exclusively on the existence of an offer. The BIA also held that adjudicators must look first to direct evidence in determining whether an offer has been made and may only consider indirect evidence if no direct evidence is available. The framework has the following four steps:

1. *Prima Facie* Evidence of an Offer (Officer's Burden)

You bear the burden of presenting *prima facie* evidence of (or evidence indicating) an offer of firm resettlement. You do this through first securing and producing direct evidence of governmental documents indicating the applicant's ability to stay in the country indefinitely. Direct evidence may include: a passport, a travel document, or evidence of refugee status. You may consider indirect evidence only if direct evidence is not available and only if the indirect evidence is of sufficient clarity and force (not mere speculation).

2. Rebuttal (Applicant's Burden)

If you present *prima facie* evidence of firm resettlement, the burden shifts to the applicant to rebut that evidence by showing that an offer has not, in fact been made or that he or she would not qualify for it.

3. Totality of Circumstances (Officer Must Weigh)

You must then weigh the totality of the evidence presented and make a determination as to whether the applicant has rebutted the evidence of firm resettlement by a preponderance of the evidence.

4. Exception (Applicant's Burden)

If the applicant is found to have received an offer of permanent residence, the burden shifts to the applicant to establish by a preponderance of the evidence⁵⁷ that an exception applies.

8.5 Burden of Proof

⁵⁷ See *Burden of Proof* section, above.

It is always the applicant's burden to establish eligibility as a refugee and your burden to elicit testimony. As the adjudicator, you bear the initial burden of producing evidence indicating (or *prima facie* evidence of) firm resettlement. The burden then shifts to the applicant to show by a preponderance of the evidence that an offer has not in fact been made or that the applicant would not qualify for it. The burden of proof required for the applicant is a preponderance of the evidence, meaning the applicant must show it is more likely than not that he or she rebutted the evidence indicating firm resettlement.

8.6 Issues to Consider

When making a firm resettlement determination, careful consideration should be given to issues regarding dual nationality. Also, the firm resettlement bar does not apply to derivatives of principal applicants and I-730 beneficiaries.

PRACTICAL EXERCISES**Practical Exercise # 1**

- **Title: Iraqi Applicant**
- **Student Materials:**

After reviewing the facts and interview notes below, determine the following:

- Is the applicant firmly resettled in Australia for purposes of a refugee resettlement adjudication?
- Is the applicant firmly resettled in Australia for purposes of an asylum adjudication?

Applicant credibly testified to the following at his DHS interview: he is a native of Iraq where he worked in the Green Zone as an interpreter for the American Army. He began receiving threatening text messages on his cell phone because he worked for the Americans. His employment ended, and he relocated to another area in Iraq where he worked under the Ministry of Trade. For work related matters, he travelled to Australia and remained there from 10/08 – 2/10. He joined his family in Jordan. He feels personally targeted especially since the word spread in his Iraqi neighborhood that he had travelled to Australia and had been working with U.S. forces, which is considered treason according to certain extremist groups.

Here is an excerpt of the interview notes:

Q: How long in Australia?

A: 10/08 – 2/10

Q: Doing there?

A: Went to Australia on a training course as Ministry of Trade Iraqi Government employee from Nov. 3-28, 2008.

Q: Sought asylum?

A: Yes, I applied when course ended.

Q: Result?

A: Granted permanent residency in Australia on 4/23/2009.

Q: Right to live and work indefinitely in Australia?

A: Yes

Q: Right to apply for Australian citizenship?

A: After 4 years residency in Australia can apply

Q: What was your granted status in Australia called?

A: Protection Visa Class XA

Q: Have you applied for wife and children to immigrate to Australia?

A: Yes

Q: Result?

A: Australian gov't will not provide financial support to bring wife and kids to Australia

Q: Do you have the right to bring them to Australia though?

A: Yes

Q: Why seek resettlement in USA?

A: Because there is financial support to get there, and my father has applied for resettlement to U.S. and has had DHS interview and awaiting response

Practical Exercise # 2

• Title: Iranian Applicant

• Student Materials:

After reviewing the facts below, determine the following:

- Is the applicant firmly resettled in the UAE for purposes of a refugee resettlement adjudication?
- Is the applicant firmly resettled in the UAE for purposes of an asylum adjudication?
- For asylum cases, is there a requirement that the applicant entered the host country as a consequence of flight from persecution?
- Is the applicant's work residency permit – an offer of permanent resettlement or some other type of permanent resettlement?

Applicant credibly testified to the following at her DHS interview: She is a native of Iran. Her parents separated, and she moved with her mother to the UAE as a

dependent on her mother's UAE employee residence permit. Applicant lived in UAE as a resident from 2002-2005 where she worked, owns property for which she receives rent, and generally lived without any restrictions. Applicant came to the U.S. on a visa to work with Voice of America, and on the radio as a journalist, she discussed the political situation in Iran. Applicant's mother cancelled Applicant's UAE residence permit.

OTHER MATERIALS**Firm Resettlement Case Law****2012**

Matter of D-X- and Y-Z-, 25 I&N Dec. 664 (BIA 2012).

2011

Matter of A-G-G-, 25 I&N Dec. 486 (BIA 2011).

2001

Abdille v. Ashcroft, 242 F.3d 477 (3d Cir. 2001).

Ali v. Reno, 237 F.3d 591 (6th Cir. 2001).

1998

Vang v. INS, 146 F.3d 1114 (9th Cir. 1998).

1994

Sadeghi v. INS, 40 F.3d 1139 (10th Cir. 1994)

1989

Matter of Soleimani, 20 I&N Dec. 99, 106 (BIA 1989)

1971

Rosenberg v. Yee Chien Woo, 402 U.S. 49 (1971).

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

<p style="text-align: center;"><u>RAD Supplement</u> Module Section Subheading</p>
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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

<p><u>ASM Supplement</u></p> <p>Module Section Subheading</p>

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

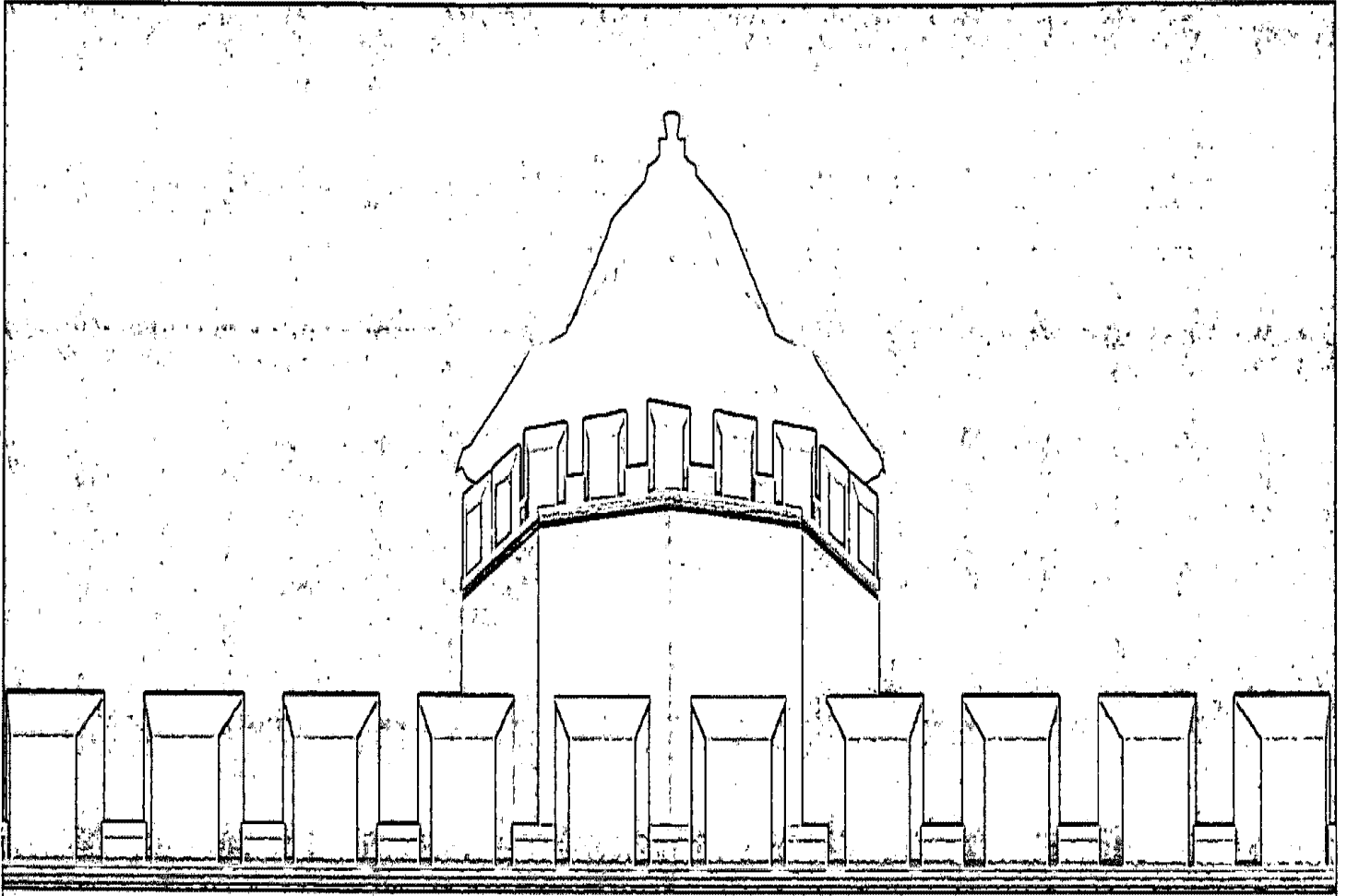
- 1.

ADDITIONAL RESOURCES

- 1.

SUPPLEMENTS

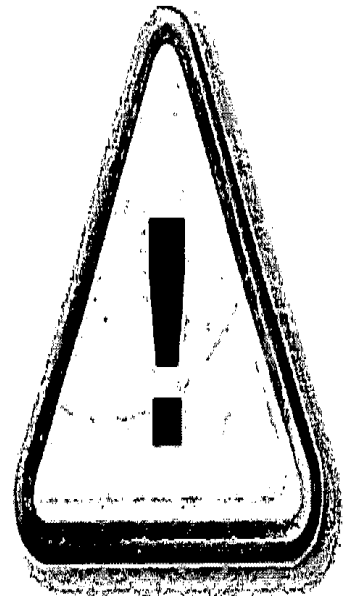
<u>IO Supplement</u>
Module Section Subheading





Firm Resettlement

Firm Resettlement

8 CFR Sec. 207.1(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 traveled 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.



Firm Resettlement

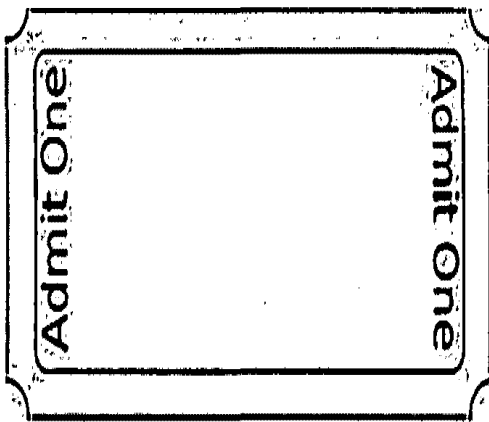
- 1) Entry into 3rd country *as a consequence of flight*

- 2) Offer or Receipt of

- 3) Permanent Status or Citizenship
("ability to stay indefinitely")

Exception: Restrictive Conditions

4-step framework: Matter of A-G-G

1. The officer has the burden to show direct or indirect evidence indicating offer
2. Applicant has the burden to rebut any **direct** evidence of offer (with *indirect* evidence, skip to step 3)
3. The officer considers totality of evidence and determines if applicant is firmly resettled
4. If firmly resettled, applicant has the burden to establish and officer has the duty to elicit testimony regarding “restrictive conditions” exception

The offer: Matter of A-G-G



The existence of a legal mechanism to obtain permanent status in the 3rd country may be sufficient evidence to establish an offer, **and is not contingent on whether the applicant applies for the status.**

However, officer must elicit if applicant would meet all requirements and be eligible for the status.

A single female fled Afghanistan to Germany in 1996 due to fear of persecution by the Taliban. She was granted asylum by the German government. She was able to find work, housing, to attend school and to travel in and out of Germany. However, she later left Germany because the cold weather made her feel sick and because the jobs she was able to find as a waitress required that she handle pork, which is against her religion. She has been referred to the USRAP as a woman-at-risk. Is she firmly resettled?

A male Iraqi refugee applicant is married to a Lebanese national and is living in Lebanon. He can legally work and his children can attend school due to his wife's status as a citizen. Is he firmly resettled?

IV. BARS AND INADMISSIBILITIES

A. PERSECUTOR BAR Has it been determined that the applicant or any derivative ever 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?	<input type="checkbox"/> Yes—Explain Below <input checked="" type="checkbox"/> No
B. FIRM RESETTLEMENT BAR Has it been determined that the applicant ever firmly resettled in a foreign country after leaving the country of nationality?	<input checked="" type="checkbox"/> Yes—Explain Below <input type="checkbox"/> No
C. INADMISSIBILITY Has it been determined that the applicant or any derivative is inadmissible to the U.S.?	<input type="checkbox"/> Yes—Explain Below (Cite specific provision). <input checked="" type="checkbox"/> No—Explain Below (As required).
D. CARRP Has it been determined that there is a national security concern for the applicant or any derivative which requires further vetting?	<input type="checkbox"/> Yes—Explain Below <input checked="" type="checkbox"/> No—Explain Below (As required).

Explanation: PA had received asylum in Ecuador after flight to Ecuador. PA was found to be firmly resettled in Ecuador. PA was able to secure appropriate employment & housing & to enroll children in school, & had not been pursued by Colombian persecutors into Ecuador. PA had suffered abuse from common-law Colombian partner in Ecuador; however, Ecuadorian authorities had shown willingness to protect the PA by jailing the ex-partner & issuing a restraining order against him.

(use additional pages as needed)

The Path to Firm Resettlement

Three Requirements

1. Entry into Third Country



for Refugees only – must be a consequence of flight from persecution
for Asylum Seekers – any time prior to entry into United States, but only after events which caused the person to be a refugee

2. Offer or Receipt of



for Refugees and Asylum-Seekers – offer alone is enough

3. Permanent Status or Citizenship



for Refugees and Asylum-Seekers – status must be permanent, akin to LPR status or citizenship
for Refugees and Asylum-Seekers – loss of permanent status does not necessarily remove bar

= Firm Resettlement

Exceptions

Restrictive Conditions

- for Refugees by host gov't or non-gov't actors
- for Asylum-Seekers by host gov't only

No Significant Ties

- for Asylum Seekers **only**, and only if stay was consequence of flight
- stayed only as long as necessary
- no significant ties

For Restrictive Conditions

look at, among other things:

- Housing
- Employment
- Property Ownership
- Travel Documentation
- Education
- Public Welfare
- Naturalization

Four-Step Framework under Matter of A-G-G: Focus Exclusively on Offer

1. Officer's burden to show **Prima Facie Evidence** of (or Evidence Indicating) **Offer of Permanent Resettlement** (Direct Evidence or, if none, Indirect)
2. Applicant's burden to **Rebut** *Prima Facie* Evidence of **Offer**
3. Officer considers **Totality of Evidence**
4. If officer decides Applicant is Firmly Resettled, Burden shifts to Applicant to Show **Exception** Applies



U.S. Citizenship and Immigration Services

Response to Query

Date: January 6, 2016

Subject: Harm to a Family Member or Third party

From: Refugee Affairs Division, Policy Branch

Keywords: Past Persecution, Harm, Harm to Third Person

Query: How do you determine whether harm to a family member or a third party contributes to a finding of past persecution of the principal applicant (PA)?

Response: Harm to an applicant's family member, or another closely associated third party, generally may constitute persecution of the applicant on account of a protected ground if:

- The harm to the applicant is serious (often it is psychological harm) **AND**
- The persecutor's intent in harming the family member or third party is to target the applicant on account of a protected characteristic, either individually, or as part of the applicant's family or other group to which the applicant belongs.

Severity of the Harm:

The harm to the applicant must be serious. There is no requirement for the applicant to witness the harm to the family member (or third party); however, witnessing the harm may intensify the severity of the harm to the applicant, as may the applicant's belief that his or her actions or status caused the persecutor to harm the family member (or third party).

Persecution may be established by credible threats that the family member (or third party) would be imminently subjected to death or severe physical pain or suffering, if such threats are intended to target the applicant and if they cause the applicant serious harm.

Further questioning may be necessary to elicit a sufficient level of harm to applicants given different levels of education or maturity, as well as varying regional, cultural, historical and educational circumstances. For example, in areas where most members of the PA's ethnicity or clan suffered deaths, rape and other violence, the PA may not initially articulate such harm to a family member as seriously affecting his or her own mental and/or physical health.

Establishing nexus to an individual by showing nexus to a group of which he/she is a part:

The RAIO Lesson Plan on Past Persecution was restructured to clarify that an applicant can establish that he is targeted on account of a protected ground by showing that he is part of a group that is targeted on account of that shared protected ground. The prior guidance stated: “[H]arm to a family member or third party will not constitute persecution of the applicant, unless the intent in harming the third party is to target the applicant, the applicant’s family, or the applicant’s ethnic group on account of a protected characteristic.”

The revised guidance now states:

“[H]arm to a family member or third party will not constitute persecution of the applicant, unless the intent in harming the third party is to target the applicant, the applicant’s family, *or all members of a group to which the applicant belongs* on account of a protected characteristic” (emphasis added).

Persecutor’s motivations with respect to the third party:

When a persecutor harms a third party in order to target an applicant on account of a protected ground, that third party may often share the applicant’s protected trait, or may be part of a group that shares that trait. But it is not required in order to establish nexus. The focus of analysis should be on whether the persecutor is targeting the applicant on account of the applicant’s protected trait. For example, a group of political dissidents’ children are abducted from the common school they are known to attend, and the abductors might torture the children in order to persecute the parents on account of the parents’ shared political opinions. If one of the parents in that scenario were an applicant, he could show that the torture of his child was intended to harm him on account of a protected ground. It would not matter that his child was too young to have a political opinion of his own (i.e., that the third party harmed in order to persecute the applicant did not share the applicant’s protected trait).

Relevant to the revision of the Past Persecution Lesson Plan described above, this applicant would not have to show evidence that the abductors identified him individually and knew which child was his. The applicant could establish that he was targeted on account of his political opinion as a part of a group of dissidents so targeted.

The following examples provide guidance on when harm to a family member or another closely associated third party should be considered persecution of the applicant.

- **PERSECUTION:** The wife of a political dissident is abducted and killed as a way of teaching her husband, the applicant, a political lesson.
- **NOT PERSECUTION:** The applicant’s relative is targeted solely because of the relative’s protected characteristic (not the applicant’s characteristic).
 - Example 1: The applicant’s LGBT brother is beaten by skinheads in front of the applicant because the brother is gay. The applicant is not gay or active in LGBT issues, and the perpetrators ignored the applicant during the attack on his brother.
 - Example 2: The applicant’s daughter received death threats when she converted to Christianity after getting married. The applicant is a Muslim and he has not experienced any harm because of his daughter’s conversion.

Harm which does not constitute persecution may nonetheless contribute to a well-founded fear of future persecution.

As with any refugee case, an applicant with a well-founded fear of persecution may establish eligibility for refugee resettlement even if past persecution is not established. Harm to a family member or another third party close to the PA which does not constitute persecution of the PA may nonetheless provide evidence that the PA's fear of future persecution is well-founded.

Marking the Assessment:

Past serious harm to a family member or another, closely associated third party, which the PA articulates as also causing harm to himself or herself should be marked on Part III.A.1 of the assessment regardless of whether or not there is a nexus to the PA's protected characteristic and the harm suffered by the PA would rise to the level of persecution.

Examples:

1. PA's brother harmed, but there is no nexus to the PA.

III. INA §101(A)(42)—APPLICANT'S CLAIM	
A. Past Persecution	
1. Does the applicant claim to have been harmed or mistreated in his/her country(ies) in the past? If no, go to Part III.B. If yes, identify the perpetrator(s) of, and describe, the harm or mistreatment: Perpetrator(s): <u>NEIGHBORHOOD THUGS.</u> Harm/Mistreatment: <u>PA'S BR RECEIVED ANTI-CHRISTIAN THREATS. PA'S BR BEATEN</u>	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
2. Is the claimed harm or mistreatment on the basis of one of the five protected grounds? If no, go to Part III.B. If yes, designate applicable ground(s): <input type="checkbox"/> Race <input type="checkbox"/> Religion <input type="checkbox"/> Nationality <input type="checkbox"/> Membership in a Particular Social Group <input type="checkbox"/> Political Opinion Specify Characteristic(s): <u>NO NEXUS TO PA. BR CONVERTED TO CHRISTIANITY, PA IS BUDDHIST.</u>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
3. Does the claimed harm or mistreatment rise to the level of persecution? If no, explain below:	Yes <input type="checkbox"/> No <input type="checkbox"/>

2. PA's brother is harmed on account of a shared nexus (religion); however, PA unable to show that the harm rises to the level of persecution.

III. INA §101(A)(42)—APPLICANT'S CLAIM	
A. Past Persecution	
1. Does the applicant claim to have been harmed or mistreated in his/her country(ies) in the past? If no, go to Part III.B. If yes, identify the perpetrator(s) of, and describe, the harm or mistreatment: Perpetrator(s): <u>POLICE</u> Harm/Mistreatment: <u>PA'S BROTHER BEATEN AND THREATENED.</u>	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
2. Is the claimed harm or mistreatment on the basis of one of the five protected grounds? If no, go to Part III.B. If yes, designate applicable ground(s): <input type="checkbox"/> Race <input checked="" type="checkbox"/> Religion <input type="checkbox"/> Nationality <input type="checkbox"/> Membership in a Particular Social Group <input type="checkbox"/> Political Opinion Specify Characteristic(s): <u>BOTH PA AND BROTHER CONVERTED TO CHRISTIANITY.</u>	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
3. Does the claimed harm or mistreatment rise to the level of persecution? If no, explain below: <u>PA IS UNABLE TO ARTICULATE THAT THE HARM TO HIMSELF RISES TO THE LEVEL OF PERSECUTION.</u>	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>

3. PA's mother harmed, and a nexus is established to a protected characteristic of the PA.

III. INA §101(A)(42)—APPLICANT'S CLAIM	
A. Past Persecution	
1. Does the applicant claim to have been harmed or mistreated in his/her country(ies) in the past? If no, go to Part III.B. If yes, identify the perpetrator(s) of, and describe, the harm or mistreatment: Perpetrator(s): <u>JANJAWED PARAMILITARY</u> Harm/Mistreatment: <u>MOTHER KILLED (IN FRONT OF PA)</u>	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
2. Is the claimed harm or mistreatment on the basis of one of the five protected grounds? If no, go to Part III.B. If yes, designate applicable ground(s): <input checked="" type="checkbox"/> Race <input type="checkbox"/> Religion <input type="checkbox"/> Nationality <input type="checkbox"/> Membership in a Particular Social Group <input type="checkbox"/> Political Opinion Specify Characteristic(s): <u>PA AND MO BOTH ETHNIC FUR. (JANJAWED USED ETHNIC SLURS DURING ATTACK)</u>	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
3. Does the claimed harm or mistreatment rise to the level of persecution? If no, explain below:	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>



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 a part of the refugee definition as codified in the Immigration and Nationality Act (INA), the “on account of” five protected grounds, specifically membership in a particular social group (PSG) 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 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**

Division-Specific Required Reading - Refugee DivisionDivision-Specific Required Reading - Asylum DivisionDivision-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). Matter of Acosta, 19 I&N Dec. 211, 233-34 (BIA 1985)
4. Brief of the Department of Homeland Security In re: Rodi Alvarado-Pena, filed with the Attorney General of the United States, February 19, 2004 (2004 DHS brief in R-A-).
5. 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.
6. 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 RAO Training Module, Gender-Related Claims
7. 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.
8. 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.
9. 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).

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)
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)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
11/06/2013	6.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

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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 that persecution or feared persecution is "on account of" membership in a particular social group (PSG).

The nexus analysis for PSG 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?

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). 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. This part of the analysis is generally not required with other protected characteristics, of which there tends to be a common understanding or usage among those applying this area of law.

To determine whether the applicant belongs to a group which may be considered a particular social group, you should first consider any precedent decisions analyzing similar facts and rely on any such decisions in reaching a conclusion. If there is no precedent decision on point, you should analyze the facts using the principles set forth below to determine whether the group constitutes a particular social group.

2.1 Is the Applicant a Member of a Particular Social Group?

Definition

The BIA has established a two-prong test for evaluating whether a group meets the definition of a particular social group.¹

First, the group must comprise individuals who share a common, immutable characteristic – such as sex, color, kinship ties, or past experience – that members cannot change or a characteristic that is so fundamental to the member's identity or conscience that he or she should not be required to change it.²

Second, the group must be recognizable and distinct in the society. To determine whether a group is recognizable and distinct, you must examine the shared trait asserted to define the group. Evidence that the society in question distinguishes individuals who share that common trait from individuals who do not possess that trait can establish that the group is recognizable and distinct in the society.³

A group cannot be considered a particular social group within the meaning of the refugee definition if it fails to meet either of the two prongs set forth in *Matter of C-A-* for evaluating whether a particular social group exists. A group of individuals who share characteristics that meet the first prong of the test is not “a particular social group” within the meaning of the refugee definition if the group fails to meet this social “distinction” or “visibility” prong. Similarly, even when a group of individuals is socially recognizable

¹ *Matter of C-A-*, 23 I&N Dec. 591 (BIA 2006).

² *Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 1985).

³ *Matter of C-A-*, 23 I&N Dec. 591 (BIA 2006). The Eleventh Circuit has had occasion to review the BIA's “social visibility” element set out in *Matter of C-A-* and found that requirement to be a reasonable interpretation of the INA. *Castillo-Arias v. U.S. Attorney General*, 446 F.3d 1190, 1198 (11th Cir. 2006).

and distinct, it must still be established that the group's members share a trait that meets the first prong in order to qualify as a particular social group. Both prongs are required.

2.1.1 Step One: *Acosta* - Immutable Characteristic May Be Unchangeable or Fundamental

The BIA explained that the common, immutable characteristic that defines the group is one that either cannot be changed, or is so fundamental to each member's identity or conscience that it ought not be required to be changed. Under this definition, membership in the particular social group becomes comparable to the other four protected characteristics.⁴ By interpreting "persecution on account of membership in a particular social group" in this manner, the BIA reasoned that it was preserving "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."⁵

Membership in a particular social group may be imputed to an applicant who, in fact, does not possess the unchangeable or fundamental characteristic.

Unchangeable Characteristics

Unchangeable characteristics are attributes that literally cannot be changed. Some examples of characteristics that cannot be changed include innate ones, like gender, race, ethnicity, skin color, and family relationships.⁶ Some of these characteristics are biological attributes of a person. Others might be past experiences that cannot be changed because a person cannot change the past.

Fundamental Characteristics

Fundamental characteristics are traits or beliefs that a person should not be required to change because they are fundamental 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. Some examples of shared beliefs or characteristics that are fundamental to an individual's identity or conscience include being lesbian or gay or not having had FGM. 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.⁷

⁴ *Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 1985).

⁵ *Id.*

⁶ See *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

⁷ 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

When the membership in a particular social group is only imputed to the applicant, and the applicant does not in fact possess this trait, the subjective component of this analysis does not apply. Because the applicant in such a case does not actually possess the trait, it is not relevant to enquire whether it is actually fundamental to his or her identity. In such a case, you should assess the objective component to determine fundamentality.

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.⁸ An applicant's decision to assume significant risks can, in some cases, provide evidence that the belief or trait is so fundamental to the applicant's identity or conscience.⁹ The relevance 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 identities.¹⁰ For example, an individual may assume the risk of a particular activity for monetary gain.¹¹

2.1.2 Step Two: *Matter of C-A*- "Group Must Be Socially Distinct"

In *Matter of C-A*-, the BIA held that a cognizable social group must be perceived as distinct in society.¹² Essentially, the social "visibility" or "distinction" element requires that the group be distinct within the society. This requirement can be met by showing that the society in question differentiates between people who possess the shared belief or trait and people who do not.

Evidence of distinction within a society includes special provisions in the law of the country of origin, evidence that members of the group are afforded special privileges or given special responsibilities, or any other evidence to show that the members of the group are treated differently. Evidence that members of the group are harmed by either the government or private actors can be evidence that they share a distinct trait, but you should be careful to avoid defining a particular social group by the harm they suffer.¹³

The BIA reasoned that the inclusion of this element ensures that "particular social group" is defined in a way that does not dilute the refugee definition by becoming a "catch-all"

activity does so for reasons so fundamental to "human dignity" that he should not be forced to forsake the association").

⁸ 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).

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ *Id.*

¹² *Matter of C-A*-, 23 I&N Dec. 951, 959 (BIA 2006).

¹³ See section on Other Requirements for Valid Social Groups, below.

protected ground for all forms of mistreatment, including mistreatment motivated solely by personal reasons.¹⁴

Applying this reasoning in *Matter of C-A-*, the BIA found that the group composed of “non-criminal informants” did not constitute a particular social group within the meaning of the refugee definition because such a group lacks social distinction. The BIA pointed out that confidential informants, by their very nature, operate in secret.¹⁵

In addition to finding that the group composed of “non-criminal informants” is not a particular social group in *Matter of C-A-*, the BIA found that two other possible group formulations, “non-criminal informants working against the Cali drug cartel” and “former non-criminal informants working against the Cali drug cartel,” did not constitute particular social groups because they did not meet the social “distinction” requirement, i.e., members of these groups did not share a trait or traits distinguishable within Colombian society.¹⁶

In contrast, a particular social group may be comprised of “[c]ivilian witnesses who have the ‘shared past experience’ of assisting law enforcement against violent gangs that threaten communities in Guatemala”¹⁷ or witnesses “who testified in court against gang members” in El Salvador.¹⁸

The group does not have to self-identify as a group to be socially distinct

It is not necessary for a group to identify itself explicitly as a group in order for the social visibility or distinction requirement to be met. Group members may hide their identity or may not associate with each other in order to avoid persecution. Thus, 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 or fundamental trait from others because of their shared belief or characteristic, then the group is socially visible or distinct.¹⁹

Social distinction must be evaluated in context

¹⁴ *Matter of C-A-*, 23 I&N Dec. at 960 (citing to UNHCR *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.).

¹⁵ *Matter of C-A-*, 23 I&N Dec. at 960.

¹⁶ *Id.*

¹⁷ *Garcia v. Att’y Gen. of U.S.*, 665 F.3d 496, 504 and fn. 5 (3d Cir. 2011) (distinguishing case from *Matter of C-A-* because aid to law enforcement in this case was public, not confidential).

¹⁸ *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 *Matter of C-A-* that those who testify against cartel members are socially visible).

¹⁹ *Id.* at 956-57.

In *Matter of A-M-E- & J-G-U*, the BIA indicated that determining whether a group has a shared characteristic with required social visibility must be “considered in the context of the country of concern and the persecution feared.”²⁰

In that case, the BIA reviewed country conditions to evaluate whether, in context, the proposed particular social group shared socially distinct characteristics. The BIA 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.²¹ A review of country of origin information for Guatemala demonstrated that “affluent Guatemalans” were not at greater risk of criminality or extortion in particular. 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 BIA also rejected the following possible formulations of the group: “wealth,” “upper income level,” “socio-economic level,” “the monied class,” and “the upper class.” The BIA 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.²² These concepts are discussed in more detail in the section, Groups Based on Wealth or Affluence, below.

“Particularity”

The Board has also discussed considerations relating to “particularity” for social group analysis. USCIS interprets “particularity” not as a separate, independent requirement, but as part of the “social distinction” inquiry. To be socially distinct, a particular social group must have well-defined boundaries, such that it is generally clear to members of the society in question that individuals who possess a particular trait are distinguished from individuals who do not possess the trait. A particular social group must be defined with particularity such that “the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized in the society in question as a discrete class of persons.”²³ The definition of the group must provide a benchmark for determining who the members of the group are so that membership may be delimited or ascertained. Particular social groups defined in terms that are amorphous, indeterminate, subjective, inchoate, or variable will fail the particularity requirement, because it is difficult to determine who is a member of these groups.²⁴

²⁰ *Matter of A-M-E- & J-G-U*, 24 I&N Dec. 69, 74 (BIA 2007). Compare with *Tapiero de Oréjuela*, 423 F.3d 666, 672 (7th Cir. 2005), discussed below.

²¹ See also *Donchev v. Mukasey*, 553 F.3d 1206 (9th Cir. 2009) (“friends of Roma individuals or of the Roma people” not a socially distinct group because country conditions did not show that the Bulgarian government and society placed restrictions on the applicant’s freedoms due to his friendship with Roma people, and members of the group, such as the applicant’s family members, were not viewed or treated by Bulgarian society in a uniform manner).

²² *Matter of A-M-E- & J-G-U*, 24 I&N Dec. at 75 fn 6.

²³ *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008).

²⁴ *Matter of A-M-E- & J-G-U*, 24 I&N Dec. at 76.

For example, in *Matter of A-M-E- & J-G-U-* the BIA found that the group composed of “affluent” or “wealthy” Guatemalans failed as a particular social group because the group was too amorphous and indeterminate.²⁵ The BIA reasoned that the concept of wealth, in an impoverished nation such as Guatemala, can be defined to include a broad range of individuals, from those in the top echelons of wealth to those who are relatively comfortable, and that group members could encompass as little as 1% or as much as 20% of society. Given these circumstances, the BIA found the proposed group definition to be inchoate and variable. The proposed group was indeterminate and, therefore, the applicants failed to establish the particularity required in defining a *particular* social group.²⁶

Similarly, in *Matter of C-A-*, the BIA found that the Colombian applicants’ proposed particular social group of “noncriminal informants” was too loosely defined to meet the refugee definition’s particularity requirement.²⁷ The BIA indicated that a group constituted of “noncriminal informants” could have a variable membership that might encompass *any* noncriminal informant who passed information concerning the various guerilla groups or drug cartels to either the Colombian government or any competing faction or cartel.

2.13 Other Requirements for Valid Particular Social Groups

A social group cannot be defined by terrorist, criminal, or persecutory activity or association, past or present

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.²⁸

Two federal courts have found that “former gang members” may constitute a particular social group. For cases arising within the jurisdiction of the Sixth and Seventh Circuits,

²⁵ *Id.*

²⁶ See also *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008) (group composed of “male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in territories controlled by the MS-13 gang, and who refuse [gang] recruitment” lacks particularity because the meaning of the various terms used to define the group are too amorphous and subject to different interpretations).

²⁷ *Matter of C-A-*, 23 I&N Dec. at 957.

²⁸ 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 (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....”). See also *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (current or former gang membership does not give rise to a particular social group due to gang members’ criminal activities).

asylum officers must follow these rulings.²⁹ See Asylum Supplement – Former Gang Membership as a Particular Social Group.

Avoid Circular Reasoning

The particular social group in which the applicant claims membership should generally not be defined exclusively by the harm that the applicant asserts as the persecution feared.³⁰ Circular reasoning may not be used to describe the group. The particular social group must exist independently from the persecution suffered or feared that is being asserted as the basis of the claim.

Example

An applicant was raped and beaten by Salvadoran guerrillas. She argued that she faced harm in the future as a member of the particular social group “women previously battered and raped by Salvadoran guerrillas.” The court rejected her claim finding that there was no indication she would face future harm on the basis of her membership in this particular social group. The court found that she was not more likely to be harmed than any other young woman in El Salvador.³¹ Note that the applicant was not a member of the group at the time the harm occurred.

This is not to say, however, that a PSG can never be defined with reference to harm. If, for example, women who have been raped are viewed as distinct by society in a particular country, and ostracized or otherwise treated differently because of their past experience, that treatment might then be considered to be on account of their membership in a particular social group based on the past experience of harm. In such cases, the immutable characteristic of the applicant having been raped has motivated the persecutors to ostracize her (or even to rape her again, but this time on account of her status as a rape victim)..

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. He claimed past persecution based on his membership in the particular social group of “children from Northern Uganda who are abducted and enslaved by the LRA.” 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. The applicant was not a member of the group at the time he was recruited. However, the court held that

²⁹ *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 (7th Cir. 2009).

³⁰ *But see Lukwago v. Ashcroft*, 329 F.3d 157, 178-79 (3d Cir. 2003)(finding that former child soldiers who have escaped LRA enslavement are a valid social group).

³¹ See *Gomez v. INS*, 947 F.2d 660, 663-4 (2d Cir. 1991).

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. Since the experience of having been a child soldier for the LRA is immutable, and former child soldiers are treated differently in Ugandan society, it forms a valid particular social group with regard to well-founded fear. If the applicant could show that the Ugandan government or LRA is motivated to harm him because of his status as a former child soldier who escaped involuntary servitude, he would satisfy the nexus requirement.³²

2.1.4 General Principles for Formulating Particular Social Groups

No size limitation

There are no maximum or minimum limits to the size of a particular social group. Valid particular social groups may contain only a few individuals or a large number of people.

No voluntary associational relationship needed

The BIA has found that voluntary association is not a required component of a particular social group under the BIA test for establishing a particular social group, but can be a shared trait that defines a particular social group so long as the two-pronged test of *Matter of C-A-* is met.³³ In order to satisfy the requirements of *Matter of C-A-*, the voluntary association must be fundamental to the identity or conscience of the member, and it must be a trait that distinguishes the group members from others in society. Thus, a voluntary association should be analyzed as any other trait asserted to define a particular social group.

Cohesiveness or homogeneity is not required

Cohesiveness or homogeneity of group members is not a required component of a particular social group.³⁴ It is not necessary that group members be similar in all or many aspects. What is required is that they share the characteristics or beliefs that form the basis of the particular social group.

Avoid overly broad and narrowly defined groups

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, nor so narrowly that what is defined does not constitute a meaningful grouping.³⁵

³² *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) (asylum granted on remand).

³³ *Matter of C-A-*, 23 I&N Dec. 951, 956 (BIA 2006). See *Hernandez-Montiel* clarifying *Sanchez-Trujillo*; but see *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994); *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003).

³⁴ *Matter of C-A-*, 23 I&N Dec. at 957. See also *UNHCR Guidelines On International Protection: "Membership of a Particular Social Group"*, para. 15.

³⁵ 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).

DHS has taken the position that “these decisions should not be read to mean that a group must be small in order to qualify as a particular social group. Rather, the best reading of these cases is that a social group is ‘overbroad’ if it is broadly defined by general traits that are not the specific characteristic that is targeted by the persecutors.”³⁶ In other words, groups that are defined too broadly may be cognizable, but the claims based on such groups may fail the “on account of” requirement. To avoid overly broad or too narrowly defined particular social groups, you should analyze groups by the specific beliefs and characteristics that motivate the persecutor.

Consider all relevant information, including country of origin information

You should 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 your determination. Country of origin information indicating that the immutable characteristic reflects social distinctions is relevant when analyzing whether a group constitutes a particular social group.³⁷ For example, in a country that operates in a caste system, members of a particular caste may be found to be members of a particular social group and may be targeted for harsh treatment.

3 IS THE PERSECUTION OR FEARED PERSECUTION “ON ACCOUNT OF” THE APPLICANT’S PARTICULAR SOCIAL GROUP MEMBERSHIP?

To determine whether an applicant has been persecuted, or has a well-founded fear of persecution, *on account of* his or her membership in a particular social group, you must elicit and consider all evidence, direct and circumstantial, relevant to the motive of the persecutor.³⁸

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. After you determine that there is a valid particular social group, and the applicant is a member of that group, you must analyze the record for evidence that any persecution suffered or feared is on account of the applicant’s membership in the particular social group. This step in the process is the same analysis that you must conduct with any of the four other protected grounds.

³⁶ 2004 DHS brief in *R-A-* at 22. See also *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (holding that the particular social group could be defined as Somalian females because 98% are subjected to FGM).

³⁷ 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.”).

³⁸ For a more complete discussion of “on account of,” see On Account of (Nexus) – Analyzing Motive section, above. The “on account of” inquiry is similar, and is controlled by *Elias-Zacarias*, regardless of which protected characteristic is being considered.

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 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.

4.1 Family Membership

The Ninth Circuit has found that immediate members of a certain family constitute the “prototypical example” of a particular social group.³⁹ 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.⁴⁰

The right to have a relationship with one’s family is protected by international human rights norms, and thus is fundamental. Also, familial relationships are for the most part immutable, in that they cannot be changed.

When formulating the particular social group, you must assess whether the society in question distinguishes individuals who share the familial relationship from individuals who do not. The question here is not generally whether a specific family is well-known or visible in the society. Rather, the question is whether the society views the degree of relationship shared by group members as so significant that the society distinguishes groups of people based on that type of relationship.⁴¹

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, would not. In other societies, however, extended family groupings may have greater social significance, such that they could meet the social “distinction” element. 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.

The First Circuit has held that a nuclear family constitutes 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).⁴²

³⁹ *Sanchez-Trujillo*, 801 F.2d at 1576; see also *Matter of Acosta*, 19 I&N Dec. 210, 232 (BIA 1985).

⁴⁰ 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: 01/12/2007).

⁴¹ See *Matter of S-E-G-*, 24 I&N Dec. 579, 585 (BIA 2008) (“family members” of Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang” not a particular social group as the familial relationship was not defined with particularity).

⁴² *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993).

The Fourth Circuit 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 requirements of *S-E-G*.⁴³

The Ninth Circuit has found that family membership constitutes a particular social group where there is a sufficiently strong and discernible bond between the family members, such that the relationship becomes the foreseeable basis for persecution.⁴⁴

The Seventh Circuit found that parents of Burmese student dissidents share a common, immutable characteristic sufficient to constitute a particular social group.⁴⁵

It is important to keep in mind that it is the family membership itself that forms the basis for the particular social group. This means that a case that at first glance may appear to be a personal dispute may satisfy the nexus requirement with regard to family members.

Example

An Albanian man testified against a human trafficker, who escaped. The witness was then severely attacked and left for dead by the trafficker’s associates, but survived. The witness’ wife and children were then subject to death threats by the trafficker’s associates. The associates targeted the wife and children on account of their close familial relationship to their husband and father.

4.2 Clan Membership

A clan is an extended family group that has been found to be a particular social group. The BIA held that membership in a Somali sub-clan may form the basis of a particular social group.⁴⁶ 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. Although extended family groups may not always be recognized as

⁴³ *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).

⁴⁴ See *Lin v. Asheroft*, 377 F.3d 1014, 1028 (9th Cir. 2004); *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (finding that an extended family relationship of 2nd cousins living far apart does not satisfy the requirements of a particular social group).

⁴⁵ See *Lwin v. INS*, 144 F.3d 505 (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).

⁴⁶ *Matter of H-*, 21 I & N Dec. 337 (BIA 1996).

particular social groups, in the Somali context, a clan is a discrete group, whose members are linked by custom and culture.⁴⁷ Clan members also are usually identifiable within their countries of origin as members of their clan.

4.3 Gender

In *Matter of Acosta* the BIA indicated that gender alone may form the basis for a particular social group.⁴⁸ In a later gender-related persecution case, *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.”⁴⁹

Though some circuits have discussed gender as a basis of a particular social group, few have found an individual to be eligible for asylum on the basis of a particular social group defined solely by the applicant’s gender. While a particular social group based solely on an applicant’s gender, for example “Kenyan women,” is likely a valid particular social group, it is unlikely that a persecutor would single out a person for harm solely because of his or her gender. A persecutor is more likely to be motivated by a person’s gender in combination with some other characteristic he or she possesses, such as a person’s social status in a domestic relationship.

In *Fatin v. INS*, the Third Circuit indicated that while the applicant had established that the group of Iranian women may well satisfy the *Acosta* definition of a “particular social group,” she had not demonstrated that she had a well-founded fear based solely on her gender.⁵⁰ Similarly, the Eighth Circuit in *Safae v. INS* rejected the applicant’s particular social group of Iranian women as overly broad “because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on

⁴⁷ *Matter of H-*, 21 I & N Dec. 337 (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); see also 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).

⁴⁸ For further information, see RAI0 Training Module, *Gender-Related Claims*; OCC Response to RAI0 Query: *PSGs within the context of Afghan Women at Risk* (Jan. 3, 2012); *Matter of Acosta*, 19 I & N Dec. 211 (BIA 1985).

⁴⁹ *Matter of Kasinga*, 21 I & N Dec. 357 (BIA 1996).

⁵⁰ *Fatin v. INS*, 12 F.3d 1233, 1240-41 (3d Cir. 1993) (the court held that the applicant failed to establish that she belonged to the social group of “Iranian women who refuse to conform to the government’s gender specific laws and social norms” based on her testimony that she would find these objectionable and would avoid compliance if she could, in part because she did not testify that she would either refuse to comply with the gender-specific laws, such as wearing the chador, or that to comply with such laws would be so abhorrent to her beliefs that it would amount to persecution).

their gender”⁵¹ and proceeded to consider a particular social group which could satisfy the nexus requirement and which was defined by not only nationality and gender, but also by opposition to Iranian customs relating to dress and behavior.

The Ninth Circuit held that an applicant established that she was subjected to FGM on account of her membership in the particular social group of “Somalian females.” In reaching this conclusion, the court reasoned that an applicant’s gender is an immutable characteristic that satisfies the *Acosta* definition of a particular social group. The court found support for its conclusion that the applicant’s nationality and gender were the motivating characteristics for the FGM, because FGM “in Somalia is not clan specific, but rather is deeply imbedded in the culture throughout the nation and performed on approximately 98 percent of all females.”⁵² The Eighth Circuit has also held that “Somali women” constitute a particular social group in an FGM case.⁵³

Similarly, the Tenth Circuit held that both gender and tribal membership are immutable characteristics. In responding to concerns that, if gender alone is recognized as a social group (and stating parenthetically that it certainly is one) half a population could be eligible for asylum, the court explained that the focus should be on whether members of that group are sufficiently likely to be persecuted “on account of” their membership. While acknowledging that gender alone could form a particular social group, the court analyzed the case with respect to a particular social group defined as female members of the Tukulor Fulani tribe.⁵⁴

An even more narrowly tailored particular social group that more appropriately describes the characteristic that is being targeted would be “Somali females who have not been subject to FGM as practiced in their society.” It is likely Somali women who have undergone FGM as required by the relevant cultural expectations are not targeted for FGM. Rather it is only those who have not yet undergone it in the way required by their culture who are targeted. In most FGM cases, you should consider whether the trait of “not having undergone FGM as practiced in their society” should be included in the social group definition.

For more on particular social groups and FGM, see the Female Genital Mutilation (FGM) section below.

In *Perdomo*, the Ninth Circuit remanded the case to the BIA to consider whether “women in Guatemala” constitute a particular social group. The court noted that country of origin information reflects a high incidence of murder of women in Guatemala and the non-responsiveness of the Guatemalan government.⁵⁵

⁵¹ *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994).

⁵² *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005).

⁵³ *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

⁵⁴ *Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005).

⁵⁵ *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010). This case is still pending at the BIA on remand.

Gender-based claims have also been raised by young male applicants fearing recruitment by government or opposing forces engaged in civil strife.⁵⁶ In a series of cases arising out of the conflict in El Salvador, the Ninth Circuit considered whether young Salvadoran men could establish eligibility for asylum based on their fear of recruitment as combatants in that country's civil war. In *Chavez v. INS*, the Court found that the applicant's "status as a 'young urban male' [was] not specific enough for political asylum."⁵⁷

4.4 Female Genital Mutilation (FGM)

There have been a number of cases involving forced FGM in which eligibility for asylum was based on membership in a particular social group related to gender, or gender plus another characteristic, such as tribe and/or opposition to FGM.

Examples from case law

Matter of Kasinga

As discussed above, in *Matter of Kasinga*, the BIA found the applicant eligible for asylum based on her fear of persecution on account of 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." The separate concurring opinions in *Kasinga* emphasized that opposition to the practice was not a necessary component to the particular social group. Later decisions by the BIA and federal courts analyzing similar fact patterns do not focus on the applicant's opposition to the practice in the formulation of the particular social group. The applicant's opposition to the practice, of course, would be highly relevant to the analysis of whether FGM would be persecution to the applicant.⁵⁸

Niang v. Gonzales

In *Niang v. Gonzales*, the Tenth Circuit held that being targeted for FGM because of one's membership in the group of female members of the Tukulor Fulani tribe would constitute persecution on account of membership in a particular social group. The Tenth Circuit noted that the particular social group could be defined as gender alone, as gender is an immutable characteristic. In responding to concerns that, if gender alone is recognized as forming a social group (and stating parenthetically that it certainly is one), half a population could be eligible for asylum, the Court explained that the focus should be on whether members of that group are sufficiently likely to be persecuted "on account of" their membership. While acknowledging that gender alone could form a particular

⁵⁶ See *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

⁵⁷ *Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984).

⁵⁸ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of A-T*, 24 I&N Dec. 617 (A.G. 2008).

social group, the Court analyzed the case with respect to a particular social group defined as female members of the Tukolor Fulani tribe.⁵⁹

Mohammed v. Gonzales

In *Mohammed v. Gonzalez*, the Ninth Circuit held that an applicant established that she was subjected to FGM on account of her membership in the particular social group of Somali females. In reaching this conclusion, the court reasoned that an applicant's gender is an immutable characteristic that satisfies the *Acosta* definition of a particular social group.⁶⁰

Framework for analysis

Caselaw 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 A-T*, the framework for analyzing such cases depends in critical ways on how the group is formulated.⁶¹ In many cases, the best formulation of the particular social group may be "females [of the applicant's tribe or nationality] who have not yet undergone FGM as practiced in their culture," because it more appropriately identifies the characteristic motivating the persecutor. For example, the Somali female in *Mohammed* was subject to FGM, not simply because she was a female, but because she was a female who had not already undergone FGM as practiced in her culture. The particular social group of "Somali females," is broader than the group targeted.

Thus, in most FGM cases, officers should consider whether the relevant social group should be 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. This would not preclude a valid claim by a woman previously subjected to FGM who fears FGM in the future, if she can establish 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 the first time she was subject to FGM the procedure was not performed to the extent required by her culture).

Eligibility Based on Feared FGM of 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 perceived protected characteristic). When a child is subjected to FGM, it is generally not because of a parent's protected characteristic.

⁵⁹ *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005).

⁶⁰ *Mohammed v. Gonzales*, 400 F.3d 785, 796 (9th Cir. 2005).

⁶¹ *Matter of A-T*, 24 I&N Dec. 617 (A.G. 2008).

Rather, the FGM is imposed on the child because of the *child's* characteristic of being a female who has not yet undergone FGM as practiced by his or her culture.⁶²

If the child of an opponent of FGM 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.

4.5 Opponents of Cultural Practices or Social Norms

Individuals who oppose or refuse to conform to a cultural practice or social norm enforced in a region or country may, in certain circumstances, constitute a particular social group. This is an area that often overlaps with other protected grounds, such as political opinion and religion.⁶³

4.5.1 Female Genital Mutilation (FGM)

In *Kasinga*, the BIA held that women of a particular tribe in Togo who had not been subject to FGM and opposed it constituted a particular social group. However, the government argued, and concurring opinions emphasize, the importance of the applicant's status as a woman who had not experienced the procedure and de-emphasize the importance of her opposition to the practice with respect to the particular social group definition.⁶⁴ Later decisions by the BIA and federal courts analyzing similar fact patterns do not focus on the applicant's opposition to the practice in the formulation of the particular social group. The applicant's opposition to the practice, of course, would be highly relevant to the analysis of whether FGM would be persecution to the applicant.

The Ninth and Tenth Circuits have held that opposition to FGM is not required to establish persecution on account of membership in a particular social group where evidence shows that the persecutor was motivated by the applicant's gender, tribal or clan membership, or nationality. The Tenth Circuit in *Niang* indicated that its holding was not intended to indicate "that an *adult's* voluntary submission to FGM necessarily constitutes persecution."⁶⁵

⁶² *Matter of A-K*, 24 I&N Dec. 275 (BIA 2007).

⁶³ See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328, 1336 (BIA 2000) (citing the holding in *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) that "dress and conduct rules pertaining to women may amount to persecution if a woman's refusal to comply is on account of her religious or political views").

⁶⁴ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) Concurring opinion by Board member Filppu, joined by Heilman, and concurring decision by Board member Rosenberg.

⁶⁵ *Mohammed v. Gonzales*, 400 F.3d 785, 797 n.16 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005) (emphasis added) (finding that because the applicant's gender and her membership in the Tukulor Fulani tribe are immutable characteristics and thus meet the *Acosta* definition of a particular social group, she was not required to provide evidence of opposition to FGM).

Evidence of “submission” or “opposition” could be relevant, however, to the analysis of whether FGM is persecution. Consistent with USCIS analysis of “persecution” generally, you should determine whether the harm (FGM) was objectively serious harm that was or would be experienced as serious harm by the applicant. FGM is widely recognized as a serious human rights abuse, and is clearly objectively serious harm. Where the applicant also experienced or would experience it as serious harm it constitutes persecution. This does not require “opposition,” although opposition could certainly be one way of showing that the applicant experienced FGM as serious harm. Where an applicant underwent FGM at an early age, when she was too young to form a view of whether she experienced it as serious harm or not, the applicant’s testimony on her perception as an adult of the FGM may serve as evidence on this point.

4.5.2 Gender-Specific Dress Codes

Where refusal to abide by gender-specific dress codes could result in severe 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* and the Eighth Circuit in *Safaie* 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.⁶⁶

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.”⁶⁷ 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

⁶⁶ *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994).

⁶⁷ *Fatin v. INS*, 12 F.3d at 1241-1242.

evidence could be interpreted such that the dress requirements were “not abhorrent to [the applicant’s] deepest beliefs.”⁶⁸ 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.

4.6 Sexual Orientation

Persecution on account of sexual orientation constitutes persecution on account of membership in a particular social group. The BIA found that a homosexual male in Cuba who was harmed on account of his homosexuality was persecuted on account of his membership in a particular social group.⁶⁹

The Ninth Circuit has held that gay men with female sexual identities in Mexico constitute a particular social group.⁷⁰ The court held that the applicant’s female identity was immutable because it was an inherent characteristic.

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 homosexual, could be sufficient to establish past or future persecution on account of an imputed membership in a particular social group.⁷¹

For more information, see RAIO Training Module, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims*.

4.7 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.” 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 membership is a characteristic an individual should not be required to change.

In *Carranza-Hernandez v. INS*, the Second Circuit found that an individual who had established a fear on account of his union activities was eligible for asylum, although it did not specify which protected ground union activities would fall under, and made no specific finding on particular social group.⁷²

⁶⁸ *Yadegar-Sargis*, 297 F.3d 596, 604-605 (7th Cir. 2002).

⁶⁹ *Matter of Toboso-Alfonso*, 20 I & N Dec. 819 (BIA 1990) (designated by the Attorney General as a precedent decision on June 16, 1994); see also *Boer-Sedano v. Gorzales*, 418 F.3d 1082, 1089 (9th Cir. 2005).

⁷⁰ *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

⁷¹ *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003).

⁷² *Carranza-Hernandez v. INS*, 12 F.3d 4 (2d Cir. 1993). The INS did not raise the particular social group issue in appeal before BIA.

The Fifth Circuit, while **not** specifically holding on the issue, indicates in *Zamora-Morel v. INS* 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.⁷³

Depending on the facts, cases involving union membership, labor disputes, or union organizing also may be analyzed under political opinion.

4.8 Students, professionals, and landowners

Courts have held that particular social groups of students are either not cognizable particular social groups,⁷⁴ or that the harm applicants suffered was not on account of their membership in student groups.⁷⁵ These holdings do not preclude a finding that a specific, identifiable, group of students could constitute a particular social group.

The First Circuit recognized that persons associated with a former government, members of a tribe, and educated or professional individuals could be members of a social group.⁷⁶

The Seventh Circuit 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.⁷⁷

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.⁷⁸

⁷³ *Zamora-Morel v. INS*, 905 F.2d 833 (5th Cir. 1990).

⁷⁴ *Civil v. INS*, 140 F.3d 52 (1st Cir. 1998) (social group of pro-Aristide young students is not cognizable because it is overbroad).

⁷⁵ *Matter of Martinez-Romero*, 18 I&N Dec. 75 (BIA 1981).

⁷⁶ *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985)

⁷⁷ *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).

⁷⁸ *Id.* Cf. *Matter of A-M-E- & J-G-U*, 24 I&N Dec. 69 (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.

4.9 Ancestry

The BIA found that “Filipinos with Chinese ancestry” could define a particular social group, because of the immutability of the characteristic.⁷⁹ Note that this protected characteristic can also be appropriately analyzed under the nationality or race protected grounds.

4.10 Age

The BIA 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 BIA 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 claim for asylum may still be cognizable.”⁸⁰ 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 older BIA and Circuit Court cases addressed the validity of using age, in conjunction with other characteristics, as the basis for a particular social group. They rejected cases involving young, urban males who feared either conscription by the military or forcible recruitment by guerrillas.⁸¹ In those cases the persecutors targeted the young men because they are 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 valid particular social groups.

More recently, 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, thus the class is not particular enough to satisfy the social-distinction prong.⁸² 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.⁸³

⁷⁹ *Matter of V-T-S*, Int. Dec. # 3308 (BIA 1997).

⁸⁰ *Matter of S-E-G-*, 24 I&N Dec. 579, 583-84 (BIA 2008).

⁸¹ *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).

⁸² *Lukwago v. Ashcroft*, 329 F.3d 157, 171-172 (3d Cir. 2003); see also *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005) (indicating that “youth,” as well as “poverty” and “homelessness,” are too vague and all encompassing to be characteristics that set the parameters for a particular social group under the INA in concluding that “Honduran street children” do not constitute a particular social group).

⁸³ *Lukwago v. Ashcroft*, 329 F.3d at 174-75.

4.11 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 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.

4.11.1 Former Military/Police Membership

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, recognizable identity in society to meet the "social distinction" test established in *Matter of C-A-*.⁸⁴

If the applicant has established membership in a particular social group of former police officers or soldiers, the "on account of" inquiry may be especially difficult and may require special scrutiny. An applicant would also have to demonstrate that the persecution suffered or feared is on account of the social status that attaches to the applicant by virtue of his or her former service in order to succeed on the claim.

For example, if the persecutor targets a former police officer principally out of reprisal for the former officer's role in disrupting particular criminal activity, the persecution would not be considered to be on account of the applicant's membership in a group of "former police officers." 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.

⁸⁴ *Matter of C-A-*, 23 I&N Dec. at 959; *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988); see also *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)

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).

4.11.2 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, recognizable identity in the society. If these requirements are met, it is possible that an applicant could establish a cognizable social group in such circumstances.⁸⁵

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.

Harm inflicted on a police officer or soldier in order to prevent or frustrate the performance of his or her duties is not on account of the applicant's membership in a group of current "police officers" or "soldiers." 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.

It is only where the harm is inflicted because of the applicant's status, 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.

4.11.3 Federal Court and BIA Interpretations

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, as does the BIA, recognizes a distinction between *current* service and *former* service when determining the scope of a cognizable social group.⁸⁶

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*, is instructive:

⁸⁵ 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).

⁸⁶ *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. Threats referred to specific acts the applicant engaged in); 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).

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.⁸⁷

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 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.⁸⁸

4.12 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.⁸⁹ 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, however, you must closely examine whether the proposed group can be defined with enough particularity to make it socially distinct. In the context of the facts established in *Matter of 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 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.”⁹⁰

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.⁹¹

⁸⁷ *Cruz-Navarro v. INS*, 232 F.3d 1024 (9th Cir. 2000)

⁸⁸ *Ahmed v. Ashcroft*, 348 F.3d 611, 616 (7th Cir. 2003).

⁸⁹ *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007); See also *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007)(upholding *Matter of A-M-E*); *Davila-Mejia v. Mukasey*, 531 F.3d 624 (8th Cir. 2008) (adopting the social distinction component and rejecting as not socially distinct and lacking particularity the group defined as ‘family business owners in Guatemala.’).

⁹⁰ *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 73.

⁹¹ *Id.* at 75, n. 6.

The BIA's emphasis on social context is consistent with the Seventh Circuit's approach in *Orejuela*, where members of the "educated, landowning class" in Colombia were recognized as members of a particular social group.⁹² 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. 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 a economic class, not merely "wealth," was an important motivating factor for them.

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.⁹³

4.13 Non-Criminal Drug Informants

The BIA found that the group of "non-criminal informants," as well as two other possible group formulations, "non-criminal informants working against the Cali drug cartel" and "former non-criminal informants working against the Cali drug cartel," do not constitute particular social groups because, under the record facts in that case, they lack social visibility.⁹⁴

4.14 Civilian Witnesses

In contrast, a particular social group can be comprised of "[c]ivilian witnesses who have the 'shared past experience' of assisting law enforcement against violent gangs that threaten communities in Guatemala"⁹⁵ or witnesses "who testified in court against gang members" in El Salvador.⁹⁶ The public nature of the past experience in those cases resulted in social distinction under the facts of the cases.

4.15 Drug Traffickers

⁹² *Tapiero de Orejuela*, 423 F.3d 666 (7th Cir. 2005).

⁹³ See *Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 624 (8th Cir. 2008) ("competing family business owners" not a particular social group because it lacked social visibility to be perceived as a group by society).

⁹⁴ *Matter of C-A-*, 23 I & N Dec. 951, 961 (BIA 2006).

⁹⁵ *Garcia v. Att'y Gen. of U.S.*, 665 F.3d 496, 504 and fn. 5 (3d Cir. 2011) (distinguishing case from *Matter of C-A-* because aid to law enforcement in this case was public, not confidential).

⁹⁶ *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 *Matter of C-A-* that those who testify against cartel members are socially visible).

In *Bastanipour*, an applicant was convicted of trafficking in drugs in the United States and faced removal to Iran. He claimed a well-founded fear because 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.⁹⁷

4.16 Criminal Deportees

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.”⁹⁸

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.⁹⁹ The applicant in that case pointed to reports of crime against Americans on vacation, as well as Mexican 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. The court held that the group was not defined with sufficient particularity to be a cognizable social group.¹⁰⁰

4.18 Tattooed Youth

The Sixth Circuit has found that 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.

⁹⁷ *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) (citations omitted).

⁹⁸ *Elien v. Ashcroft*, 364 F.3d 392(1st Cir. 2004); see also *Toussaint v. Attorney General of U.S.*, 455 F.3d. 409, 417 (3rd Cir. 2006) (adopting the reasoning of the First Circuit in ruling that criminal deportees to Haiti do not constitute a “particular social group”).

⁹⁹ *Delgado-Ortiz v. Holder*, 600 F.3d 1148 (9th Cir. 2010).

¹⁰⁰ *Id.* at 1151-1152.

Further, the court stated that “the concept of a refugee simply cannot guarantee an individual the right to have a tattoo.”¹⁰¹

4.19 Individuals Resisting Gang Recruitment

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.¹⁰²

4.20 Gang Members

The Ninth Circuit 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.¹⁰³

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.¹⁰⁴ 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.” 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.”¹⁰⁵

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.¹⁰⁶

¹⁰¹ *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003).

¹⁰² *Matter of S-E-G-*, 24 I&N Dec. 479 (BIA 2008). See also *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008) (relying on *Matter of S-E-G-* the court found that “young men in El Salvador resisting gang membership” failed as a particular social group because the group lacked social distinction and lacked particularity).

¹⁰³ *Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007).

¹⁰⁴ *Id.* at 945-946.

¹⁰⁵ *Id.* at 946.

¹⁰⁶ *Id.*

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 *In re A-M-E-*, 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.”

4.21 Former Gang Members

Two federal courts have found that “former gang members” may be a particular social group. This is not consistent with USCIS and RAIO policy, which is that a PSG may not be based on criminal activity, past or present.¹⁰⁷ However, for cases arising within the jurisdiction of the Sixth and Seventh Circuits, Asylum Officers must follow these rulings.¹⁰⁸ See Asylum Supplement – Former Gang Membership as a Particular Social Group.

4.22 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.”¹⁰⁹

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 persons 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; and 2) persons who share that disability are socially distinct in the applicant’s society. You must also carefully analyze the persecution aspect of the claim. A country’s inability to provide medical care does not

¹⁰⁷ 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...”).

¹⁰⁸ *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).

¹⁰⁹ *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).

constitute persecution. Such inability may be a factor, however, in determining if an asylum applicant would suffer “other serious harm.” See RAI0 Training Module *Past Persecution*, Asylum Supplement – Exercise of Discretion to Grant Based on Past Persecution, No Well-Founded Fear.

In *Raffington v. INS*, the Eighth Circuit found that the groups of “mentally ill Jamaicans” or “mentally ill female Jamaicans” do not constitute a particular social group. The court based its conclusion that 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.”¹¹⁰ While being closely affiliated or actuated by a common impulse or purpose is not a requirement for the particular social group formulation, the court did not analyze the facts using the immutability and social distinction framework. The claim mainly failed for the applicant’s failure to establish that she had a well-founded fear of persecution.

In a subsequent case, the Seventh Circuit 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.¹¹¹

4.23 Homeless Children

In *Escobar v. Gonzales*, the Third Circuit held that Honduran “street children” do not constitute a particular social group. In reaching its conclusion, the court identified the three main characteristics of the proposed particular social group – poverty, homelessness, and youth – and found that the characteristics were too vague and not particular enough to form a particular social group under the INA.¹¹²

4.24 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.¹¹³ Therefore, the court concluded that the applicants in that case could not establish that they were members of a legally cognizable particular social group.

5 CONCLUSION

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.

¹¹⁰ *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003) (citing *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994)).

¹¹¹ *Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008).

¹¹² *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005).

¹¹³ *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1191 (10th Cir. 2005).

To properly determine whether persecution is on account of a protected ground, you 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.

6 SUMMARY

A particular social group is a group of persons who share a characteristic, such as similar background, habits, or social standards. The shared characteristic must be either unchangeable or so fundamental to the individual’s conscience or identity that the individual should not be required to change it. Except in a few limited circumstances, the particular social group must also have social distinction. Evidence that the society in question distinguishes individuals who share that common trait or belief from individuals who do not possess that trait or belief can establish that the group is recognizable and distinct in the society. Several circuit courts have rejected the Board’s application of a social visibility or recognizability requirement in cases before them on petition for review.¹¹⁴ Those decisions, however, question the way the Board applied social visibility or recognizability in those cases and do not preclude the interpretation of precedent as imposing a social distinction requirement as set out in this lesson plan.

Except in limited circumstances, a social group cannot be defined by terrorist, criminal, or persecutory activity or association, past or present.¹¹⁵ In addition, the particular social group should generally not be defined exclusively by the harm that the applicant asserts as the persecution feared.¹¹⁶ Circular reasoning may not be used to describe the group. The particular social group must exist independently from the persecution suffered or feared that is being asserted as the basis of the claim.

¹¹⁴ *Valdiviezo-Galdamez v. Att’y Gen. of U.S.*, 663 F.3d 582 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

¹¹⁵ The Sixth and Seventh Circuit have held that former gang membership can form the basis of a particular social group. *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 (7th Cir. 2009).

¹¹⁶ *But see Lukwago v. Ashcroft*, 329 F.3d 157, 178-79 (3d Cir. 2003) (finding that former child soldiers who have escaped LRA enslavement are a valid social group).

PRACTICAL EXERCISES

Practical exercises will be added at a later time.

Practical Exercise # 1

- **Title:**
- **Student Materials:**

OTHER MATERIALS

There are no “Other Materials” for this module.

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

- 3.
- 4.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

RAD Supplement

Particular Social Groups Based on Gender and the Issue of “Women at Risk”

In the context of refugee processing, UNHCR regularly submits “women at risk” Priority 1 referrals to theUSRAP. Simply because a refugee applicant has been found to be a woman at risk for the purposes of determining whether she should be granted access to theUSRAP does not constitute a finding that she is a member of a particular social group for purposes of making the refugee determination. In fact, a determination that a woman is a “woman at risk” for purposes ofUSRAP access has no bearing on the adjudication of her refugee claim.

For further analysis, see RAIOTraining Module, *Gender-Related Claims*; OCC Response to RAIO Query: *PSGs within the context of Afghan Women at Risk*

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 - Former Gang Membership as a Particular Social Group in the Sixth and Seventh Circuit

The Sixth and Seventh Circuits have held that former gang membership can form the basis of a particular social group.¹¹⁷ The Seventh Circuit case involved a Salvadoran man who joined a street gang in El Salvador when he was fourteen. He remained a member of the gang until he came to the United States at age twenty-three. In the Sixth Circuit, the court held that a Honduran man who was a former member of the 18th Street gang was a member of a particular social group.

In contrast to the Ninth Circuit's decision in *Arteaga*, the Seventh Circuit held that former gang membership is consistent with the BIA's precedent holding that former military service is an immutable characteristic (*Matter of Fuentes*). The court held that the applicant was "a member of a specific, well-recognized, indeed notorious gang . . . that is neither unspecific nor amorphous." **Note:** This case is only binding on asylum adjudications originating in the Seventh Circuit.

¹¹⁷ *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).

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

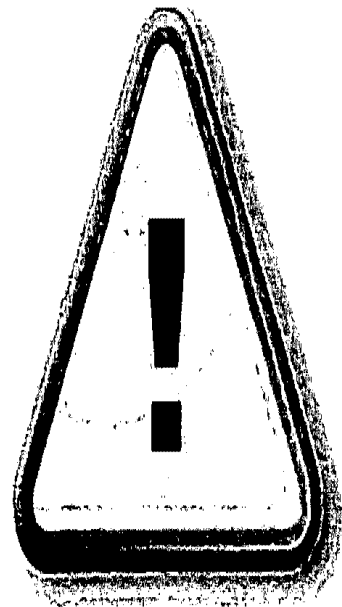
- 1.
- 2.

SUPPLEMENTS



FIRM RESETTLEMENT

Firm Resettlement

8 CFR Sec. 207.1(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 traveled 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.



Firm Resettlement

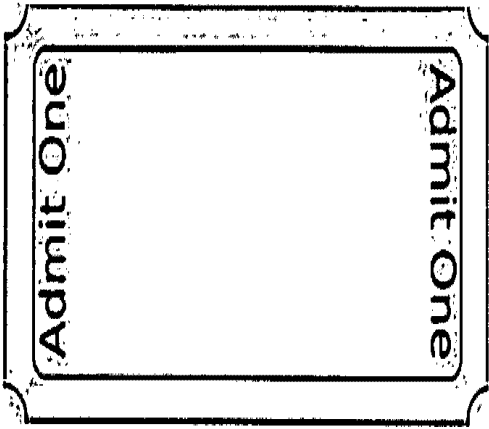
- 1) Entry into 3rd country *as a consequence of flight*

- 2) Offer or Receipt of

- 3) Permanent Status or Citizenship
("ability to stay indefinitely")

Exception: Restrictive Conditions

4-step framework: Matter of A-G-G

1. The officer has the burden to show direct or indirect evidence indicating offer
2. Applicant has the burden to rebut any **direct** evidence of offer (with *indirect* evidence, skip to step 3)
3. The officer considers totality of evidence and determines if applicant is firmly resettled
4. If firmly resettled, applicant has the burden to establish and officer has the duty to elicit testimony regarding “restrictive conditions” exception

The offer: Matter of A-G-G



The existence of a legal mechanism to obtain permanent status in the 3rd country may be sufficient evidence to establish an offer, and **is not contingent on whether the applicant applies for the status.**

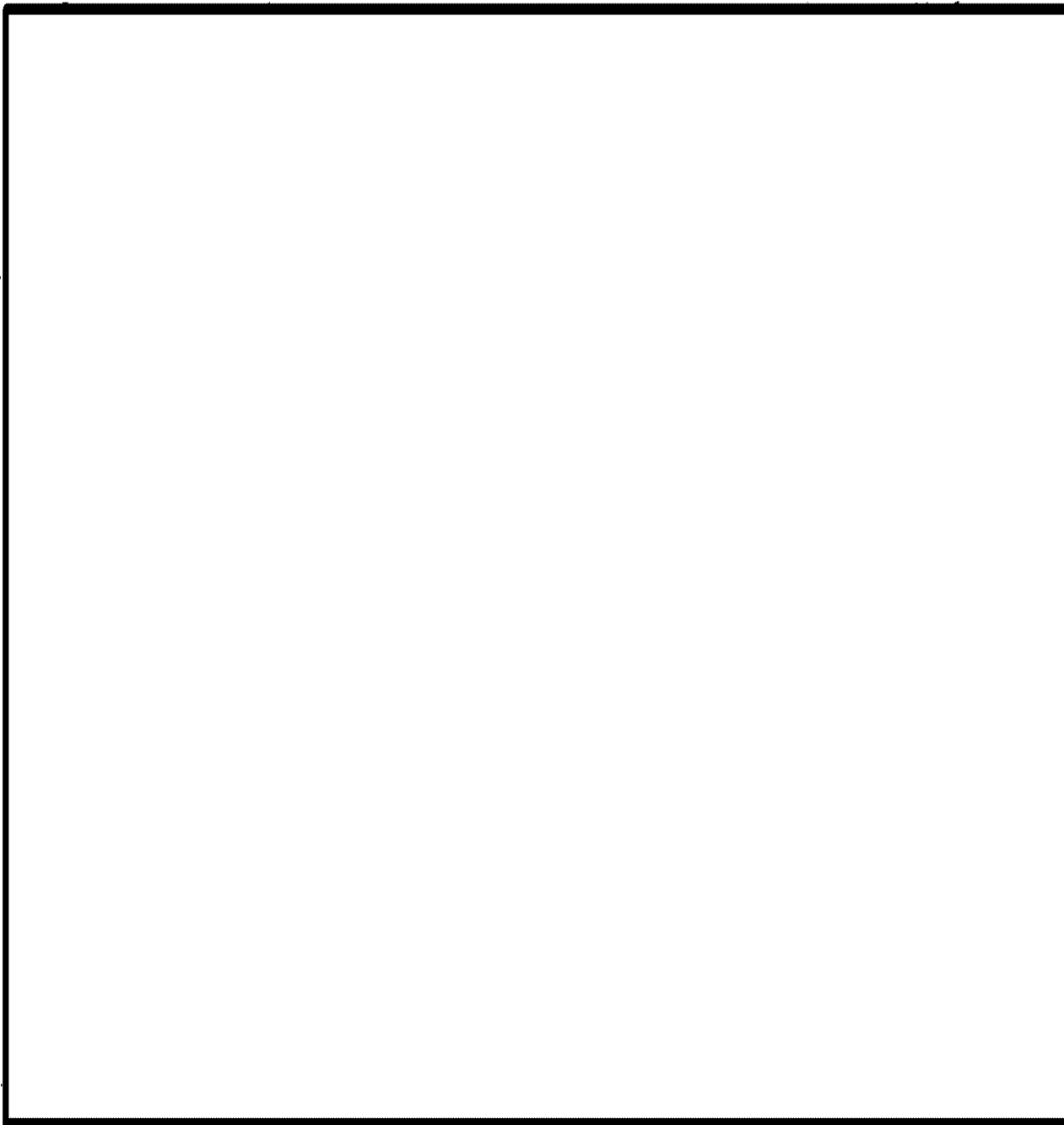
However, officer must elicit if applicant would meet all requirements and be eligible for the status.

A single female fled Afghanistan to Germany in 1996 due to fear of persecution by the Taliban. She was granted asylum by the German government. She was able to find work, housing, to attend school and to travel in and out of Germany. However, she later left Germany because the cold weather made her feel sick and because the jobs she was able to find as a waitress required that she handle pork, which is against her religion. She has been referred to the USRAP as a woman-at-risk. Is she firmly resettled?

(b)(5)

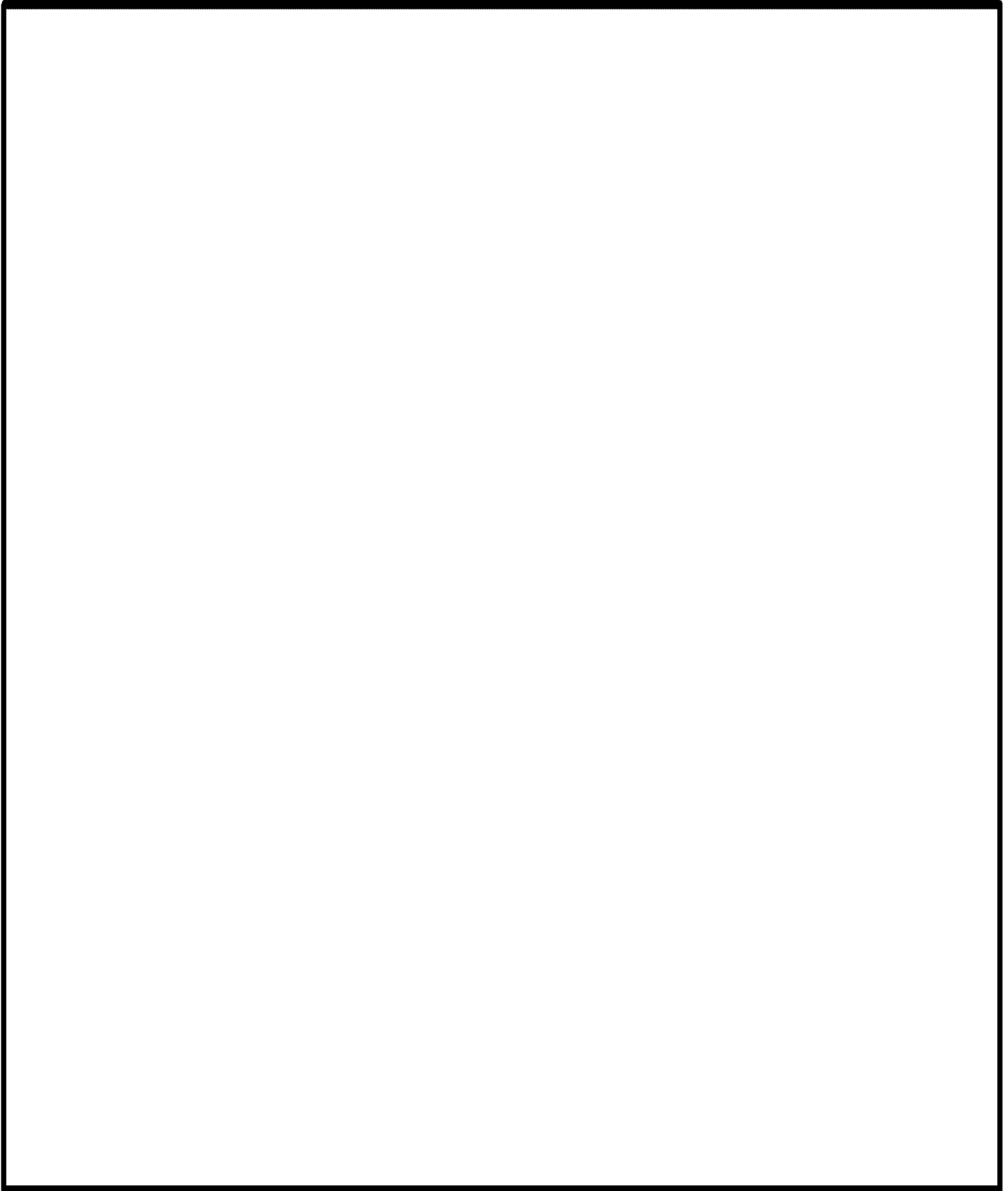


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PERSECUTOR BAR

(b)(5)

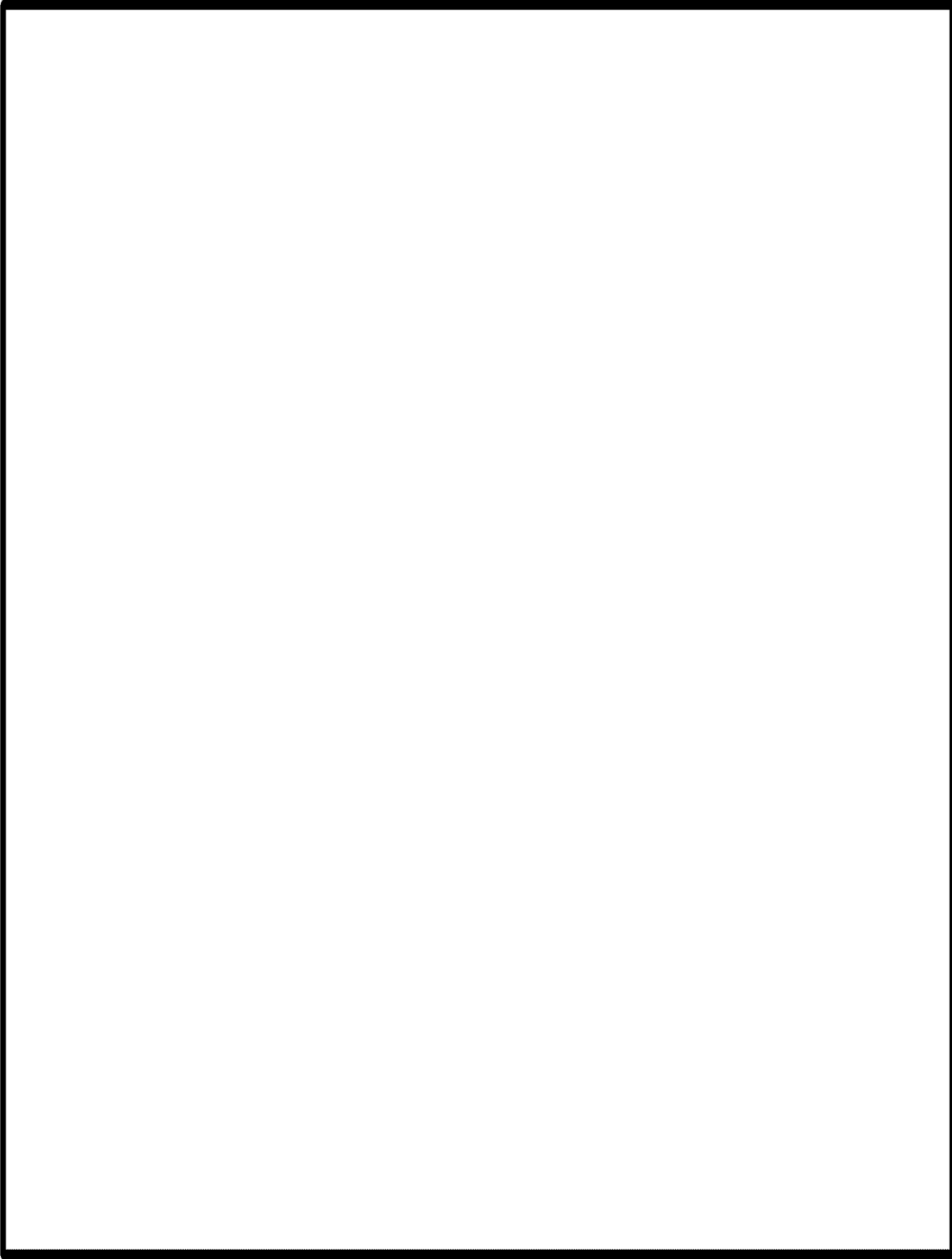


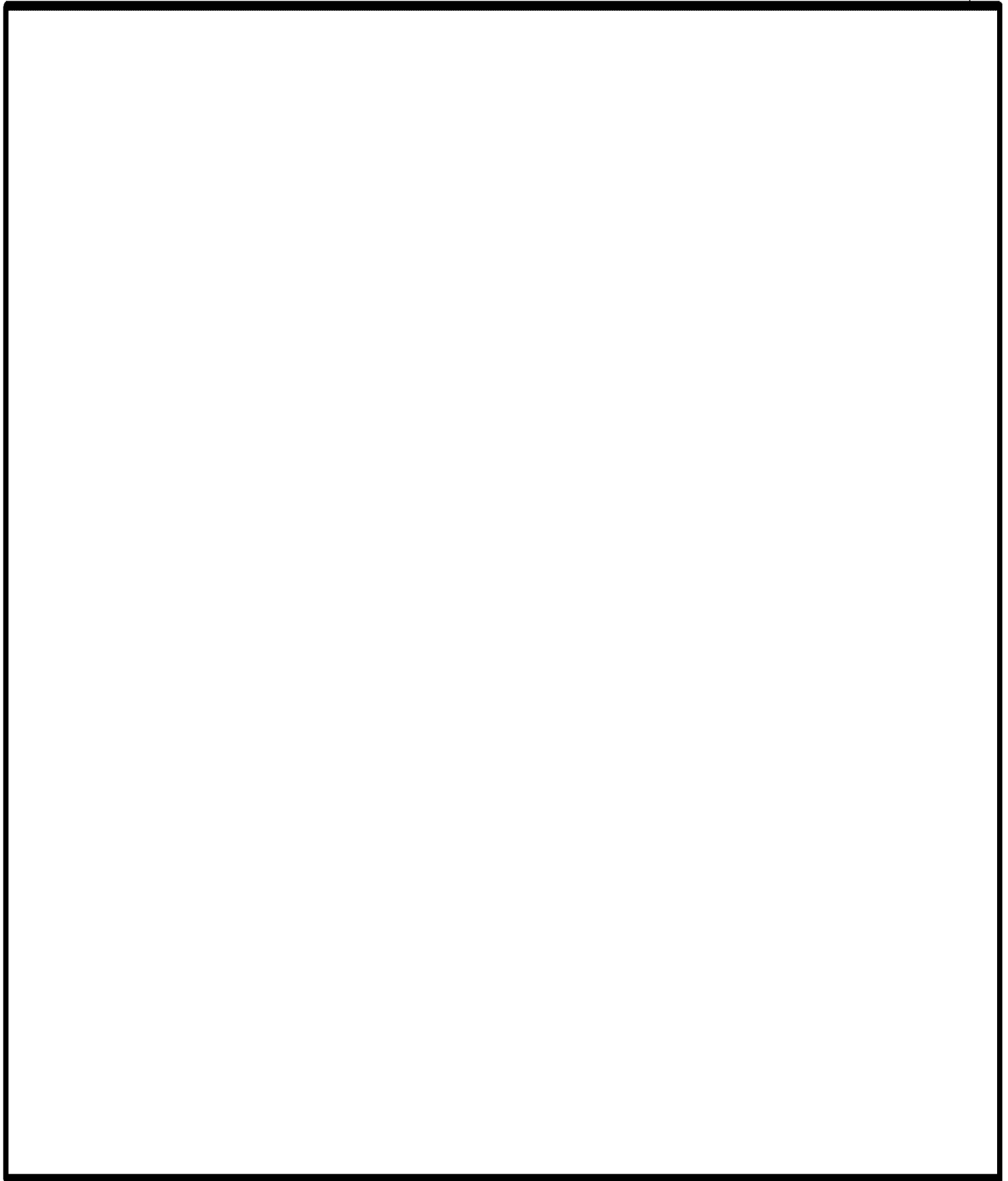
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(b)(7)(e)



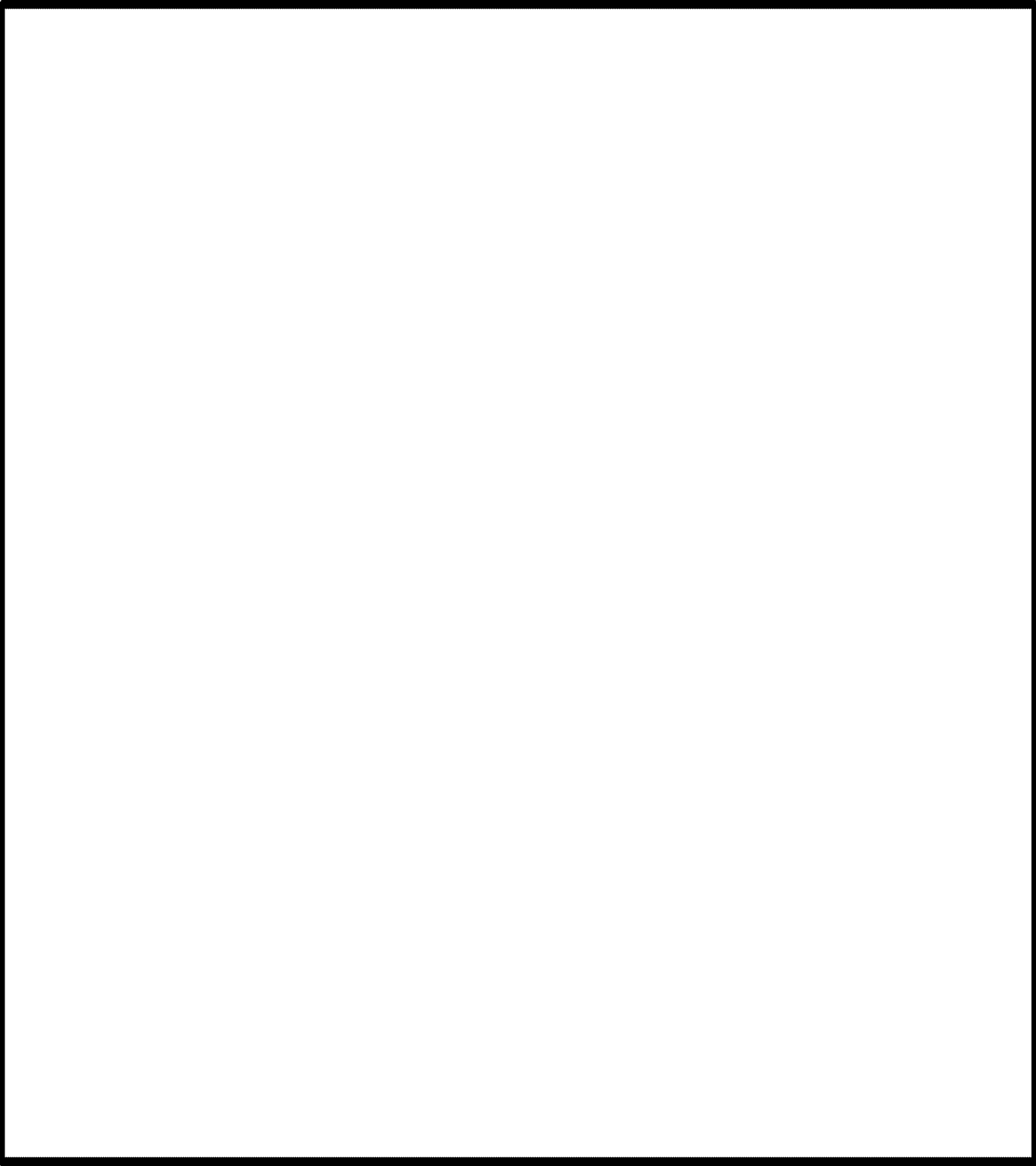


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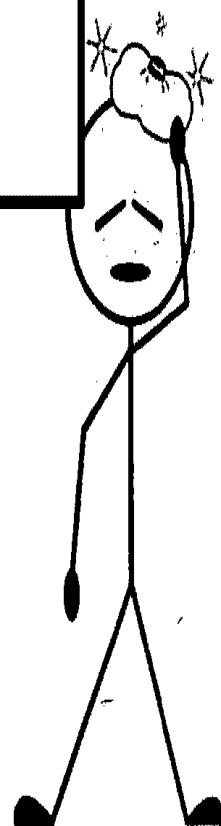
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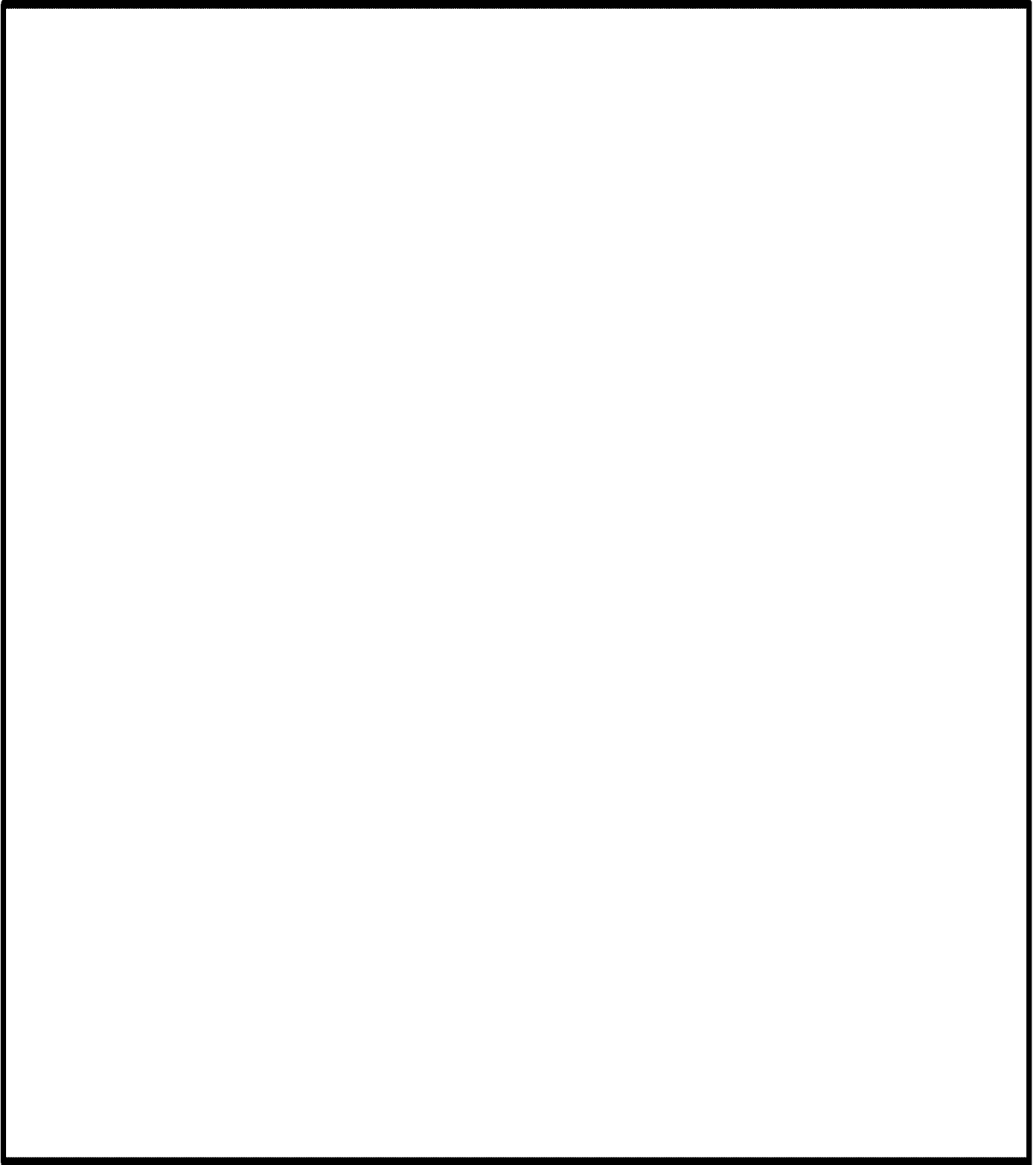


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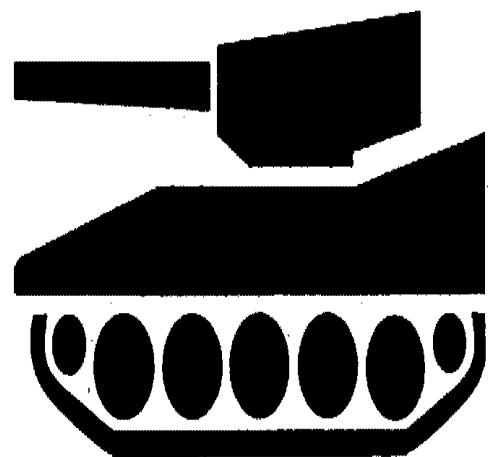
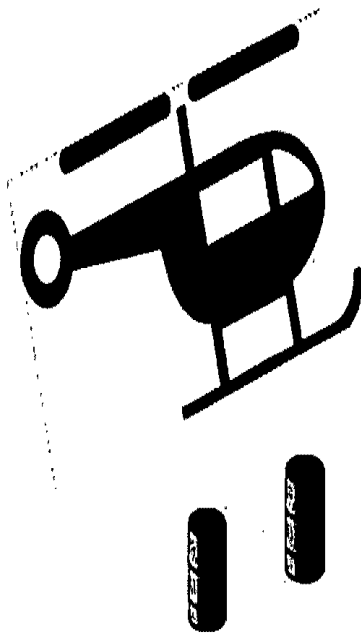
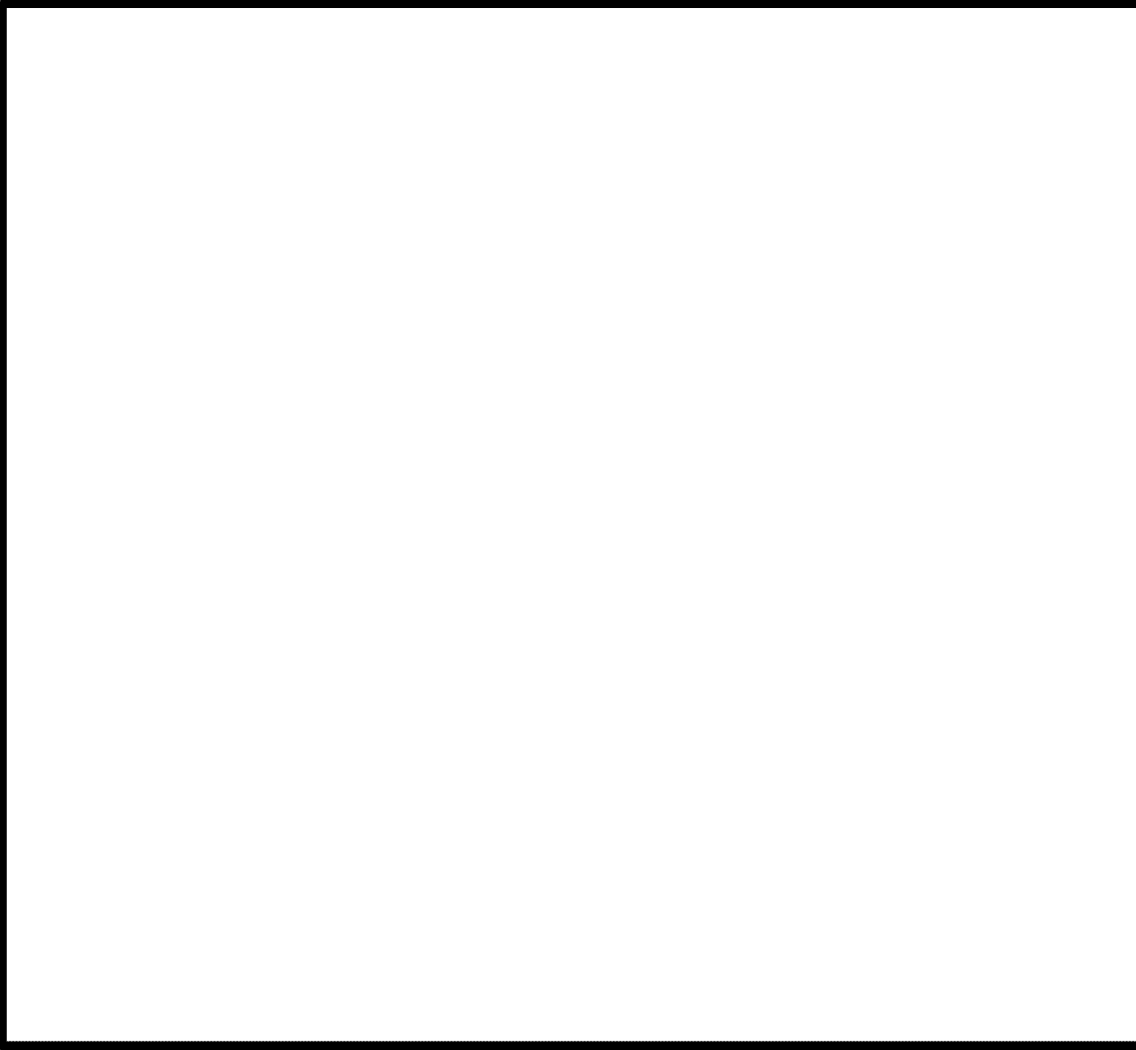


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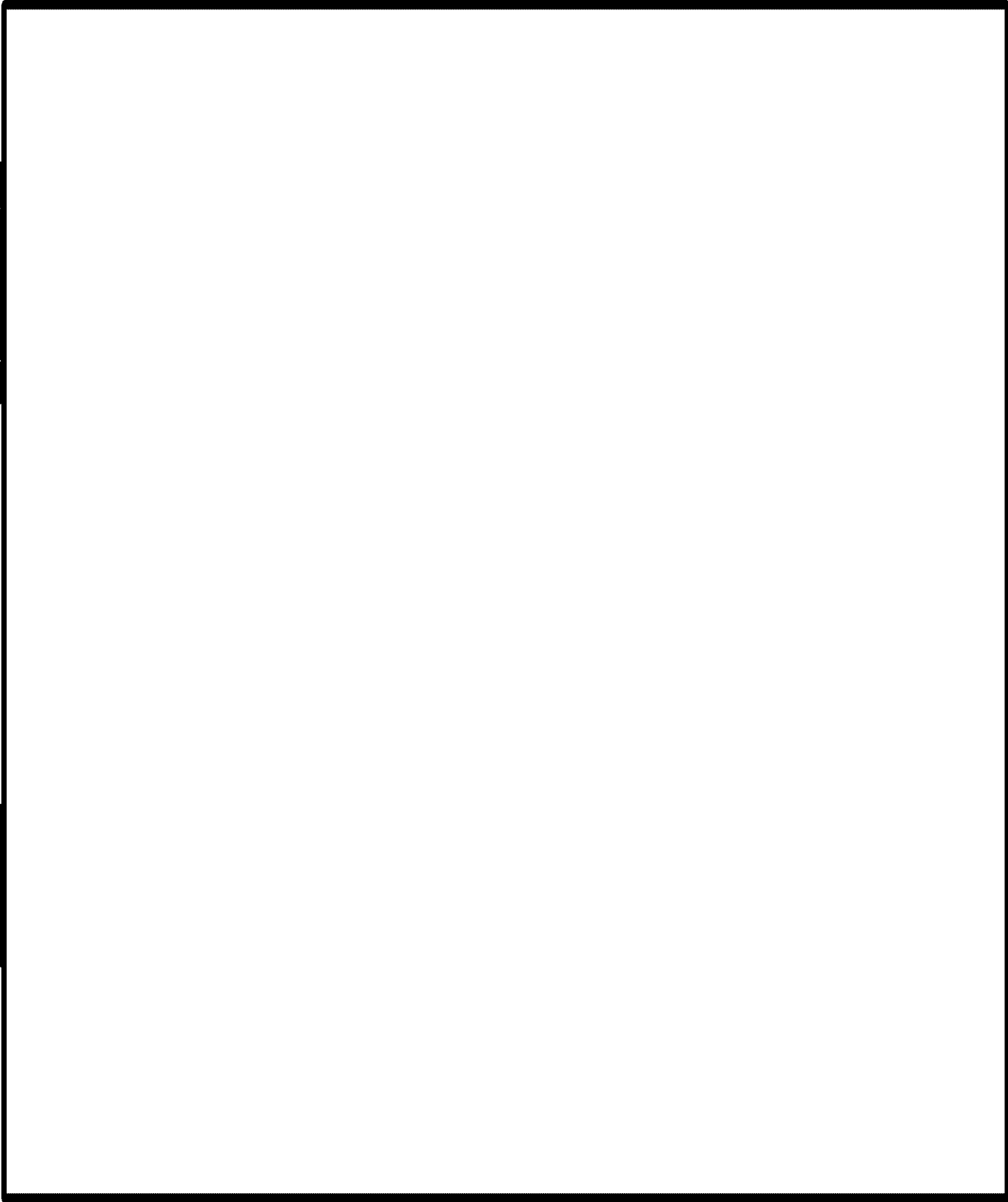
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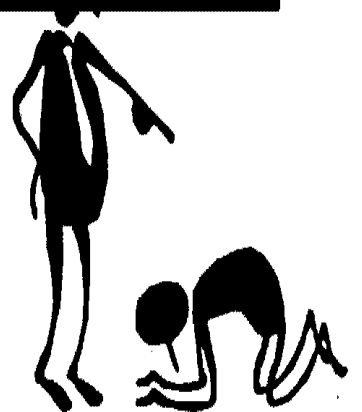
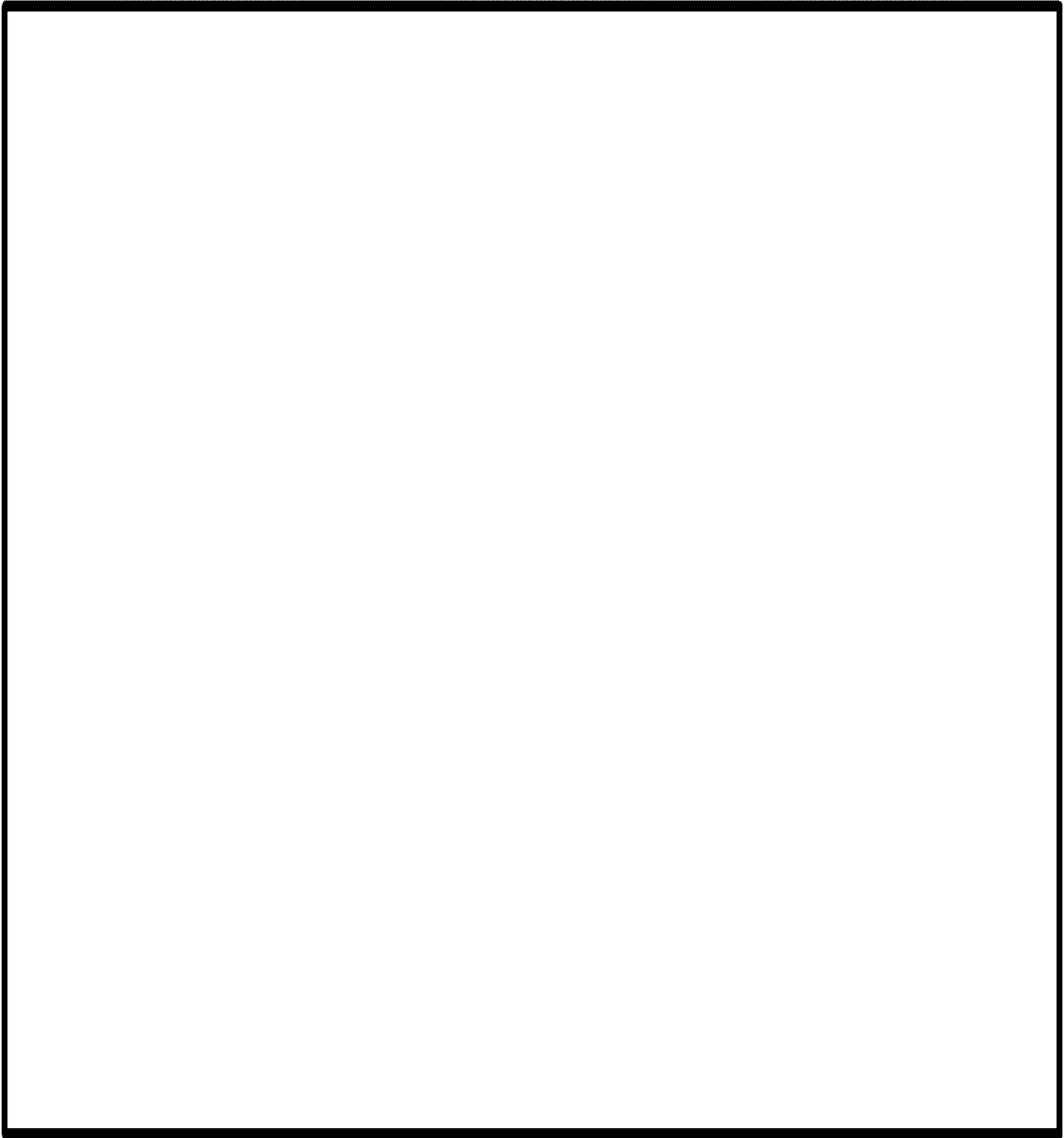


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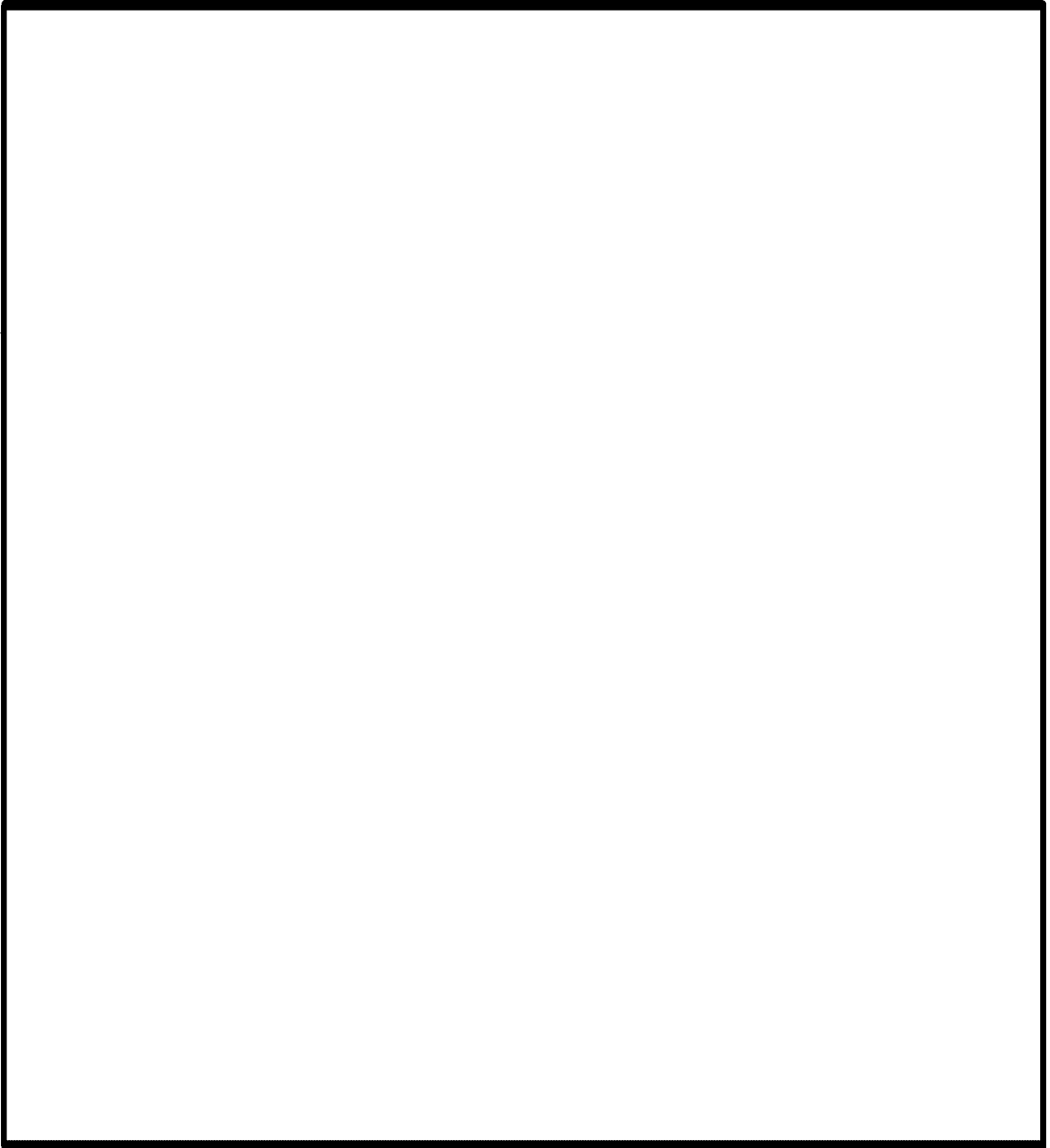
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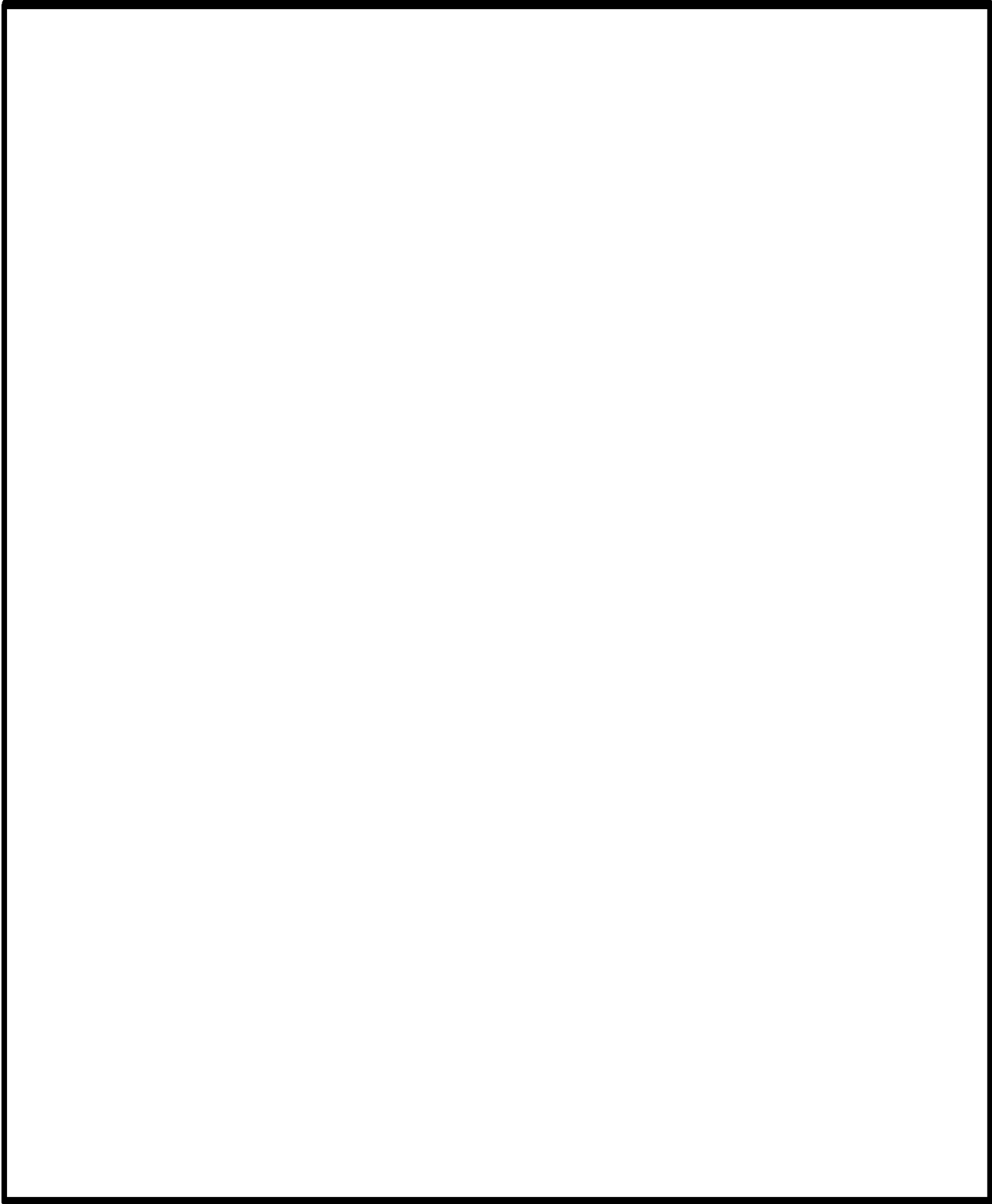
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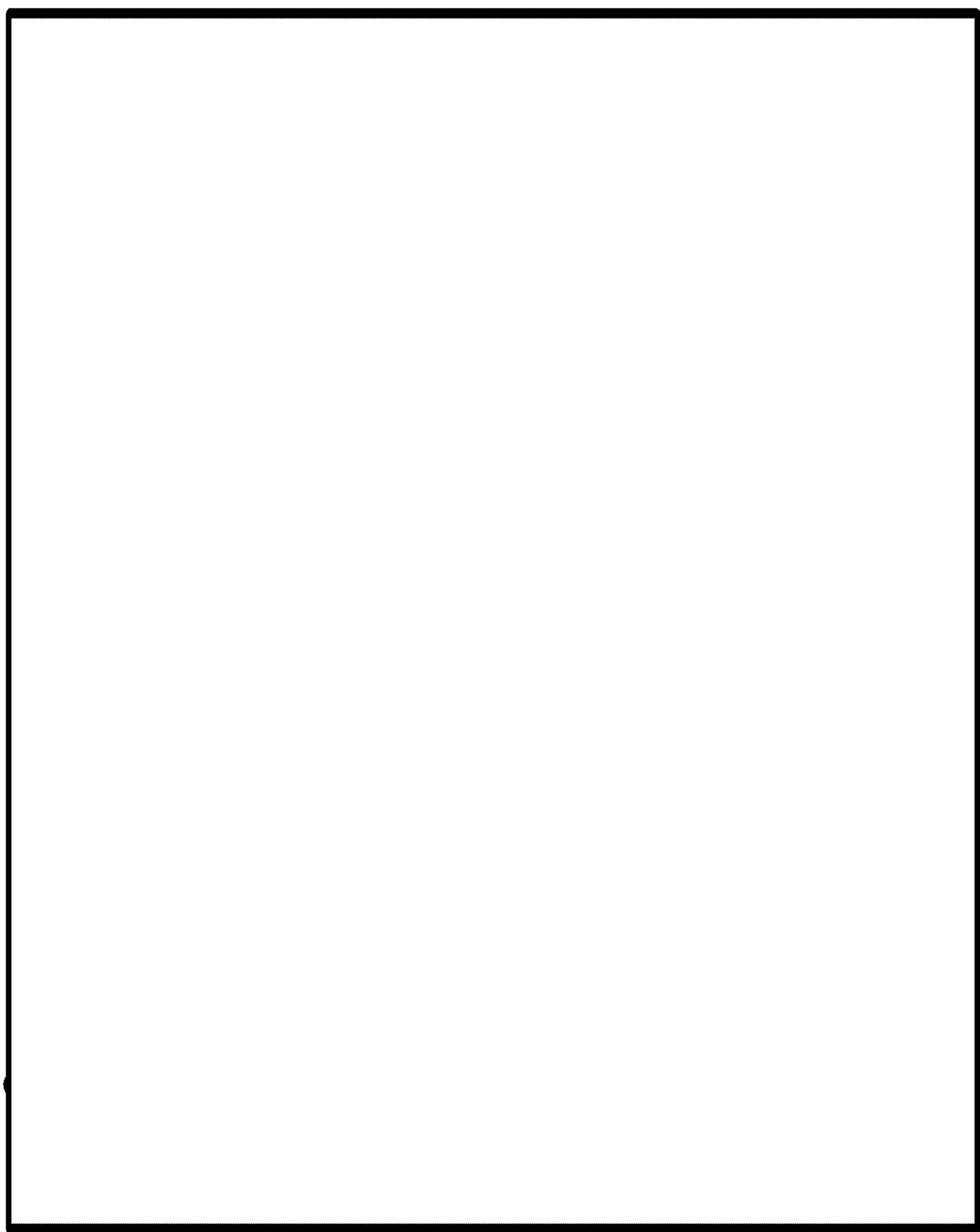


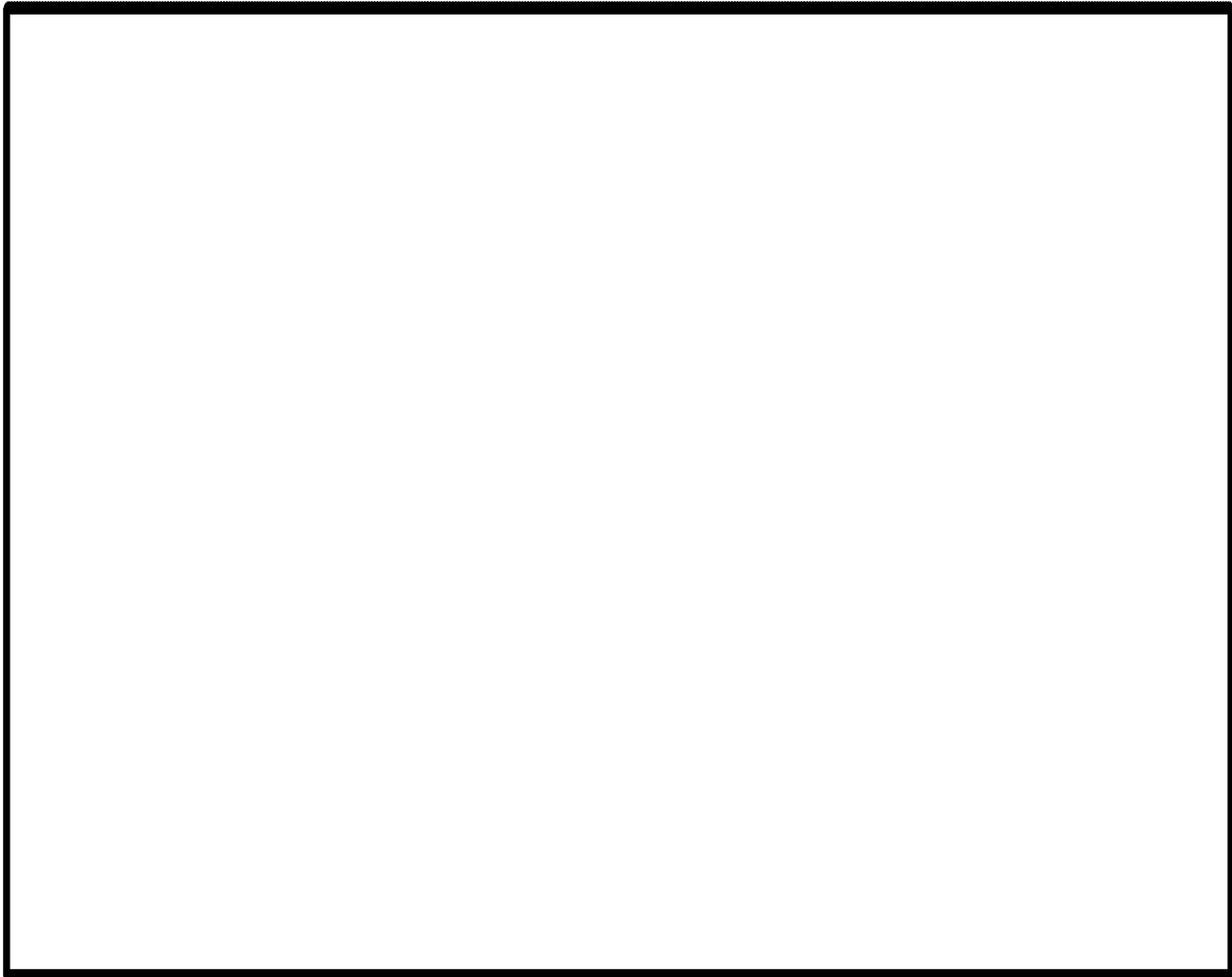
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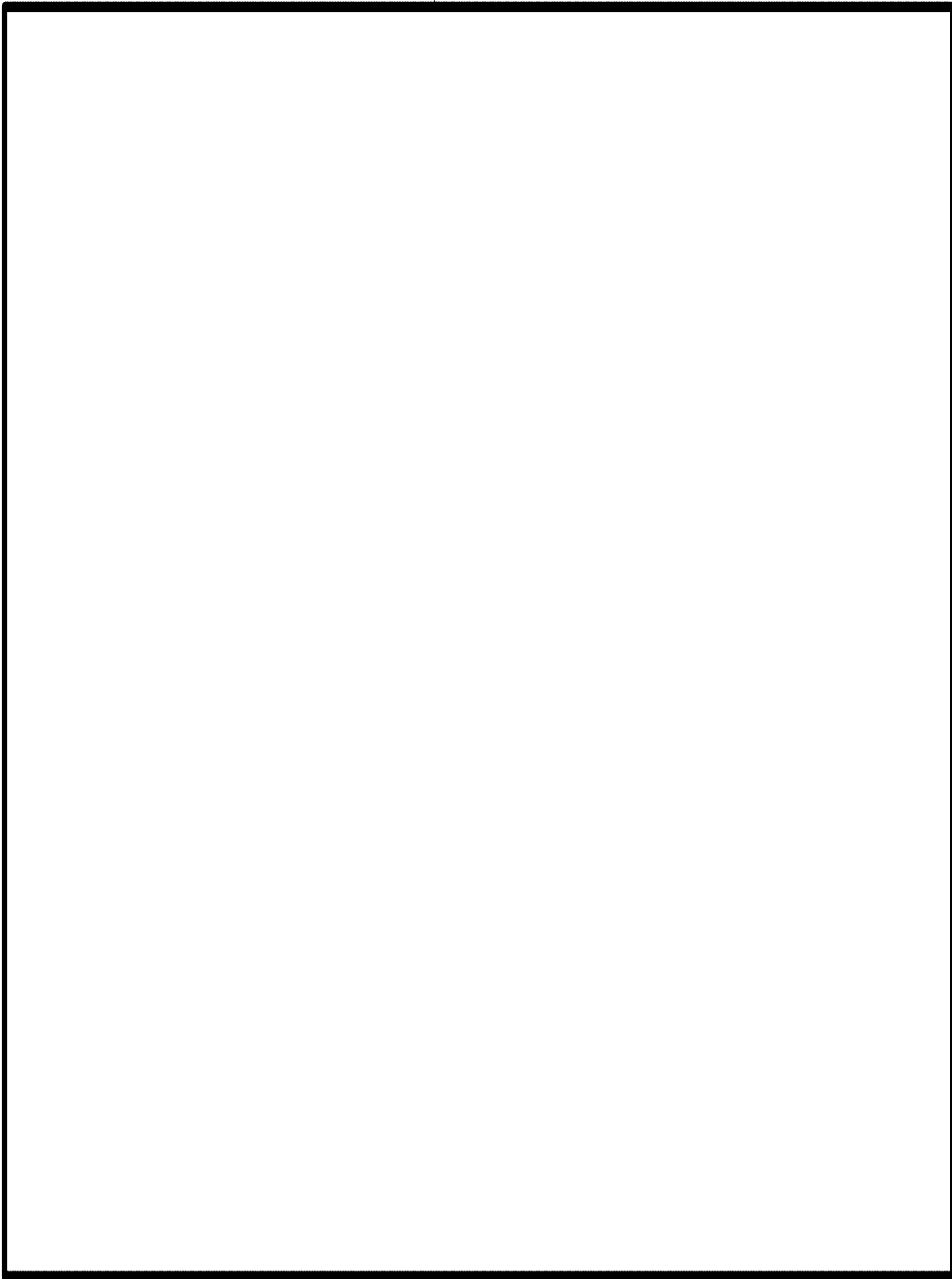
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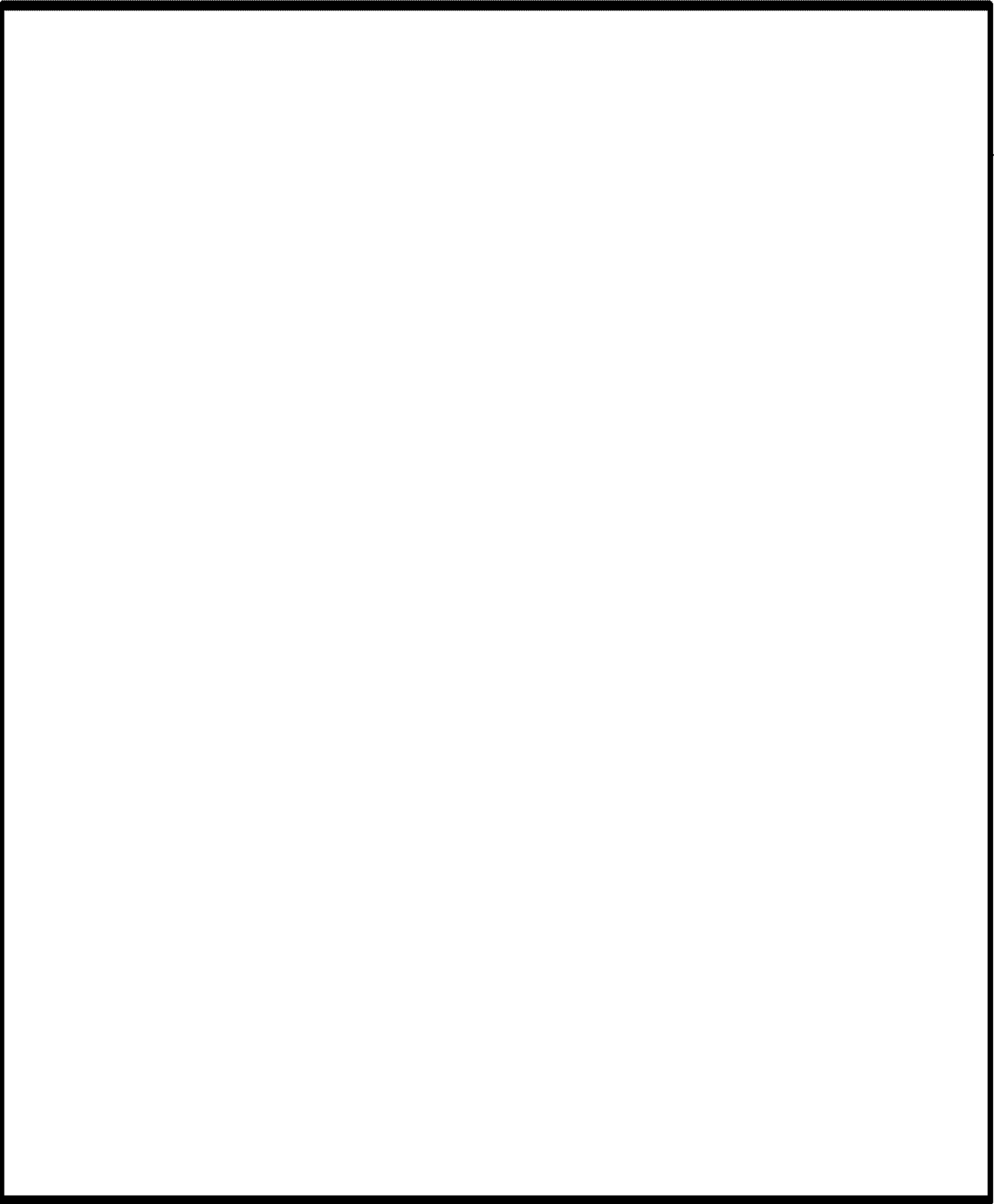


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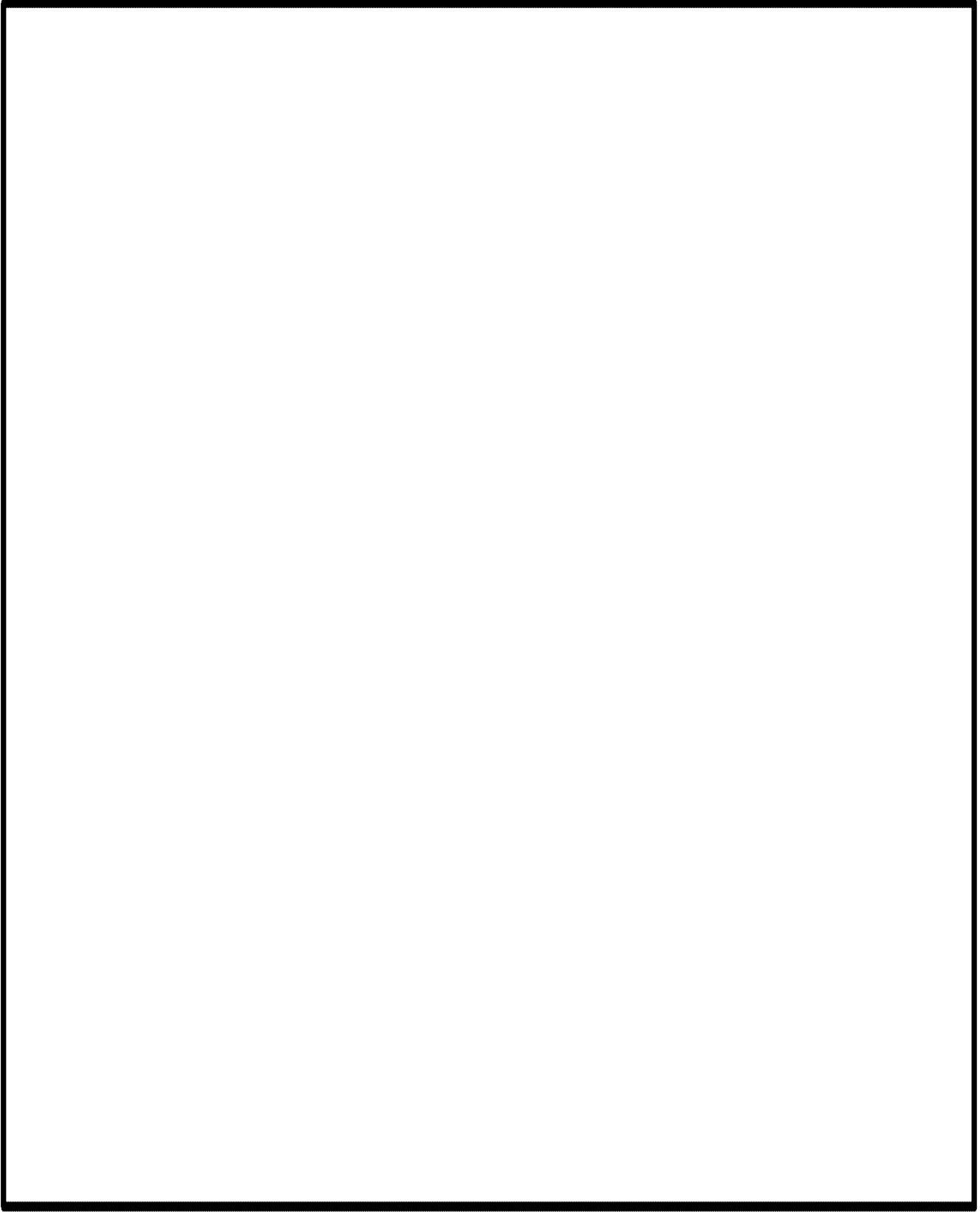
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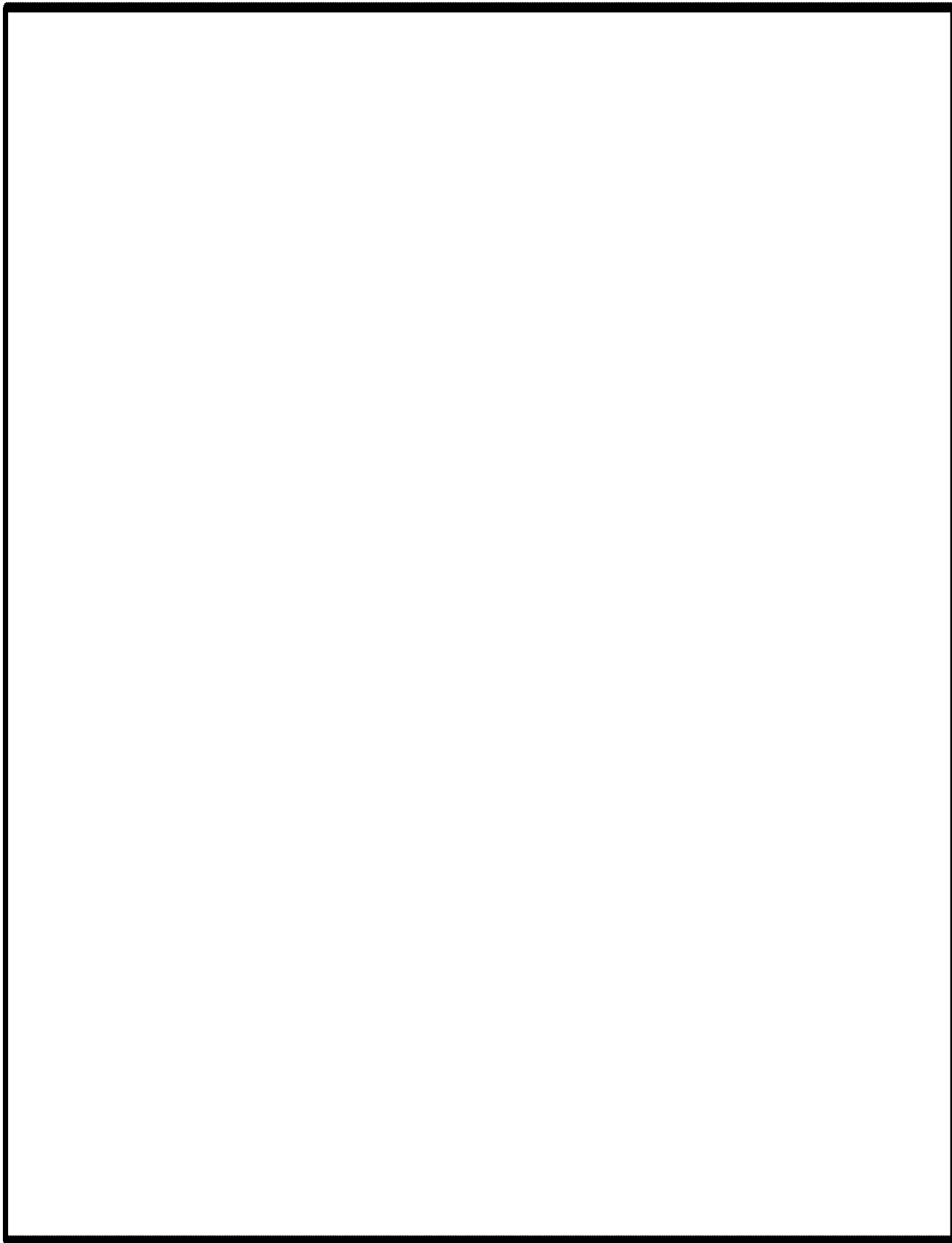
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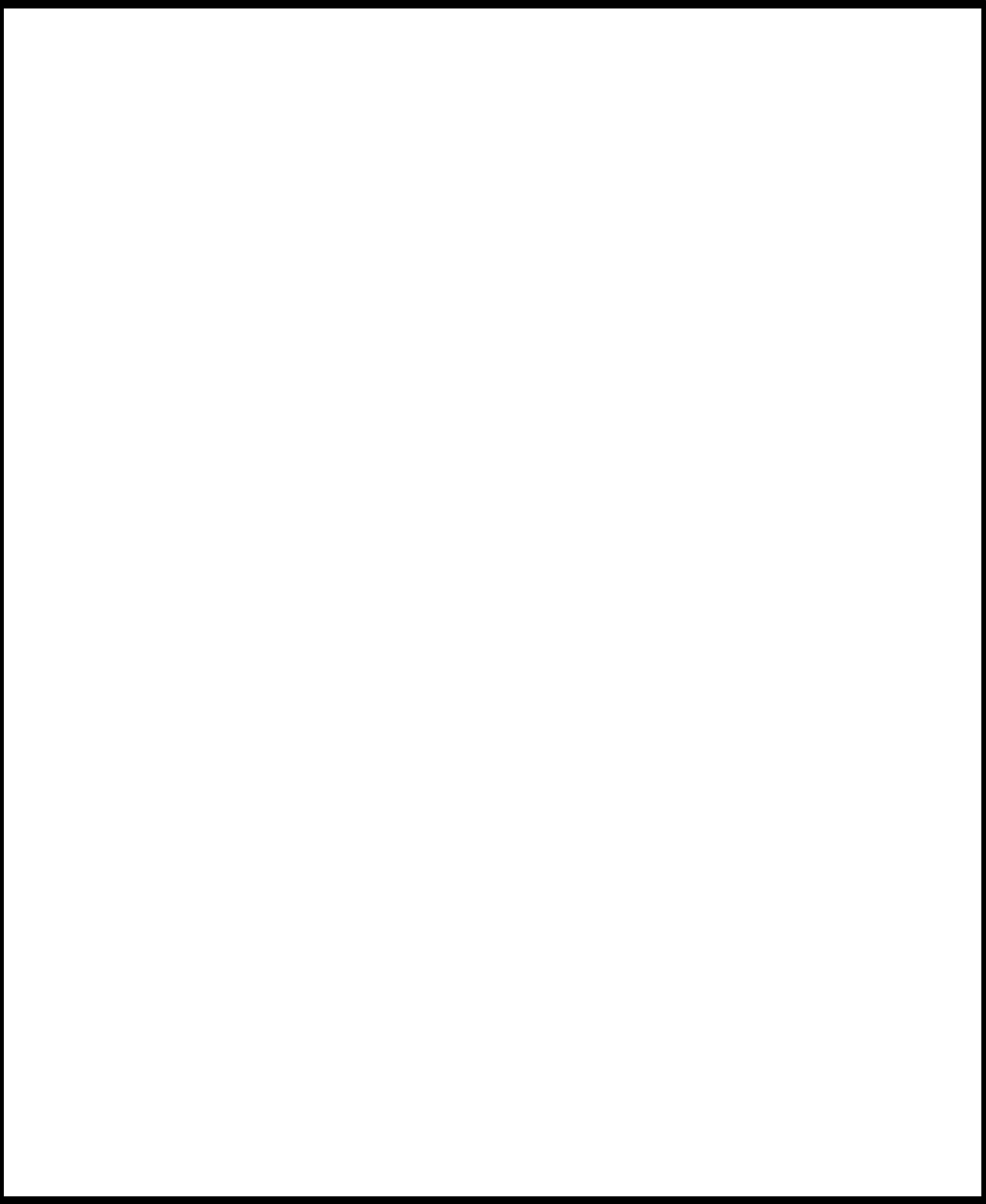


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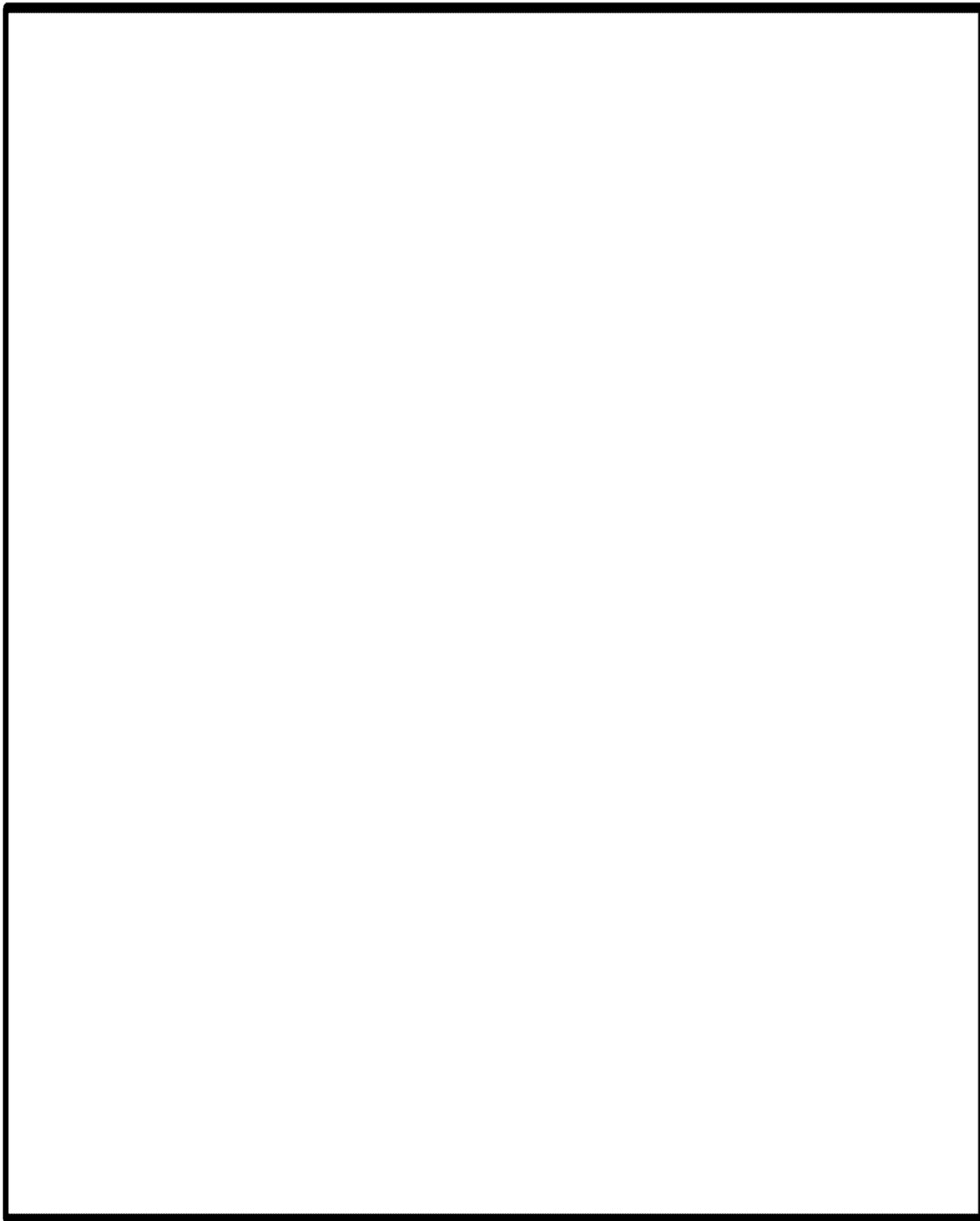


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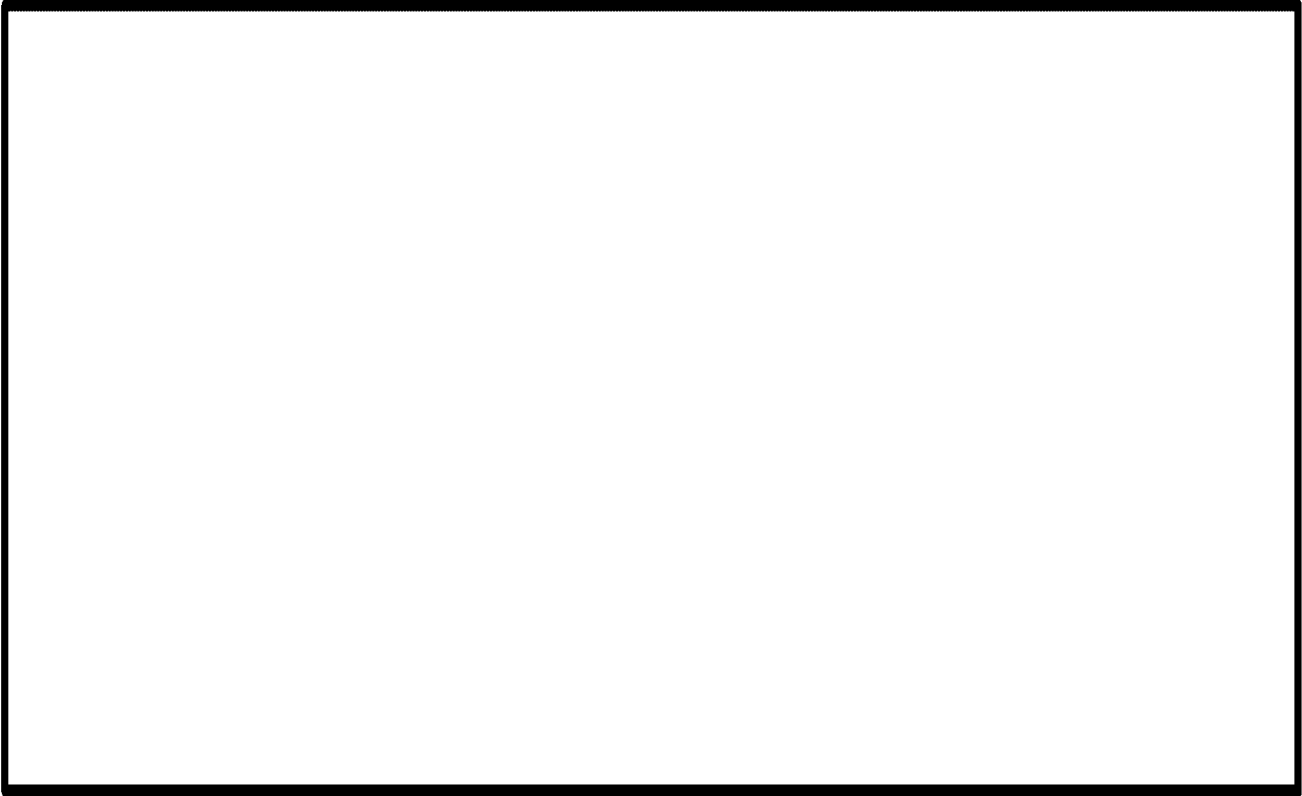
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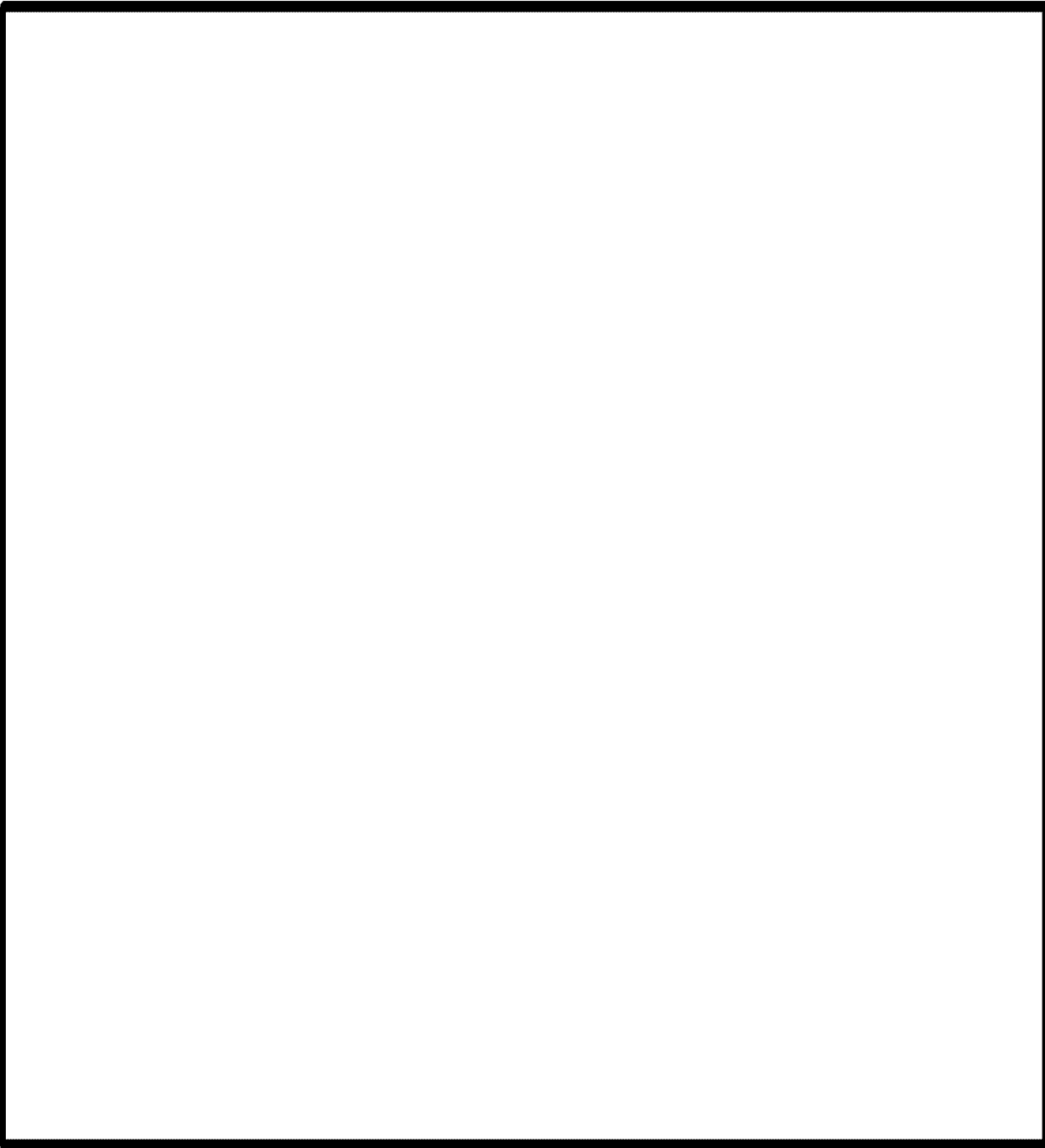


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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

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

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).

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)

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)

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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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION.....61

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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.

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

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 Persecution, 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).

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

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).

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); *Picherskaia 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 RAO 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.

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.

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

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); *Mihaley 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).

- 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

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.

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., *Vaduya v. INS*, 131 F.3d 689, 690 (7th Cir. 1997); and *Lunaj 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.

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 Danielius, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), pp. 117-18. For additional information, see RAIIO 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 RAIIO 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 UNHCR, *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.

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:

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. USDQJ*, 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).

- 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 livelihood⁶⁰
- 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).

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 accorded⁶¹

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).

- 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.

- 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).

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:

⁷⁸ *Beck v. Mukasey*, 527 F.3d 737, 741 (8th Cir. 2008).

⁷⁹ *Gormley v. Ashcroft*, 364 F.3d 1172 (9th Cir. 2004).

⁸⁰ *Hinri 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.

- 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 others⁸⁴
- 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).

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

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.

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

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 RAIIO 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.

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

¹⁰² See *Matter of Villalita*, 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).

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 attempts¹⁰⁵

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).

- evidence the government actors condoned the acts
- evidence of an inability on the part of the government to prevent the acts¹⁰⁷

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).

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).

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.

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,

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)

- 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).

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.

PRACTICAL EXERCISESPractical 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

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,

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.

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

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

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

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

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

"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

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

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.

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*!"

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.

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.

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.

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**

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.

OTHER MATERIALS

There are no Other Materials for this module.

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

<u>RAD Supplement</u>
Module Section Subheading

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. 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).

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)

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).

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 of 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).

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)

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 care¹⁴²
- debilitation and homelessness due to unavailability of specific medications¹⁴³

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 *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155, 162 (3d Cir. 2011).

¹⁴³ *Kholiyavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008).

¹⁴⁴ For additional information, see section on Economic Harm.

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.

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.

ADDITIONAL RESOURCES

- 1.

SUPPLEMENTS

<u>IO Supplement</u>
Module Section Subheading

Past Persecution and Well-Founded Fear: Part III

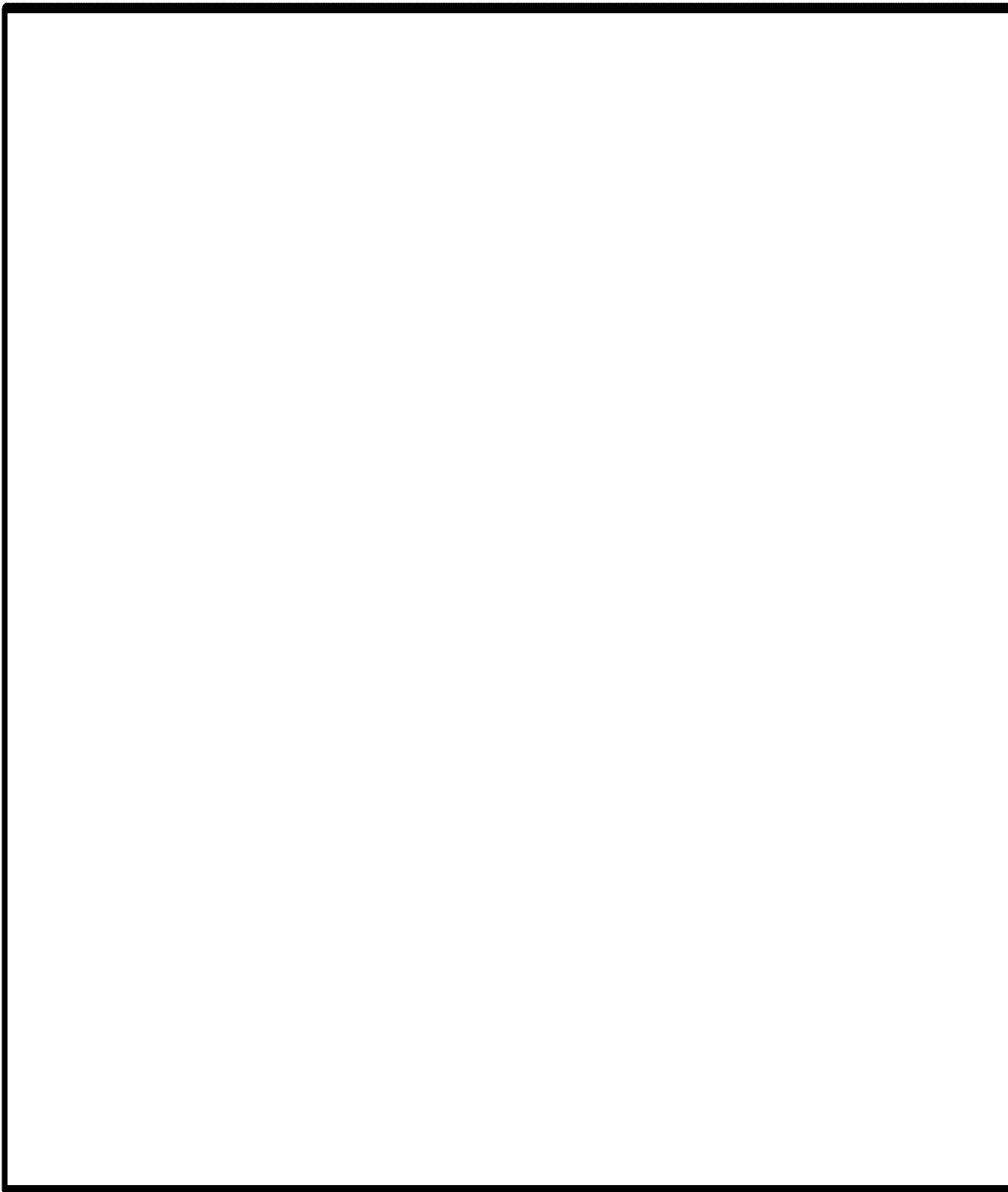
Eva Garon and Christie Valentine, Refugee Officers



U.S. Citizenship
and Immigration
Services

July 2015
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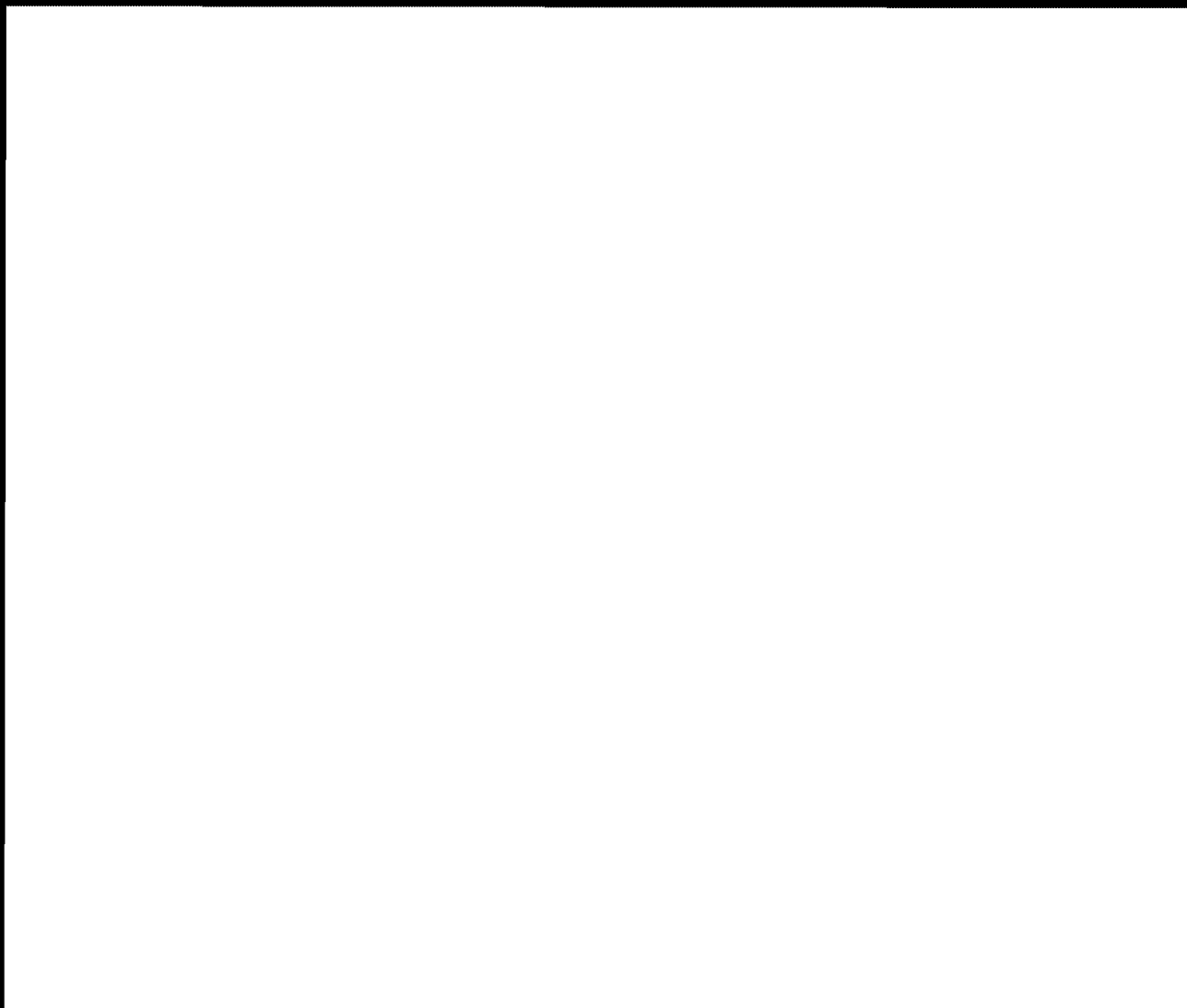
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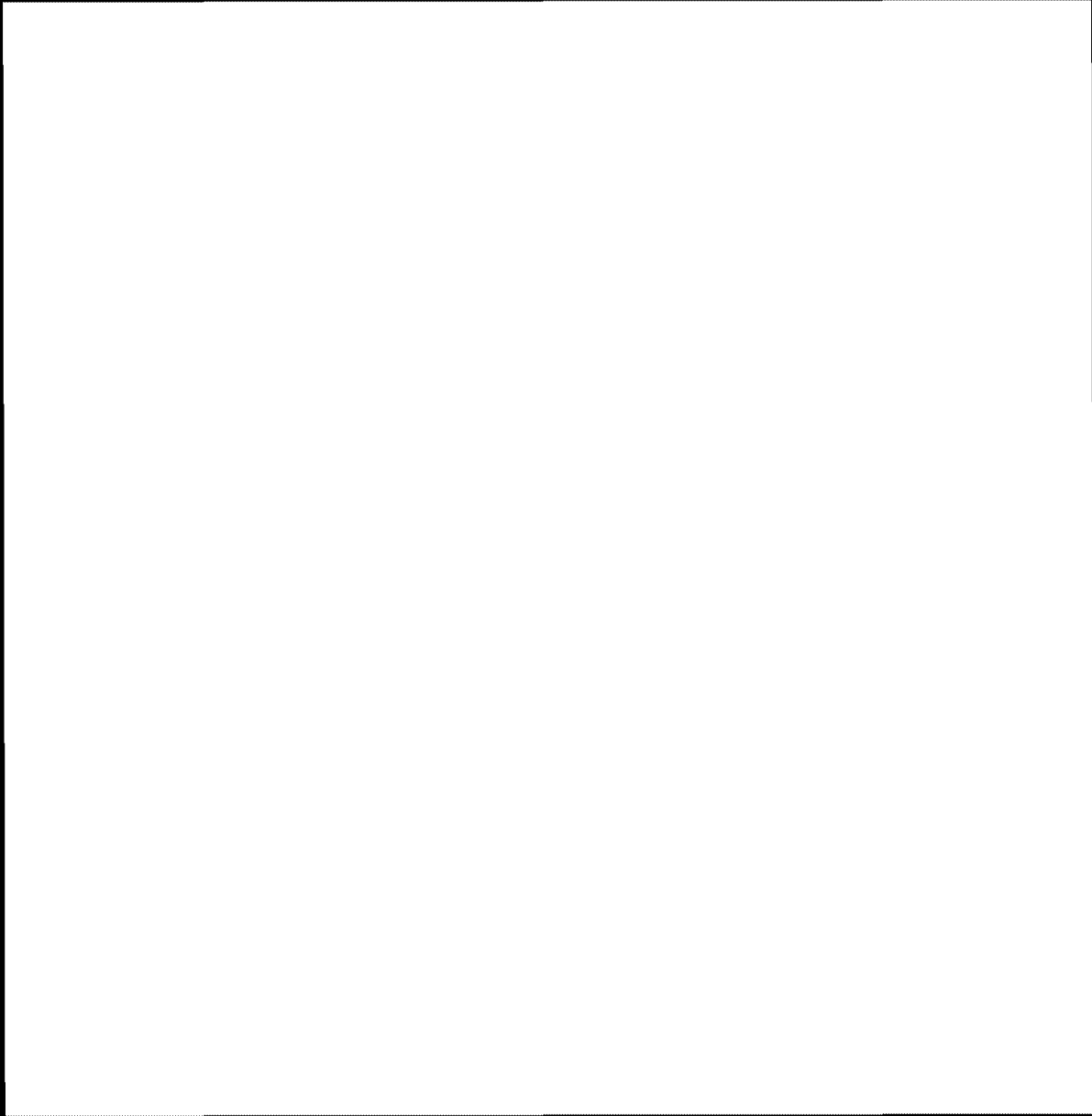
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Past Persecution

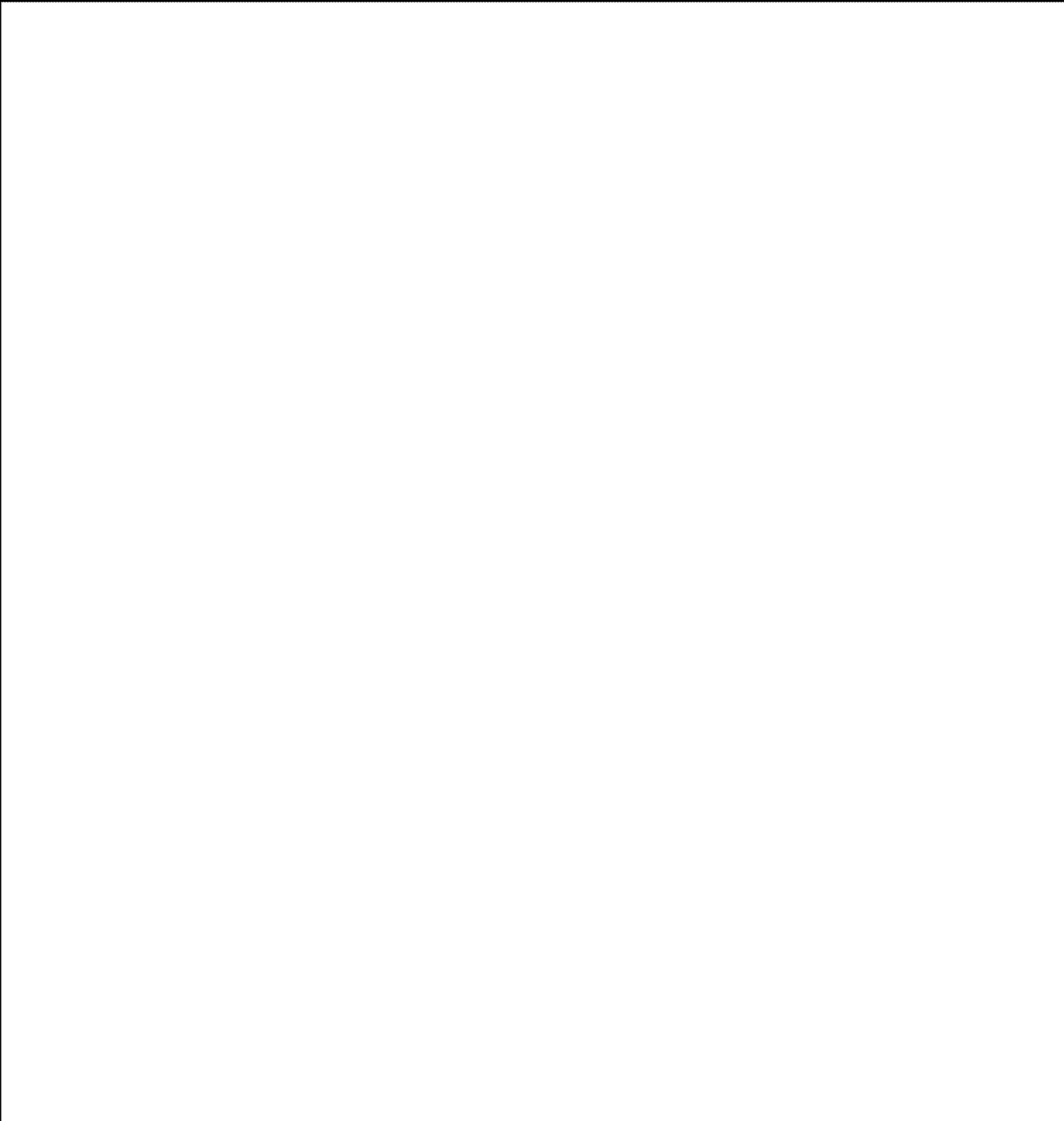
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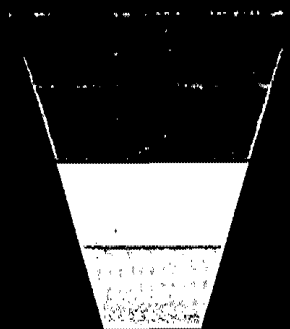
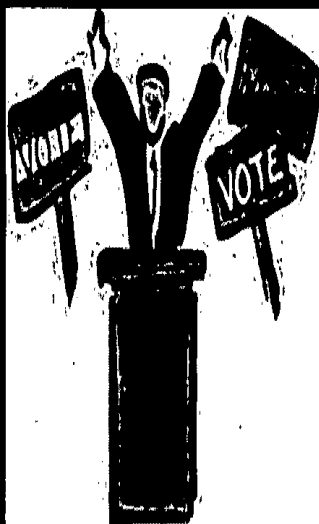
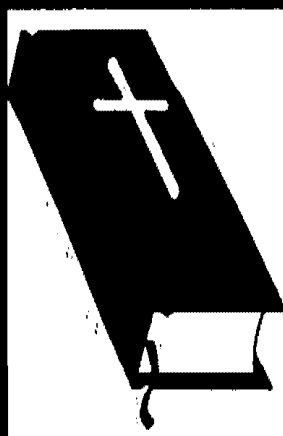
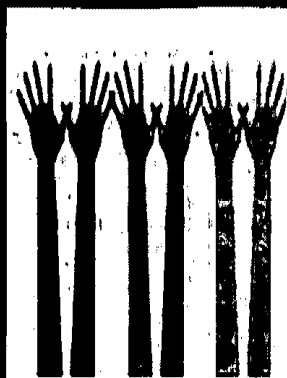


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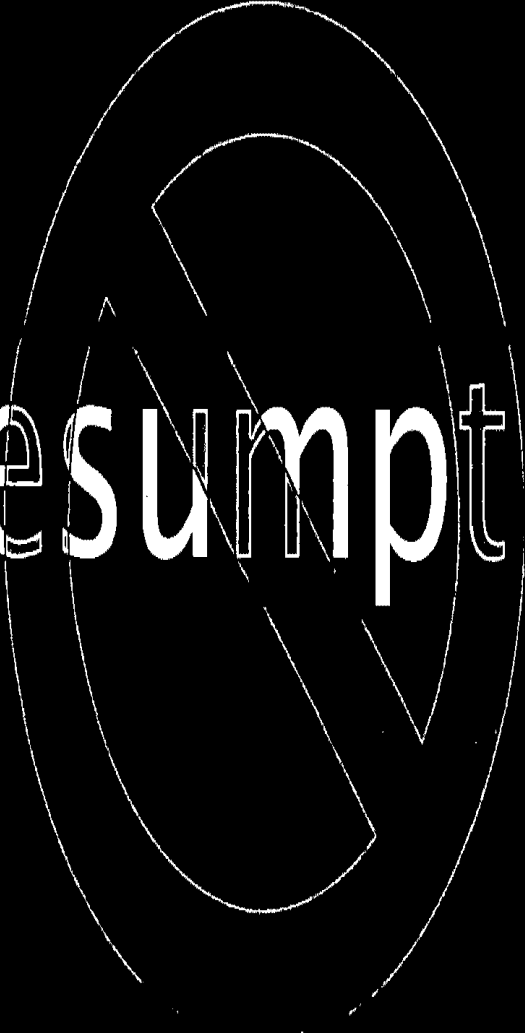


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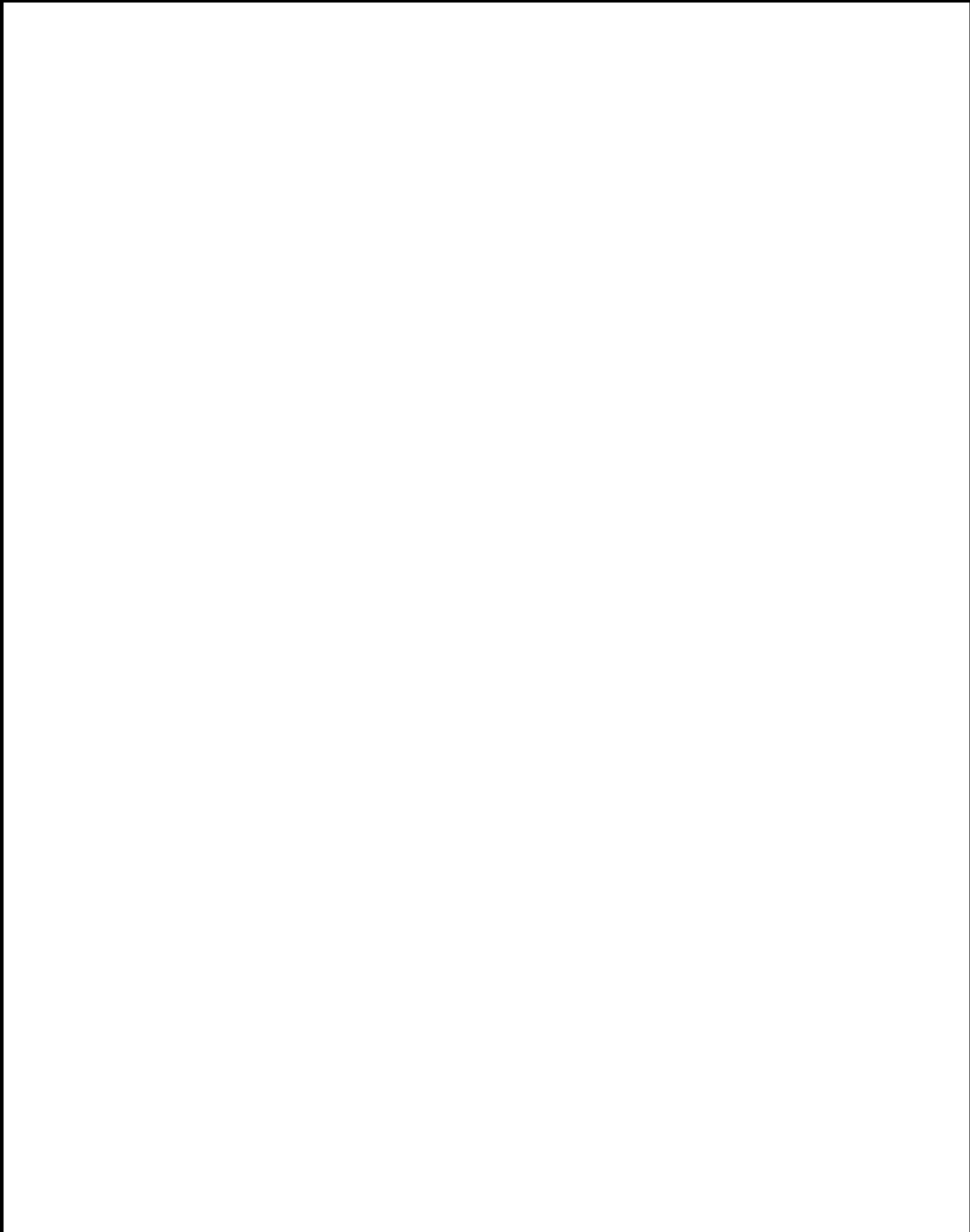


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Presumption?

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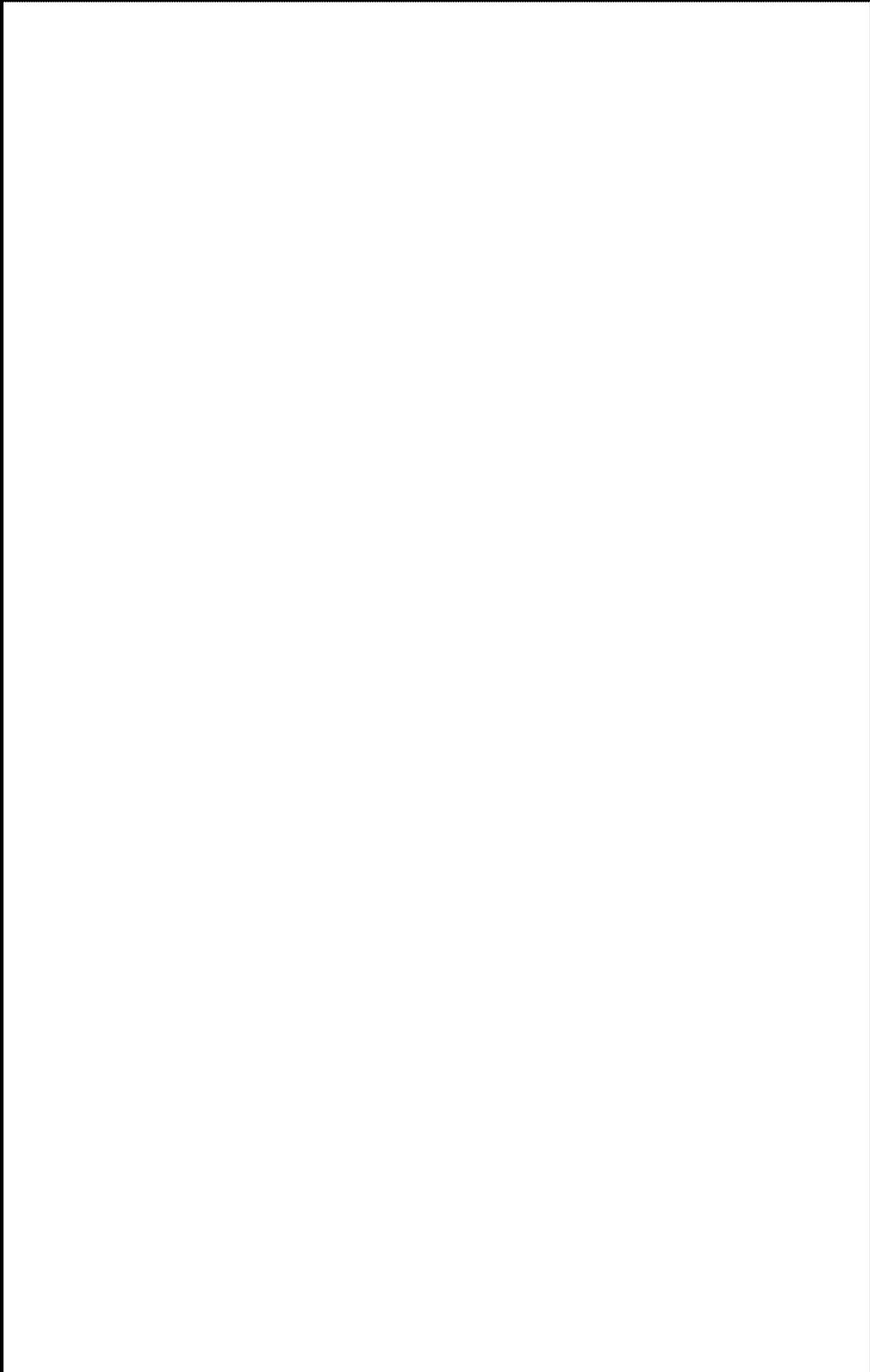


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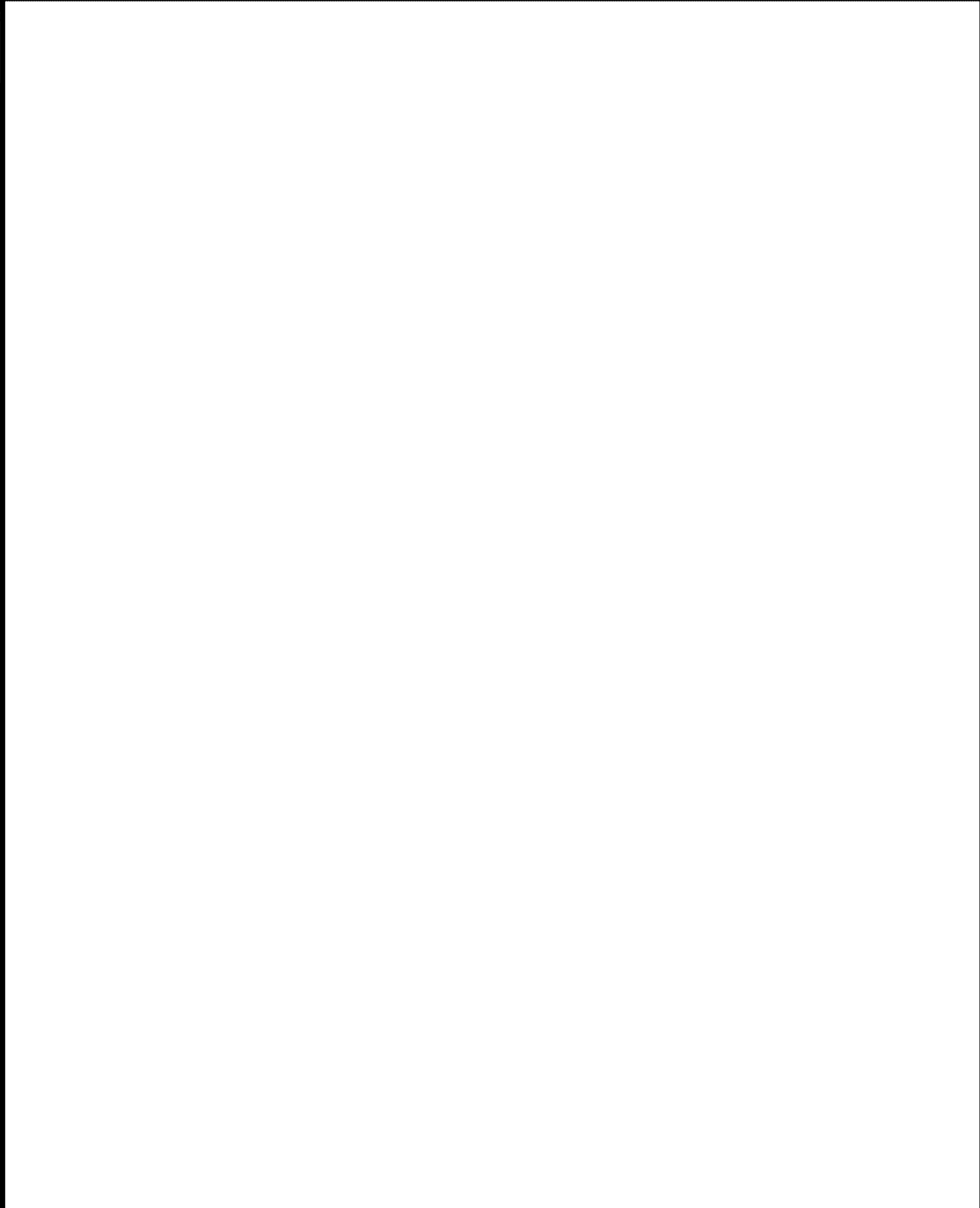
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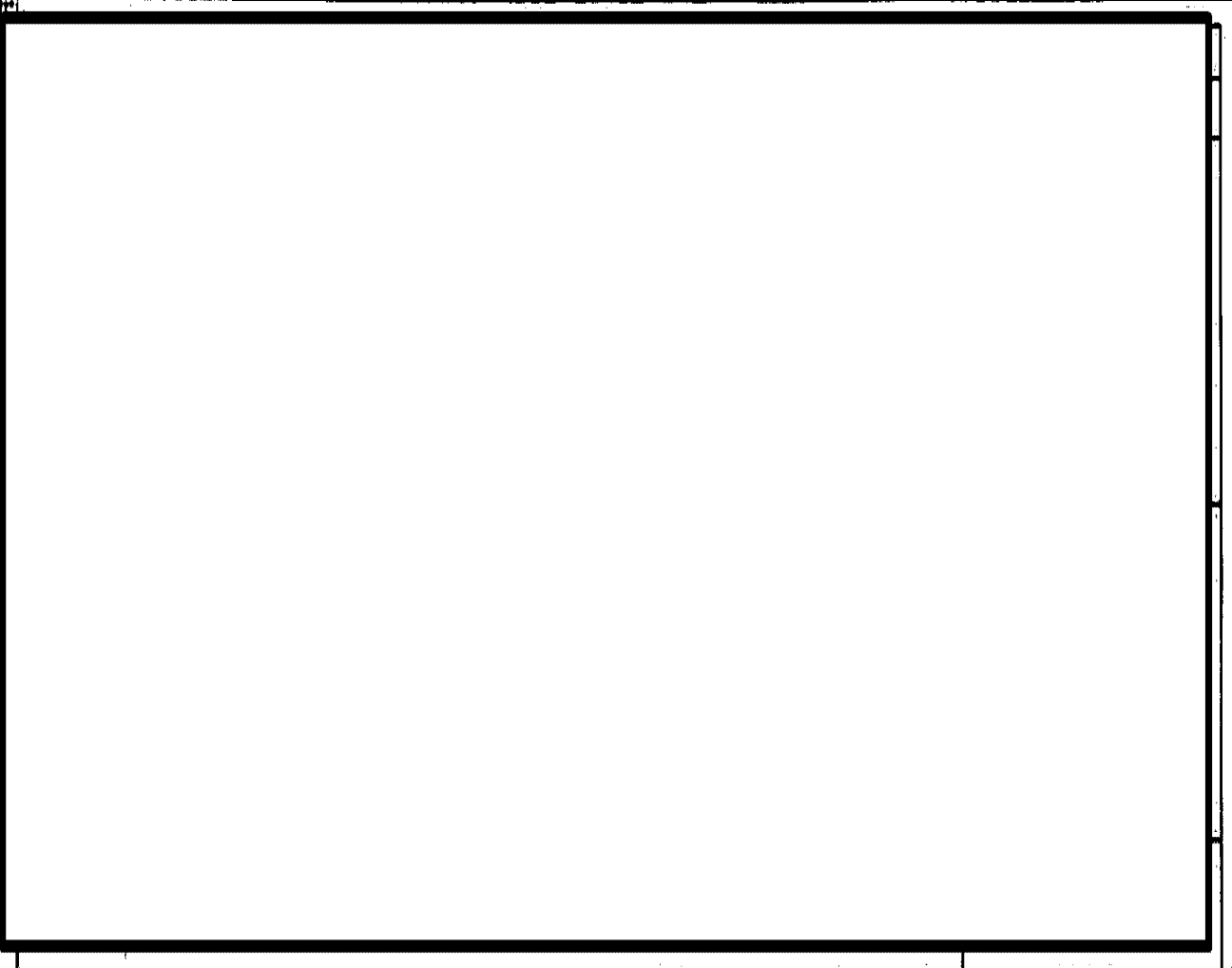


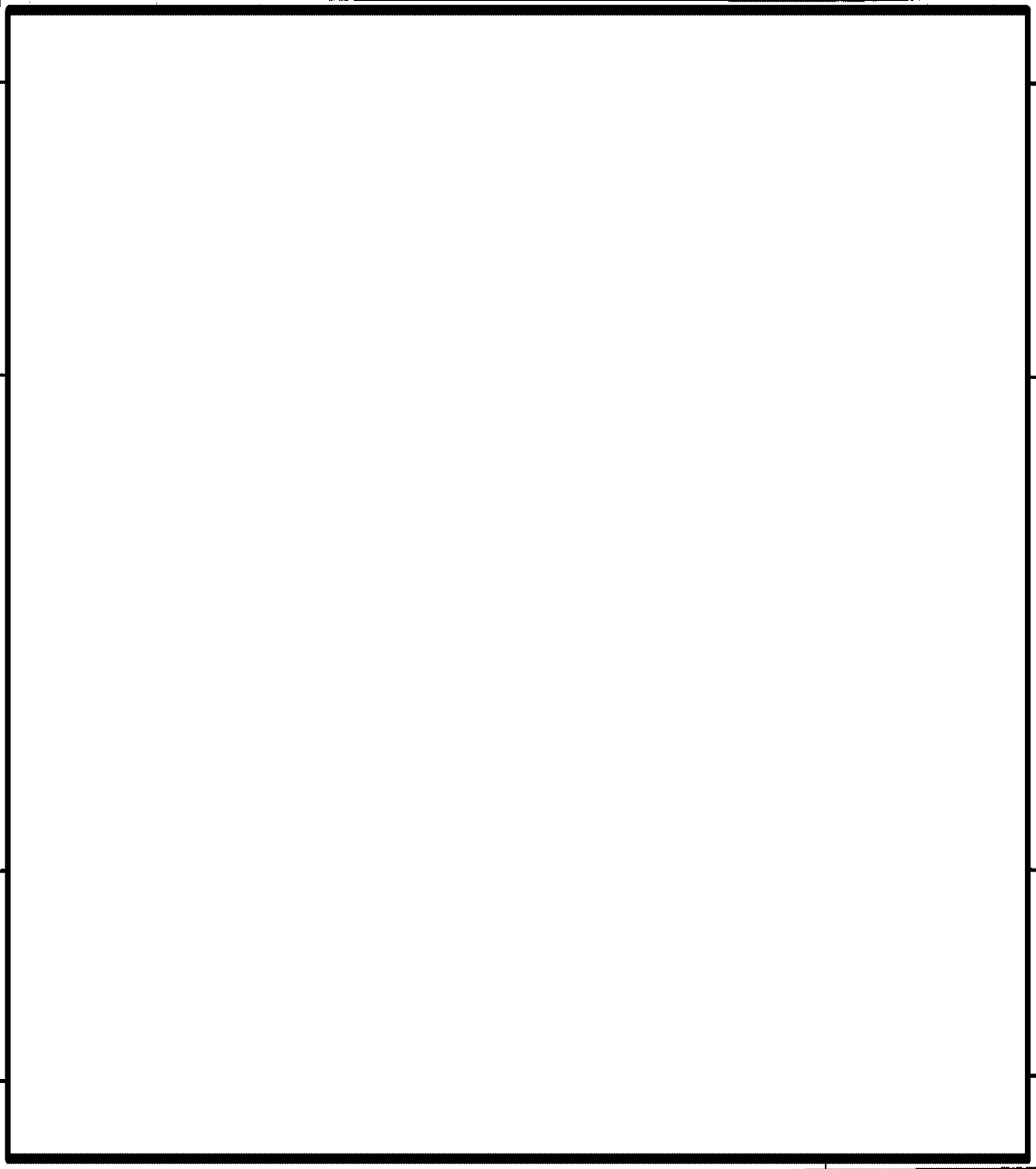
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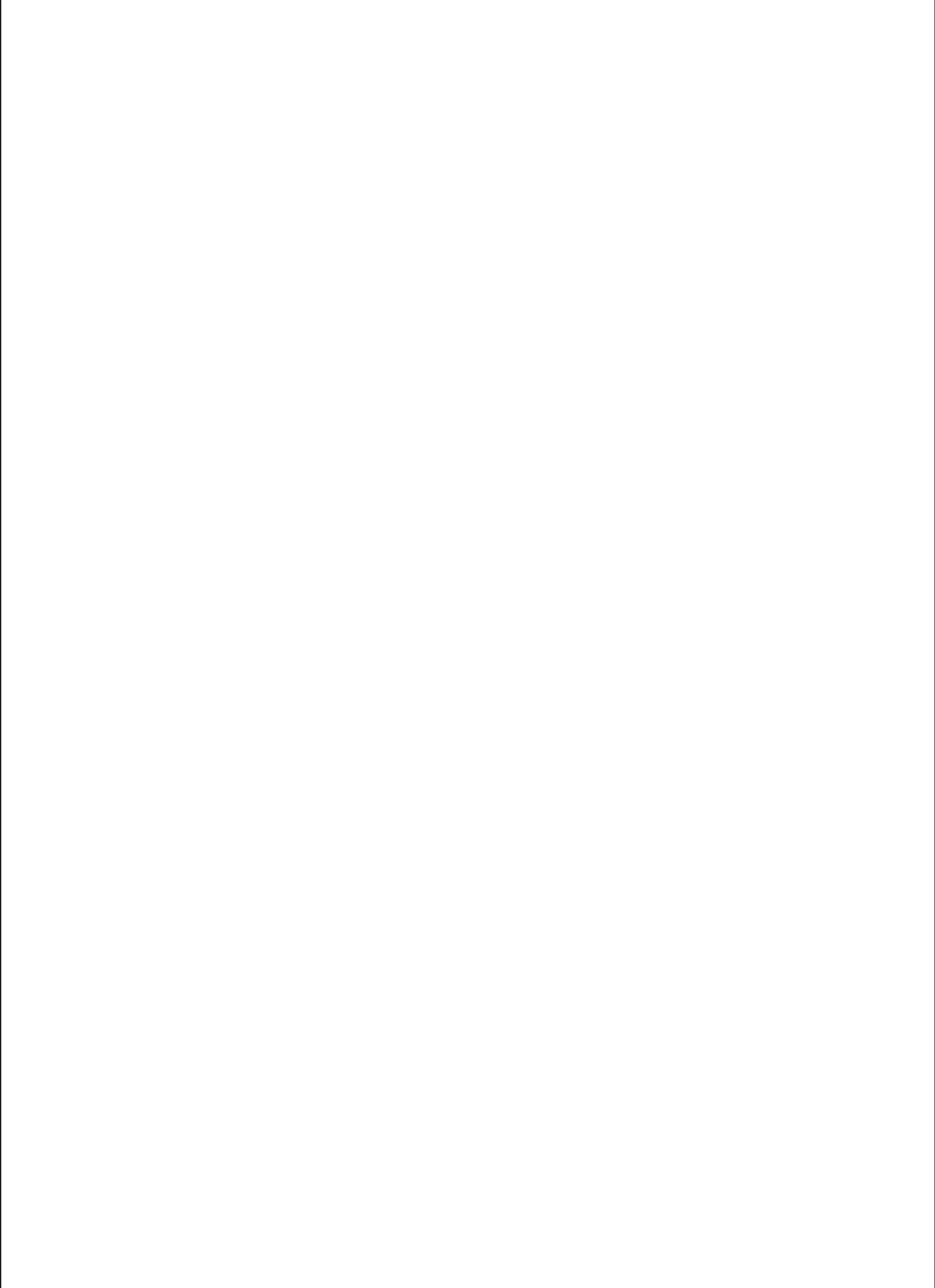
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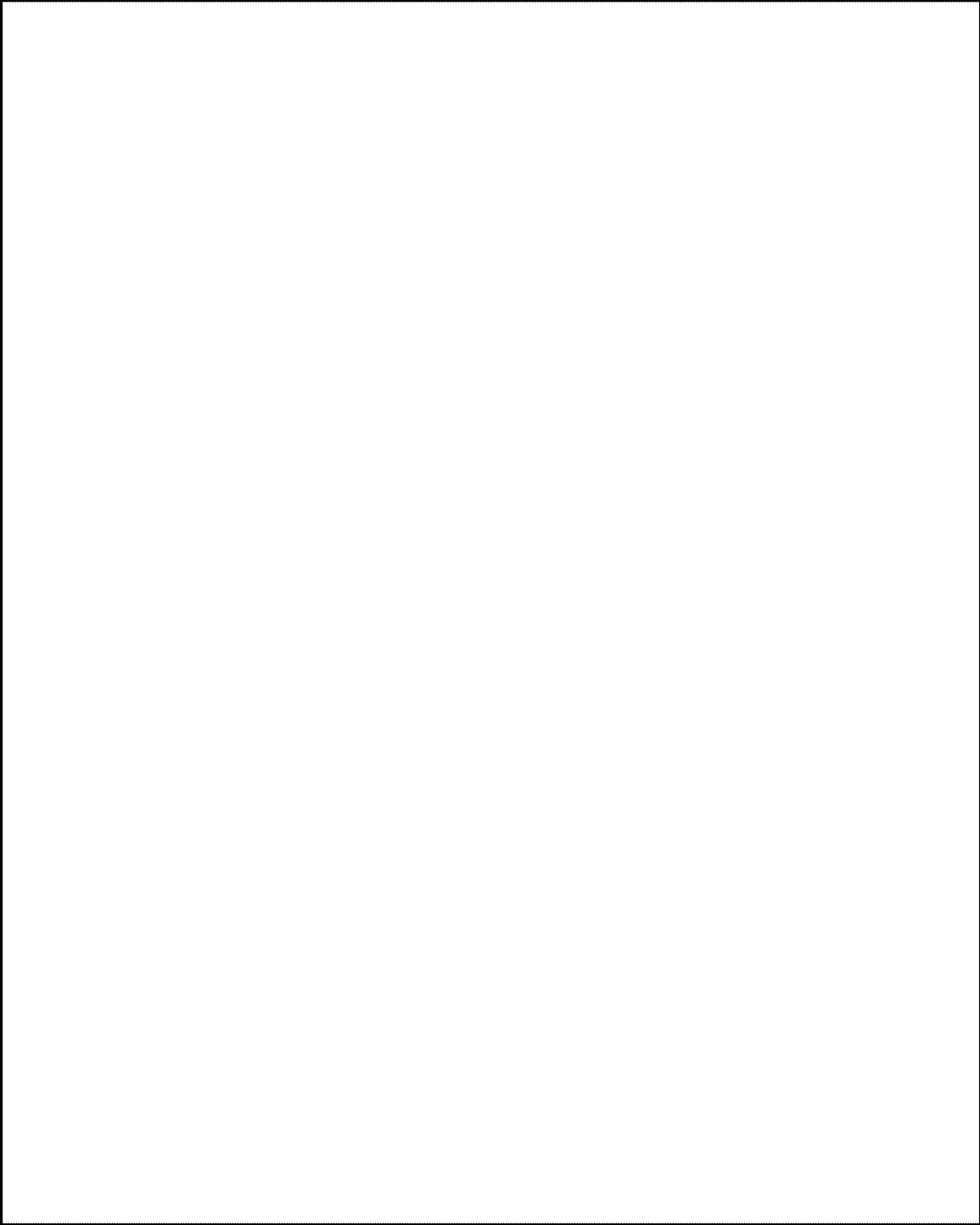
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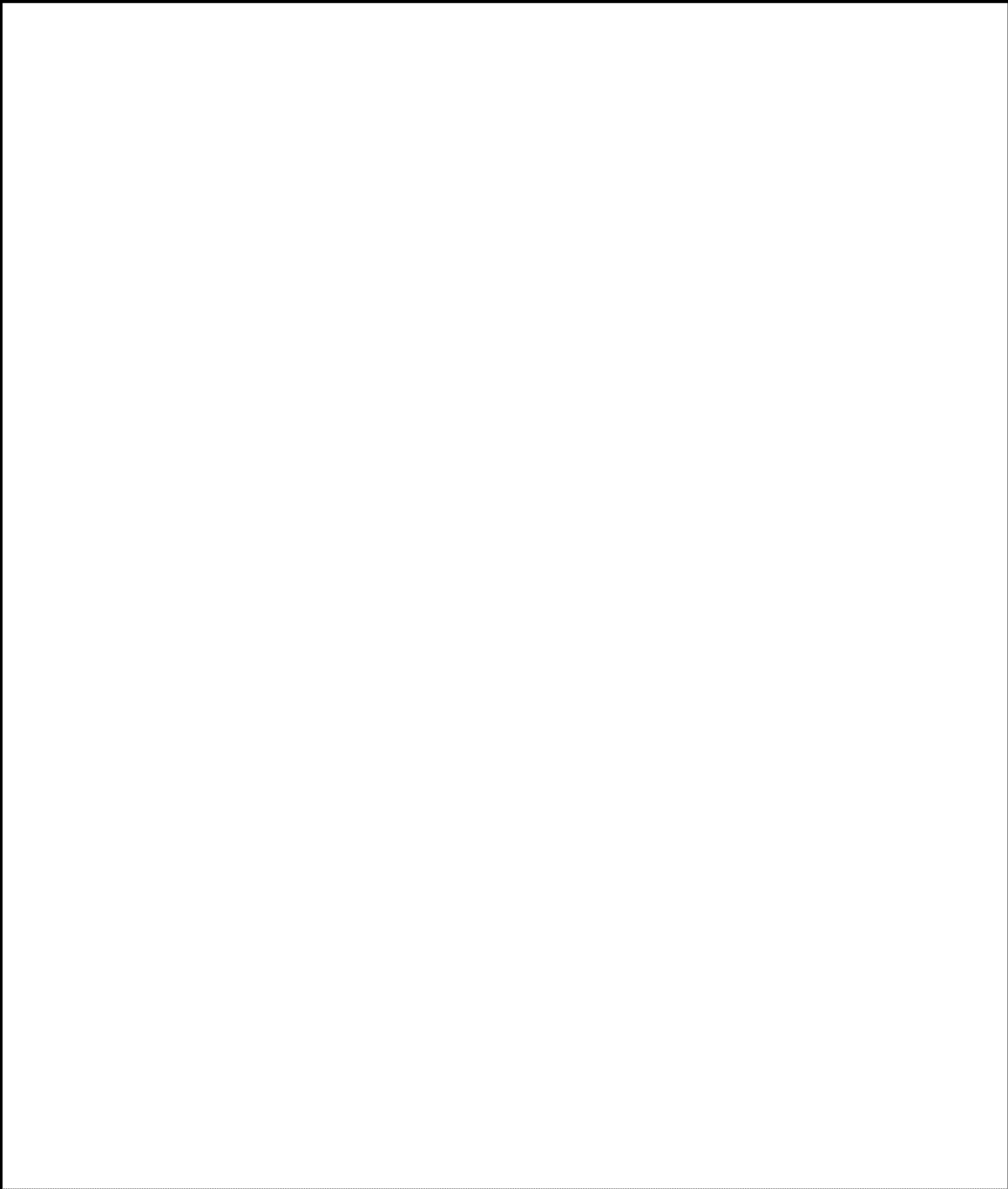
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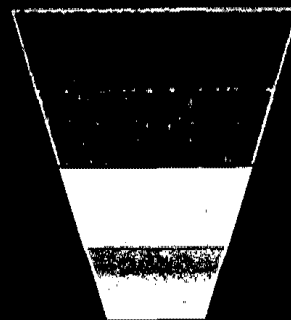
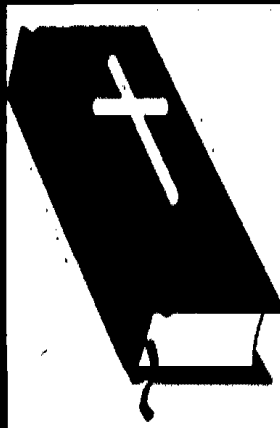
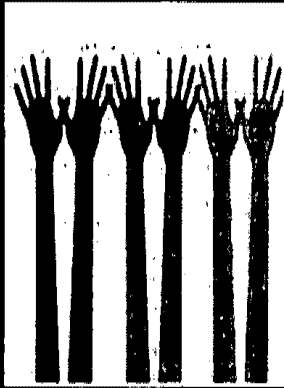


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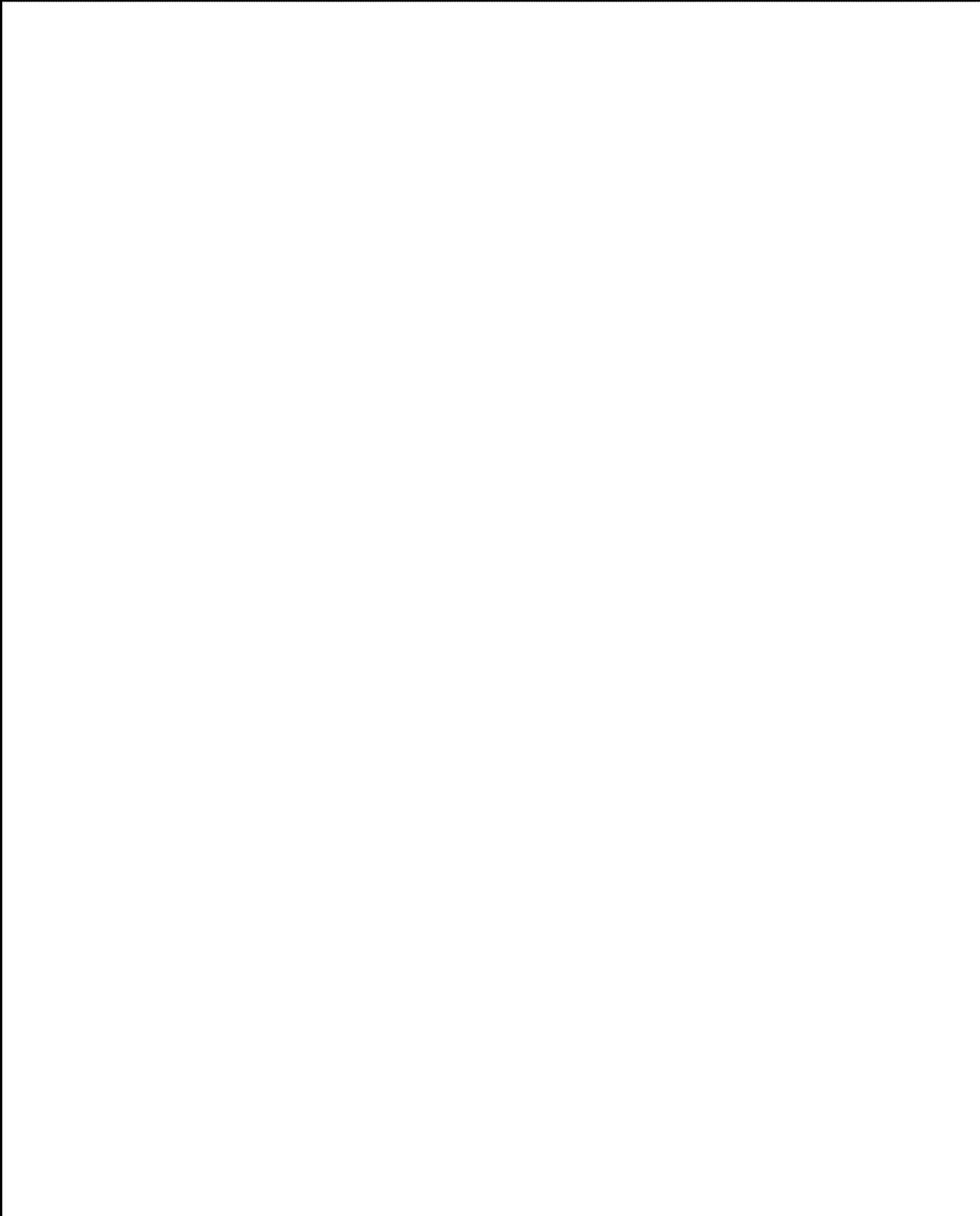


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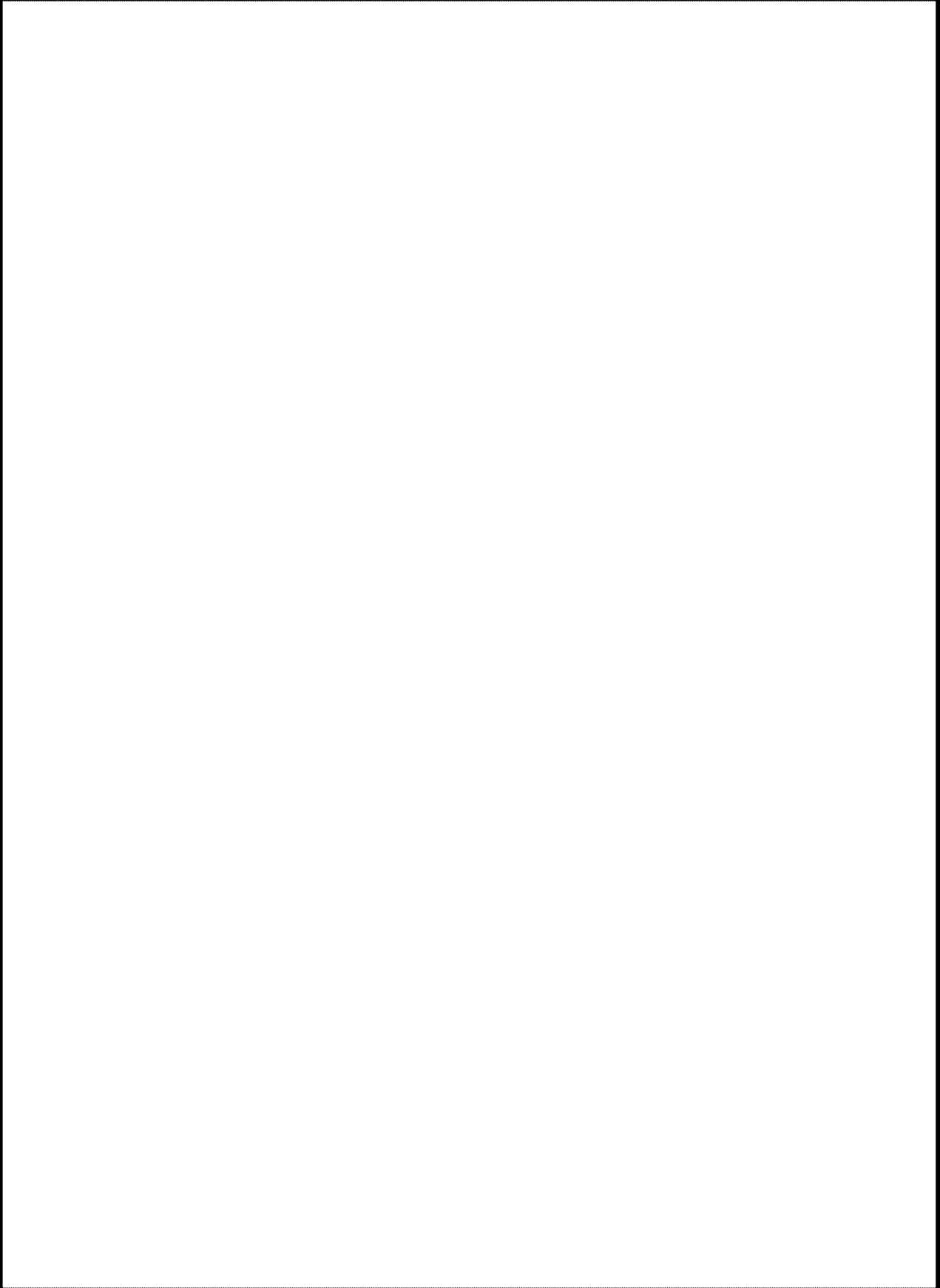
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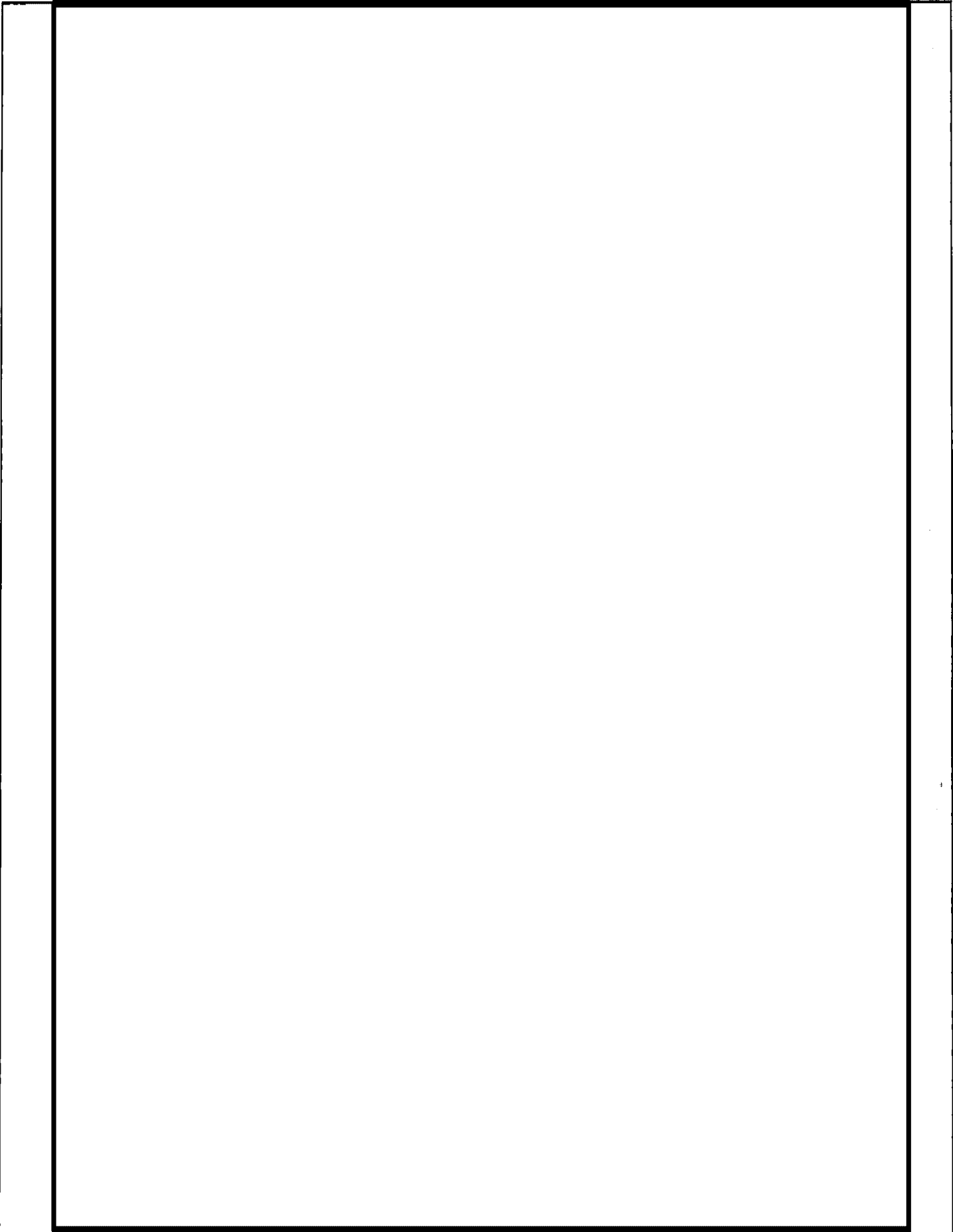
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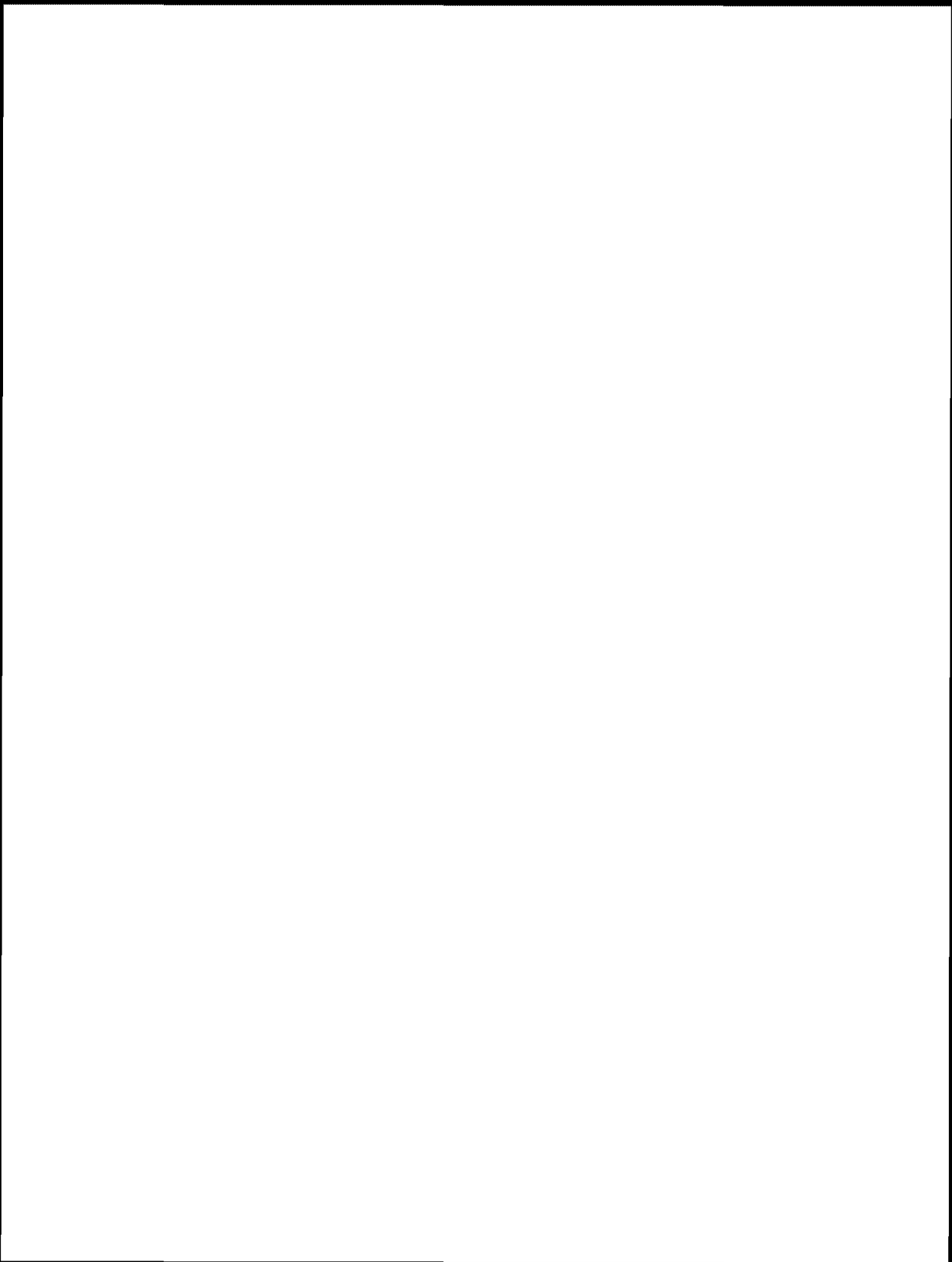
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Response to Query

Date: May 29, 2013

Subject: PSGs within the context of sexual and gender based violence against Congolese women.

Keywords: country conditions, PSG, women-at-risk, Congolese women, DRC, sexual and gender based violence, abduction, social ostracism

Query: Under what circumstances might Congolese women be found eligible for refugee protection as members of a particular social group (PSG)?

Response: Three specific types of fact patterns have emerged during interviews with Congolese women-at-risk: 1) Claims involving sexual assault, rape, and sexual and gender based violence (SGBV) 2) Claims involving women being abducted by armed groups and forced to be “bush wives”, and 3) Claims involving Congolese women without effective familial protection. Outlined below are considerations that were recommended in that specific context for analysis of possible PSG-based claims. However, guidance for analysis in forming these types of PSGs may also be applicable in other contexts as similar fact patterns emerge elsewhere.

General information on PSG

(1) The members of a particular social group must share a common, immutable characteristic, which may be an innate one, such as sex, color, or kinship ties, or a shared past experience, such as former military leadership, but it must be one that members of the group either cannot change, or should not be required to change, because it is fundamental to their individual identities or consciences. *Matter of Acosta*, 19 I&N Dec. 211, 233-24 (BIA 1985).

(2) The social “visibility” or “distinction” of a claimed social group is an important consideration in identifying the existence of a “particular social group” for the purpose of determining whether a person qualifies as a refugee. One way to meet this requirement is to establish that the society in question distinguishes people who have the trait from people who do not have the trait in significant ways. *Matter of C-A-*, 23 I&N Dec. 591 (BIA 2006).

(3) The group cannot be defined by terrorist, criminal or persecutory activity or association, past or present.

(4) The particular social group in which the applicant claims membership cannot be defined by the harm that the applicant experienced (for evaluating past persecution) or fears (for evaluating well-founded fear). Circular reasoning should not be used to describe the group. The particular social group must have existed before the persecution began. However, if women who were sexually assaulted or raped by militants in the DRC are viewed distinctly by elements of society in that country, and ostracized or otherwise treated differently because of their past experience, that treatment might then be considered to be on account of their membership in a particular social group based on the past experience of harm. The harm the women may fear on this

account (whether it be social ostracism, repeated SGBV or other harm) is distinct from the past experience of the initial SGBV that defines the group.

Past Persecution on Account of Another Protected Ground

This guidance addresses PSG analysis in cases where an applicant is persecuted on account of a PSG that is defined by an applicant's experience of past harm. Of course, if that past harm is serious enough to be persecution and was inflicted on account of a different protected ground (e.g., actual or imputed political opinion or ethnicity), that past harm may be analyzed as past persecution on account of that other ground. In cases where there is not clear evidence of nexus between that initial past harm and a protected ground, however, exploration of these PSG theories may be appropriate.

Social status and PSG:

An individual's social status can be a characteristic that may define a particular social group.

Factors which may help define social status in the Congolese context:

- Gender
- Age
- Ethnicity
- Role within a domestic relationship
- Status as a female without relationships necessary for support within Congolese society
- Urban or rural background
- A combination of these or other traits

(1) Guidelines for analysis of claims involving sexual assault, rape, and sexual and gender based violence (SGBV):

PSG:

Congolese women who have been sexually assaulted, raped, or are the victim of SGBV and now face familial and social ostracism, other stigmatization, and/or other harm as a result of these experiences. Officers should look at what traits create the social status that causes an applicant to be subject to harm as a result of sexual assault, rape, or SGBV.

For past persecution or well-founded fear cases, persecution is objectively serious harm that is also experienced as serious harm by the applicant (i.e. subjectively serious harm).

Lines of questioning to pursue include:

- Has the applicant who survives sexual assault, rape or SGBV been blamed, ostracized, or rejected by their family or community?
- Has the applicant been abandoned by their husband or other family members or ejected from their homes?
- Was the applicant subject to rape or sexual assault in front of family or community members in an attempt by the perpetrator to increase social isolation of the victim?
- Was the applicant left without effective familial protection after the sexual assault, rape or SGBV?

- Did the applicant not seek medical treatment after the sexual assault, rape or SGBV due to the stigma involved?
- Was a child born of the rape? Is the child also socially ostracized?
- How does the applicant view herself after her experience(s) of sexual assault, rape or SGBV?
- Does she devalue or stigmatize herself or feel that others devalue or stigmatize her?
- Does society view the applicant as socially distinct because she experienced sexual assault, rape or SGBV?

Past Persecution:

Is there testimony or other evidence that allows the officer to conclude that the applicant has suffered sexual assault, rape or SGBV? Has the applicant faced social and familial ostracism as a result of these experiences? Has the applicant faced additional, repeated sexual assault, rape or SGBV as a result of the social status created by the initial harm? Has the applicant experienced other harm that rises to the level of persecution? If so, document how these additional harms rise to the level of persecution.

Well-Founded Fear:

In evaluating whether the feared future harm rises to the level of persecution, the interviewing officer may consider:

- What harm would the applicant suffer on account of being sexually assaulted, raped, or experiencing other SGBV in the DRC?
- Would she be socially distinct as a victim of sexual assault, rape or SGBV and face social or familial ostracism?
- Would the applicant be more vulnerable to further instances of sexual assault, rape or SGBV based on her past experiences of SGBV?
- Would the applicant be more vulnerable to other types of harm?
- Do country conditions indicate that the police or judicial system are able and willing to protect women, in particular women who are known to be victims of past sexual assault, rape or SGBV from future instances of harm?

(2) Guidelines for analysis of claims involving women abducted by armed groups and forced to be “bush wives”¹:

PSG:

Congolese women who have been abducted by armed groups and forced to be “bush wives” who face familial and social ostracism, other stigmatization, and/or other harm as a result of their abduction.

Lines of questioning to pursue include:

- How long was the applicant held in captivity?

¹ The term “bush wife” refers to women and girls who have been abducted by a militia or armed group and forced into “marriage”, including domestic and sexual servitude while being held against their will in isolated and remote locations.

- How old was the applicant when she was abducted?
- Was the applicant sexually assaulted or raped or the victim of other SGBV during her abduction?²
- What other duties was the applicant forced to perform for her abductors?³
- Is the applicant now identified with or associated with the armed group by others in her family or community?
- Was a child born to the applicant during or after her abduction?
- How is the applicant recognized as a “bush wife”?
- Is the applicant stigmatized by others as a result of her abduction and role as a “bush wife”?

Past Persecution:

Is there testimony or other evidence that allows the officer to conclude that the applicant has been abducted and forced to be a “bush wife”? Has the applicant experienced familial and social ostracism or other stigmatization as a result of her abduction? Has the applicant faced any other kinds of harm (e.g., additional rape, sexual assault, SGBV or other harm) because of the stigma of having been a “bush wife”? If so, does it rise to the level of persecution?

Well-Founded Fear:

In evaluating whether the feared future harm rises to the level of persecution, the interviewing officer may consider:

- What harm would the applicant suffer on account of having been abducted and forced to be a “bush wife” in the DRC?
- Is the applicant particularly vulnerable to subsequent abductions if she returns? Could the applicant be targeted for further SGBV or other harm because of her perceived association with a particular militia or armed group?
- Does the social distinction of the applicant as a former “bush wife” subject the applicant to social and familial stigmatization?
- Could the applicant be subjected to further instances of sexual assault, rape or SGBV based on her designation as a “bush wife”?
- Do country conditions indicate that the police or judicial system are able and willing to protect women from future instances of harm, particularly women who share the applicant’s experience as a forced “bush wife”?

(3) Guidelines for analysis of claims involving Congolese women without effective familial protection:

PSG

² Please note that forced sexual activity is not material support.

³ The interviewing officer must do a complete TRIG analysis to ensure that no inadmissibilities apply as a result of activities performed during the applicant’s abduction. When an applicant has been forced to be a “bush wife”, certain activities such as cooking, cleaning, washing clothes or any other similar chores would be considered material support. Relevant questions should be asked to establish whether the applicant acted under duress.

Congolese women without effective familial protection who face social ostracism, other stigmatization, and/or other harm because they lack familial protection.

Lines of questioning to pursue include:

- Has the applicant been ostracized or rejected by their community because she lacks effective familial protection?
- Under what circumstances did the applicant become separated from other family members?
- Has the applicant faced sexual assault, rape, or SGBV because she lacks effective familial protection?
- Has the applicant faced other harm because she lacks effective familial protection?
- How does the applicant view herself because she lacks effective familial protection? Does she devalue or stigmatize herself or feel that others devalue or stigmatize her?
- Does society view the applicant as socially distinct because she lacks effective familial protection?
- How are women living alone in refugee or IDP camps perceived?

Past Persecution

Is there testimony or other evidence that allows the officer to conclude that the applicant has been subject to harm on account of her lack of effective familial protection? What forms has this harm taken? Are they serious enough to be considered persecution? Officers should look at what traits create the social status that causes an applicant to be subject to harm if she were to return to Congo without effective familial protection.

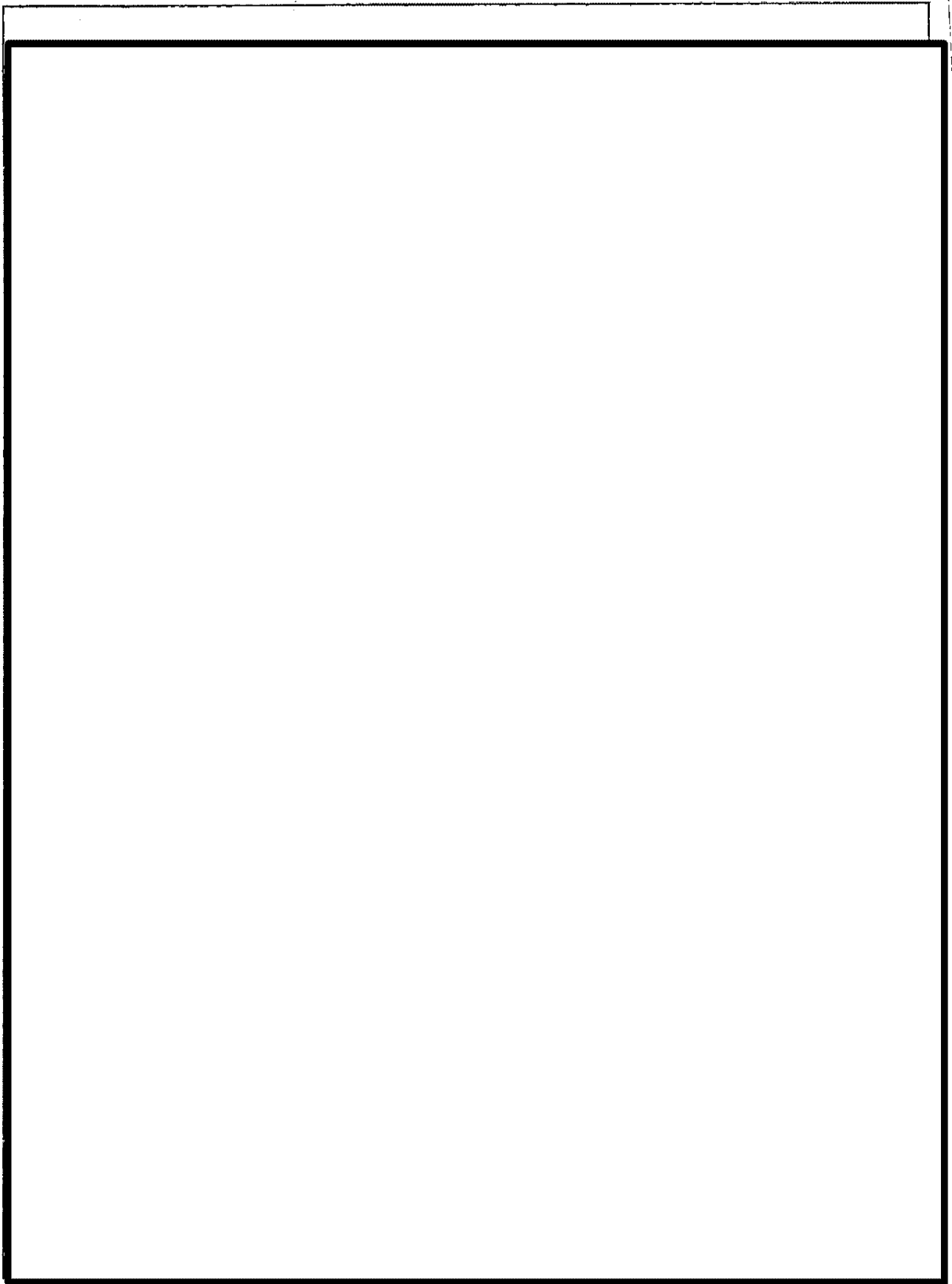
Well-Founded Fear

In evaluating whether the feared future harm rises to the level of persecution, the interviewing officer may consider:

- What harm would the applicant suffer on account of being a Congolese woman without effective familial protection returning to DRC?
- Would she be at risk for sexual assault, rape, SGBV or other harm on account of her lack of familial protection?
- Would the applicant or her children face abduction or forced marriage without familial protection?
- Would the applicant face severe restrictions on her ability to work that would deprive her of any reasonable means of subsistence?
- Do country conditions indicate that the police or judicial system are able and willing to protect women from future instances of harm, particularly women who share the applicant's experience as a forced "bush wife"?

Step-by-Step Persecutor Bar Guide

(b)(7)(e)



Please note: this guide is a starting point and should not be used as a substitute for all necessary lines of questioning and follow-up questions during your adjudication.



U.S. Citizenship
and Immigration
Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

**INTERVIEWING SURVIVORS OF
TORTURE AND OTHER SEVERE
TRAUMA**

TRAINING MODULE

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

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, Adrienne; Corne, Shawn; Fursland, Anthea; Zelwer, Barbara. Committee for Health Rights in Central America (CHERICA). "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.

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

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

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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

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.

“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.

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 legitimize 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.

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.

- 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.

- 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.

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.

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

- **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 impact⁸**
 - 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.

- 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 ability 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*.

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

- 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

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.

- 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, depends 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.

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 RAIIO Training module, *Interviewing – Working with an Interpreter*.

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*.

- 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 Adrienne 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.

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 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

- 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

- 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.

PRACTICAL EXERCISES

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

Practical Exercise # 1

- **Title:**
- **Student Materials:**

OTHER MATERIALS

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

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

<p><u>RAD Supplement</u></p> <p>Module Section Subheading</p>

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

<p style="text-align: center;"><u>ASM Supplement</u></p> <p style="text-align: center;">Module Section Subheading</p>

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

<u>IO Supplement</u>
Module Section Subheading



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

- 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.aialoads.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

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

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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.

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

As an officer in the RAIIO 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 RAIIO Directorate usually provide only interpretation; on occasion, however, they may be asked to translate written

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

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

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

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).

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*.

The Interpreter <u>Should</u> Do the Following:	
1	<p><i>Keep all information discussed by all parties at a USCIS interview confidential [RAD Supplement – 5, ASM Supplement – 5, IO Supplement – 4].</i></p>
2	<p><i>Interpret verbatim (word for word) as much as possible</i></p> <ul style="list-style-type: none"> • 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: <p style="margin-left: 40px;">You: What did you do next?</p> <p style="margin-left: 40px;">Interpreter (to interviewee):</p> <p style="margin-left: 80px;">(proper): What did you do next?</p> <p style="margin-left: 80px;">(not proper): He asked what you did next.</p> <p style="margin-left: 40px;">Interviewee: I went to the U.S. Embassy to request a visa.</p> <p style="margin-left: 40px;">Interpreter (to you):</p> <p style="margin-left: 80px;">(proper): I went to the U.S. Embassy to request a visa.</p> <p style="margin-left: 80px;">(not proper): He went to the U.S. Embassy to request a visa.</p> • 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	<p><i>Interpret the interviewee’s responses to your questions even if the</i></p>

	<i>responses do not appear to answer the questions</i>
4	<i>Inform you if he or she does not understand what you have said</i>
5	<i>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</i>
6	<p><i>Advise you or the interviewee if the length of a question or response would pose difficulties for him or her to interpret</i></p> <p>You and/or the interviewee can then break the statement/question into shorter chunks of information for the interpreter to convey.</p>
7	<i>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</i>
8	<i>Advise you if the interviewee expresses any confusion about your question or statement</i>

The Interpreter Should <u>NOT</u> do the following:	
1	<i>Engage in private conversations with the interviewee during the interview</i>
2	<p><i>Attempt to explain the meaning of anything that is said during the interview, including your questions and statements, even if the interviewee appears confused.</i></p> <p>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 will then allow</p>

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

	you to clarify any confusion with follow up questions.
3	<i>Condense or elaborate upon what you say or what the interviewee says</i>
4	<i>Attempt to answer for the interviewee or explain the meaning of what the interviewee says</i>
5	<p><i>Begin the interview ahead of you; it is you, not the interpreter who begins, directs, and concludes the interview.</i></p> <p>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.</p>
6	<i>Allow any personal biases and opinions to affect the interpretation during an interview</i>

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).

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 – 6].

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).

- 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).

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,"

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

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.

<u>British English</u>	<u>American English</u>
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 Interpretation⁹

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 RAI0 Training module, *Cross-Cultural Communication*.

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

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-cultural Communication* (under development; please refer to RAD and ASM lesson plans on this topic).

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.

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*.

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*.

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:

<u>Avoid:</u>	<u>Say:</u>
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*.

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"

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.

- 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:

- 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

- 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

- 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"

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.

OTHER MATERIALSOther 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

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).

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 Procedures: Introduction, Section 3 "Explain the Role of the Interpreter"*, 19 August 2009.
2. 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) (17 June 2009).

ADDITIONAL RESOURCES

Program announcement from Terry Rusch, Director, Office of Admissions, Bureau of Population, Refugees and Migration, Dept. of State, to US Refugee Coordinators and Overseas Processing Entities, *Program Announcement 2005-01: Revised Guidance on Confidentiality of State Department Refugee Records*, (12 Oct. 2004).

SUPPLEMENTS

RAD Supplement – 1

2.2 Interpreters Utilized for RAIO 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 US resettlement. The RSC provides an orientation for the interpreters used at USCIS interviews, including the requirement to interpret accurately and completely and 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 US, and at some interview locations, the interpreters themselves may be applicants to the USRAP.

RAD Supplement – 2

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

Currently RAD has no written policy governing its officers interviewing in a language other than English. Certain RAD Officers were hired for their Spanish language skills and are conducting refugee interviews in Spanish throughout the Americas region.

RAD Supplement – 3

2.4 Verifying the Identity of the Interpreter

No procedure exists for verifying the identity of the interpreter at refugee interviews conducted overseas

RAD Supplement – 4

3.2 Advising the Interpreter of His or Her Role

Often in refugee interviews conducted by RAD or IO staff, the same pool of interpreters is utilized for a particular circuit ride or group of interviews. Generally, at the beginning of a circuit ride at a given location, a meeting is coordinated by the division's team leader with the interpreters and the officers who will conduct the interviews. During this meeting, introductions are made and the role and responsibilities of the interpreter are explained. On such circuit rides, the division's team leader may place the entire interpreter pool under oath at the beginning of the circuit ride or on a daily basis. Therefore there is no need to swear in the interpreter at each refugee interview; however, you should still briefly explain at the beginning of each interview the interpreter's role and that the interpreter has been advised to keep all information from the interview confidential for the benefit of the

interviewee who may not understand the roles of all parties present.

You should:

[e]xplain that the role of the interpreter is to interpret faithfully to the best of his or her ability the statements and questions made by the officer and the applicant, without adding, changing, or omitting any statements. Inform the applicant that the interpreter does not adjudicate the case or make any decision regarding the refugee status determination. Advise the applicant that if at any point in the interview he/she does not understand the interpreter to let you know. If you determine that the applicant and interpreter do not understand each other, the team leader should be consulted to find a capable interpreter.

USCIS Refugee Affairs Division, *Standard Operating Procedures: Introduction. Section 3 "Explain the Role of the Interpreter"*, 19 August 2009.

Officers are not discouraged from placing the interpreter under oath at each interview, however, as it may help to put the interviewee at ease in discussing sensitive matters.

RAD Supplement – 5

3.2 Advising the Interpreter of His or Her Role

6.2 Explain the Interpreter's Role to the Interviewee

Interpreter Ground Rules # 1: Keep all information discussed by all parties at a USCIS interview confidential

Regarding confidentiality of the refugee interview, the officer should explain during the interview introduction that the oral, written, and documentary information the applicant submits to the United States Refugee Admissions Program (USRAP) remains within the USRAP and is not disclosed to the government of the stated country of persecution. If an interpreter is used, indicate that the interpreter also understands the applicant's testimony is confidential.¹⁷ In addition, the officer should explain that he or she will ask the applicant to sign a Release of Information Consent Form, although signing the form is voluntary. The

¹⁷ Applicants may be hesitant to disclose information if they believe it is not confidential for a variety of reasons. For example, applicants may have information that could cause others to harm them. They may fear for the lives of others that are still within their native country. Also, descriptions of past events may be of a highly personal nature.

form will be used to facilitate sharing of information between USCIS and UNHCR, other USG entities, and other resettlement countries. USCIS Refugee Affairs Division, *Standard Operating Procedures: Introduction, Section 3 "Explain Confidentiality."* 19 August 2009.

RAD Supplement – 6

3.3 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 only needs to be placed under oath prior to the first interview.¹⁸

Some persons may have objections to using the term "swear" or object to raising their right hand. 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 completely and truthfully interpret 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 – 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

At your discretion, and in consultation with a Team Leader or supervisor, you may stop an interview so that the RSC can provide a competent interpreter. The Team Leader and the RSC will make every reasonable effort to resolve the interpretation problem to avoid rescheduling due to the difficulty of rescheduling refugee interviews.

¹⁸ Some supervisors or team leaders may choose to swear in all interpreters at the beginning of a circuit ride or at the beginning of each work week or work day.

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).

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.

ASM Supplement – 2

2.2 Interpreter Utilized 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); and
- Must not be a representative or employee of the applicant's country of nationality, or if stateless, country of last habitual residence.

There are no other regular requirements regarding who can serve as an interpreter. The immigration status of the interpreter is not a bar (for example, the interpreter may be another asylum applicant) 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
- May be a country representative or employee.

For additional information, see Asylum Division lesson plans, *American Baptist Churches (ABC) Settlement Agreement and 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

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 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 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.

ASM Supplement – 6

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.4.a.iii, "Improper Conduct."

See also *Affirmative Asylum Procedures Manual* for a copy of the Interpreter's Oath.

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.”

The Asylum Officer will administer an oath to the interpreter monitor in which he or she will swear or affirm:

1. to immediately report to the Asylum Officer any errors in interpretation;
2. 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
3. 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.” 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.

ASM Supplement – 8

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.”

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 Incompetency or if the Interpreter is Not Available

Problems with Applicant’s Interpreter

If, based on information provided by the contract interpreter, the Asylum Officer determines, and a Supervisory Asylum Officer concurs, that the applicant’s interpreter has abused his or her role, or if the applicant’s interpreter is not competent to interpret, the Asylum Officer should terminate the interview. The interview will be rescheduled at the fault of the applicant, and the 150-day clock will be stopped.

Written Notice Provided to Applicants who Fail to Bring a Competent Interpreter

As with applicants who do not bring an interpreter, the Asylum Office must give the applicant written notice explaining the consequences of failing to provide a competent interpreter. For purposes of employment authorization, the 150-day clock will be stopped until such time as the applicant appears for the rescheduled interview.

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 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, or the Asylum Officer may refer the case to the Office of the Immigration Judge. See *Affirmative Asylum Procedures Manual*, Section II.J.4.a.v, "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. 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.

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

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-730 petitions, 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).

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.

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.



U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

CROSS-CULTURAL COMMUNICATION AND OTHER FACTORS THAT MAY IMPEDE COMMUNICATION AT AN INTERVIEW

TRAINING MODULE

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RAIO Directorate – Officer Training / *RAIO Combined Training Course***CROSS-CULTURAL COMMUNICATION AND OTHER FACTORS
THAT MAY IMPEDE COMMUNICATION AT AN INTERVIEW**

Training Module

MODULE DESCRIPTION

Through interactive communication exercises, this module describes how cultural differences may create barriers to effective communication and provides techniques for recognizing and overcoming those barriers.

TERMINAL PERFORMANCE OBJECTIVE(S)

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

Given written and role-play asylum and refugee scenarios, the trainee will correctly identify inter-cultural issues that may create barriers to communication.

ENABLING PERFORMANCE OBJECTIVES

1. Explain factors that may impede communication at an interview.
2. Explain issues that may arise in interviewing individuals from different cultures.
3. Explain techniques for effective communication across cultural barriers.

INSTRUCTIONAL METHODS

- Interactive presentation, practical exercises, discussion

METHOD(S) OF EVALUATION

- Multiple choice 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. Kalin, Walter. "Troubled Communication: Inter-cultural Misunderstanding in the Asylum Hearing," *International Migration Review*, guest editor: Dennis Gallagher (Summer, 1986), p. 230-239.
2. Lawyers Committee for Human Rights. *Guidelines for Immigration Lawyers Working with Interpreters: Extending Legal Assistance Across Language Barriers* (New York, NY: June 1995), 5 p.
3. Rubin, Joan and Thompson, Irene. *How to be a More Successful Language Learner: Toward Learner Autonomy* (Boston, Massachusetts: Heinle & Heinle Publishers, 1994), p. 37-41.

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
C3	Skill in tailoring communications to diverse audiences (e.g., cross-cultural, management) (4)
IR3	Skill in responding to cultural behavior in an appropriate way (e.g., respectful, accepting of cultural differences) (4)
ITK6	Knowledge of principles of cross-cultural communications (e.g., obstacles, sensitivity, techniques for communication) (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
05/10/2013	Throughout document	Corrected minor typos, formatting, cites identified by OCC-TKMD.	LGollub, RAIO Training
11/23/2015	Throughout document	Corrected broken links and minor typos	RAIO Training

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Throughout this training module you may 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.

In this module, the term "interviewee" is used to refer to an individual who is interviewed by an officer in the RAI0 Directorate for an official purpose.

1 INTRODUCTION

This lesson explains how communicating through a second language, cultural factors, stress, and "personal agendas" can affect the interview process. The lesson also includes ways that you, the interviewing officer, can minimize the negative effects that these factors can have at an interview.

2 COMMUNICATING ACROSS A SECOND LANGUAGE¹

2.1 Overview

English is not the first language of most of the interviewees you will encounter. Although some interviews are conducted entirely in English, at most interviews there is an interpreter who interprets what the interviewee says into English and what you say into a language the interviewee can understand. Not only does this increase the time spent conducting the interview, but it also creates a situation in which miscommunication can occur.

Interpreting from one language to another is not simply a word-for-word interpretation. The language structure and vocabulary of a culture evolve as an expression of what is necessary and important in that culture; therefore, language and culture are closely

¹ This section of the lesson plan is based in part on a presentation entitled, "Dimensions of Language and Culture," by Susan Rauffer (currently the Director at the Newark Asylum Office) as part of studies in World Issues at the Experiment in International Living (World Learning), Brattleboro, VT and used with the author's permission.

intertwined. Although there are literal translations between languages for many words, there are many other words in some languages that do not have lexical equivalents in other languages and which need to be translated by multiple words or phrases. (For example, Alaska natives have many different words for “snow.” A translation into English using only the word “snow” would not capture the exact meaning of what had been said.) In addition, communication does not involve merely the spoken word; tone of voice, “body language,” and other factors contribute to the message that is conveyed.

You need to be aware of the potential for miscommunication when a second language is used, and to attempt to keep the possibility of miscommunication at a minimum.

2.2 Communication

Communication can be broken down into two components, verbal and non-verbal.

Verbal

- Linguistic
 - vocabulary
 - grammar
- Paralinguistic
 - manipulation of speech: e.g., volume of speech, rate of speech, pitch/tone, stress
 - extra-speech sounds: e.g., groans, sighs, laughter, crying, whistling, and other sounds such as “huh” and “uh”

Non-verbal

- Movements that substitute for language, i.e. body language
 - facial expressions (smiles, frowns, etc.)
 - eye contact
 - body movement
 - posture
 - physical distance
 - use of environment (tapping fingers on tabletop, drawing, etc.)
 - touching
 - use of silence; timing

Written language

For purposes of this training, we will not discuss written language; whenever non-verbal communication is discussed below, it refers only to body language.

2.3 Verbal Communication - Linguistic

2.3.1 The Danger of Mistranslation

“The enormous danger of failing to communicate in the modern world is dramatically illustrated by the circumstances surrounding the bombing of Hiroshima. There is evidence that the first atom bomb might never have been dropped if a Japanese translator had not erred in the translation of one word. The word *mokusatsu*, used by the Japanese cabinet in their reply to the Potsdam surrender ultimatum was rendered ‘ignore’ rather than correctly, ‘withholding comment pending decision.’ Thinking the Japanese had rejected the ultimatum, the Allies went ahead with the nuclear bombardment.”²

2.3.2 The Development of Language

People develop and build for themselves a language to meet their specific needs. This language acts as a grid through which the individual perceives the world. This also constrains the ways in which the individual categorizes and conceptualizes different phenomena. Examples of ways in which different languages have evolved include the following.

Tense

Although English has several past tenses, it does not have the same specific past tenses that some other languages may have. For example, Sukima, a Tanzanian language, has the following past tenses which English does not have.

- Immediate past - Used when something happened less than 2 hours ago.
- Proximate past - Used when something happened this morning.
- Intermediate past - Used when something happened two days ago.
- Remote past - Used when something happened any time more than two days ago.

Some languages may have past and future tenses, but these tenses may not always be used in everyday speech. Instead, a “time” word may be used with a present tense verb. (e.g., Khmer [Cambodian]-speakers often do not use the marker for past or future tenses when conversing, but rather use the present tense along with a time-marking word such as “last year,” “tomorrow,” “in a while,” “next week,” etc., to denote the past or future. This is sometimes done in English also: “I’m leaving tomorrow.”)

Person

- English - I, you (singular and plural)

² Frank M. Grittner, *Teaching Foreign Languages*, Harper and Row, NY, 1977, p. 33, citing to Lincoln Kinnear Barnett, *The Treasure of Our Tongue*, New York, Knopf, 1964, p. 292.

- French - one form of “I”, two forms of “you”
- Thai - several forms of “I” and “you”, the use of which depends on the sex of the speaker, his or her relation to the other person, and the situation; in addition, there are forms of “I” and “you” which are used **only** by the king and royal family

Gender

- English - no gender (one form of “the”)
- Spanish - masculine and feminine (the = **el**, la)
- French - masculine and feminine (the = **le**, la)

Use of terms³

- In Moré, spoken in Burkina Faso, cold, hunger, or thirst “has” a person. (“Cold has me.”)
- In the Ama-Zulu culture, women are not **allowed** to mention the names of certain of their husband’s relatives. **Instead**, they **must** use a substitute, often a descriptive term. For example, a woman cannot refer to her husband’s brother by name but rather might call him “younger father” or “small father,” or “the father of ____ (naming one of his children).”
- Even the words that form **the** names cannot be used. For example, Chief Buthelezi’s father’s name was “Mathole Mnyama” **which** means “calf” (Mathole) and “dark” or “black” (Mnyama). **Not only** is the chief’s wife not able to refer to her father-in-law by his name, but she also **cannot** use the words for “calf,” “black,” or “dark,” or even “nyama” which means “meat.” If she wants to refer to a black dress, for example, she must use another term such as “color like night.”

Differences between languages such as those noted above can create problems when the exchange of information must **be** done through an interpreter.

2.4 Verbal Communication - Paralinguistic

Manipulation of Speech

The way people manipulate their speech may convey a message. Consider the implications if an interviewee’s manipulation of speech regarding the following issues is misinterpreted at an interview.

³ For additional information on the use of terminology between different versions of languages, see RAIO Training module, *Interviewing – Working with an Interpreter*.

Pitch (tone)

Pitch is not very important in English; it usually remains constant during speech. In other languages such as Chinese, Lao, Vietnamese, Thai, words may be determined by the pitch. For example in Mandarin, the word “ma” has different meanings, depending on the tone used.

- ma (high tone, level) = mother
- ma (high tone, rising) = jute
- ma (low tone, rising) = horse
- ma (low tone, falling) = scold

In Thai, depending on the tone used, “kow” can have several meanings, including “rice,” “white,” and “I.”

Stress

Stress is more important in English than pitch and usually affects sentences rather than individual words. Consider the meaning of the following sentence with the stress falling on different words: “The military put my brother in jail.”

Stress in some languages affects individual words. For example, placing the stress on different parts of the following Spanish word alters the meaning of the word.

- te'rmino - terminal
- term'ino - I finish
- termino' - he finished

Volume of speech

Volume of speech can indicate anger, surprise, distress, etc. The situation, setting, and culture often dictate the appropriate volume.

Rate of speech

When someone speaks quickly it may indicate nervousness, or it may be that the person's normal speech is fast. Likewise, there may be various reasons why someone might speak slowly.

Extra-speech sounds

When and how extra-speech sounds such as groans, laughter, etc., are used is usually culturally determined. For example, when it is appropriate to laugh or cry is often determined by one's culture. This has implications for interviews as interviewees may laugh or cry at what may appear to you to be inappropriate moments.

2.5 Non-Verbal Communication

Non-verbal communication is very often culturally determined. The individuals within a culture usually know the meanings of the non-verbal signals in their own culture. The same signals, however, can have very different meanings in other cultures.

The next section of this lesson discusses non-verbal communication across cultures. Please also refer to the background reading for information on this topic.

3 INTER-CULTURAL COMMUNICATION

3.1 Overview

In addition to bringing other languages to the interview, interviewees bring their cultural backgrounds.⁴ You also bring your own cultural background to the interview and view things through your own cultural perspective.

The individuals you interview will be from many different cultural backgrounds. Most will be from a cultural background that is different from your own. Although there are many similarities between cultures, there are also many differences, and these differences can affect the interview process.

It is impossible to understand the cultural norms of all the people you will encounter. Anthropologists and others spend many years immersed in other cultures and still are not able to learn all the nuances of the culture. You can, however, become sensitive to some of the potential problems that you may encounter and which are related to cultural differences, and learn techniques that you can use when interviewing persons from other cultures.

3.2 No Two People Are Alike

Even two people within the same culture will not react exactly the same in similar situations. One's ways of interacting with people and coping with situations are developed by prior experiences, family background, age and sex, culture, etc. No two people are alike – not even people who are from the same family and who share a common culture.

We bring to every situation our “personal baggage” of how we expect others to act and think.⁵ We sometimes misinterpret the words and actions of others because we unconsciously expect that the meanings behind their words and actions are the same as

⁴ Each person at the interview - interpreter, legal representative, etc. - brings his or her cultural background to the interview.

⁵ For additional information on “Personal baggage,” see RAIO Training module, *Interviewing – Introduction to the Non-Adversarial Interview*.

our own meanings if we were in a similar situation. Misunderstandings arise, feelings are hurt, and problems are encountered due to such misinterpretations. Even when we make a conscious effort to be sensitive to other cultures, we may still miscommunicate because of the difficulty in picking up on the cultural cues of others.

In the RAIO context, the consequences of misinterpretation at an interview can be grave.

3.3 Inter-Cultural Miscommunication

Perceptions of other cultures

Most people have had little or no training in inter-cultural interactions. Therefore, in an encounter with someone from a culture other than our own, we rely on our assumptions about how other persons from our own culture act, as well as on our perceptions of how individuals from the other culture act.

These perceptions are formed by what we have heard or learned in school, through the media, and through other vicarious experiences, as well as any actual contact with persons from the other culture. We may have developed ideas about persons from certain cultures that have little basis in actual fact.

In addition, we have fewer points of common reference with someone from a different culture than we have with someone from our own culture and we may find it difficult to understand someone with whom there are only a few or no common points of reference.

Our "personal baggage" is sometimes magnified when dealing with persons from other cultures because we often know very little about their cultures, and may have misconceptions about them.

Both interviewers and interviewees (as well as others at an interview) bring with them to the interview culturally based perceptions of the world.

Cultural perceptions at an interview

Interviewees also have preconceived ideas of immigration officers.

Culture dictates certain behavior. You need to keep constantly in mind that you cannot assume that an interviewee's actions and words have the same meanings as they have in your culture.

Examples

- Certain body language may differ from culture to culture. Many hand gestures used in one culture to beckon people, to point to people or objects, to indicate agreement, to wave, etc., can have different meanings in other cultures, some of which are very insulting. Ways of non-verbally indicating "yes" and "no" also vary from culture to

culture. What may be a gesture to indicate affirmation may indicate a negative response in another culture.

- The physical distance between two people who are engaged in conversation differs from culture to culture. In some cultures, a foot of space is sufficient between two people; in other cultures, much more space is needed for the people involved to feel comfortable.
- The amount of physical contact also varies from culture to culture. For example, in some cultures, individuals of the same sex who are not romantically involved hold hands when walking or talking. In other cultures, this is rarely done.
- Sitting so that the sole of your shoe faces someone is considered very rude in some cultures, whereas in other cultures, this is not an issue.
- Time is measured differently and holds different importance in various cultures. Time in some cultures may be measured in terms of planting seasons rather than months, weeks, and days as it is in other cultures. Being on time for all functions is highly valued in some cultures while in others, it is expected that people will arrive after the announced starting time for events, especially social functions such as parties.
- Women's roles vary greatly from one culture to another. In some cultures, very few women hold positions of authority, power, and respect in the workforce; in other cultures, women have a more active role in this area. In certain cultures, many women have little contact with men other than male family members and defer to men; in other cultures, women interact openly and freely with men.
- People's reactions to grief differ widely from individual to individual as well as from culture to culture.⁶ Some people may have difficulty speaking about the death of a loved one without crying while other people may be able to discuss events surrounding the death of a loved one without exhibiting any outward signs of emotion.
- "Saving face" rules many of the actions of people from some cultures; people may do the utmost possible to avoid losing face or putting someone else in a situation where that person would lose face. In other cultures, being "forthright" in interactions often takes precedence over saving face.
 - For example, if an individual is asked to give directions to a location but does not know how to get to the location, he or she may point the questioner in a particular direction in order to avoid not being able to give assistance.

⁶ A particular reaction to grief may also indicate that the applicant is suffering from Post-Traumatic Stress Disorder or other trauma-related condition. For additional information, see RAIO Training module, *Interviewing Survivors of Torture*.

- Gift-giving is a way of assuring that things get done in some cultures; gifts are expected and are given to thank people for performing a service or act, or in anticipation of a particular service or act. In other cultures, such practices may be viewed as inappropriate or may be seen as a form of bribery. In addition, in some cultures, if you admire a possession of someone, you may receive it as a gift; not accepting it may offend the giver.
- Eye contact varies from culture to culture. What may be considered a normal length of time for eye contact in one culture, may, in another culture, be termed “staring” and considered rude, causing the other person to feel uncomfortable.
- In some cultures, the left hand is only used for bathroom functions, and so giving or receiving anything with the left hand is considered extremely rude.

Application of knowledge of cultural differences

There are many such examples, and it would be impossible to list or understand all of them. The point is not to try and learn about every situation and cultural nuance, but to recognize that our expectations about how people react and what they say are often culture-bound. It is not uncommon for individuals to make judgments based on preconceived ideas of cultures. You must try as much as possible to recognize and put aside any preconceived ideas about how people act and the meanings of their actions in order to avoid making decisions based on cultural misperceptions.

4 STRESS AND PERSONAL AGENDAS

4.1 Stress

People deal with stressful situations in ways that vary in degree of intensity. For example, a job interview, taking a test, becoming a parent, and the death of a loved one are all stressful situations. An interview before a U.S. government official involving a possible benefit, can be a stressful situation for all of the individuals involved. Each person responds to stress differently and has developed personal mechanisms for handling stress, and you and the interviewees bring this to the interview. For example:

Interviewee

- Future depends on the interview
- Is nervous about an interview with a government official
- Is dealing with an unfamiliar environment
- Is worried about communicating through an interpreter (concerned that information may not be communicated correctly)

- May be apprehensive about retelling painful or humiliating experiences (See RAIO Training module, *Interviewing – Interviewing Survivors of Torture or Other Severe Trauma*.)
- May be concerned about forgetting important information or becoming confused
- May be suffering from Post-Traumatic Stress Disorder or other trauma-related condition, in which case his or her stress level may be heightened

Officer

- Concerned you may not get all of the necessary information (especially if you are new to the position)
- Concerned about time pressure—the next interviewee may have arrived

Interpreter

- Has heavy responsibility to interpret accurately
- May not speak English or the interviewee's language well
- May be under time pressure to interpret for another interviewee or to leave quickly in order to be on time for work
- May also have experienced trauma; the interviewee's story may trigger symptoms in the interpreter relating to his or her own trauma

Representative (trusted adult in the context of children's interviews), etc.

- Concerned that the interviewee will have difficulty answering questions due to the stress of the interview or because the interviewee may be suffering from Post-Traumatic Stress Disorder, etc.
- Afraid of surprises: interviewee tells you something that the legal representative has not yet heard
- May have another appointment – anxious to complete interview
- Concerned you will not elicit all pertinent information

How people react to stress

Each person brings to the interview his or her individual ways of reacting to and dealing with stress. This can interfere with the interview process. Some of the ways people react to stress include:

- Change in voice and speech patterns
- Forgetfulness
- Need to feel in control

- Deference to authority
- Defensiveness

In stressful situations, individuals may easily remember the least important things and forget what is most important. This addition to the dynamic of the interview can result in miscommunication and misunderstanding.

4.2 Agendas

In addition to the interview being stressful for all concerned, each person has a personal “agenda” which, whether an appropriate or inappropriate agenda, may impede open communication. Agendas may be conscious or unconscious.

Applicant

- To get story out; not to forget anything; to avoid discussing particularly painful or humiliating experiences
- To convince the interviewer to grant the requested benefit
- In the case of fraud, to present a convincing claim which is untrue—not to get caught in a lie

Officer

- To finish the interview in an established amount of time
- Not to overlook any procedural points
- Not to miss any important facts
- To focus on the important issues and not spend time on non-relevant topics
- Not to let previous interviews have an impact on your approach to the current interview
- In cases where you suspect a lack of credibility or fraud, to remain neutral in tone, demeanor, and attitude

Interpreter

- To interpret correctly
- To understand all of the interviewer’s words without having to ask for clarification and appearing not to know English well
- To help the applicant present a good claim
- To please the person who hired him or her
- To project a professional image

- To avoid losing face

Representative

- To present the applicant in a favorable light
- To make sure the applicant doesn't forget to relate any important information
- To notice if any points are missed by the interviewer
- To be allowed to make comments on behalf of the applicant
- To distance himself or herself from fraud if he or she discovers fraud during the interview; to help cover-up the fraud if he or she is involved in the fraud

4.3 How Stress and Personal Agendas Can Negatively Affect the Interview Process

Agendas may help both you and the interviewee get out all of the important information. There are often situations, however, in which stress and agendas can have an adverse impact on an interview.

The individuals at the interview are often overwhelmed by dealing with the stressful environment of the interview and may be too intently focused on pursuing their personal agendas. This can result in the following:

- Material facts of testimony missing
- Inaccuracy in interpretation or the appearance of inaccuracy
- Appearance of incredibility on the part of the interviewee, such as nervous demeanor and inconsistent testimony or appearance of inconsistent testimony
- Attention not entirely focused on questions and/or responses and therefore what is said is not accurately heard and understood
- "Pushiness" to get points across
- Impatience; non-adversarial nature of the interview is jeopardized

4.4 Ways to Minimize the Negative Effects of Stress and Personal Agendas

You are in control of the interview; the interviewee has little control over how stressful the interview is. Therefore, you need to be aware of your actions during the interview and adapt your behavior to fit the situation in order to minimize as much as possible the negative effects of stress and personal agendas. To this end, you can:

1. Attempt to put the interviewee and others at ease at the beginning of the interview.
2. Assure the interviewee that he or she will be given a full opportunity to present his or her claim.

3. Explain the process of the interview and the roles of each person so that everyone will know what to expect.
4. Focus on the interviewee and listen to what he or she is saying.
5. Have patience when the interviewee does not answer a question. Keep in mind the variety of factors that may have prevented the interviewee from hearing or understanding the questions. Remember that although the interview process may become routine for you, it is not routine for the interviewee and others who may be present. You may need to give the interviewee a few seconds of silence to organize his or her thoughts.⁷
6. Recognize your own agendas, such as the need to get all the information within a certain amount of time, but do not let that interfere with your ability to listen to the interviewee. Consciously set aside inappropriate agendas.
7. Use your time wisely during the interview so you do not feel rushed near the end of your time: structure and pace the interview, and avoid discussing information that is irrelevant to the interview at hand.

5 OTHER FACTORS THAT MAY IMPEDE COMMUNICATION AT AN INTERVIEW

5.1 Additional Factors

There are a number of other factors that may impede communication at an interview:

- The interviewee may be suffering from Post-Traumatic Stress Disorder or other trauma-related condition that may impair his or her ability to follow your questioning, to answer questions, and to relate his or her story in a credible manner.⁸
- The interviewee may be experiencing physical discomfort or impaired cognitive ability due to torture or other abuse he or she experienced (or may have a physical condition unrelated to such abuse but which may cause physical pain or discomfort).
- The environment of the interview may not put the interviewee at ease during the interview. For example:
 - The interviewee may not feel comfortable disclosing information to you because he or she is of the same or different sex as you
 - The interpreter may be someone to whom the interviewee feels uncomfortable telling parts of his or her story

⁷ For additional information on the use of silence during the interview, see RAIO Training modules, *Interviewing – Eliciting Testimony* and *Interviewing Survivors of Torture*.

⁸ For additional information, see RAIO Training module, *Interviewing Survivors of Torture*.

- You or the physical environment may remind the interviewee of the place where he or she was abused in his or her country at the hands of a government official
- Something about the interviewee or his or her story may trigger a response in you that may distract you momentarily from your task of conducting a non-adversarial interview.

6 CONCLUSION

You cannot possibly be aware of all of the factors that impede communication at a particular interview; each interview is unique, and each interviewee is unique. What you can do, however, is to be aware that a number of factors may impede communication, and when communication appears to be impaired, you should attempt to discern what the problem may be and attempt to alleviate it.

7 SUMMARY

Communicating Across a Second Language

Although some interviews are conducted entirely in English, there is usually an interpreter who interprets what the interviewee says into English and what you, the interviewing officer, say into a language the applicant can understand. Interpreting from one language to another is not simply a word-for-word interpretation between two languages.

Although there are literal translations between languages for many words, there are many other words in some languages that do not have lexical equivalents in other languages and that need to be translated by using more than one word. In addition, communication does not involve merely the spoken word; tone of voice, “body language” and other factors contribute to the message that is conveyed. You need to be aware of the potential for miscommunication when a second language is used, and to attempt to keep the possibility of miscommunication at a minimum.

Inter-Cultural Communication

Culture plays an especially important role in the communication at an immigration interview. There are many differences between cultures regarding body language, physical closeness, views of time, women’s roles, reactions to grief, etc.

Because of the many differences between individuals, it is often difficult to determine how someone will react in a given situation. We often misinterpret the meanings of the words and actions of others because we assign our own meanings to their words and actions, and our meanings may not be the same as theirs. You need to keep in mind the effects of culture in evaluating an interviewee’s behavior.

Stress and Personal Agendas

Interviews with a U.S. government official are stressful situations, and the individuals at an interview bring with them the methods they have devised for dealing with stress, any personal agendas they may have, their cultural backgrounds, and their “personal baggage.” In addition, an interviewee may be affected by trauma experienced in his or her country or during the flight from the country. All of these factors influence the behavior of the individuals at an interview, and may impede communication.

You must attempt to reduce the stress of the others at the interview and recognize the existence of possible agendas in order to assist the flow of communication. You also need to recognize your own ways of dealing with stress and personal agendas and minimize any negative effect your own stress and agendas may have on the interview process.

PRACTICAL EXERCISES

There are several practical exercises that will be conducted during this class. The materials for the exercises will be distributed during class.

Practical Exercise # 1

- Title:
- Student Materials:

OTHER MATERIALS

There are no Other Materials for this module.

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

There is no RAD Supplement for this module.

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

<p style="text-align: center;"><u>RAD Supplement</u> Module Section Subheading</p>
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SUPPLEMENT B – ASYLUM DIVISION

There is no Asylum Supplement for this module.

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

<p style="text-align: center;"><u>ASM Supplement</u> Module Section Subheading</p>
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SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

There is no IO Supplement for this module.

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

<u>IO Supplement</u>
Module Section Subheading



U.S. Citizenship
and Immigration
Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

**INTERVIEWING –
ELICITING TESTIMONY**

TRAINING MODULE

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

ELICITING TESTIMONY

Training Module

MODULE DESCRIPTION

Through discussion and practical exercises, this training module instructs students on how to elicit information from an interviewee in a non-adversarial manner: how to probe appropriately to elicit necessary information, the types of questions to ask, and questioning techniques to use.

TERMINAL PERFORMANCE OBJECTIVE(S)

During a non-adversarial interview, you (the Officer) will be able to elicit all relevant information to properly adjudicate the petition or application, or to act on a request.

ENABLING PERFORMANCE OBJECTIVES

1. Explain how to elicit biographical information from an interviewee.
2. Explain how to elicit information pertaining to eligibility for an immigration benefit or request.
3. Explain how to elicit information pertaining to possible mandatory bars, inadmissibility grounds, or discretionary grounds for denial or referral.
4. Explain different questioning techniques and when it is appropriate to use them.
5. Explain how to ask follow-up questions to obtain additional information for the adjudication.

INSTRUCTIONAL METHODS

Interactive presentation, discussions, practical exercises

METHOD(S) OF EVALUATION

- Written exam
- Practical exercise exam

REQUIRED READING

None

ADDITIONAL RESOURCES

1. Amina Memon, Christian A. Meissner and Joanne Fraser, "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. Available at http://works.bepress.com/cgi/viewcontent.cgi?article=1057&context=christian_meissner.
2. Ronald P. Fisher & 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. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1696130.

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
ILR28	Knowledge of policies and procedures for processing claims for individuals with disabilities (3)
ITS1	Skill in identifying the most appropriate interview technique (e.g., yes/no, open-ended) (4)
ITS2	Skill in organizing and sequencing interview questions to elicit information (4)
ITS3	Skill in framing interview questions and requests for information (4)
ITS4	Skill in asking appropriate follow-up interview questions (4)
ITS5	Skill in maintaining control of interviews (4)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
ITK6	Knowledge of principles of cross-cultural communication (e.g., obstacles, sensitivity, techniques for communication) (4)
RI2	Skill in identifying the information required to establish eligibility (4)
C1	Skill in communicating with others in a direct manner (4)
C2	Skill in communicating difficult or contentious information with concerned parties (e.g., attorney, applicant, supervisor) (4)
C4	Skill in active listening (4)
C5	Skill in recognizing and reacting to non-verbal cues (4)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
09/12/2012	Entire Lesson Plan	Lesson Plan published	RAIO Training
11/25/2015	Throughout document	Corrected links and minor typos	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; corroborate information provided by applicants, petitioners, and beneficiaries; and/or 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, 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 proper procedures for taking notes, and considerations when conducting an interview through an interpreter. This module describes how to elicit information in a non-adversarial manner through the use of various question types and questioning techniques. Please refer to the other interviewing modules for additional guidance on conducting RAIO interviews.

- Interviewing – Introduction to the Non-Adversarial Interview

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

As an officer in the Refugee, Asylum, and International Operations (RAIO) Directorate, you will conduct different types of interviews. The Code of Federal Regulations, 8 C.F.R. § 208.9(b), requires that Asylum Officers conduct interviews in a non-adversarial manner. Although this regulation applies specifically to asylum adjudications, as a matter of policy, RAIO directs that all officers in the RAIO Directorate must conduct all interviews in a non-adversarial manner.

Conducting an interview may appear to be straightforward – you ask questions and the interviewee answers them. Conducting a truly effective interview, however, takes a great deal of skill. You must be aware at all times of the direction in which the interview is proceeding, and, when necessary, change the direction by adjusting your questioning techniques so that you can elicit material information from the interviewee.

It is your responsibility to control the exchange of information during an interview. You must encourage the interviewee to speak freely, ensure that you and the interviewee understand each other, keep the interviewee focused on relevant issues, and make certain that you gather all of the information that you need in the timeframe allotted. Although you can control only your own actions, the manner in which you conduct the interview and interact with the interviewee will affect how he or she reacts and will affect his or her ability to provide the information you need.

2 GOALS IN ELICITING TESTIMONY

The main goal in conducting almost all of the interviews conducted by the RAIO Directorate is to elicit testimony from the interviewee to determine eligibility for a benefit, or for some other purpose as noted above. Depending on the type of interview, you will use information you have learned from several sources to guide the interview. These sources may include an application and supporting documents, information from U.S. Government databases, and country of origin information.

2.1 Give the Interviewee the Opportunity to Be Heard

Give the interviewee an opportunity to provide in his or her own words information bearing on eligibility for a benefit. Also, give the interviewee an opportunity to provide additional information that is not already in the record so that you will have a complete understanding of the events that form the basis for the application or request.

2.2 Address Credibility Concerns

Address any concerns you may have regarding the interviewee's credibility or information that is lacking in the record, and give the interviewee an opportunity to address concerns regarding implausible testimony, lack of detail, and/or internal and external inconsistencies.¹ There may be inconsistencies:

- within the application and supporting documentation

Example

The applicant claimed on the application that his date of birth is December 10, 1947; the marriage certificate which he submitted with his application indicated that his date of birth is April 18, 1947.

(Note that you must make changes to the application if necessary. See RAIO Training module, *Interviewing – Introduction to the Non-Adversarial Interview*.)

- between the application (including supporting documentation) and the applicant's oral testimony

Example

During the interview, the applicant stated that he was never arrested but the application states that he was detained by the authorities for attending a political rally.

- between the applicant's claim and country of origin information

Example

The applicant stated she joined a political party in 1988, but the pre-interview country of origin research conducted by the officer indicates that the party did not come into existence until 1990.

- within the applicant's testimony

Example

At the beginning of the interview, the applicant claimed that he worked until he left his country; later in the interview, the applicant claimed that he was in hiding for three months prior to leaving his country.

2.3 Determine Whether the Interviewee Is Subject to Any Bars or Grounds of Inadmissibility

¹ For additional information on assessing credibility, see RAIO Training module, *Credibility*.

Determine whether the interviewee participated in any activities that would result in:

- a mandatory bar
- being found inadmissible to the United States
- a discretionary denial/referral

3 OFFICER’S DUTY TO ELICIT TESTIMONY

When someone applies for an immigration benefit, it is his or her burden to establish eligibility. For some benefits, such as the *I-601 Application for Waiver of Ground of Inadmissibility*, applicants establish eligibility exclusively through documentary evidence. For other benefits, such as asylum or refugee status, credible testimony alone may be enough to satisfy that burden. In cases requiring an interview, although the burden is on the applicant to establish eligibility, equally important is your obligation to elicit all pertinent information.

During your pre-interview preparation, you will have gathered evidence such as information about the interviewee from the application, case file, and U.S. Government databases, and in the case of refugee or asylum interviews, you will also have gathered information from country of origin resources. The interview is your opportunity to further develop the record by gathering testimonial evidence. The quality of that testimonial evidence depends on your ability to elicit information from the interviewee. [RAD Supplement – Officer’s Duty to Elicit Testimony; ASM Supplement – Officer’s Duty to Elicit Testimony; IO Supplement – Family Based Petitions; IO Supplement – Intercountry Adoption Forms; IO Supplement – Naturalization Forms; IO Supplement – Travel Documents]

3.1 Eliciting Testimony = Fully Exploring Issues

Eliciting testimony means more than asking routine questions and receiving responses. In the refugee and asylum context, you have the affirmative duty to “elicit all relevant and useful information bearing on the applicant’s eligibility” for the form of relief sought.² This is applicable in the IO context as well. “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. An answer to one question may lead to additional questioning that is necessary to have a complete picture of the events that occurred.

If you move on to another line of inquiry without allowing the interviewee the opportunity to provide relevant information, important information may remain undisclosed.

² 8 C.F.R. § 208.9(b); UNHCR Handbook, paras. 196 and 205(b)(i)

3.2 Going Beyond the Information in the Application

Applications, petitions, and other requests for action generally contain biographic and historical information about the applicant/beneficiary that can assist you in making your determinations. Although you must verify all of the information contained in the application, petition, or request, do not merely ask the interviewee the same questions that are listed on the form. An application, petition, or request only outlines the minimum information required to establish eligibility. You must expand upon the information that the interviewee has already provided by asking follow-up questions. The interviewee's responses will enable you to develop a complete picture of the interviewee's request and whether the interviewee is eligible for the benefit he or she seeks.

3.3 The Interviewee May Not Know What Is Important to Disclose

As the interviewing officer, you should not limit the inquiry to what the interviewee may believe is important. The interviewee is not likely to be familiar with U.S. immigration laws and regulations and what is necessary to establish eligibility for a benefit. In addition, he or she will not be familiar with the interview process. You, however, are the authority on relevant law, what is necessary to establish eligibility, and the interview process. Therefore, you must help the interviewee understand the process so that he or she can focus on and provide the information necessary for you to make a determination.

Example

A refugee or asylum applicant believes that the authorities wish to harm him because of his religious beliefs. During the interview, however, the officer elicits information that indicates that the authorities also wish to harm the applicant because of his ethnic background, or because his religious activities are viewed as a form of political opinion which could lead to an additional ground of eligibility for status.

3.4 Vague or Non-Responsive Answers

For a number of reasons, an interviewee may give a vague or non-responsive answer to a question you ask. If this happens, you should not simply move forward to another line of inquiry; instead, you must ask follow-up questions to expand upon and clarify the interviewee's statements. It is your duty to fully and fairly develop the record by eliciting information from the interviewee, probing for additional information, and following up on the interviewee's statements.

4 TYPES OF QUESTIONS USED IN INTERVIEWS

There are many different ways you can ask questions during an interview. The types of questions you use will vary within each interview as well as from interview to interview. Some types of questions may be more effective than others, depending on characteristics of the applicant such as age, education, and effects of trauma, as well as the kind of

information you are eliciting from the interviewee. Additionally, there are some types of questions that you should avoid in the RAIO context. You must be familiar with various types of questions, be aware of the effectiveness of the specific questioning techniques and when to use them, and be able to change the types of questions you use to fit the circumstances of each interview.

Educators and linguists have categorized questions in a number of different ways. For the purpose of RAIO interviews, we use the question types described below, some of which may overlap in certain ways. These question types are categorized according to how they are used in the RAIO context.

Most frequently used question types

- Open-ended questions
- Closed-ended questions

Question types to use with caution in limited circumstances

- Multiple choice questions
- Leading questions

Question types to avoid in non-adversarial interviews (discussed below at 6.14 and 6.15)

- Compound questions
- Loaded questions

4.1 Open-Ended Questions

As the term suggests, an open-ended question is framed to give the interviewee an opportunity to provide a full answer in his or her own words. It may also provide the interviewee the opportunity to expand on a statement made earlier in the interview. Open-ended questions generally begin with interrogative words such as “what,” “why,” and “how,” and elicit descriptive/factual information, such as a factual account of a situation or event, or an opinion rather than a simple “yes” or “no” response.

Examples

- “What happened then?”
- “Why do you think [the persecutor] wanted to harm you?”
- “Why did you go into hiding?”

- “Why did the authorities arrest you?”
- “Is there anything else you would like to add? Is there anything that you feel is important for me to know that we did not discuss?”
- “How did the child become an orphan?”
- “How did you meet your spouse?”
- “Why do you want to give up your permanent residency?”
- “Describe what your spouse/child does for work in the United States.”

Effect

The use of open-ended questions can assist you in obtaining information and putting the interviewee at ease. Asking open-ended questions demonstrates to the interviewee your willingness to listen to his or her responses, and such questions usually yield more information than most other types of questions. Allowing a complete response may expand on the information originally included in the application or in a statement by the interviewee, and requires you to listen carefully in order to identify all key issues. In such circumstances, the interviewee may raise other important points that you will need to pursue with additional lines of questioning.

Because open-ended questions can elicit a lengthy response, such questions may lead the interviewee to give information that you do not need. Unless carefully worded, some open-ended questions can be overly broad or even confusing and the interviewee may not know how to reply if, in his or her mind, there could be many possible responses. Therefore, you must pay attention to how you craft open-ended questions so it will be clear to the interviewee what you are asking and so that you elicit information in a controlled way.

Examples

- “What is the last thing that happened that made you decide to leave home?”
- “How did you decide to marry your wife?”

Research on interview techniques has shown that carefully framed open-ended questions can provide more accurate information with more detail than other types of questions. The research further indicates that if the interviewer uses open-ended questions and encourages the interviewee with occasional prompting questions, the most detail is elicited and the information provided is most accurate.³

³ 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

Examples

- “Tell me more about ...”
- “You mentioned a weapon earlier while you were telling me about being kidnapped. Tell me more about that weapon.”

4.2 Closed-Ended Questions

Unlike open-ended questions, closed-ended questions normally elicit the simple answer “yes” or “no” or a very brief statement or limited information. These questions allow you to obtain specific information in a short amount of time when a lengthy response is not needed.

Closed-ended questions that elicit a “yes” or “no” response usually begin with “did,” “does,” “do,” “is,” “are,” “was,” “were,” “has,” or “have.”

Examples

- “Did the military know you were involved with the rebels?”
- “Did you go to the police for help?”
- “Have you ever been arrested?”
- “Were you in contact with either of the birth parents prior to filing the petition?”
- “Does anyone else over the age of 18 reside in your household?”

Closed-ended questions that elicit limited information generally result in a brief reply and do not encourage the applicant to explain the circumstances surrounding the information in the reply.

Examples

- “What is the name of your political party?”
- “How many members are there in your local union?”
- “When did you become aware that you were in danger?”
- “When did you last see the child’s birth father?”

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.

Effect

Closed-ended questions are helpful when your primary purpose is to confirm information already provided. When you are reviewing information on the application with the interviewee, specific closed-ended questions can be appropriate. Closed-ended questions can also be used to probe into answers elicited by open-ended questions. Sometimes, an interviewee may not provide certain information unless it is specifically requested. In such circumstances you should alternate between open- and closed-ended questions as appropriate.

Keep in mind that closed-ended questions limit the information you can elicit. Because it allows the interviewee to reply only briefly, and does not encourage him or her to explain the circumstances surrounding the information in the reply, you will often need to ask additional questions to clarify the facts and gain a full perspective. For example, the question: "How many members are there in your local union?" may fail to elicit the fact that there were 38 original members, but 6 were arrested during a military raid and now there are 32 members remaining.

4.3 Multiple Choice Questions

A multiple choice question requires the interviewee to choose between two or more options. There are two kinds of multiple choice questions: "limited options" and "open options."

A "limited options" multiple choice question gives the interviewee a few options from which he or she can choose as a response.

Example

"When you left your village, did you tell anyone you were going or did you leave without telling anyone?"

Effect

A "limited options" multiple choice question can help point the interviewee in a particular direction by limiting his or her response options. As the name suggests, however, this type of question may limit an interviewee's response by suggesting to the interviewee that only one of the options presented is the appropriate response. By limiting the possible responses in this way, the interviewer may miss information that the interviewee would otherwise have offered. In the example above, the interviewee has only two options – to indicate that he or she did or did not tell anyone about leaving. It does not elicit an alternative answer such as, "I told one of the soldiers that I could no longer live under their tyranny, but I did not actually tell him that I was leaving." Therefore, when using "limited options" questions, you should understand their limitations and word them carefully.

An “open options” multiple choice question can help focus the interviewee on the information you are seeking by opening up a number of possible responses or by indicating to the interviewee the type of answer you are trying to elicit.

Example

Q: Then what happened?

A: The policeman hit me.

Q: How did the policeman hit you?

A: I don't understand.

Q: Did the policeman hit you with an open hand, a closed fist, his foot, or with an object?

A: He hit me with the butt of his gun.

Effect

An “open options” multiple choice question can be useful in focusing an interviewee and can help move along the interview, particularly if the interviewee is having difficulty forming a response. Although there is less potential for limiting an interviewee's response than when using “limited options” questions, you should still word “open options” questions carefully so as not to suggest an answer to the interviewee.

4.4 Leading Questions

A leading question is a question that is phrased in a way that suggests or elicits a particular answer. If you ask a question in a way that suggests the answer, the interviewee may give you the answer he or she thinks you want to hear, not the facts as they occurred.

On the other hand, in limited circumstances, a leading question can be useful when it is used to confirm something that the interviewee has already stated. Leading questions can focus the interviewee's answer in a particular direction, and may be helpful when you are trying to guide the interviewee to the appropriate point in his or her story in order to develop his or her testimony.

Example (appropriate leading question)

"Do you still live at 123 Main Street in Hoboken?"

Effect

Leading questions can speed up the interview process in an appropriate manner, particularly when confirming biographical information or when you want to make sure you understand what the interviewee has said. Gathering information using the question

above is faster than asking, "Where do you live?" Using the leading version of this question, however, would be inappropriate if you have questions or doubts about the interviewee's address.

Example (inappropriate leading question)

"Since Christians were harmed in Iraq, do you think you'll be harmed because you're Christian?"

Effect

Leading questions such as the one above may persuade the interviewee to give a specific answer, even though it may not be the answer the interviewee wants to give. You must remember that your task is to elicit information from the interviewee, not provide it for him or her.

Example (inappropriate leading question)

"They didn't really harm you, did they?"

Effect

This question, if asked during an asylum or refugee interview, suggests that you have decided, before the interview is concluded, that the interviewee did not experience past persecution. Instead, an open-ended question such as, "What happened before you left your country?" would elicit a response without suggesting an answer.

During an interview, you are in a position of authority and power. Most interviewees are unfamiliar with the interview process, and want you to see them in a favorable light. If you ask a question in a way that suggests the answer, the interviewee may give you the answer he or she thinks you want to hear, not the facts as they occurred.

In general, leading questions during non-adversarial interviews should be avoided, because interviewees are more likely to fully disclose information if they are asked open-ended questions that elicit a full range of possible answers.

5 PROBING / FOLLOWING UP

Probing or following up is **crucial** during an interview. If responses are not followed up with further questioning, you may discover after the interview that you do not have all the information needed to make an appropriate decision on credibility and the applicant's eligibility for the benefit sought.

It may be necessary to probe or follow up with whoever is present at the interview, including the principal interviewee, a family member, the attorney or legal representative (if one is present), or any others present.

The response to one question you ask may lead to additional questions that elicit more information about a particular topic or event. Probing for details and clarification is often done by beginning with open-ended questions, then following up on particular issues raised in the interviewee's responses by asking additional open-ended questions, closed-ended questions, or other types of questions.

Probing and following up should become second nature to you as an interviewing skill. This requires that you remain alert and intellectually engaged during the interview process. When probing for details, you should always maintain a neutral tone and give the interviewee an opportunity to respond with more detail or to clarify his or her statements. Let the interviewee know that you are attempting to understand fully what he or she is trying to convey.

You will ask follow-up questions to obtain additional information and further develop the record. This often involves probing to thoroughly understand the circumstances surrounding an event and its relevance to the purpose of the interview. You should base your follow-up questions on what the interviewee has already told you. For example, if the interviewee says she was threatened, ask questions to determine what the threat consisted of, when the threat occurred, who made the threat, and how it was made.

It is important to keep in mind the nature of the particular event as it may dictate the type of questions to ask and the extent to which probing is appropriate. For example, in a refugee case where the applicant has been sexually abused, you may decide to follow up on specific details related to the circumstances surrounding abuse (e.g., the time of the attack(s), the location, the number of people involved), but asking for details about the abuse itself is not necessary. Such questions could further traumatize the applicant and would not affect a determination on eligibility.⁴

You will need to ask follow-up questions in a number of circumstances. Consider the following:

5.1 Elicit Additional Facts Bearing On Eligibility

It is your role to make decisions and legal determinations based on facts. The additional information you obtain through follow-up questions helps you develop the factual record, which, in turn, helps you determine eligibility. A refugee or asylum applicant who fears persecution must establish, through direct or circumstantial evidence, the motive of the person he or she fears. The applicant may not know, or may not be able to articulate the motive of his or her persecutor and generally will not be able to make legal conclusions. For example, an interviewee whose claim involves domestic violence may not be able to explain clearly why he or she was abused. Questions such as "What were you doing or

⁴ For additional information, see RAIO Training module, *Interviewing Survivors of Torture and Other Severe Trauma*.

saying at the time of the attack?” or “What did [your attacker] say to you when he or she was hitting you?” may help to clarify the motive of the persecutor. Asking follow-up questions will assist you in determining the facts necessary to make these legal decisions.

5.2 Clarify Terms or Phrases

You will often need to clarify the meaning of a term or phrase the interviewee uses by asking follow-up questions.

Examples

- If an interviewee uses a term such as “tortured,” “mistreated,” or “detained,” that has a number of interpretations, you must determine exactly what the interviewee means.
- If the interviewee says that he or she was “hit,” it may be appropriate to ask the following:
 - “How did your attacker hit you?”
 - “What did the attacker hit you with?”
 - “Where on your body did the attacker hit you?”
 - “Please describe what happened.”
 - If an interviewee claims that the child she or he wants to adopt was “abandoned,” you may need to ask:
 - “What were the circumstances that led to the birth mother giving up the child?”
 - “Where did the birth mother leave the child?”
 - “With whom did the birth mother leave the child?”

5.3 Clarify Statements

Sometimes you will need to clarify statements that appear to be illogical or that may have several meanings.

Examples

- When asked how many children the interviewee had, she states that she is the mother of five children; however, she may also have several step-children that she is not including because she did not give birth to them, or she may be including children who are deceased.

- An interviewee may state that he came into the United States without inspection at Los Angeles. He may mean that he crossed the border at San Ysidro, but the only city he knows is Los Angeles; or he may have been a stowaway who arrived at the port in Los Angeles; or he may have arrived at the airport with false documents.

Ambiguous statements such as these must be clarified.

5.4 Connect Statements Made at Different Points in the Interview

You may need to connect statements the interviewee made at one point in the interview with statements he or she made at another point in the interview, asking follow-up questions about the relationship between the two statements.

Example

An interviewee states at the beginning of the interview that she has two brothers in the military. Later she states that guerrillas targeted her house when they raided her village but that she does not know why they targeted her house. It would be appropriate to probe further to determine whether there is any connection between her brothers' membership in the military and the guerrillas' attack on her house.

Appropriate follow-up questions include:

- Did the guerrillas say anything during the attack?
- Did they attack other houses?
- Why do you think they targeted certain houses, in addition to your house?
- How were the households that were not attacked different from the households that were attacked?

In asking such follow-up questions, you should avoid leading questions, such as:

- Did the guerrillas attack your house because your brothers were in the military?

5.5 Resolve Possible Inconsistencies

There may be inconsistencies within the interviewee's verbal testimony or between the interviewee's testimony and documents he or she submitted, including the application, or there may be other inconsistencies.⁵ Prior to the interview, you must review carefully all documents submitted by the interviewee, being alert for any possible inconsistencies in

⁵ For additional information, see RAIO Training modules, *Credibility and Evidence*.

the information within the documents, which may raise lines of questioning that you must pursue. During the interview, you should compare the information the interviewee provides with those documents and you should be alert to possible conflicting statements within the interviewee's testimony.

Examples

- At the beginning of the interview, an interviewee states that he entered the country of first flight in June 1995 after escaping from prison. Later in the interview, the interviewee submits an arrest document from his country of origin that is dated July 1, 1995. You must determine the reason for the discrepancy in dates. It is possible that the interviewee actually traveled to the country of first flight in July and made a mistake when giving the date, that the interpreter misinterpreted⁶ the dates, or that the arrest document is false.
- On the application the interviewee gives January 12, 2010 as his date of marriage. During the interview he says he was married in December 2009. Upon further questioning, he explains that the marriage contract between the two families was signed and recorded with the government in December, but they held the party for the families and community on January 12.
- Applicant stated at the beginning of the interview that she had four children, listed their names, and stated that three were in the Central African Republic and one was in Uganda. Later in the interview, she stated that all of her close relatives had fled Uganda. You would need to ask probing questions to clarify these conflicting statements.

5.6 Address Vague or Non-Responsive Testimony

You must always follow up on vague or non-responsive answers. If the interviewee's answer is vague, does not directly answer the question, or does not answer the question at all, this may indicate that you, the interpreter, or the interviewee has not communicated clearly. On the other hand, it may indicate that the interviewee is not being forthright or is fabricating a claim.⁷

Examples

- The interviewee testifies to having attended high school at a boarding school in Tehran for five years. You ask the interviewee the school address, but the interviewee says he does not know the address. You then follow up by asking, "You testified to attending and residing at this school for five years. Is there a reason you do not know the address?" (Note: In some locations, such as rural

⁶ For the definition of "interpret" and "translate," see Other Materials.

⁷ For additional information, see RAIO Training module, *Credibility*.

villages, there may not be street addresses. See RAIO Training module, *Cross-Cultural Communication*.)

- When you ask the interviewee questions, he does not answer completely; rather, he gives vague responses and his wife answers for him, sometimes correcting or contradicting what he has said. When you advise that you want only the husband to respond to the questions you ask him, you find out that there is an issue with the language of interpretation: the interpreter only speaks Mandarin. The husband's first language is Cantonese, however, and he does not speak Mandarin well. Because his wife speaks both Mandarin and Cantonese, she has been responding for her husband.
- The interviewee testifies to having served as an active member of an opposition political party for the past ten years. When you ask the interviewee the name of the political party, he responds with an acronym, OLF. When you ask what the letters stand for in the full name of the party, he cannot answer. You then follow up by asking, "You testified to having been an active member of this political party for the past ten years. It seems that someone who is an active member of a political party for ten years would know the full name of their party. Can you explain why you do not know the full name of the party?"

When following up on vague or non-responsive answers you must be particularly careful about your tone of voice, being sure to refrain from using a hostile or confrontational tone.

5.7 Ask Questions in Relation to Country of Origin Information

For protection-related interviews, a thorough knowledge of country of origin information is essential in order to ask appropriate follow-up questions. Officers who are well-versed in country of origin information will be better able to ask relevant follow-up questions and will be less likely to miss important facts.

6 GUIDELINES FOR ELICITING TESTIMONY

You will have to draw on a range of question types and interviewing techniques to elicit all necessary information in an impartial manner within time constraints, while remaining in control of the interview. This section includes a number of techniques to keep in mind when interviewing.⁸

6.1 Prepare for the Interview

⁸ For additional information on interview best practices, see RAIO Training module, *Interviewing – Introduction to the Non-Adversarial Interview*.

Before beginning an interview, review the application, the supporting documents, security check information, as well as country of origin information if necessary. This review can provide a basis for determining initial lines of questioning as well as specific questions to ask during the interview. It may be helpful to create a timeline in your notes to refer to during the interview, particularly if the interviewee discusses multiple and/or overlapping events. Additionally, adjudicative aids from your Division may be referenced to help prepare for your interview. [ASM Supplement – Sample Checklists] You should go into the interview with a mental or written outline of the issues raised in the application that you need to develop during the interview.

While thorough pre-interview preparation allows you to identify questions to ask during the interview, it should not prevent you from exploring additional issues that arise during the interview.

6.2. Establish Rapport

Research has shown that a good relationship between the interviewer and interviewee is key to getting sufficient and accurate information during an interview.⁹ During your introduction, while you explain the purpose of the interview, the roles of those present, and while you verify biographical sections of the application, make every effort to establish rapport with the interviewee and others present. You can continue to build on this rapport as you enter the substantive phases of the interview.

6.3 Be an Active Listener

In addition to assisting you in gathering the information you need, being an active listener can help build rapport with the interviewee.

6.3.1 Listen Carefully

It is imperative that you pay attention and listen to what the interviewee is saying so that you do not miss important information or relevant lines of questioning. If you are mentally preparing your next question or focusing on taking notes as the interviewee is testifying, you may miss key elements in the interviewee's answer that would affect your choice of question or questioning technique.

6.3.2 Maintain Appropriate Eye Contact

Make non-confrontational eye contact with the interviewee. Look at the interviewee rather than the interpreter when asking questions. Keep in mind, however, that eye contact may have different meanings in different cultures, and with different types of

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.

interviewees. When interviewing survivors of torture or severe trauma, for example, eye contact may appear confrontational. Always be mindful of cultural cues, and adapt your eye contact to the situation.¹⁰

6.3.3 Show Interest

Engage the interviewee by showing interest in what he or she is saying. Convey your interest to the interviewee through appropriate posture and facial expressions. During the interview, you should avoid slouching, fidgeting, looking at people passing by the office, or reading the application when the interviewee is speaking. Keep your facial expressions open and neutral.

Encourage the interviewee to continue speaking when appropriate. General leads or prompts, such as “go on” or “and then?” let the interviewee know you are listening and that you are following what he or she says, allowing him or her to elaborate. This type of encouragement also indicates that you are engaged in the interview even while taking notes.

6.3.4 Use the Interviewee’s Words and Terms

Repeating what the interviewee said can encourage him or her to continue a narrative or explanation. Further, it can help the interviewee refocus if he or she becomes confused or goes off on a tangent.

Using the interviewee’s words also can help build rapport by showing the interviewee that you are focusing on their statement.

Example

“You said the soldiers ‘came in the tea shop while [your] husband and parents were out in the fields.’ When they came in, what did they say to you?”

6.4 Be Patient and Flexible

As noted above, you must not show impatience or discouragement when encountering a confused, non-responsive, or evasive interviewee. The interview can be a stressful situation for the interviewee and others at the interview. Cultural and language barriers may be substantial. Information can be easily misunderstood, especially when an interpreter is involved. You must be patient and prepared to repeat or rephrase questions or to ask the interviewee to repeat his or her answers.

¹⁰ For additional information, see RAIIO Training modules, *Cross-Cultural Communication and Interviewing - Interviewing Survivors of Torture and Other Severe Trauma*.

It is inappropriate to show frustration by your tone of voice or by making statements such as “Just answer the question!” Even saying, “Could you please ...?” depending on the tone, may still convey frustration. Also be aware of your body language and other non-verbal cues as they may reflect emotions such as impatience, more clearly than your words.

Sometimes, a few seconds of silence can give the interviewee an opportunity to collect his or her thoughts and determine how to answer a particularly difficult question. You may feel a need to fill in the silence by asking additional questions. However, waiting a reasonable time for the applicant to respond is likely to result in better responses. If the interviewee is clearly formulating an answer, give him or her the time to do so. Silence can seem to last longer in our minds. As you gain more experience, silence will become a useful tool.

Keep in mind that interviews unfold in unpredictable ways and at various speeds. You must be flexible so that you can pursue lines of questioning that may come up. Allow enough time for the lines of questioning to develop fully, adapting your questioning to fit the situation.

6.5 Have All Interactions Interpreted to the Interviewee

There may be times when you need to discuss certain issues with the attorney or representative, interpreter (if one is present), or someone else at the interview. During interviews in which an interpreter is present, the interpreter is the conduit through which information is relayed to and from the interviewee. Conversations with the interpreter or any other person present that are not interpreted isolate the interviewee and create distance between you and the interviewee, thereby thwarting the ultimate goal of eliciting sufficient relevant testimony to determine eligibility. Ensure that what is discussed is interpreted so the interviewee is aware of all that transpires during the interview and to avoid confusion and foster a sense of inclusion on the part of the interviewee.¹¹

6.6 Keep Questions Simple

Use questions that are clear, short, and simple:

- “Who are you afraid of?”
- “What do you think would happen to you if you returned?”
- “Why?”

Avoid using double negatives in your questions, as it can confuse the interviewee and interpreter.

¹¹ For additional information on eliciting testimony through an interpreter, see RAIO Training module, *Interviewing – Working with an Interpreter*.

Example (of a poorly-worded question)

“Isn't it true that you didn't leave your town until you found out that you were unemployed and unable to locate a job?”

Be mindful of the various types of questions and the effect they have and use various questioning techniques purposefully to fully elicit from the interviewee the relevant information bearing on their eligibility for the benefit sought.

When working with an interpreter, if you need to ask a long question or a question for which you need to give an explanation before the interviewee responds, break up your question or statements into shorter phrases that can be easily interpreted.

Example

1. Mr. Abdul, I need to change the subject now. (Pause for interpreter)
2. I want to begin discussing your military history. (Interpret)
3. I will be asking you about each part of your military service, (Interpret)
4. what your duties were, (Interpret)
5. and where you were stationed. (Interpret)
6. Are you ready? (Interpret)
7. When did you first join the military? (Interpret)

6.7 Use Language That is Easy for the Interviewee to Understand¹²

The interviewees you encounter will have varied levels of English language ability, education, knowledge of the U.S. immigration process, and knowledge of colloquial English terms. Words such as *adjudicate*, *well-founded fear*, and *inadmissibility* may not be clear to the interviewee or interpreter. Therefore, you must use words and terms that will not be misunderstood by the interviewee and others present at the interview.

Furthermore, on October 13, 2011, the U.S. Government implemented the *Plain Writing Act of 2010*. This law requires, in part, that federal agencies draft and issue documents in language that the public can understand. Although this law concerns written communication, the principles outlined in it are relevant to verbal communication with the public, including your interviews.

¹² For additional information on using language that is easy to understand, see RAIO Training module, *Interviewing – Working with an Interpreter*.

6.8 Repeat or Rephrase Questions

At times it may become necessary to repeat a question due to a non-responsive or unclear answer from the interviewee. When the interviewee appears confused by an initial question, the wording of that question may be the source of the problem. Think of a way to restate the question or to approach the subject in a different way rather than asking the same question again. Rephrasing may help the interviewee better understand what you are asking.

Example

Q: "Were you ever arrested?"

A: (silence, long pause)

Q: "Have you ever had any problems with the police?"

or

Q: "Have you ever been stopped or detained by any authorities?"

When you don't understand what the interviewee has said, say so. Just as it is important for an interviewee to explain when he or she has not understood a question, it is also critical for you to let the interviewee know when you don't understand something he or she has said. Of course, this should be done in a polite manner. This will give the interviewee an opportunity to clarify what he or she has said.

Keep in mind that the interviewee wants you to understand his or her testimony. Rarely will asking an interviewee to repeat or rephrase an answer due to your confusion be problematic.

Example

Q: "Why did you join the student group?"

A: "We met at school."

Q: "The group met at school?"

A: "Yes"

Q: "And what was the reason you joined the group?"

Example

Q: “Did you ever have any problems with the Guatemalan army (interpreted as *ejercito*)?”

A: “No.”

Q: “Did you ever have any problems with soldiers (interpreted as *soldados*)?”

A: “Yes. They came to our village and took my husband and the other men. Then they came back to me and...”

6.9 Repeat or Summarize the Interviewee’s Testimony

Repeating what the interviewee said can ensure that you do not misunderstand or miss any information.

When you summarize what you heard, the interviewee is given an opportunity to point out any misunderstandings or information that was missed. Summarizing parts of the testimony also brings together the important points of the discussion and gives each participant at the interview an organized picture of what was said. When summarizing, omit irrelevant issues and organize the pertinent information presented.

Example

“What I heard you say was . . . Is that correct?”

6.10 Ask the Interviewee to Repeat Your Question Back to You

If an interviewee's response does not answer your question, a technique you can use is to ask the interviewee or interpreter to repeat your question back to you so you can be certain it was understood. This technique should be used sparingly. While it serves to ensure accurate understanding, it does cause a delay, and if done many times in one interview, it can lead to confusion.

Example

“Your answer makes me think you did not understand what I am asking. Can you repeat my question so that I am sure we are discussing the same topic?”

6.11 Place the Events in Time or Sequence

Putting events in proper sequence can help you and the interviewee discuss the events and helps you assess the impact of the events on the claim. Knowing when and the sequence in which events occurred can affect the determination of eligibility as well as the assessment of the interviewee’s credibility. You should ask questions that facilitate understanding the order in which the events took place.

Examples

- "When did the arrest happen?"
- "Was this before or after the birth of your oldest child?"
- "What led up to the attack?"

Recollection of exact dates or a sequence of events can be difficult, particularly if the event was traumatic.¹³ It is often easier to recall events in relation to one another than to recall events in isolation. If the interviewee has difficulty responding to: "What month did you desert the army?" you could try rephrasing the question to: "Had the airstrikes begun when you deserted?"

It is important to keep in mind that perceptions of time vary from culture to culture. A question asking for a specific time or date may not be understood by an interviewee whose culture places little value on specific hours and dates. In addition, some interviewees may want to explain what they feel to be the most important events first rather than relate a story in chronological order.

Ask for the time of an event by asking the time relative to other events, such as in what season the event occurred, or if the event took place before or after a holiday, rainy or dry season, birth of a child, death, planting or harvesting, etc. In addition, asking the question several different ways may help you elicit all of the necessary information.¹⁴

Examples

- "You told me you were stationed north of Kirkuk in 1977 or 1978 but you can't recall which months. Do you remember if the weather was cold or hot?"
- "Was your son old enough to attend school when your husband left home?"

However, in situations where you suspect fraud, it may be useful to elicit testimony out of order to determine whether the interviewee's testimony is internally consistent. This does not mean that it is appropriate to try to trick the applicant. Asking questions out of sequence is an appropriate method of verifying credibility only if the applicant has demonstrated ability during previous portions of the interview to appropriately handle such questioning. It may be inappropriate to draw a negative credibility inference when the interviewee has previously demonstrated, for example, that she is from a culture

¹³ For additional information, see RAIO Training module, *Interviewing – Interviewing Survivors of Torture and Other Severe Trauma*.

¹⁴ For additional information on culturally-based perceptions of time, see RAIO modules, *Credibility* and *Cross-Cultural Communication*.

where time references are not significant.¹⁵ It is important to remember to always remain professional and impartial, even when suspecting fraud.

6.12 Consider the Cultural Background of the Interviewee

Be mindful of the fact that even among people who share a common language, words, expressions, and gestures can have different meanings in different cultures or countries, and perceptions can vary from culture to culture. Even within one country or culture, an interviewee from a remote, indigenous population likely would not describe his or her experiences using the same words, with the same meanings, as an interviewee from a city. Furthermore, interpreters using the precise dialect of the interviewee or sharing the interviewee's cultural background will not always be available.¹⁶

6.13 Be Aware of the Use of Pronouns and Other Ambiguous Terms

"What did they do then?" may seem clear to you, but the interviewee or interpreter may be unclear about the use of ambiguous terms such as "they" and "then." Which "they" is being referred to: the traffickers, the interviewee's family, members of the opposition party, or the children? Moreover, "then" is an imprecise time marker and may be misunderstood. It is important to be specific when asking questions.

Example

"After the police tore down your banner, what happened next?"

Relationship terms such as "your sister," titles such as "the police inspector," or actual names of persons should be substituted for pronouns such as "he" or "they" to avoid confusion. Similarly, it is important to clarify with the interviewee what he or she means by the terms "he" or "they."

Examples

- "You said 'they' hit you. When you say 'they,' who do you mean?"
- "When you say the birth parents relinquished the child to 'them,' are you referring to the prospective adoptive parents or are you referring to the orphanage?"
- "When you say 'they' were all witnesses at your wedding, do you mean your family, your husband's family, or someone else?"

6.14 Do Not Use Compound Questions

¹⁵ For additional information, see RAIO Training module, *Evidence Assessment*.

¹⁶ For additional information, see RAIO Training module, *Cross-Cultural Communication* (under development; see ROTC and AOBTC lesson plans on this topic).

Compound questions are several questions asked together. In everyday conversation, individuals who speak the same language and know each other may use compound questions without miscommunication. They reframe questions and statements in mid-thought, combine related ideas, or ask multiple questions without pausing. At an immigration interview, however, a second language and an interpreter are often involved, as well as different cultures. These are all “filters” through which the exchange of information occurs. Asking compound questions at an immigration interview can lead to critical misunderstandings. Officers asking compound questions do so unwittingly, as they do with normal conversation. You should make every effort to avoid asking compound questions.

Examples (to be avoided)

- “What were your experiences in jail, such as how long you were detained, the conditions of the jail, and what happened to you while you were there?”
- “How were you threatened and why, if you were so fearful for your life after receiving the threats, did you wait six months to leave the country?”
- “Can you tell me the name and current location of your spouse, what she does for work there, and what she’s told you about the city in which she currently lives?”
- “Do you know what prompted your father to leave China and why is he not identified as your parent on the household registry you submitted?”

The use of compound questions can result in several unfavorable outcomes including the following:

- Questions are not interpreted completely.
- Confusion and misunderstandings occur because the answer to one question may be interpreted as the answer to a different question.
- The interviewee and the interpreter can easily become confused and not know what to answer.
- The interviewee’s confusion could cause you to determine that the interviewee is not credible.

Ask each part of a compound question, or a series of questions, separately to minimize confusion or the appearance of inconsistencies. Writing your interview notes in a question and answer format can help you avoid asking compound questions.

Clear and concise questions are more likely than compound questions to withstand the filters of interpreters and cultural differences and will cause less confusion for all parties

during the interview process. Compound questions may compromise an interview and must be avoided.

6.15 Do Not Use Loaded Questions

A loaded question conveys a bias or a personal judgment, usually negative, of the interviewing officer, or it presupposes information or facts that have not yet been established.

Examples (to be avoided)

- “Why didn’t you stay and protect your family instead of leaving them to fend for themselves?”
- “Why in the world did you do that?”
- “If you really weren’t complicit with the regime, why did you return?”

Loaded questions put people on the defensive and impede the open flow of communication. An interviewee who feels defensive may be reluctant to openly relate his or her experiences. Asking questions that reveal your personal biases undermines your control of the interview. For all of these reasons, loaded questions must not be used during interviews.

6.16 Keep the Interview Focused

Keeping the interview focused is important so that you can gather all of the relevant information necessary to make a decision within time constraints.

6.16.1 Focus on Relevant Details

When you begin an interview, you should have a plan of what information you need to elicit. Of course, your plan may change as the interview progresses, but having a plan will help you to focus on the relevant information you need to elicit.

6.16.2 Thoroughly Address Each Issue Before Moving On

As issues come up during the interview and you recognize additional lines of questioning that you want to pursue, you may be tempted to move to another topic without fully exploring the first topic. As noted in RAIO Training module, *Interviewing – Introduction to the Non-Adversarial Interview*, it is a good practice to keep a notepad or some other method of quickly recording questions or lines of questioning that come to mind that you want to ask later so you do not forget to ask, and you can remain on point on one topic until you have all the information you need before moving on.

6.16.3 Help the Interviewee Understand What Is Relevant

An interviewee's perception of what information is important may differ from yours. The interviewee may not feel it is necessary to include certain details and may omit information that can assist you in determining whether the interviewee is eligible for a benefit. He or she is already familiar with the information and may not realize that you need to know additional details surrounding particular events. An interviewee also may jump from one thought to another. In such cases, you may need to focus the interviewee on a single topic or point. The interviewee may be confused by your attempt to focus on something that he or she feels is not important. It is your responsibility to help the interviewee focus his or her testimony on information that is relevant to the purpose of your interview.

Examples

- “In order to help reach a decision in your case, it is important that we discuss what happened when you went to the Prosecutor’s Office on March 15, 2008.”
- “I understand that the home invasion was a traumatic event for your family. However, to make the right decision, I need to get a few more details about the call you received afterwards. What specifically did the caller say?”
- An interviewee at an I-730 refugee follow-to-join interview may think that his previous military history is irrelevant since the purpose of the interview is to confirm the family relationship. The information is important, however, because it could show that the interviewee assisted or engaged in the persecution of others, in which case the interviewee would not meet the legal definition of a refugee.

6.16.4 Keep the Interviewee on Point

To conduct efficient interviews, focus your questioning on topics that are relevant to the purpose of the interview. If the interviewee keeps returning to topics you consider irrelevant or that you believe already were covered, you should explore the topic enough to determine its relevance. If it is relevant, you should either explore the issue or explain to the applicant that you will return to the subject later. However, if you determine it is irrelevant, acknowledge the interviewee’s concern and explain what information you actually need.

Example

Q: Right now, I am asking about an incident in your village outside of Mosul. You continue to tell me about what happened to your father in Diyala. How does your father’s situation relate to the incident in the village?

A: Because my father was a deacon at St. Paul’s church, the Iraqi Islamic State sent a message to the church to tell all of us in our home village that we are not wanted in Iraq unless we convert. Most of the members of St. Paul’s are people who migrated to Diyala from our village and many come back here for safety because Diyala is so dangerous.

Q: I see. Tell me about the message to the church. Then we will come back to what happened in the village.

Some interviewees may try to explain in detail information about their country or relate a complete history of their family. In such cases, provide assurance to the interviewee that you are aware of the situation in the particular country and would like the interviewee to focus on details that relate specifically to the application or request. You can also assure the interviewee that you will be eliciting all the information that you need.

Examples

- “Sir, I understand your explanation of the ‘South Azeri movement’ in Iran and how important it is to you. I also have country condition background information about it. Right now, though, I would like you to talk about what actions the Iranian government took when you participated in the meeting with other ‘South Azeris’ two years ago.”
- “I see that your grandfather was very influential in your life. However, right now I would like you to tell me when you became politically active yourself.”
- “Information about your arrest is important. Before we discuss that, however, I would like to learn more about how you became involved in your political party.”

Although trying to refocus an interviewee may sometimes be difficult, you must remain professional and non-adversarial at all times, while keeping control of the interview.

6.17 Use Time Efficiently

Time is limited in all interviews. Managing your time can also help you keep the interview focused. You must efficiently use the time available by asking questions that will elicit the information you need. Ideally, the interviewee should be doing most of the talking and you should be actively listening and noting the interviewee's responses. When the interviewee raises topics that are not material to the purpose of the interview, politely redirect the interview.

Examples

- “I’m sorry, I know you are trying to answer the question, but I’d like you to tell me what the soldier said to you.”
- “That’s interesting, but what I’m asking is...”

Keep in mind, however, that if the interviewee digresses or does not answer the questions posed, this may be an indication that the interviewee is not being truthful. In such situations, you may need to take time to ask additional questions to further assess credibility.

Your time management during the interview will evolve as you gain experience and familiarity with the types of interviews you conduct. Keep the interview focused on eligibility.

6.18 Consider Past Trauma

Interviewees who are survivors of torture or other severe trauma may have difficulty responding to questioning during an interview. The trauma he or she experienced may distract the interviewee to such an extent that it may be difficult for the interviewee to testify about certain incidents or experiences. You need to take this into consideration when interviewing.¹⁷

Examples

- “I understand that you have difficulty remembering what happened while you were imprisoned, but please tell me what you do remember.”
- “I understand that you’d prefer not to talk about what happened; but it is very important to your case. Everything you tell me is completely confidential. Did the police hurt you after they arrested you?”

6.19 Pay Attention to Transitions

Be aware of how you shift from one topic to another and what effect these shifts have on the interviewee’s testimony. In most cases, the transition should be smooth and clear. Remember that the interviewee probably does not know the law and the important issues to the same extent as you. A smooth transition will aid efforts to elicit information.

Example

Changing focus from a discussion of what happened at the hospital after the interviewee was beaten to what happens to similarly situated people may confuse the interviewee. A statement such as, “We have talked about the events at the hospital; now I want to ask you some questions about what happens to other people who have been attacked” can help the interviewee make the transition to the new topic of future harm.

6.20 Ask Questions about Events in Relation to Known Country of Origin Information

Being well-versed in country of origin information allows you to ask relevant follow-up questions for a variety of adjudications. The more you know about the interviewee’s country of origin, the less likely you will be to miss important facts. Awareness of country of origin information also assists you in conducting the interview with cultural

¹⁷ For additional information, see RAIO Training module, *Interviewing Survivors of Torture and Other Severe Trauma*.

sensitivity, may assist you in putting the interviewee at ease during the interview, and may assist you in determining credibility.¹⁸

6.21 Avoid Making Assumptions

Avoid jumping to conclusions by making assumptions without knowing all of the facts.

Examples

- The interviewee states that he was a member of an opposition political party and that he was arrested at a party rally at which he was the main speaker. You might assume that the interviewee was arrested because he voiced his political opinion at the rally. It may be possible, however, that the interviewee was arrested because his party did not apply for the necessary permission to hold the rally or that he and others in the rally became violent and attacked the houses of opposing party members who lived nearby.
- In an interview for an I-407, Abandonment of Lawful Permanent Resident Status, an LPR states that she has been outside the United States for more than one year. You should not assume that she has abandoned her status. Instead, elicit testimony regarding the circumstances and reason for her departure from the U.S. including whether she has applied for and been granted a reentry permit.

Assumptions about what an interviewee may know, such as “all Christians know the Bible,” may keep you from probing more deeply into an interviewee’s eligibility, or may lead you to determine incorrectly that the interviewee is not credible.

6.22 Resolve Inconsistencies

You must let the interviewee know if you have noticed a material inconsistency or if you are trying to better understand his or her testimony. Always remain impartial and give the interviewee an opportunity to respond with more detail or clarify his or her statements. When following up on inconsistencies or vague, non-responsive, or contradictory answers, you must be particularly careful about your tone of voice. Be sure to refrain from using a hostile or confrontational tone. Always remain professional, impartial, and in control of the interview.

Example

“When you were explaining your situation to UNHCR, you said the Mai Mai entered your house, took your parents outside, then killed your father and raped your mother. Now you said something different, that the Mai Mai took your father

¹⁸ For additional information, see RAIO Training module, *Researching and Using Country of Origin Information*.

and brother away and you have not seen them since. Can you help me understand the difference in what you said happened to your father?"

(Note: If an interpreter is involved, this example would most likely be interpreted to the interviewee in three chunks of information, conforming to the principle noted above under, "Keep Questions Simple," to keep your questioning clear, short, and simple.)

6.23 Develop a Library of Interviewing Best Practices

As you gain more experience, you will develop your own interview style and you will recognize best practices that work for you. Talking with other officers can also help increase your repertoire of interviewing skills.¹⁹

7 CONCLUSION

You have the affirmative duty "to elicit all relevant and useful information bearing on the applicant's eligibility."²⁰ 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, it is RAIO policy for officers in the RAIO Directorate to conduct all interviews in a non-adversarial manner.

The goal of RAIO interviews is for the interviewee to confirm, correct, or elaborate on information that is in the application and supporting documentation so that you can make a determination on eligibility for the benefit he or she seeks. The interview allows you to address inconsistencies and other credibility concerns and gives the interviewee an opportunity to address those issues. The interview also allows you to determine whether the interviewee participated in any activities that would result in a mandatory bar or a ground of inadmissibility, or establish a basis for a discretionary denial or referral.

You may apply a wide range of interviewing techniques to achieve these goals, many of which are discussed in this module. Officers who remain flexible and alert will generally elicit the most useful and relevant information. When implementing the techniques for eliciting testimony, remember: engage the interviewee; put the interviewee at ease by using a non-adversarial tone; maintain control of the interview; and always be professional.

The key to a successful interview is to:

- Prepare

¹⁹ For additional suggestions and best practices for developing interviewing skills, see RAIO Training module, *Interviewing – Introduction to the Non-adversarial Interview*.

²⁰ 8 C.F.R. § 208.9(b).

- Establish rapport
- Review relevant documentation
- Use appropriate questioning techniques
- Listen actively
- Ask probing questions
- Follow up thoroughly
- Clarify inconsistencies

8 SUMMARY

8.1 Officer's Duty to Elicit Testimony

While the burden is on the applicant to establish eligibility for a benefit, equally important is your obligation as the interviewing officer to elicit all pertinent information. The interview is your opportunity to further develop the record by gathering testimonial evidence. The quality of that testimonial evidence depends on your ability to elicit information from the interviewee.

8.2 Types of Questions Used in Interviews

There are many ways you can ask questions during an interview. The types of questions you use will vary within each interview as well as from interview to interview. Some types of questions may be more effective than others, depending on the kind of information you are eliciting from the interviewee.

Open-Ended Questions

An open-ended question helps put the interviewee at ease and is framed to give the interviewee the opportunity to provide a full answer in his or her own words. It often begins with "why" or "how." An open-ended question gives some control to the interviewee and may lead to a lengthy response; therefore, you must take care to always keep the interviewee focused on what is relevant to the proceedings.

Closed-Ended Questions

Closed-ended questions elicit a brief specific statement or a yes or no answer. Closed-ended questions help you maintain control as the interviewing Officer. These questions can be helpful when you are trying to confirm information that was already provided and when eliciting specific information. In combination with open-ended questions, closed-ended questions assist you in directing the flow of the interview and obtaining certain specific facts.

Multiple Choice Questions

A multiple-choice question can be either “limited options” or “open options.”

A “limited options” question gives the interviewee a choice of a few possible responses. An “open options” question provides suggestions about the type of information you need, rather than providing specific responses from which to choose.

Leading Questions

A leading question is a question that is phrased in a way that suggests a particular answer is expected. Leading questions must be worded and used carefully and judiciously, taking care not to “create” the interviewee’s testimony.

8.3 Probing / Following Up

No reply or issue should be left in doubt when you finish the interview. Remain alert throughout the interview and be prepared once you have asked a question and received a response to follow up on the information you received until you have obtained the information necessary to make a proper determination. Asking follow-up questions and probing for information during an interview is *crucial*. You will need to ask follow-up questions throughout the interview and, in particular, in order to:

- Elicit additional facts bearing on eligibility
- Clarify terms or phrases
- Clarify statements
- Connect statements the interviewee made at different points in the interview
- Resolve possible inconsistencies
- Address vague or non-responsive testimony
- Ask questions in relation to country of origin information

8.4 Guidelines for Eliciting Testimony

- Prepare for the interview.
- Establish rapport.
- Be an active listener.
- Be patient and flexible.
- Have all interactions interpreted to the interviewee.

- Keep questions simple.
- Use language that is easy to for the interviewee to understand.
- Repeat or rephrase questions.
- Repeat or summarize the interviewee's testimony.
- Ask the interviewee to repeat your questions back to you.
- Place the events in time or sequence.
- Consider the cultural background of the interviewee.
- Be aware of the use of pronouns and other ambiguous terms.
- Do not use compound or loaded questions.
- Keep the interview focused.
- Use time efficiently.
- Consider past trauma.
- Pay attention to transitions.
- Ask questions about events in relation to known country of origin information.
- Avoid making assumptions.
- Resolve inconsistencies.
- Develop a library of interviewing best practices.

PRACTICAL EXERCISES

OTHER MATERIALS

“Interpret” vs. “Translate”

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 documents from another language into English and vice versa.

For additional information, see RAIO Training module, *Interviewing – Working with an Interpreter*.

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. RAIO Training Module—ASM Supplements
2. Interviewing Adjudicative Aid (see below)

ADDITIONAL RESOURCES

None

SUPPLEMENTS

ASM Supplement – Officer’s Duty to Elicit Information

During an asylum interview, the Asylum Officer must elicit testimony in order to answer the following questions:

- Who is the applicant?
- Who are the family members included in the application?
- How and when did the applicant enter the United States?
- Why did the applicant leave his or her country?
- Did the applicant suffer past persecution? (Focusing on past harm and/or threats, if any.)
- Does the applicant fear future persecution?
- What are the motives of the past or potential future persecutor in harming the applicant?
- Is the applicant afraid to return, and if so, why? (Focusing not only on the experiences of the applicant, but also on the experiences of others similarly situated, and any other serious harm.)

- Who does the applicant fear? (Who is the persecutor?)
- Is the persecutor a governmental actor or a person or entity that the government is unable or unwilling to control?
- Is the feared persecution country-wide?
- Did the applicant participate in any activity that would make him or her ineligible for asylum or warrant a discretionary denial/referral?

ASM Supplement – Interviewing Adjudicative Aids

This adjudicative aid is not intended to be fully exhaustive of all avenues of exploration and all issues that may arise during an interview. The purpose of this aid is to serve as a reminder of key elements in preparing for and conducting an asylum interview.

PRE-INTERVIEW preparation/review of file

- ___ note who is included/family relationships/ages
- ___ is file complete?
- ___ necessary forms (I-589, fingerprints, photos)
- ___ dependents' A-files included
- ___ G-28 on file? signed by applicant and representative?
- ___ any indication file is not in jurisdiction?
- ___ note claimed entry date, status of applicant, and filing date
- ___ review claim
- ___ review relevant documents
- ___ quick country of origin information review
- ___ general timeline of key events

- check for any special status (e.g., *ABC*, *Mendez*)
- computer systems check
- does file review raise the possibility there may be another A-file associated with the applicant?

CONDUCTING THE INTERVIEW

• Introduction

- purpose of interview
- confidentiality
- process (including roles of those present)
- interpreter
- interpreter's form, role
- representative
- G-28, waiver if representative is not present
- role
- dependents
- verify (and dismiss during interview if appropriate)

• Oath

- applicant
- interpreter, and interpreter monitor if being used
- witnesses

• Verify basic biographic and entry information (check I-589 and documents)

- address, biographical information (use "post-it" on front of file as reminder to update RAPS if necessary)
- date, place, manner of entry
- documents
- verify and note if from original
- compare for consistency (copy at end of interview if necessary)
- determine who prepared I-589 and if applicant is aware of contents of application
- annotate changes on the I-589

• Testimony

- other countries lived in and status there
- reason for claim (cover all possible grounds)
- identify persecutor and issues of state protection
- mandatory bars, other reasons for ineligibility, inadmissibility or discretionary denial

- ___ go to Q&A format if there is derogatory information
- ___ compare with I-589, documents, and country of origin information
- ___ probe credibility
- ___ question applicant about reason for any discrepancies/inconsistencies
- ___ question applicant about any circumstances surrounding any delay in filing

• **Closing statement/questions**

- ___ applicant
- ___ representative

• **Conclusion**

- ___ sign/date I-589
- ___ explain any corrections to applicant
- ___ copy documents and certify if from original or copy
- ___ advise applicant how s/he will be informed of decision (pick-up, mail)

• **Immediate POST-INTERVIEW tasks**

Update RAPS

- ___ MODA - (check CSTA screen to be sure case is assigned to you)
- ___ VIST - status
- ___ PUSH - pick-up date
- ___ MOVE - new address
- ___ I-589 - biographical information

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.

Caveat: Some of the form types below contain example questions for eliciting specific testimony. The example questions may or may not apply to a specific interview scenario, and are not intended to be all-inclusive.

REQUIRED READING

None

ADDITIONAL RESOURCES

None

SUPPLEMENTS

IO Supplement – Family Based Petitions

• **Form I-730, (Visa 92/Visa 93) Refugee/Asylee Relative Petition**

Purpose: To verify the family relationship between the interviewee and the Petitioner in the U.S.

People Interviewed: The beneficiary residing overseas.

Basic information the Officer should elicit:

- Who is the interviewee?
- How is the interviewee related to the Petitioner?
- For following spouse – elicit information on marriage dates and associated history; compare with I-589 or I-590.
- Does the interviewee know why the Petitioner left their country?

- *CAUTION reminder: 8 CFR 208.6 confidentiality continues to apply, per regulation (for asylum) and per policy (for refugee) in the following-to-join interview.*
- Question example: Do you know the date your relative (spouse, parent etc.) departed country X? To your knowledge, did your relative depart with a visa? Do you know the purpose of your relative's departure from country X? Officer should document any discrepancies.
- Is the interviewee subject to any grounds that would make them inadmissible or bar them from following-to-join status or admission to the United States as a refugee or derivative asylee?

• **Form I-130, Petition for Alien Relative**

Please note: I-130s are typically a paper based adjudication; however interviews may be conducted by USCIS when the bona fides of the relationship are in question.

Purpose: To verify the family relationship between the interviewee and the Petitioner.

People Interviewed: The beneficiary and occasionally the petitioner residing overseas

Basic information you should elicit:

- Who is the interviewee?
- How is the interviewee related to the Petitioner?
- Have the interviewee and Petitioner submitted sufficient evidence to establish the claimed relationship?
 - If relevant (with beneficiary and Petitioner attending interview together), you may interview the relatives separately to assess credibility and bona fides.
- Verify marital and divorce history.
- Verify birth/parental information.
- Can the interviewees provide sufficient biographical details about one another?
- Example question: Tell me about your spouse's family – how many

siblings does he/she have? What is the name of the oldest/youngest sibling? What are the names of your spouse's parents? Are both parents alive? Where do they live?

- Do the interviewees provide consistent and detailed information regarding their courtship?
 - Example question: When and where did you first meet? Tell me what happened? Where were you living at the time? (if relevant) What is the name of the person who introduced you to each other?
- Do the interviewees provide consistent and detailed information regarding their living arrangements?
 - Example question: (if relevant) Describe the home/apartment? Suggest interviewee draw a quick floor plan. (if relevant) Does couple sleep in same bed – who sleeps on what side?
- Is the beneficiary-interviewee subject to any grounds that would make them inadmissible for admission to the United States as a conditional or legal permanent resident?

IO Supplement – Intercountry Adoption Forms

The following are forms that you may or may not interview to process an adoption case. There is no requirement that an interview be conducted on any of the following forms associated with an intercountry adoption. Local guidance and case specific facts dictate whether these forms are verified through a face to face interview with the prospective adoptive parents or through a paper adjudication. For the purpose of intercountry adoptions, an interview may be conducted individually or by a combination of the following individuals: Department of State Official, USCIS Officer, Consular Officer, and/or FSN.

- **Form I-600A, Application for Advance Processing of Orphan Petition**

Purpose: To determine eligibility/suitability of prospective adoptive parents (PAPs) to adopt.

People Interviewed: Prospective adoptive parents (PAPs)

Basic information **the** you must elicit:

- Verification of the PAPs identities, marital status and countries of citizenship.
- Verification of the required home study requirements.
- What is the name and contact information of the organization or individual assisting the PAPs in locating or identifying a child?
- Do the PAPs plan to travel abroad to locate or adopt a child? When do they intend to depart and to where will they travel?
- Will the child come to the U.S. for adoption after compliance with the pre-adoption requirements, if any, of the State of proposed residence?
- Will the child be adopted abroad after having been personally seen and observed by the PAPs?
- Where do the PAPs intend to file their Form I-600 petition after being matched with a child?
- How many children do the PAPs intend to adopt?
- Have the PAPs submitted a valid and complete home study conducted by an adoption agency or individual certified to conduct home studies?
- Have the PAPs paid the correct fees associated with the application?
- Do the PAPs have current fingerprint clearances?

• **Form I-600, Petition to Classify Orphan as an Immediate Relative**

Purpose: To establish eligibility of the child as an orphan already adopted or coming to the U.S. for adoption.

People Interviewed: Prospective adoptive parents; see also other parties in Form I-604 section below.

Basic information **you** should elicit:

- Verification of the PAPs identities, marital status and countries of citizenship.
- Verification of the child beneficiary's identity, gender, DOB and POB.

- How did the beneficiary become an orphan?
- If the child has only one parent, what happened to the other parent, is the remaining parent capable of providing for the child and has the remaining parent in writing irrevocably released the child for emigration and adoption?
- Has the child been adopted abroad by the PAPs or do the PAPs intend to adopt the child in the U.S.?
- Have pre-adoption requirements, if any, of the child's proposed State of residence been met if required for Form I-600 processing? If not, will they be met later? (Pre-adoption requirements only apply: 1) when the child is coming to the U.S. for adoption, 2) if the unmarried PAP or both married PAPs did not personally see the child prior to or during the adoption proceeding, and 3) if the adoption abroad was not full and final.)
- Does the child have any special needs, physical, emotional or otherwise?
- Who has legal custody of the child?
- Name of attorney abroad, if applicable.
- What is the name and contact information of the organization or individual assisting the PAPs in this case?
- What is address where the child will reside in the U.S.?
- What is the present address of the child?
- Any additional information available to locate the child?
- Location of the U.S. Embassy or consulate where the application for visa will be made.
- Have the PAPs submitted a valid and complete home study conducted by an adoption agency or individual certified to conduct home studies? Or evidence of a valid Form I-600A approval?
- Have the PAPs paid the correct fees associated with the petition, if any?
- Do the PAPs have current fingerprint clearances?
- Have there been any significant changes in the PAP household since the Form I-600A was approved (or since the last home study submitted to USCIS)?
- Are there any new children or adult household members residing in the

PAPs home since the Form I-600A was approved (or since the last home study submitted to USCIS)?

- Have the PAPs moved or changed residences since the Form I-600A was approved (or since the last home study submitted to USCIS)?

• **Form I-604, Determination on Child for Adoption**

Purpose: To determine if the child is eligible to be classified as an orphan, and verify the documentary evidence submitted with the Form I-600, *Petition to Classify Orphan as an Immediate Relative*.

People Interviewed: Orphanage, hospital, police, government officials, birth parents, or anyone with knowledge of the child's origins.

Basic information you must elicit (as appropriate):

- How was the child presented to the orphanage?
- Where are the birth parents?
- Did the birth parents relinquish the child voluntarily?
- Identification of individual/entity with legal custody of the child.
- Testimony to verify that the child meets the regulatory definitions of an orphan (i.e. abandonment, desertion, disappearance, loss, separation, or relinquishment by qualifying sole or surviving parent).
- Evidence of child-buying.

IO Supplement – Naturalization Forms

• **Form N-400, Application for Naturalization (for active-duty military and their family members)**

Purpose: To ensure that a lawful permanent resident meets the qualifications for citizenship.

People Interviewed: Lawful permanent residents: Active duty member of the

military, spouse of an active duty member of the military, or child of an active duty member of the military.

Basic information you should elicit:

- Verification of the identity of the interviewee.
- Does the interviewee have their green card with them?
- Verify all information on N-400 and N-445 is accurate.
- Does the interviewee have a criminal history?
- Has the interviewee met the good moral character requirements?
- Evaluate the interviewee's ability to read, write and speak English.
- Evaluate the interviewee's knowledge of civics.
- Verify the interviewee's loyalty to the United States.

• **Form I-407, Abandonment of Lawful Permanent Resident Status**

Purpose: To ensure that the interviewee is freely relinquishing permanent resident status and understands the consequences of abandonment.

People Interviewed: Lawful permanent residents wishing to relinquish status.

Basic information the you should elicit:

- Verify the identity of the interviewee.
- Has the interviewee brought their green card for relinquishment? If not, where is it?
- What was the interviewee's date and place of last departure from the United States?
- What is the interviewee's intended or actual residence abroad?
- Is the interviewee voluntarily, willingly, and affirmatively abandoning permanent residency?
- Why does the interviewee want to abandon permanent residency?
- Does the interviewee reserve the right to appear before an immigration

judge to determine admissibility at a later date?

- Does the interviewee waive their right to a hearing before an immigration judge at a later date?
- Does the interviewee fully understand the consequences of abandoning lawful permanent residence?

IO Supplement – Travel Documents

• Boarding Letters

Purpose: To ensure that a lawful permanent resident meets the criteria for the issuance of a boarding letter.

People Interviewed: Lawful permanent residents whose LPR cards have been lost, stolen, destroyed, or are in possession of an expired LPR card.

Basic information you should elicit:

- Verification of the identity of the interviewee.
- What are the circumstances prompting the request for a boarding letter?
- Where did the interviewee travel to? What was the purpose of interviewee's travel outside the United States?
- How long has the interviewee been outside of the United States? If relevant, ask for documentary corroboration.
- If relevant, has the interviewee abandoned their residence in the United States? If relevant, can the interviewee present corroborating documentary evidence of continued U.S. residence?
- Has the interviewee made previous requests for a boarding letter? When? Where? And under what circumstances?
- Determine if interviewee has corroborating documentary evidence substantiating the request for boarding letter. If not, why not?
 - Includes, but not limited to, police statement/letter (for stolen LPR card).
 - Statement from medical professional if medically related (for applicant or immediate family member).

- Does the interviewee continue to be admissible to the United States?
- What arrangements has the interviewee made, if any, for return travel to the United States? If relevant, ask for documentary corroboration.

• **Form I-131, Application for Travel Document**

- Refugee Travel Document (RTD):

People Interviewed: persons classified as refugees or asylees, or refugees or asylees who obtained LPR status and whose travel documents have been lost, stolen, destroyed, or are in possession of expired travel documents.

Basic information the you should elicit:

- Verify the identity of the interviewee.
- What are the circumstances prompting the request for a RTD?
- Has the interviewee made previous requests for a RTD? When? Where? And under what circumstances?
- Where did the interviewee travel to? What was the purpose of the interviewee's travel outside the United States?
- How long has the interviewee been outside of the United States? If relevant, ask for documentary corroboration.
- Did the interviewee return to the country of feared persecution? If so, why and for how long?
- Does the interviewee have any legal immigration status in any other country besides the United States?
- If relevant, has the interviewee abandoned their residence in the United States? If relevant, can the interviewee present corroborating documentary evidence of continued U.S. residence?
- If relevant, determine if interviewee has corroborating documentary evidence supporting the request for RTD. If not, why not?
 - Includes, but not limited to, police statement/letter (for stolen documents).
 - Statement from medical professional if medically related (for applicant

or immediate family member).

- Does the interviewee continue to be admissible to the United States? Or, if asylee, has the interviewee become subject to any bars for asylum?
- What arrangements has the interviewee made, if any, for return travel to the United States? If relevant, ask for documentary corroboration.

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. RAIO Training Module-RAD Supplements
2. Sample Checklists (under development)

ADDITIONAL RESOURCES

None

SUPPLEMENTS

RAD Supplement – Officer’s Duty to Elicit Information

The basic information the Refugee Officer needs to elicit during the interview must answer the following questions:

1. Who is the applicant?
2. How and when did the applicant leave his or her country of nationality or last habitual residence?
3. Why did the applicant leave his or her country? Did he or she ever return?
4. Is the applicant afraid to return, and if so, why? (Focus not only on the experiences of the applicant but also on the experiences of others who are similarly situated.)
5. Is the applicant subject to any grounds that would make him or her ineligible for refugee status or admission to the United States?



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

- 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

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)

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 and minor typos	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

- 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.

- 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 RAIIO 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.

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*.

- 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

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-281 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).

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.

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*.

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].

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 interview¹¹ [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 rapport¹³ 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*.

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.

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*.

- 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.

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).

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).

- 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-281 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.

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