# Lesson Plan Overview

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| **Course** | Refugee, Asylum and International Operations Directorate Officer Training<br>Asylum Division Officer Training Course |
| **Lesson** | ***Reasonable Fear of Persecution and Torture Determinations*** |
| **Rev. Date** | February 13, 2017; *Effective as of Feb 27, 2017.* |
| **Lesson Description** | The purpose of this lesson is to explain when reasonable fear screenings are conducted and how to determine whether the alien has a reasonable fear of persecution or torture using the appropriate standard. |
| **Terminal Performance Objective** | When a case is referred to an Asylum Officer to make a "reasonable fear" determination, the Asylum Officer will be able to correctly determine whether the applicant has established a reasonable fear of persecution or a reasonable fear of torture. |
| **Enabling Performance Objectives** | 1. Indicate the elements of "torture" as defined in the Convention Against Torture and the regulations. (AIL5)(AIL6)<br>2. Identify the type of harm that constitutes "torture" as defined in the Convention Against Torture and the regulations. (AIL5)(AIL6)<br>3. Describe the circumstances in which a reasonable fear screening is conducted.(APT2)(OK4)(OK6)(OK7)<br>4. Identify the standard of proof required to establish a reasonable fear of torture.(ACRR8)(AA3)<br>5. Identify the standard of proof required to establish a reasonable fear of persecution.(ACRR8)(AA3)<br>6. Examine the applicability of bars to asylum and withholding of removal in the reasonable fear context. (ACRR3) |
| **Instructional Methods** | Lecture, practical exercises |
| **Student Materials/ References** | United Nations. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (see RAIO Training Module, *International Human Rights Law)*<br><br>*Ali v. Reno*; *Mansour v. INS*; *Matter of S-V-*; *Matter of G-A-*; *Sevoian v. Aschcroft; In re J-E-; Matter of Y-L-; Auguste v. Ridge; Ramirez Peyro v. Holder; Roye v. Att'y Gen. of U.S.*<br><br>Reasonable Fear forms and templates (are found on the ECN website) |
| **Method of Evaluation** | Written test |


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**Background Reading**

1. Reasonable Fear Procedures Manual (Draft).

2. Martin, David A. Office of the General Counsel. *Compliance with Article 3 of the Convention against Torture in the cases of removable aliens,* Memorandum to Regional Counsel, District Counsel, All Headquarters Attorneys (Washington, DC: May 14, 1997), 5 p.

3. Lafferty, John, Asylum Division, *Updated Guidance on Reasonable Fear Note-Taking*, Memorandum to All Asylum Office Staff (Washington, DC: May 9, 2014), 2p. plus attachments.

4. Lafferty, John, Asylum Division, *Reasonable Fear Determination Checklist and Written Analysis*, Memorandum to All Asylum Office Staff (Washington, DC: Aug. 3, 2015), 1p. plus attachments.

5. Langlois, Joseph E. INS Office of International Affairs. *Implementation of Amendments to Asylum and Withholding of Removal Regulations, Effective March 22, 1999*, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, D.C.: March 18, 1999), 16 p. plus attachments.

6. Langlois, Joseph E. Asylum Division, Office of International Affairs. *Withdrawal of Request of Reasonable Fear Determination*, Memorandum to Asylum Office Directors, et al. (Washington, DC: May 25, 1999), 1p. plus attachment (including updated version of Withdrawal of Request of Reasonable Fear Determination form, 6/13/02 version).

7. Pearson, Michael *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries* (Washington, DC: February 23, 2001), 7p. plus attachments.

8. Langlois, Joseph L. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries* (Washington, DC: February 22, 2001), 3p. plus attachments.

9. Langlois, Joseph E. Asylum Division, Office of International Affairs. *International Religious Freedom Act Requirements Affecting Credible Fear and Reasonable Fear Interview Procedures*, Memorandum for Asylum Office Directors, et al. (Washington, DC: April 15, 2002), 3p.


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10. Langlois, Joseph E. Asylum Division. *Reasonable Fear Procedures Manual,* Memorandum for Asylum Office Directors, et al. (Washington, DC: January 3, 2003), 3p. plus attachments.

11. Langlois, Joseph E. Asylum Division. *Issuance of Updated Credible Fear and Reasonable Fear Procedures,* Memorandum for Asylum Office Directors, et al. (Washington, DC: May 14, 2010), 2p. plus attachments.

12. Ted Kim, Asylum Division. *Implementation of Reasonable Fear Processing Timelines and APSS Guidance,* Memorandum to All Asylum Office Staff, (Washington, DC: April 17, 2012), 2p. plus attachments.

13. Pearson, Michael *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries* (Washington, DC: February 23, 2001), 7p. plus attachments.

14. Langlois, Joseph L. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries* (Washington, DC: February 22, 2001), 3p. plus attachments.

15. Langlois, Joseph E. Asylum Division, Office of International Affairs. *International Religious Freedom Act Requirements Affecting Credible Fear and Reasonable Fear Interview Procedures*, Memorandum for Asylum Office Directors, et al. (Washington, DC: April 15, 2002), 3p.

16. Langlois, Joseph E. Asylum Division. *Reasonable Fear Procedures Manual,* Memorandum for Asylum Office Directors, et al. (Washington, DC: January 3, 2003), 3p. plus attachments.

17. Langlois, Joseph E. Asylum Division. *Issuance of Updated Credible Fear and Reasonable Fear Procedures,* Memorandum for Asylum Office Directors, et al. (Washington, DC: May 14, 2010), 2p. plus attachments.

18. Ted Kim, Asylum Division. *Implementation of Reasonable Fear Processing Timelines and APSS Guidance,* Memorandum to All Asylum Office Staff, (Washington, DC: April 17, 2012), 2p. plus attachments.

## CRITICAL TASKS

Knowledge of U.S. case law that impacts RAIO. (3)
Knowledge of the Asylum Division jurisdictional authority. (4)
Skill in identifying information required to establish eligibility. (4)
Skill in identifying issues of claim. (4)
Knowledge of relevant policies, procedures, and guidelines of establishing applicant eligibility for reasonable fear of persecution of torture. (4)
Knowledge of mandatory bars and inadmissibilities to asylum eligibility. (4)
Skill in organizing case and research materials (4)
Skill in applying legal, policy, and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence. (5)
Skill in analyzing complex issues to identify appropriate responses or decisions. (5)


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**Presentation** | **References**

## I. INTRODUCTION

This lesson instructs asylum officers on the substantive elements required to establish a reasonable fear of persecution or torture. More detailed instruction on procedures for conducting interviews and processing cases referred for reasonable fear determinations are provided in the Reasonable Fear Procedures Manual and separate procedural memos. For guidance on interviewing techniques to elicit information in a non-adversarial manner, asylum officers should review the RAIO Training Modules: *Interviewing – Introduction to the Non-Adversarial Interview; Interviewing – Eliciting Testimony;* and *Interviewing – Survivors of Torture and Other Severe Trauma.*

## II. BACKGROUND

Federal regulations require asylum officers to make reasonable fear determinations in two types of cases referred by other DHS officers, after a final administrative removal order has been issued under section 238(b) of the Immigration and Nationality Act (INA), or after a prior order of removal, exclusion, or deportation has been reinstated under section 241(a)(5) of the INA. These are cases in which an individual ordinarily is removed without being placed in removal proceedings before an immigration judge.

8 C.F.R. § 208.31; Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (Feb. 19, 1999).

Congress has provided for special removal processes for certain aliens who are not eligible for any form of relief from removal. At the same time, however, obligations under Article 33 of the *Refugee Convention relating to the Status of Refugees* and Article 3 of *the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* ("Convention Against Torture", "the Convention", or "CAT") still apply in these cases. Therefore, withholding of removal under either section 241(b)(3) of the INA or under the regulations implementing the Convention Against Torture may still be available in these cases. Withholding of removal is not considered to be a form of relief from removal, because it is specifically limited to the country where the individual is at risk and does not prohibit the individual's removal from the United States to a country other than the country where the individual is at risk.

The purpose of the reasonable fear determination is to ensure compliance with U.S. treaty obligations not to return a person to a country where the person's life or freedom would be threatened on account of a protected characteristic in the refugee definition, or where

These treaty obligations are based on Article 33 of the *1951 Convention relating to the Status of Refugees*; and Article 3 of the Convention


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the person would be tortured, and, at the same time, to adhere to Congressional directives to subject certain categories of aliens to streamlined removal proceedings.

Against Torture.

Similar to credible fear determinations in expedited removal proceedings, reasonable fear determinations serve as a screening mechanism to identify potentially meritorious claims for further consideration by an immigration judge, and at the same time to prevent individuals subject to removal from delaying removal by filing clearly unmeritorious or frivolous claims.

## III. JURISDICTION

*See* Reasonable Fear Procedures Manual (Draft).

### A. Reinstatement under Section 241(a)(5) of the INA

1. Reinstatement of Prior Order

INA § 241(a)(5); 8 C.F.R. § 241.8.

Section 241(a)(5) of the INA requires DHS to reinstate a prior order of exclusion, deportation, or removal, if a person enters the United States illegally after having been removed, or after having left the United States after the expiration of an allotted period of voluntary departure, giving effect to an order of exclusion, deportation, or removal.

Once a prior order has been reinstated under this provision, the individual is not permitted to apply for asylum or any other relief under the INA. However, that person may apply for withholding of removal under section 241(b)(3) of the INA (based on a threat to life or freedom on account of a protected characteristic in the refugee definition) and withholding of removal or deferral of removal under the Convention Against Torture.

There are certain restrictions on issuing a reinstatement order to people who may qualify to apply for NACARA 203 pursuant to the Legal Immigration Family Equity Act (LIFE). The LIFE amendment provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief "shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act."

Langlois, Joseph E. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries* (Washington, DC: February 22, 2001).

Pearson, Michael. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding*


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*Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries* (Washington, DC: February 23, 2001).

In all cases, section 241(a)(5) applies retroactively to all prior removals, regardless of the date of the alien's illegal reentry. There are other issues that may affect the validity of a reinstated prior order, such as questions concerning whether the applicant's departure executed a final order of removal. An Asylum Pre-screening Officer (APSO) who is unsure about the validity of a reinstated prior removal order should consult the Reasonable Fear Procedures Manual, a supervisor, or the Headquarters Quality Assurance Branch.

*See Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006).

*Note:* In the Fifth Circuit, an individual's departure from the U.S. after issuance of an NTA, but prior to the order of removal, does not strip an immigration judge of jurisdiction to order that individual removed; thus, that individual can be subject to reinstatement if previously ordered removed in absentia. *See U.S. v Ramirez-Carcamo*, 559 F.3d 384 (5th Cir. 2009).

2. Referral to Asylum Officer

If a person subject to reinstatement of a prior order of removal expresses a fear of return to the intended country of removal, the DHS officer must refer the case to an asylum officer for a reasonable fear determination, after the prior order has been reinstated.

8 C.F.R. §§ 208.31(a)-(b), 241.8(e).

3. Country of Removal

Form I-871, *Notice of Intent/Decision to Reinstate Prior Order* does not designate the country where DHS intends to remove the alien. Depending on which removal order is being reinstated under INA § 241(a)(5), that order may or may not designate a country of removal. For example, Form I-860, *Notice and Order of Expedited Removal*, does not indicate a country of removal, but an IJ order of removal resulting from section 240 proceedings does designate a country of removal. Regardless of which type of prior order is being reinstated, DHS must indicate where it proposes to remove the alien in order for the APSO to determine if the alien has a reasonable fear of persecution or torture in that particular country.

The asylum officer need only explore the person's fear with respect to the countries designated or the countries


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proposed. For example, if the applicant was previously ordered removed to country X, but is now claiming to be a citizen of country Y, the asylum officer should explore the person's fear with respect to both countries. If the person expresses a fear of return to any other country, the officer should memorialize it in the file to ensure that the fear is explored should DHS ever contemplate removing the person to that other country.

### B. Removal Orders under Section 238(b) of the INA (based on aggravated felony conviction)

1. DHS removal order

Under certain circumstances, DHS may issue an order of removal if DHS determines that a person is deportable under section 237(a)(2)(A)(iii) of the INA (convicted by final judgment of an aggravated felony after having been admitted to the U.S.). This means that the person may be removed without removal proceedings before an immigration judge.

INA § 238(b).

2. Referral to an asylum officer

If a person who has been ordered removed by DHS pursuant to section 238(b) of the INA expresses a fear of persecution or torture, that person must be referred to an asylum officer for a reasonable fear determination.

8 C.F.R. §§ 208.31(a)-(b), 238.1(f)(3). Note that regulations require the DHS to give notice of the right to request withholding of removal to a particular country, if the person ordered removed fears persecution or torture in that country. 8 C.F.R. § 238.1(b)(2)(i).

3. Country of Removal

The removal order under section 238(b) should designate a country of removal, and in some cases, will designate an alternative country.

## IV. DEFINITION OF "REASONABLE FEAR"

Regulations define "reasonable fear of persecution or torture" as follows:

8 C.F.R. § 208.31(c).

> The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the

bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

A few points to note, which are discussed in greater detail later in the lesson, are the following:

1. The "reasonable possibility" standard is the same standard required to establish eligibility for asylum (the "well-founded fear" standard).

2. Like asylum, there is an "on account of" requirement necessary to establish reasonable fear of *persecution*: the persecution must be on account of a protected characteristic in the refugee definition.

3. There is no "on account of" requirement necessary to establish a reasonable fear of *torture*.

4. Mandatory and discretionary bars are not considered in a determination of reasonable fear of *persecution* or reasonable fear of *torture*.

8 C.F.R. § 208.31(c); Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999).

## V. STANDARD OF PROOF

The standard of proof to establish "reasonable fear of persecution or torture" is the "reasonable possibility" standard. This is the same standard required to establish a "well-founded fear" of persecution in the asylum context. The "reasonable possibility" standard is lower than the "more likely than not standard" required to establish eligibility for withholding of removal. It is higher than the standard of proof required to establish a "credible fear" of persecution. The standard of proof to establish a "credible fear" of persecution or torture is whether there is a significant possibility of establishing eligibility for asylum or protection under the Convention Against Torture before an immigration judge.

*See* RAIO Training Modules, Well-Founded Fear and Evidence.

Where there is disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue, the precedent for the Circuit in which the applicant resides is used in determining whether the applicant has a reasonable fear of persecution or torture. Note that this differs from the credible fear context in which the Circuit interpretation most favorable to the applicant is used.

## VI. IDENTITY

The applicant must be able to credibly establish his or her

identity by a preponderance of the evidence. In many cases, an applicant will not have documentary proof of identity or nationality. However, credible testimony alone can establish identity and nationality. Documents such as birth certificates and passports are accepted into evidence if available. The officer may also consider information provided by Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP).

*See* RAIO Training Module, *Refugee Definition*.

## VII. PRIOR DETERMINATIONS ON THE MERITS

An adjudicator or immigration judge previously may have made a determination on the merits of the claim. This is most common in the case of an applicant who is subject to reinstatement of a prior order. For example, the applicant may have requested asylum and withholding of removal in prior removal proceedings before an immigration judge, and the immigration judge may have made a determination on the merits that the applicant was ineligible.

The APSO must explore the applicant's claim, according deference to the prior determination unless there is clear error in the prior determination. The officer should also inquire as to whether there are any changed circumstances that would otherwise affect the applicant's eligibility.

## VIII. CREDIBILITY

### A. Credibility Standard

In making a reasonable fear determination, the asylum officer must evaluate whether the applicant's testimony is credible.

The asylum officer should assess the credibility of the assertions underlying the applicant's claim, considering the totality of the circumstances and all relevant factors.

The U.S. Supreme Court has held that to properly consider the totality of the circumstances, "the whole picture… must be taken into account." The Board of Immigration Appeals (BIA) has interpreted this to include taking into account the whole of the applicant's testimony as well as the individual circumstances of each applicant.

*United States v. Cortez*, 449 U.S. 411, 417 (1981).

See RAIO Training Module, *Credibility*; *see also Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995) and *Matter of Kasinga*, 21 I&N Dec. 357, 364 (BIA 1996).

### B. Evaluating Credibility in a Reasonable Fear Interview

1. General Considerations

See RAIO Training Module, *Credibility*.

a. The asylum officer must gather sufficient information to determine whether the alien has a reasonable fear of persecution or torture. The applicant's credibility should be evaluated (1) only after all information is elicited and (2) in light of "the totality of the circumstances, and all relevant factors."

b. The asylum officer must remain neutral and unbiased and must evaluate the record as a whole. The asylum officer's personal opinions or moral views regarding an applicant should not affect the officer's decision.

c. The applicant's ability or inability to provide detailed descriptions of the main points of the claim is critical to the credibility evaluation. The applicant's willingness and ability to provide those descriptions may be directly related to the asylum officer's skill at placing the applicant at ease and eliciting all the information necessary to make a proper decision. An asylum officer should be cognizant of the fact that an applicant's ability to provide such descriptions may be impacted by the context and nature of the reasonable fear screening process.

2. Properly Identifying and Probing Credibility Concerns During the Reasonable Fear Interview

a. *Identifying Credibility Concerns*

In making this determination, the asylum officer should take into account the same factors considered in evaluating credibility in the affirmative asylum context, which are discussed in the RAIO Modules: *Credibility* and *Evidence.*

Section 208 of the Act provides a non-exhaustive list of factors that may be used in a credibility determination in the asylum context. These include: internal consistency, external consistency, plausibility, demeanor, candor, and responsiveness.

The amount of detail provided by an applicant is another factor that should be considered in making a credibility determination. In order to rely on "lack of detail" as a credibility factor, however, asylum


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officers must pose questions regarding the type of detail sought.

While demeanor, candor, responsiveness, and detail provided are to be taken into account in the reasonable fear context when making a credibility determination, an adjudicator must take into account cross-cultural factors, effects of trauma, and the nature of the reasonable fear interview process—including detention, relatively brief and often telephonic interviews, etc.—when evaluating these factors in the reasonable fear context.

b. *Informing the Applicant of the Concern and Giving the Applicant an Opportunity to Explain*

When credibility concerns present themselves during the course of the reasonable fear interview, the applicant must be given an opportunity to address and explain them. The asylum officer must follow up on all credibility concerns by making the applicant aware of each portion of the testimony, or his or her conduct, that raises credibility concerns, and the reasons the applicant's credibility is in question. The asylum officer must clearly record in the interview notes the questions used to inform the applicant of any relevant credibility issues, and the applicant's responses to those questions.

## C. Assessing Credibility in Reasonable Fear when Making a Reasonable Fear Determination

1. In assessing credibility, the officer must consider the totality of the circumstances and all relevant factors.

2. When considering the totality of the circumstances in determining whether the assertions underlying the applicant's claim are credible, the following factors must be considered as they may impact an applicant's ability to present his or her claim:

   *(i)* trauma the applicant has endured;
   *(ii)* passage of a significant amount of time since the described events occurred;
   *(iii)* certain cultural factors, and the challenges inherent in cross-cultural communication;

*See also* RAIO Training Module, *Interviewing-Survivors of Torture;* RAIO Training Module, *Interviewing- Working with an Interpreter.*

Asylum officers must ensure that persons with potential biases against applicants on the grounds of race, religion, nationality, membership in a particular social group, or political opinion are not used as interpreters. *See International Religious*


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*(iv)* detention of the applicant;

*(v)* problems between the interpreter and the applicant, including problems resulting from differences in dialect or accent, ethnic or class differences, or other differences that may affect the objectivity of the interpreter or the applicant's comfort level; and unfamiliarity with speakerphone technology, the use of an interpreter the applicant cannot see, or the use of an interpreter that the applicant does not know personally.

*Freedom Act of 1998*, 22 U.S.C. § 6473(a); RAIO Training Module, *IRFA (International Religious Freedom Act)*.

3. The asylum officer must have followed up on all credibility concerns during the interview by making the applicant aware of each concern, and the reasons the applicant's testimony is in question. The applicant must have been given an opportunity to address and explain all such concerns during the reasonable interview.

4. Generally, trivial or minor credibility concerns in and of themselves will not be sufficient to find an applicant not credible.

   Nonetheless, on occasion such credibility concerns may be sufficient to support a negative reasonable fear determination considering the totality of the circumstances and all relevant factors. Such concerns should only be the basis of a negative determination if the officer attempted to elicit sufficient testimony, and the concerns were not adequately resolved by the applicant during the reasonable fear interview.

5. The officer sould compare the applicant's testimony with any prior testimony and consider any prior credibility findings. The individual previously may have provided testimony regarding his or her claim in the context of an asylum or withholding of removal application. For example, the applicant may have requested asylum and withholding of removal in prior removal proceedings before an immigration judge, and the immigration judge may have made a determination that the claim was or was not credible. It is important that the asylum officer ask the individual about any inconsistencies between prior testimony and the testimony provided at the reasonable fear interview.


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In any case in which the asylum officer's credibility determination differs from the credibility determination previously reached by another adjudicator on the same allegations, the asylum officer must provide a sound explanation and support for the different finding.

6. All reasonable explanations must be considered when assessing the applicant's credibility. The asylum officer need not credit an unreasonable explanation.

   If, after providing the applicant with an opportunity to explain or resolve any credibility concerns, the officer finds that the applicant has provided a reasonable explanation, a positive credibility determination may be appropriate when considering the totality of the circumstances and all relevant factors.

   If, however, after providing the applicant with an opportunity to explain or resolve any credibility concerns, the applicant fails to provide an explanation, or the officer finds that the applicant did not provide a reasonable explanation, a negative credibility determination based upon the totality of the circumstances and all relevant factors will generally be appropriate.

## D. Documenting a Credibility Determination

1. The asylum officer must clearly record in the interview notes the questions used to inform the applicant of any relevant credibility issues, and the applicant's responses to those questions.

2. The officer must specify in the written case analysis the basis for the negative credibility finding. In the negative credibility context, the officer must note any portions of the testimony found not credible, including the specific inconsistencies, lack of detail or other factors, along with the applicant's explanation and the reason the explanation is deemed not to be reasonable.

3. If information that impugns the applicant's testimony becomes available after the interview but prior to serving the reasonable fear determination, a follow-up interview must be scheduled to confront the applicant with the derogatory information and to provide the applicant with an opportunity to address the adverse information.


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Unresolved credibility issues should not form the basis of a negative credibility determination.

## IX. ESTABLISHING A REASONABLE FEAR OF PERSECUTION

To establish a reasonable fear of persecution, the applicant must show that there is a reasonable possibility he or she will suffer persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. As explained above, this is the same standard asylum officers use in evaluating whether an applicant is eligible for asylum. However, the reasonable fear standard in this context is used not as part of an eligibility determination for asylum, but rather as a screening mechanism to determine whether an individual may be able to establish eligibility for withholding of removal in Immigration Court.

In contrast to an asylum adjudication, the APSO may not exercise discretion in making a positive or negative reasonable fear determination and may not consider the applicability of any mandatory bars that may apply if the applicant is permitted to apply for withholding of removal before the immigration judge.

### A. Persecution

The harm the applicant fears must constitute persecution. The determination of whether the harm constitutes persecution for purposes of the reasonable fear determination is no different from the determination in the affirmative asylum context. This means that the harm must be serious enough to be considered persecution, as described in case law, the *UNHCR Handbook*, and USCIS policy guidance. Note that this is different from the evaluation of persecution in the credible fear context, where the applicant need only demonstrate a significant possibility that he or she could establish that the feared harm is serious enough to constitute persecution.

*See* Discussion of "persecution" in RAIO Training Module, *Persecution*.

### B. Nexus to a Protected Characteristic

As in the asylum context, the applicant must establish that the feared harm is on account of a protected characteristic in the refugee definition (race, religion, nationality, membership in a particular social group, or political opinion). This means the applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the applicant because the applicant possesses or is believed to possess one or

8 C.F.R. § 208.31(c).


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more of the protected characteristics in the refugee definition.

The applicant does not bear the burden of establishing the persecutor's exact motivation. For cases where no nexus to a protected ground is immediately apparent, the asylum officer in reasonable fear interviews should ask questions related to all five grounds to ensure that no nexus issues are overlooked.

Although the applicant bears the burden of proof to establish a nexus between the harm and the protected ground, asylum officers have an affirmative duty to elicit all information relevant to the nexus determination. Evidence of motive can be either direct or circumstantial. Reasonable inferences regarding the motivations of persecutors should be made, taking into consideration the culture and patterns of persecution within the applicant's country of origin and any relevant country of origin information, especially if the applicant is having difficulty answering questions regarding motivation.

There is no requirement that the persecutor be motivated only by the protected belief or characteristic of the applicant. As long as there is a reasonable possibility that at least one central reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic, the applicant may establish the harm is "on account of" a protected characteristic in the reasonable fear context.

## C. Past Persecution

### 1. Presumption of future persecution

If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant has a reasonable fear of persecution in the future on the basis of the original claim. This presumption may be overcome if a preponderance of the evidence establishes that,

*See* 8 C.F.R. § 208.16(b)(1)(i).

a. there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or

b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable to expect the applicant to do so.


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2. Severe past persecution and other serious harm

A finding of reasonable fear of persecution cannot be based on past persecution alone, in the absence of a reasonable possibility of future persecution. A reasonable fear of persecution may be found only if there is a reasonable possibility the applicant will be persecuted in the future, regardless of the severity of the past persecution or the likelihood that the applicant will face other serious harm upon return. This is because withholding of removal is accorded only to provide protection against future persecution and may not be granted without a likelihood of future persecution.

In contrast, a grant of asylum may be based on the finding that there are compelling reasons for the applicant's unwillingness to return arising from the severity of past persecution or where the applicant establishes that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country, even if there is no longer a reasonable possibility the applicant would be persecuted in the future. 8 C.F.R. § 208.13(b)(1)(iii).

As noted above, a finding of past persecution raises the presumption that the applicant's fear of future persecution is reasonable.

## D. Internal Relocation

As in the asylum context, the evidence must establish that the applicant could not avoid future persecution by relocating within the country of feared persecution or that, under all the circumstances, it would be unreasonable to expect him or her to do so. In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

*See* Discussion of internal relocation in RAIO Training Module, *Well-Founded Fear*; *see also* 8 C.F.R. § 208.16(b)(3).

## E. Mandatory Bars

Asylum officers may *not* take into consideration mandatory bars to withholding of removal when making reasonable fear of persecution determinations.

8 C.F.R. § 208.31(c).

*See* Reasonable Fear Procedures Manual (Draft).

If the asylum officer finds that there is a reasonable possibility the applicant would suffer persecution on account of a protected characteristic, the asylum officer must refer the case to the immigration judge, regardless of whether the person has committed an aggravated felony, has persecuted others, or is subject to any other mandatory bars to withholding of removal.


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However, during the interview the officer must develop the record fully by exploring whether the applicant may be subject to a mandatory bar.

If the officer identifies a potential bar issue, the officer should consult a supervisory officer and follow procedures outlined in the Reasonable Fear Procedures Manual on "flagging" such information for the hearing.

The immigration judge will consider mandatory bars in deciding whether the applicant is eligible for withholding of removal under section 241(b)(3) of the Act or CAT.

8 C.F.R. §§ 208.16(c)(4), (d). Please note there are no bars to deferral of removal under CAT.

The following mandatory bars apply to withholding of removal under section 241(b)(3)(A) for cases commenced April 1, 1997 or later:

INA § 241(b)(3)(B); 8 C.F.R. §§ 208.16(d)((2), (d)(3) (for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, mandatory denials are found within section 243 (h)(2) of the Act as it appeared prior to that date).

(1) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(2) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(3) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States;

(4) there are reasonable grounds to believe that the alien is a danger to the security of the United States (including anyone described in subparagraph (B) or (F) of section 212(a)(3)); or

(5) the alien is deportable under Section 237(a)(4)(D) (participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing. Any alien described in clause (i), (ii), or (iii) of section 212(a)(3)(E) is deportable.)

## X. CONVENTION AGAINST TORTURE – BACKGROUND

This section contains a background discussion of the Convention Against Torture, to provide context to the reasonable fear of torture determinations. As a signatory to the Convention Against Torture


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the United States has an obligation to provide protection where there are substantial grounds to believe that an individual would be in danger of being subjected to torture. Notably, there are no bars to protection under the Convention Against Torture. Torture is an act universally condemned and so repugnant to basic notions of human rights that even individuals who are undeserving of refugee protection, will not be returned to a country where they are likely to be tortured. An overview of the Convention Against Torture may be found in the RAIO Module: *International Human Rights Law*.

## A. U.S. Ratification of the Convention and Implementing Legislation

The United States Senate ratified the Convention Against Torture on October 27, 1990. President Clinton then deposited the United States instrument of ratification with the United Nations Secretary General on October 21, 1994, and the Convention entered into force for the United States thirty days later, on November 20, 1994.

Recognizing that a treaty is considered "law of the land" under the United States Constitution, the Executive Branch took steps to ensure that the United States was in compliance with its treaty obligations, even though Congress had not yet enacted implementing legislation. The INS adopted an informal process to evaluate whether a person who feared torture and was subject to a final order of deportation, exclusion, or removal would be tortured in the country to which the person would be removed. The United States relied on this informal process to ensure compliance with Article 3 in immigration cases until the CAT rule was promulgated.

Similarly, the Department of State considered whether a person would be subject to torture when addressing requests for extradition.

On October 21, 1998, President Clinton signed legislation that required the Department of Justice to promulgate regulations to implement in immigration cases the United States' obligations under Article 3 of the Convention Against Torture, subject to any reservations, understandings, and declarations contained in the United States Senate resolution to ratify the Convention.

Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, Division G, Oct. 21, 1998).

Pursuant to the statutory directive, the Department of Justice regulations provide a mechanism for individuals fearing torture to seek protection under Article 3 of the Convention in immigration cases. One of the mechanisms for protection provided in the regulations, effective March 22, 1999, is the "reasonable fear" screening process.

*See* 8 C.F.R. §§ 208.16-208.18.


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### B. Article 3

1. *Non-Refoulement*

Article 3 of the Convention provides:

> No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

This provision does not prevent the removal of a person to a country where he or she would not be in danger of being subjected to torture. Like withholding of removal under section 241(b)(3) of the INA, which is based on Article 33 of the Convention relating to the Status of Refugees, protection under Article 3 of the Convention Against Torture is country-specific.

In addition, this obligation does not prevent the United States from removing a person to a country at any time if conditions have changed such that it no longer is likely that the individual would be tortured there.

*See* 8 C.F.R. §§ 208.17(d)-(f), 208.24 for procedures for terminating withholding and deferral of removal.

2. U.S. Ratification Document

When ratifying the Convention Against Torture, the U.S. Senate adopted a series of reservations, understandings and declarations, which modify the U.S. obligations under Article 3, as described in the section below on the Convention definition of torture. These reservations, understandings, and declarations are part of the substantive standards that are binding on the United States and are reflected in the implementing regulations.

## XI. DEFINITION OF TORTURE

Torture has been defined in a variety of documents and in legislation unrelated to the Convention Against Torture. However, only an act that falls within the definition described in Article 1 of the Convention, as modified by the U.S. ratification document, may be considered "torture" for purposes of making a reasonable fear of torture determination. These substantive standards are incorporated in the regulations at 8 C.F.R. § 208.18(a) (1999).

*See* RAIO Training Module, *Interviewing - Survivors of Torture and Other Severe Trauma*, background reading associated with that lesson; Alien Tort Claims Act, codified at 28 U.S.C. § 1350.


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Article 1 of the Convention defines torture as:

*See also* 8 C.F.R. §§ 208.18(a)(1), (3).

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

The Senate adopted several important "understandings" regarding the definition of torture, which are included in the implementing regulations and are discussed below. These "understandings" are binding on adjudicators interpreting the definition of torture.

136 Cong. Rec. S17429 at S17486-92 (daily ed. October 27, 1990); 8 C.F.R. § 208.18(a).

## A. Identity of Torturer

The torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Convention Against Torture, Article 1.

### 1. Public official

The torturer or the person who acquiesces in the torture must be a public official or other person acting in an official capacity in order to invoke Article 3 Convention Against Torture protection. A non-governmental actor could be found to have committed torture within the meaning of the Convention *only if* that person inflicts the torture (1) at the instigation of, (2) with the consent of, or (3) with the acquiescence of a public official or other person acting in an official capacity.

Convention against Torture, Article 1. *See also* Committee on Foreign Relations Report, Convention Against Torture, Exec. Report 101-30, August 30, 1990 (hereinafter "Committee Report"), p. 14; Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8483 (Feb. 19, 1999); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001).

The phrase "acting in an official capacity" modifies both "public official" and "other person," such that a public official must be "acting in an official capacity" to satisfy the state action element of the torture definition.

*Matter of Y-L-, A-G-, R-S-R*, 23 I&N Dec. 270 (AG 2002); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002).


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When a public official acts in a wholly private capacity, outside any context of governmental authority, the state action element of the torture definition is not satisfied. On this topic, the Second Circuit provided that, "[a]s two of the CAT's drafters have noted, when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons."

*Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004).

To determine whether a public official is acting in a private capacity or in an official capacity, APSOs must elicit testimony to determine whether the public official was acting within the scope of their authority and/or under color of law. A determination that the public official is acting under either of the scope of their authority or under color of law would result in a determination that the public official was acting "in an official capacity".

Although the regulation does not define "acting in an official capacity," the Attorney General equated the term to mean "under color of law" as interpreted by cases under the civil rights act.

*See Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001); *Ahmed v. Mukasey*, 300 Fed.Appx. 324 (5th Cir. 2008) (unpublished).

Thus, a public official is acting in an official capacity when "he misuses power possessed by virtue of law and made possible only because he was clothed with the authority of law."

*Ramirez Peyro v. Holder*, 574 F.3d 893 (8th Cir. 2009).

To establish whether a public official is acting in an official capacity (i.e. under the color of law), the applicant must establish a nexus between the public official's authority and the harmful conduct inflicted on the applicant by the public official. The Eighth Circuit addressed "acting in an official capacity" in its decision in *Ramirez Peyro v. Holder*. The court indicated such an inquiry is fact intensive and includes considerations like "whether the officers are on duty and in uniform, the motivation behind the officer's actions and whether the officers had access to the victim because of their positions, among others." *Id.*

*See U.S. v. Colbert*, 172 F.3d 594, 596 - 597 (8th Cir 1999); *West v. Atkins*, 487 U.S. 42, 49 (1988).

Following the guidance provided in *Ramirez Peyro v. Holder*, the Fifth Circuit also addressed "acting in an official capacity" by positing "[w]e have recognized on numerous occasions that acts motivated by an officer's

*Marmorato v. Holder*, 376 Fed.Appx. 380, 385 (5th Cir. 2010) (unpublished).

personal objectives are 'under color of law' when the officer uses his official capacity to further those objectives." Citing directly to *Ramirez Peyro v. Holder*, the Fifth Circuit determined that "proving action in an officer's official capacity 'does not require that the public official be executing official state policy or that the public official be the nation's president or some other official at the upper echelons of power. Rather ... the use of official authority by low-level officials, such a[s] police officers, can work to place actions under the color of law even where they are without state sanction.'"

In this context, the court points to two published cases as examples. First, *Bennett v. Pippin,* 74 F.3d 578, 589 (5th Cir.1996), in which the court found "that an officer's action was 'under color of state law' where a sheriff raped a woman and used his position to ascertain when her husband would be home and threatened to have her thrown in jail if she refused." The Fifth Circuit compared this case to *Delcambre v. Delcambre,* 635 F.2d 407, 408 (5th Cir.1981) (per curiam), in which the court found "no action under color of law where a police chief assaulted his sister-in-law over personal arguments about family matters, but did not threaten her with his power to arrest."

*See also Miah v. Mukasey,* 519 F. 3rd 784 (8th Cir. 2008) (elected official was not acting in his official capacity in his rogue efforts to take control of others property).

As *Marmorato v. Holder* illustrates with its citation to *Bennett v. Pippin*, an official need not be acting in the scope of their authority to be acting under color of law.

It is unsettled whether an organization that exercises power on behalf of the people subjected to its jurisdiction, as in the case of a rebel force which controls a sizable portion of a country, would be viewed as a "government actor." It would be necessary to look at factors such as how much of the country is under the control of the rebel force and the level of that control.

*See Matter of S-V-*, Int. Dec. 3430 (BIA 2000) (concurring opinion); *see also Habtemichael v. Ashcroft*, 370 F.3d 774 (8th Cir. 2004) (remanding for agency determination as to the extent of the Eritrean People's Liberation Front's (EPLF) control over parts of Ethiopia during the period when the applicant was conscripted by the EPLF); *D-Muhumed v. U.S. Atty. Gen.*, 388 F.3d 814 (11th Cir. 2004) (denying protection under CAT because "Somalia currently has no central government, and the clans who control

various sections of the country do so through continued warfare and not through official power."); *but see* the Committee Against Torture decision in *Elmi v. Australia*, Comm. No. 120/1998 (1998) (finding that warring factions in Somalia fall within the phrase "public official(s) or other person(s) acting in an official capacity). Note that the United Nations Committee Against Torture a monitoring body for the implementation and observance of the Convention Against Torture. The U.S. recognizes the Committee, but does not recognize its competence to consider cases. The BIA considers the Committee's opinions to be advisory only. *See Matter of S-V-*, I&N Dec. 22 I&N Dec. 1306, 1313 n. 1 (BIA 2000).

2. Acquiescence

When the "torturer" is not a public official or other individual acting in an official capacity, a claim under the *Convention Against Torture* only arises if a public official or other person acting in an official capacity instigates, consents, or acquiesces to the torture.

A public official cannot be said to have "acquiesced" in torture unless, prior to the activity constituting torture, the official was "aware" of such activity and thereafter breached a legal responsibility to intervene to prevent the activity.

8 C.F.R. § 208.18(a)(7).

The Senate ratification history explains that the term "awareness" was used to clarify that government acquiescence may be established by evidence of *either* actual knowledge *or* willful blindness. "Willful blindness" imputes knowledge to a government official who has a duty to prevent misconduct and "deliberately closes his eyes to what would otherwise have been

136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990); Committee Report (Aug. 30, 1990), p. 9; *see also* S. Hrg 101-718 (July 30, 1990), *Statement of Mark Richard, Dep. Asst. Attorney General, DOJ*

obvious to him."

*Criminal Division*, at 14.

In addressing the meaning of acquiescence as it relates to fear of Colombian guerrillas, paramilitaries and narco-traffickers who were not attached to the government, the Board of Immigration Appeals (BIA) indicated that more than awareness or inability to control is required. The BIA held that for acquiescence to take place the government officials must be "willfully accepting" of the torturous activity of the non-governmental actor.

*Matter of S-V-*, Int. Dec. 3430 (BIA 2000).

Several federal circuit courts of appeals have rejected the BIA's "willful acceptance" phrase in favor of the more precise "willful blindness" language that appears in the Senate's ratification history.

For purposes of threshold reasonable fear screenings, asylum officers must use the *willful blindness* standard.

*Pieschacon-Villegas v. Att'y Gen. of U.S.*, 671 F.3d 303 (3d Cir. 2011); *Hakim v. Holder*, 628 F. 3d 151 (5th Cir. 2010); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 706 (9th Cir. 2010); *Diaz v. Holder*, 2012 WL 5359295 (10th Cir. 2012) (unpublished); *Silva-Rengifo v. Atty. Gen. of U.S.*, 473 F.3d 58, 70 (3d Cir. 2007); *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 240 (4th Cir. 2004); *Azanor v. Aschcroft*, 364 F.3d 1013 (9th Cir. 2004); *Amir v. Gonzales*, 467 F.3d 921, 922 (6th Cir. 2006); *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003); *Ontunez-Turcios v. Ashcroft*, 303 F.3d 341, 354-55 (5th Cir. 2002); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001).

The United States Circuit Court of Appeals for the Ninth Circuit ruled that the correct inquiry concerning the acquiescence of a state actor is "whether a respondent can show that public officials demonstrate willful blindness to the torture of their citizens." The court rejected the notion that acquiescence requires a public official's "actual knowledge" and "willful acceptance." The Ninth Circuit subsequently reaffirmed that the state actor's acquiescence to the torture must be "knowing," whether through actual knowledge or imputed knowledge ("willful blindness"). Both forms of knowledge constitute "awareness."

*Zheng v. INS*, 332 F.3d 1186 (9th Cir. 2003).

*Azanor v. Ashcroft*, 364 F.3d 1013, 1020 (9th Cir. 2004).


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The United States Circuit Court of Appeals for the Second Circuit agreed with the Ninth Circuit approach on the issue of acquiescence of government officials, stating "torture requires only that government officials know of or remain willfully blind to act and thereafter breach their legal responsibility to prevent it."

*Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (finding that even if the Egyptian police who would carry out the abuse were not acting in an official capacity, "the 'routine' nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either know of the torture or remain willfully blind to the torture and breach their legal responsibility to prevent it").

a. Relevance of a government's ability to control a non-governmental entity from engaging in acts of torture

The requirement that the torture be inflicted by or at the instigation, or with the consent or acquiescence of a public official or other person acting in an official capacity is distinct from the "unable or unwilling to protect" standard used in the definition of "refugee".

Although a government's ability to control a particular group may be relevant to an inquiry into governmental acquiescence under CAT, that inquiry does not turn on a government's ability to control persons or groups engaged in torturous activity.

*Pieschacon v. Attorney General*, 671 F.3d 303 (3d Cir. 2011) (quoting from *Silva-Rengifo v. Att'y Gen. of U.S.*, 473 F.3d 58, 65 (3d Cir. 2007)); *see also Gomez v. Gonzales*, 447 F.3d 343 (C.A.5, 2006); Reyes-*Sanchez v. U.S. Atty. Gen.*, 369 F.3d 1239 (C.A.11, 2004)("That the police did not catch the culprits does not mean that they acquiesced in the harm.").

In *De La Rosa v. Holder* the Second Circuit stated "it is not clear to this Court why the preventative efforts of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the CAT. Where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture would seem neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question of whether torture would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

*De La Rosa v. Holder*, 598 F.3d 103 (2d Cir. 2010).

In a similar case, the Third Circuit remanded to the BIA,

indicating that the fact that the government of Colombia was engaged in war against the FARC, it did not in itself establish that it could not be consenting or acquiescing to torture by members of the FARC.

*Pieschacon-Villegas v. Attorney General,* 671 F.3d 303 (3d Cir. 2011); *Gomez-Zuluaga v. Attorney General,* 527 F.3d 330 (3d Cir. 2008).

Evidence that private actors have general support, without more, in some sectors of the government may be insufficient to establish that the officials would acquiesce to torture by the private actors. Thus, a Honduran peasant and land reform activist who testified to fearing severe harm by a group of landowners did not demonstrate that government officials would turn a blind eye if he were tortured simply because they had ties to the landowners.

*Ontunez-Tursios*; 303 F.3d 341 (5th Cir. 2002).

There is no acquiescence when law enforcement does not breach a legal responsibility to intervene to prevent torture. For example, in *Ali v. Reno*, the Danish police arrested and incarcerated the male relatives of a domestic violence victim while charges against them were pending. Only after the victim requested that the male relatives not be punished were they released.

*Ali v. Reno*, 237 F.3d 591, 598 (6th Cir. 2001).

In the context of government consent or acquiescence, the court in *Ramirez-Peyro v. Holder* reiterated its prior holding that "[u]se of official authority by low level officials, such a police officers, can work to place actions under the color of law even when they act without state sanction."

574 F.3d 893, 901 (8th Cir. 2009).

Therefore, even if country conditions show that a national government is fighting against corruption, that fact may not mean there is no acquiescence/consent by a local public official to torture. The Fifth Circuit visited this issue in *Marmorato v. Holder,* in which the court found that the immigration judge misinterpreted "in official capacity" when it found that the *consent or acquiescence* standard could never be satisfied in a country like Italy, but only in nations with "rogue governments" with "no regard for human rights or civil rights. The Fifth Circuit rejected "any notion that a petitioner's entitlement to relief depends upon whether his country of removal could be included on some hypothetical list of 'rogue' nations."

The Convention Against Torture is designed to protect against future instances of torture. Therefore, the asylum officer should consider whether there is a reasonable possibility that:

*See Sevoian v. Ashcroft*, 290 F.3d 166 (3d Cir. 2002) (finding that there is no "acquiescence" to torture unless officials know about the torture before it occurs).

1. A public official would have prior knowledge or would willfully turn a blind eye to avoid gaining knowledge of the potential activity constituting torture; and

2. The public official would breach a legal duty to intervene to prevent such activity.

Evidence of how an official or officials have acted in the past (toward the applicant or others similarly situated) may shed light on how the official or officials may act in the future. "Official as well as unofficial country reports are probative evidence and can, by themselves, provide sufficient proof to sustain an alien's burden under the INA."

*Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003).

## B. Torturer's Custody or Control over Individual

The definition of torture applies only to acts directed against persons in the offender's custody or physical control.

8 C.F.R. § 208.18(a)(6); Committee Report, p. 9 (Aug. 30, 1990).

The United States Circuit Court of Appeals for the Ninth Circuit held that an applicant need not demonstrate that he or she would likely face torture while in a public official's custody or physical control. It is enough that the alien would likely face torture while under private individuals' exclusive custody or control if such torture were to take place with consent or acquiescence of a public official or other individual acting in an official capacity.

*Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004); *Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004).

For example, the Seventh Circuit has posited *in dictum* that "[p]robably more often than not the victim of a murder is within the murderer's physical control for at least a short time before the actual killing..." However, the court provided "that would not be true if for example the murderer were a sniper or a car bomber".

*Comollari v. Ashcroft, 378* F.3d 694, 697 (7th Cir. 2004).

Pre-custodial police operations or military combat operations are outside the scope of Convention protection.


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Establishing whether the act of torture may occur while in the offender's custody or physical control is very fact specific and in practicality it is very difficult to establish. While the applicant bears the burden of establishing "custody or physical control", the burden must be a reasonable one and this element may be established solely by circumstantial evidence.

While the law is unsettled as to the meaning of "in the offender's custody or physical control", when considering this element, APSOs must give applicants the benefit of doubt.

### C. Specific Intent

For an act to constitute torture, it must be specifically intended to inflict severe physical or mental pain or suffering. An intentional act that results in unanticipated and unintended severity of pain is not torture under the Convention definition.

8 C.F.R. §§ 208.18(a)(1), (5); *Auguste v. Ridge*, 395 F.3d 123, 146 (3d Cir. 2005); 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990). See Committee Report, pp 14, 16.

Where the evidence shows that an applicant may be specifically targeted for punishment that may rise to the level of torture, the harm the applicant faces is specifically intended.

*Kang v. Att'y Gen. of the U.S.*, 611 F.3d 157 (3d Cir. 2010) (distinguishing the facts from those in *Auguste v. Ridge*).

However an act of legitimate self-defense or defense of others would not constitute torture.

Also, harm resulting from poor prison conditions generally will not constitute torture when such conditions were not intended to inflict severe physical or mental pain or suffering.

For example, in *Matter of J-E-* the BIA considered a request for protection under the *Convention Against Torture* by a Haitian national who claimed that upon his removal to Haiti, as a criminal deportee, he would be detained indefinitely in substandard prison conditions by Haitian authorities. The BIA found that such treatment does not amount to torture where there is no evidence that the authorities are "intentionally and deliberately maintaining such prison conditions in order to inflict torture." Like other elements of the reasonable fear of torture analysis, the evidence establishing specific intent can be circumstantial.

*Matter of J-E-*, 23 I&N Dec. 291, 300-01 (BIA 2002); *but see Matter of G-A-*, 23 I&N Dec. 366, 372 (BIA 2002) (finding that where deliberate acts of torture are pervasive and widespread and where authorities use torture as a matter of policy, the specific intent requirement can be satisfied); *see also Settenda v. Ashcroft*, 377 F.3d 89 (1st Cir. 2004); *Elien v. Ashcroft*, 364 F.3d 392 (1st Cir. 2004); *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004).

It is important to analyze the specific facts of each case in order to accurately determine the *specific intent* element. For

example, in a case that was very similar to the facts in *Matter of J-E-*, the Eleventh Circuit directed the BIA to consider whether a Haitian criminal deportee, who was mentally ill and infected with the AIDS virus satisfied the *specific intent* element where there was evidence that mentally ill detainees with HIV are singled out for forms of punishment that included ear-boxing (being slapped simultaneously on both ears), beatings with metal rods, and confinement to crawl spaces where detainees cannot stand up was eligible for withholding of removal under the CAT. In distinguishing the facts from *Matter of J-E-*, the court stated that in *J-E-*, the petitioner did not establish that he would be individually and intentionally singled out for harsh treatment and only produced evidence of generalized mistreatment and isolated instances of torture.

*Jean-Pierre v. U.S. Attorney General*, 500 F.3d 1315 (11th Cir. 2007).

Note that, in contrast, when determining asylum eligibility, there is no requirement of specific intent to inflict harm to establish that an act constitutes persecution: "requiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture."

*See Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

*Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003).

1. Reasons torture is inflicted

The Convention definition provides a **non**-exhaustive list of possible reasons torture may be inflicted. The definition states that torture is an act that inflicts severe pain or suffering on a person *for such purposes as:*

8 C.F.R. § 208.18(a)(1).

a. obtaining from him or a third person information or a confession,

b. punishing him for an act he or a third person has committed or is suspected of having committed,

c. intimidating or coercing him or a third person, or

d. for any reason based on discrimination of any kind

*Note:* All discrimination is not torture.

2. No nexus to protected characteristic required.

Unlike the non-return (*non-refoulment)* obligation in the *Convention relating to the Status of Refugees*, the *Convention Against Torture* does not require that the

torture be connected to any of the five protected characteristics identified in the definition of a refugee, or any other characteristic the individual possesses or is perceived to possess.

## D. Degree of Harm

"Torture" requires severe pain or suffering, whether physical or mental. "Torture" is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

8 C.F.R. § 208.18(a)(1).

8 C.F.R. § 208.18(a)(2).

*See Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002) (citing to *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (1978) (discussing the severe nature of torture)).

The Report of the Committee on Foreign Relations, accompanying the transmission of the Convention to the Senate for ratification, explained:

Committee Report, p. 13.

> The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. . . ." The negotiating history indicates that the underlined portion of this description was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.

Therefore, certain forms of harm that may be considered persecution may not be considered severe enough to amount to torture.

*See*, RAIO Training Module, *Interviewing-Survivors of Torture and other Severe Trauma*, section *Forms of Torture*.

Types of harm that may be considered torture include, but are not limited to, the following:

1. rape and other severe sexual violence;

*Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003).

2. application of electric shocks to sensitive parts of the body;
3. sustained, systematic beating;
4. burning;


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5. forcing the body into positions that cause extreme pain, such as contorted positions, hanging, or stretching the body beyond normal capacity;

*Matter of G-A-*, 23 I&N Dec. 366, 372 (BIA 2002).

6. forced non-therapeutic administration of drugs; and

7. severe mental pain and suffering.

Any harm must be evaluated on a case-by-case basis to determine whether it constitutes torture. In some cases, whether the harm above constitutes torture will depend upon its severity and cumulative effect.

The BIA in *Matter of G-A-* held that treatment that included "suspension for long periods in contorted positions, burning with cigarettes, sleep deprivation, and … severe and repeated beatings with cables or other instruments on the back and on the soles of the feet … beatings about the ears, resulting in partial or complete deafness, and punching in the eyes, leading to partial or complete blindness" when intentionally and deliberately inflicted constitutes torture.

*Matter of G-A-*, 23 I&N Dec. 366, 370 (BIA 2002).

**E. Mental Pain or Suffering**

For mental pain or suffering to constitute torture, the mental pain must be prolonged mental harm caused by or resulting from:

8 C.F.R. § 208.18(a)(4); 136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

a. The intentional infliction or threatened infliction of severe physical pain or suffering;

b. The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

c. The threat of imminent death; or

d. The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.


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## F. Lawful Sanctions

Article 1 of the Convention provides that pain or suffering "arising only from, inherent in or incidental to lawful sanctions" does not constitute torture.

8 C.F.R. § 208.18(a)(3).

8. Definition of *lawful sanctions*

   "Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the *Convention Against Torture* to prohibit torture."

   8 C.F.R. § 208.18(a)(3).

   The supplementary information published with the implementing regulations explains that this provision "does not require that, in order to come within the exception, an action must be one that would be authorized by United States law. It must, however, be legitimate, in the sense that a State cannot defeat the purpose of the Convention to prohibit torture."

   Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (Feb. 19, 1999).

   Note that "lawful sanctions" do not include the intentional infliction of severe mental or physical pain during interrogation or incarceration after an arrest that is otherwise based upon legitimate law enforcement considerations.

   *See* 8 CFR § 208.18; *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004).

9. Sanctions cannot be used to circumvent the Convention

   A State Party cannot through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture. In other words, the fact that a country's law allows a particular act does not preclude a finding that the act constitutes torture.

   8 C.F.R. § 208.18(a)(3); 136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

   **Example:** A State Party's law permits use of electric shocks to elicit information during interrogation. The fact that such treatment is formally permitted by law does not exclude it from the definition of torture.

10. Failure to comply with legal procedures

    Failure to comply with applicable legal procedural rules in imposing sanctions does not *per se* amount to torture.

    8 C.F.R. § 208.18(a)(8).


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11. Death penalty

The Senate's ratification resolution expresses the "understanding" that the *Convention Against Torture* does not prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution.

136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

The supplementary information to the implementing regulations explains,

> "The understanding does not mean . . . that any imposition of the death penalty by a foreign state that fails to satisfy United States constitutional requirements constitutes torture. Any analysis of whether the death penalty is torture in a specific case would be subject to all requirements of the Convention's definition, the Senate's reservations, understandings, and declarations, and the regulatory definitions. Thus, even if imposition of the death penalty would be inconsistent with United States constitutional standards, it would not be torture if it were imposed in a legitimate manner to punish violations of law. Similarly, it would not be torture if it failed to meet any other element of the definition of torture."

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8482-83 (Feb. 19, 1999).

## XII. ESTABLISHING A REASONABLE FEAR OF TORTURE

To establish a reasonable fear of torture, the applicant must show that there is a reasonable possibility the applicant would be subject to torture, as defined in the *Convention Against Torture*, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

8 C.F.R. §§ 208.31(c), 208.18(a).

### A. Torture

In evaluating whether an applicant has established a reasonable fear of torture, the asylum officer must address each of the elements in the torture definition and determine whether there is a *reasonable possibility* that each element is satisfied.

1. Severity of feared harm


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Is there a reasonable possibility the applicant will suffer severe pain and suffering?

If the feared harm is mental suffering, does it meet each of the requirements listed in the Senate "understandings," as reflected in the regulations?

2. State action

Is there a reasonable possibility the pain or suffering would be inflicted by or at the instigation of a public official or other person acting in an official capacity?

If not, is there a reasonable possibility the pain or suffering would be inflicted with the consent or acquiescence of a public official or other person acting in an official capacity?

3. Custody or physical control

Is there a reasonable possibility the feared harm would be inflicted while the applicant is in the custody or physical control of the offender?

4. Specific intent

Is there a reasonable possibility the feared harm would be specifically intended by the offender to inflict severe physical or mental pain or suffering?

5. Lawful sanctions

Is there a reasonable possibility the feared harm would not arise only from, would not be inherent in, and would not be incidental to, lawful sanctions?

If the feared harm arises from, is inherent in, or is incidental to, lawful sanctions, is there a reasonable possibility the sanctions would defeat the object and purpose of the Convention?

## B. No Nexus Requirement

There is no requirement that the feared torture be on account of a protected characteristic in the refugee definition. While there is a "specific intent" requirement that the harm be intended to

inflict severe pain or suffering, the reasons motivating the offender to inflict such pain or suffering need not be on account of a protected characteristic of the victim.

Rather, the Convention definition provides a non-exhaustive list of possible reasons the torture may be inflicted, as described in section IX.C. above. The use of the modifier "for such purposes" indicates that this is a non-exhaustive list, and that severe pain and suffering inflicted for other reasons may also constitute torture.

*See* Committee Report, p. 14.

Note that the reasons for which a government has inflicted torture on individuals in the past may be important in determining whether the government is likely to torture the applicant.

*See Sevoian v. Ashcroft*, 290 F.3d 166 (3d Cir. 2002) (finding that the BIA did not abuse its discretion in denying a motion to reopen to consider a Convention claim when country conditions indicate that the government in question usually uses torture to extract confessions or in politically-sensitive cases and there is no reason to believe that the applicant falls into either category).

## C. Past Torture

Unlike a finding of past persecution, a finding that an applicant suffered torture in the past does not raise a *presumption* that it is *more likely than not* the applicant will be subject to torture in the future. However, regulations require that any past torture be *considered* in evaluating whether the applicant is likely to be tortured, because an applicant's experience of past torture may be *probative* of whether the applicant would be subject to torture in the future.

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999); 8 C.F.R. § 208.16(c)(3).

However, for purposes of the reasonable fear screening, which requires a lower standard of proof than is required for withholding of removal, that an applicant who demonstrates that he or she has been tortured in the past should generally be found to have met his or her burden of establishing a reasonable possibility of torture in the future, absent evidence to the contrary.

This approach governs only the reasonable fear screening and is not applicable to the actual eligibility determination for withholding under the *Convention Against Torture*. *See Abdel-Masieh v. INS*, 73 F.3d 579, 584 (5th Cir. 1996)(past actions do not create "an outer limit" on the government's future actions against an individual).

Conversely, past harm that does not rise to the level of torture does not mean that torture will not occur in the future, especially in countries were torture is widespread.


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## D. Internal Relocation

Regulations require the immigration judge to consider evidence that the applicant could relocate to another part of the country of removal where he or she is not likely to be tortured, in assessing whether the applicant can establish that it is more likely than not that he or she would be tortured. Therefore, asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in assessing whether there is a reasonable possibility that he or she would be tortured.

8 C.F.R. § 1208.16(c)(3)(ii).

Under the Convention Against Torture, the burden is on the applicant to show that it is more likely than not that he or she will be tortured, and one of the relevant considerations is the possibility of relocation. In deciding whether the applicant has satisfied his or her burden, the adjudicator must consider all relevant evidence, including but not limited to the possibility of relocation within the country of removal.

8 C.F.R. §§ 208.16(c)(2), (3)(ii).

*Maldonado v. Holder*, 786 F.3d 1155, (9th Cir. 2015) (overruling *Hassan v. Ashcroft*, 380 F.3d 1114 (9th Cir. 2004) ("Section 1208.16(c)(2) does not place a burden on an applicant to demonstrate that relocation within the proposed country of removal is impossible because the IJ must consider all relevant evidence; no one factor is determinative.... Nor do the regulations shift the burden to the government because they state that the applicant carries the overall burden of proof.")

Credible evidence that the feared torturer is a public official will normally be sufficient evidence that there is no safe internal relocation option in the reasonable fear context.

*See, e.g., Comollari v. Ashcroft*, 378 F.3d 694, 697-98 (7th Cir. 2004).

Unlike the persecution context, the regulations implementing CAT do not explicitly reference the need to evaluate the reasonableness of internal relocation. Nonetheless, the regulations provide that "all evidence relevant to the possibility of future torture shall be considered... " Therefore, asylum officers should apply the same reasonableness inquiry articulated in the persecution context to the CAT context.

8 C.F.R. § 208.16(c)(3)(iv).

8 C.F.R. § 208.13(b)(3); *See* RAIO Training Module, Well Founded Fear.


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### E. Mandatory Bars

Although certain mandatory bars apply to a grant of withholding of removal under the Convention Against Torture, no mandatory bars may be considered in making a reasonable fear of torture determination.

8 C.F.R. §§ 208.16(d)(2); 208.31(c).

Because there are ***no*** bars to protection under Article 3, an immigration judge must grant deferral of removal to an applicant who is barred from a grant of withholding of removal, but who is likely to be tortured in the country to which the applicant has been ordered removed. Therefore, the reasonable fear screening process must identify and refer to the immigration judge aliens who have a reasonable fear of torture, even those who would be barred from withholding of removal, so that an immigration judge can determine whether the alien should be granted *deferral of removal.*

8 C.F.R. § 208.17(a).

APSOs must elicit information regarding any potential bars to withholding of removal during the interview.

The officer must keep in mind that the applicability of these bars requires further evaluation that will take place in the full hearing before an immigration judge if the applicant otherwise has a reasonable fear of persecution or torture. In such cases, the officer should consult a supervisory officer and follow procedures on "flagging" such information for the hearing as outlined in the Reasonable Fear Procedures Manual.

## XIII. EVIDENCE

### A. Credible Testimony

To establish eligibility for withholding of removal under section 241(b)(3) of the Act or the Convention Against Torture, the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

8 C.F.R. §§ 208.16(b); 208.16(c)(2).

As in the asylum context, there may be cases where lack of corroboration, without reasonable explanation, casts doubt on the credibility of the claim or otherwise affects the applicant's ability to meet the requisite burden of proof. Asylum officers should follow the guidance in the RAIO Modules, *Credibility*, and *Evidence,* and HQASY memos on this issue in evaluating whether lack of corroboration affects the applicant's ability to establish a reasonable fear of persecution or torture.


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## B. Country Conditions

Country conditions information is integral to most reasonable fear determinations, whether the asylum officer is evaluating reasonable fear of persecution or reasonable fear of torture.

*See* RAIO Training Module, *Country of Origin Information (COI) Researching and Using COI in RAIO Adjudications.*

The Convention Against Torture specifically requires State Parties to take country conditions information into account, where applicable, in evaluating whether a person would be subject to torture in a particular country.

> "[T]he competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

Convention Against Torture, Article 3, para. 2.

The implementing regulations reflect this treaty provision by providing that all evidence relevant to the possibility of future torture must be considered, including, but not limited to, evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable, and other relevant information regarding conditions in the country of removal.

8 C.F.R. §§ 208.16(c)(3).

As discussed in the supplementary information to the regulations, "the words 'where applicable' indicate that, in each case, the adjudicator will determine whether and to what extent evidence of human rights violations in a given country is in fact a relevant factor in the case at hand. Evidence of the gross and flagrant denial of freedom of the press, for example, may not tend to show that an alien would be tortured if referred to that country."

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999).

Analysis of country conditions requires an examination into the likelihood that the applicant will be persecuted or tortured upon return. Some evidence indicating that the feared harm or penalty would be enforced against the applicant should be cited in support of a positive reasonable fear determination.

*See Matter of M-B-A-*, 23 I&N Dec. 474, 478-79 (BIA 2002) (finding that a Nigerian woman convicted of a drug offense in the United States was ineligible for protection under the Convention where she provided no evidence that a Nigerian law criminalizing certain drug offenses committed outside Nigeria would be enforced against


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her).

In *Matter of G-A-*, the BIA found that an Iranian Christian of Armenian descent who lived in the U.S. for more than 25 years and who had been convicted of a drug-related crime is likely to be subjected to torture if returned to Iran. The BIA considered the combination of the harsh and discriminatory treatment of ethnic and religious minorities in Iran, the severe punishment of those associated with narcotics trafficking, and the perception that those who have spent an extensive amount of time in the U.S. are opponents of the Iranian government or even U.S. spies to determine that, in light of country conditions information, the individual was entitled to relief under the Convention Against Torture.

*Matter of G-A-*, 23 I&N Dec. 366, 368 (BIA 2002).

In *Matter of J-F-F-*, the Attorney General held that the applicant failed to meet his evidentiary burden for deferral of removal to the Dominican Republic under the Conventions Against Torture. Here, the IJ improperly "… strung together [the following] series of suppositions: that respondent needs medication in order to behave within the bounds of the law; that such medication is not available in the Dominican Republic; that as a result respondent would fail to control himself and become 'rowdy'; that this behavior would lead the police to incarcerate him; and that the police would torture him while he was incarcerated." The Attorney General determined that this hypothetical chain of events was insufficient to meet the applicant's burden of proof. In addition to considering the likelihood of each step in the hypothetical chain of events, the adjudicator must also consider whether the entire chain of events will come together to result in the probability of torture of the applicant.

*Matter of J-F-F-*, 23 I&N Dec. 912, 917 n.4 (AG 2006) ("An alien will never be able to show that he faces a more likely than not chance of torture if one link in the chain cannot be shown to be more likely than not to occur." Rather, it "is the likelihood of all necessary events coming together that must more likely than not lead to torture, and a chain of events cannot be more likely than its least likely link.") (*citing Matter of Y-L-*, 23 I&N Dec. 270, 282 (AG 2002)).

"Official as well as unofficial country reports are probative evidence and can, by themselves, provide sufficient proof to sustain an alien's burden under the INA".

*Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003).

The Ninth Circuit has also addressed the use of country conditions in withholding cases, holding in *Kamalthas v. INS* that the "BIA failed to consider probative evidence in the record of country conditions which confirm that Tamil males have been subjected to widespread torture in Sri Lanka."

*Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001).

## XIV. INTERVIEWS

### A. General Considerations

*See* Reasonable Fear Procedures Manual (Draft).


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Interviews for reasonable fear determinations should generally be conducted in the same manner as asylum interviews. They should be conducted in a non-adversarial manner, separate from the public and consistent with the guidance in the RAIO Combined Training lessons regarding interviewing.

8 C.F.R. § 208.31(c).

The circumstances surrounding a reasonable fear interview may be significantly different from an affirmative asylum interview. A reasonable fear interview may be conducted in a jail or other detention facility and the applicant may be handcuffed or shackled. Such conditions may be particularly traumatic for individuals who have escaped persecution or survived torture and may impact their ability to testify. Additionally, the applicant may have an extensive criminal record. Given these circumstances, officers should take particular care to maintain a non-adversarial tone and atmosphere during reasonable fear interviews.

At the beginning of the interview, the asylum officer should determine whether the applicant has an understanding of the reasonable fear process and answer any questions the applicant may have about the process.

8 C.F.R. § 208.31(c).

Officers should read to the applicant paragraph 1.19 on Form I-899, which describes the purpose of the interview.

## B. Confidentiality

The information regarding the applicant's fear of persecution and/or fear of torture is confidential and cannot be disclosed without the applicant's written consent, unless one of the exceptions in the regulations regarding the confidentiality of the asylum process apply. At the beginning of the interview, the asylum officer should explain to the applicant the confidential nature of the interview.

8 C.F.R. § 208.6.

## C. Interpretation

If the applicant is unable to proceed effectively in English, the asylum officer must use a commercial interpreter with which USCIS has a contract to conduct the interview.

If the applicant requests to use a relative, friend, NGO or other source as an interpreter, the asylum officer should proceed with the interview using the applicant's interpreter. However, asylum officers are required to use a contract interpreter to monitor the interview to verify that the applicant's interpreter is accurate and neutral while interpreting.

8 C.F.R. § 208.31(c).

Asylum officers may conduct interviews in the applicant's preferred language provided that the officer has been certified by the State Department, and that local office policy permits asylum officers to conduct interviews in languages other than English.


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The applicant's interpreter must be at least 18 years old. The interpreter must not be:

- the applicant's attorney or representative,
- a witness testifying on behalf of the applicant, or
- a representative or employee of the applicant's country of nationality, or if the applicant is stateless, the applicant's country of last habitual residence.

*See* Reasonable Fear Procedures Manual (Draft).

## D. Note Taking

Interview notes must be taken in a Question & Answer (Q&A) format. It is preferable that the interview notes be typed. When the interview notes are taken longhand, the APSO must ensure that they are legible. Interview notes must accurately reflect what transpired during the reasonable fear interview so that a reviewer can reconstruct the interview by reading the interview notes. In addition, the interview notes should substantiate the asylum officer's decision.

8 C.F.R. § 208.31(c).

Lafferty, John, Asylum Division, *Updated Guidance on Reasonable Fear Note-Taking*, Memorandum to All Asylum Office Staff (Washington, DC), May 9, 2014.
*See also* Reasonable Fear Procedures Manual (Draft).

The Reasonable Fear Q&A interview notes are not required to be a *verbatim* transcript.

Although interview notes are not required to be a *verbatim* record of everything said at the interview, they must provide an accurate and complete record of the specific questions asked and the applicant's specific answers to demonstrate that the APSO gave the applicant every opportunity to establish a reasonable fear of persecution, or a reasonable fear of torture. In doing so, the Q&A notes must reflect that the APSO asked the applicant to explain any inconsistencies as well as to provide more detail concerning material issues. This type of record will provide the SAPSO with a clear record of the issues that may require follow-up questions or analysis, as well as assist the asylum officer in the identification of issues related to credibility and analysis of the claim after the interview.

Before ending the interview, the APSO must provide a summary of the material facts related to the protection claim and read it to the applicant who, in turn, will have the opportunity to add, or correct facts. The interview record is not considered complete until the applicant agrees that the summary of the protection claim is complete and correct.

## E. Representation

*See* Reasonable Fear Procedures Manual (Draft).

The applicant may be represented by counsel or by an accredited representative at the interview. The representative must submit a signed form G-28. The role of the representative in the reasonable fear interview is the same as the role of the representative in the asylum interview.

8 C.F.R. § 208.31(c); *see* discussion on role of the representative in the RAIO Training Module, *Interviewing-Introduction to the Non Adversarial Interview*.

The representative may present a statement at the end of the interview and, where appropriate, should be allowed to make clarifying statements in the course of the interview, so long as the representative is not disruptive. The asylum officer, in his or her discretion, may place reasonable limits on the length of the statement.

## F. Eliciting Information

The APSO must elicit all information relating both to fear of persecution and fear of torture, even if the asylum officer determines early in the interview that the applicant has established a reasonable fear of either.

*See* RAIO Training Module, *Interviewing – Eliciting Testimony*, section 3.0: "Officer's Duty to Elicit Testimony". *"Eliciting" testimony means fully exploring an issue by asking follow-up questions to expand upon and clarify the interviewee's responses before moving on to another topic.*

Specifically, the asylum officer must explore each of the following areas of inquiry, where applicable:

1. What the applicant fears would happen to him/her if returned to a country (elicit details regarding the specific type of harm the applicant fears)

2. Whom the applicant fears

The list of areas of inquiry is not exhaustive. There may be other areas of inquiry that arise in the course of the interview. Also, the asylum officer is not required to explore the areas of inquiry in the sequence listed below. As in an asylum interview, each interview has a flow of information unique to the applicant.

3. The relationship of the feared persecutor or torturer to the government or government officials

4. Was a public official or other individual acting in an official capacity? Often the public official is a police officer. The following is a brief list of questions that may be asked when addressing whether a police officer


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was acting in an official capacity:

a. Was the officer on duty?

b. Was the officer in uniform?

c. Did the officer show a police badge or other type of official credential?

d. Did the officer have access to the victim because of his/her authority as a police officer?

e. If a potential torturer is not a public official or someone acting in official capacity, is there evidence that a public official or other person acting in official capacity had ,or would have prior knowledge of the torture and breached, or would breach a legal duty to prevent the torture, including acting a manner that can be considered to be willfully blind to the torture? Is the torturer part of the government in that country (including local government)?

f. If not, would a government or public official know what they were doing?

g. Would a government or public official think it was okay?

h. If you believe that the government would think this was okay or that the government is corrupt, why do you think this?

i. What experiences have you or people you know of had with the authorities that make you think they would think it was okay if someone was tortured?

j. Would the (agents of harm?) person or persons inflicting torture be told by the government or public official to do that?

k. Did you report any past harm to a public official?

l. What did the public official say to you when you reported it?

m. Did the public official ask you questions about the


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incident? Did public officials go to crime scene to investigate?

n. Did you ever speak with police after you reported incident?

o. Did you inquire about any investigation? If so, please provide details.

p. Do you know if anyone was ever investigated or charged with crime?

5. The reason(s) someone would want to harm the applicant. For cases where no nexus to a protected ground is immediately apparent, the asylum officer in reasonable fear interviews should ask questions related to all five grounds to ensure that no nexus issues are overlooked.

6. Whether the applicant has been and/or would be in the feared offender's custody or control

    a. How do you think you will be harmed?

    b. How will the feared offender find you?

7. Whether the harm the applicant fears may be pursuant to legitimate sanctions

    a. Would anyone have a legal reason to punish you in your in your home country?

    b. Do you think you will be given a trial if you are arrested?

    c. What will happen to you if you are put in prison?

8. Information about any individuals similarly situated to the applicant, including family members or others closely associated with the applicant, who have been threatened, persecuted, tortured, or otherwise harmed

9. Any groups or organizations the applicant is associated with that would place him/her at risk of persecution or torture, in light of country conditions information

10. Any actions the applicant has taken in the past (either in


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the country of feared persecution or another country, including the U.S.) that would place him/her at risk of persecution or torture, in light of country conditions information

11. Any harm the applicant has experienced in the past:

    a. a description of the type of harm

    b. identification of who harmed the applicant

    c. the reason the applicant was harmed

    d. the relationship between the person(s) who harmed the applicant and the government

    e. whether the applicant was in that person(s) custody or control

    f. whether the harm was in accordance with legitimate sanctions

When probing into a particular line of questioning, it is important to keep asking questions that elicit details so that information relating to the issues above is thoroughly elicited. It is also important to ask the application questions such as, "Is there anyone else or anything else you are afraid of, other than what we've already discussed?" until the applicant has been given an opportunity to present his or her entire claim.

The asylum officer should also elicit information relating to exceptions to withholding of removal, if it appears that an exception may apply. This information may not be considered in evaluating whether the applicant has a reasonable fear, but should be included in the interview Q&A notes, where applicable.

## XV. REQUESTS TO WITHDRAW THE CLAIM FOR PROTECTION

*See* Reasonable Fear Procedures Manual (Draft).

An applicant may withdraw his or her request for protection from removal at any time during the reasonable fear process. When an applicant expresses a desire to withdraw the request for protection, the asylum officer must conduct an interview to determine whether the decision to withdraw is entered into knowingly and willingly. The asylum officer should ask sufficient


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questions to determine the following:

- The nature of the fear that the applicant originally expressed to the DHS officer,
- Why the applicant no longer wishes to seek protection and whether there are any particular facts that led the applicant to change his or her mind,
- Whether any coercion or pressure was brought to bear on the applicant in order to have him or her withdraw the request, and
- Whether the applicant clearly understands the consequences of withdrawal, including that he or she will be barred from any legal entry into the United States for a period that may run from 5 years to life.

An elicitation of the nature of the fear that the applicant originally expressed does not require a full elicitation of the facts of the applicant's case. Rather, information regarding whether the request to withdraw is knowing and voluntary is central to determining whether processing the withdrawal of the claim for protection is appropriate. The determination as to whether the request to withdraw is knowing and voluntary is unrelated to whether the applicant has a fear of future harm. Processing the withdrawal of the claim for protection is appropriate when the decision was made knowingly and voluntarily even when the applicant still fears harm.

## XVI. SUMMARY

### A. Applicability

Asylum officers conduct reasonable fear of persecution or torture screenings in two types of cases in which an applicant has expressed a fear of return: 1) A prior order has been reinstated pursuant to section 241(a)(5) of the INA; or 2) DHS has ordered an individual removed pursuant to section 238(b) of the INA based on a prior aggravated felony conviction.

### B. Definition of Reasonable Fear of Persecution

A reasonable fear of persecution must be found if the applicant establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality,



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membership in a particular social group, or political opinion.

## C. Definition of Reasonable Fear of Torture

A reasonable fear of torture must be found if the applicant establishes there is a reasonable possibility he or she will be tortured.

## D. Bars

No mandatory bars may be considered in determining whether an individual has established a reasonable fear of persecution or torture.

## E. Credibility

The same factors apply in evaluating whether an applicant's testimony is credible as apply in the asylum adjudication context. The asylum officer should assess the credibility of the assertions underlying the applicant's claim, considering the totality of the circumstances and all relevant factors.

## F. Effect of Past Persecution or Torture

1. If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant has a reasonable fear of future persecution on the basis of the original claim. This presumption may be overcome if a preponderance of the evidence establishes that,

   a. due to a fundamental change in circumstances, the fear is no longer well-founded, or

   b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable to expect the applicant to do so.

2. If the applicant establishes past torture, it may be presumed that the applicant has a reasonable fear of future torture, unless a preponderance of the evidence establishes that there is no reasonable possibility the applicant would be tortured in the future.



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## G. Internal Relocation

To establish a reasonable fear of persecution, the applicant must establish that it would be unreasonable for the applicant to relocate. If the government is the feared offender, it shall be presumed that internal relocation would not be reasonable, unless a preponderance of the evidence establishes that, under all the circumstances, internal relocation would be reasonable.

Asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in reasonable fear of torture determinations. Credible evidence that the feared torturer is a public official will normally be sufficient evidence that there is no safe internal relocation option in the reasonable fear context. Asylum officers should apply the same reasonableness inquiry articulated in the persecution context to the CAT context.

## H. Elements of the Definition of Torture

1. The torturer must be a public official or other person acting in an official capacity, or someone acting with the consent or acquiescence of a public official or someone acting in official capacity.

2. The applicant must be in the torturer's control or custody.

3. The torturer must specifically intend to inflict severe physical or mental pain or suffering.

4. The harm must constitute severe pain or suffering.

5. If the harm is mental suffering, it must meet the requirements listed in the regulations, based on the "understanding" in the ratification instrument.

6. Harm arising only from, inherent in, or incidental to lawful sanctions generally is not torture. However, sanctions that defeat the object and purpose of the Torture Convention are not lawful sanctions. Harm arising out of such sanctions may constitute torture.

7. There is no requirement that the harm be inflicted "on account" of any ground.



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## I. Evidence

Credible testimony may be sufficient to sustain the burden of proof, without corroboration. However, there may be cases where a lack of corroboration affects the applicant's credibility and ability to establish the requisite burden of proof. Country conditions information, where applicable, must be considered.

## J. Interviews

Reasonable fear screening interviews generally should be conducted in the same manner as interviews in the affirmative asylum process, except DHS is responsible for providing the interpreter. The asylum officer must elicit all relevant information.



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