

# Lesson Plan Overview

<b>Course</b>	Asylum Officer Basic Training
<b>Lesson</b>	<b><i>Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution</i></b>
<b>Rev. Date</b>	March 6, 2009
<b>Lesson Description</b>	This lesson discusses the definition of a refugee as codified in the Immigration and Nationality Act and its interpretation in administrative and judicial caselaw. The primary focus of this lesson is the determination as to whether an act constitutes past persecution.
<b>Field Performance Objective</b>	Given a request for asylum to adjudicate, the asylum officer will correctly apply the law to determine eligibility for asylum in the United States.
<b>Academy Training Performance Objective</b>	Given written and roleplay asylum scenarios, the trainee will correctly apply the law to determine eligibility for asylum in the United States.
<b>Interim (Training) Performance Objectives</b>	<ol style="list-style-type: none"> <li>1. Identify the elements necessary to establish that an individual is a refugee.</li> <li>2. Identify eligibility issues raised by facts presented in an asylum case.</li> <li>3. Identify how to determine nationality, if any, of an asylum applicant.</li> <li>4. Describe how to identify a persecutor, for purposes of determining whether harm that an asylum applicant experienced constitutes persecution.</li> <li>5. Identify factors to consider in determining whether an act(s) is sufficiently serious to constitute persecution.</li> <li>6. Identify factors to consider when deciding whether an applicant is eligible for asylum based on past persecution alone.</li> </ol>
<b>Instructional Methods</b>	Lecture, discussion, group and individual practical exercises
<b>Student Materials/References</b>	Participant Workbook; <a href="#">8 CFR § 208</a> ; <i>UNHCR Handbook</i> ; <i>Matter of Chen</i> , 20 I&N Dec. 16 (BIA 1989); <i>Matter of Kasinga</i> , 21 I.&N. Dec. 357 (BIA 1996) (en banc); <i>Matter of T-Z-</i> , 24 I&N Dec. 163 (BIA 2007); <i>Matter of A-K-</i> , 24 I&N Dec 275 (BIA 2007), <i>Matter of J-S-</i> , 24 I&N Dec. 520 (AG 2008); UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (Aug. 2005), 12 pp. (attached)
<b>Method of Evaluation</b>	Observed lab exercise with critique from evaluator, practical exercise exam, written test

**Background Reading**

1. Joseph E. Langlois. USCIS Asylum Division. *North Korean Human Rights Act of 2004*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 22 Oct. 2004), 2 pp. (attached)
2. Joseph E. Langlois. Asylum Division, Office of International Affairs. *Change in Instruction Concerning One Year Filing Deadline and Past Persecution*, Memorandum for Asylum Office Directors and Deputy Directors. (Washington, DC: 15 March 2001), 2 pp. (attached)
3. Joseph Langlois. INS Office of International Affairs, *Persecution of Family Members*, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 30 June 1997), 5 pp. (attached)
4. David A. Martin. INS Office of General Counsel. *Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Memorandum to Management Team (Washington, DC: 21 Oct. 1996), 6 pp. (attached)
5. David A. Martin. INS Office of General Counsel. *Legal Opinion: Palestinian Asylum Applicants*, Memorandum to Asylum Division (Washington, DC: 27 Oct. 1995), 7 pp. (attached)
6. David Martin. INS General Counsel. *Legal Opinion: Application of the Lautenberg Amendment to asylum applications under INA section 208*, Memorandum to John Cummings, Acting Asst. Commissioner, CORAP (Washington, DC: 6 Oct. 1995), 3 pp. (attached)
7. Rosemary Melville. INS Office of International Affairs. *Follow Up on Gender Guidelines Training*, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 7 July 1995), 8 pp. (See lesson, *Female Asylum Applicants and Gender-Related Claims*)
8. Phyllis Coven. INS Office of International Affairs. *Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Gender Guidelines)*, Memorandum to INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 pp. (See lesson, *Female Asylum Applicants and Gender-Related Claims*)
9. T. Alexander Aleinikoff. “The Meaning of ‘Persecution’ in United States Asylum Law,” *International Journal of Refugee Law* (Vol. 3, No. 1, 1991), pp. 411-434. (attached)
10. UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (Aug. 2005), 12 pp. (attached)

**CRITICAL TASKS****SOURCE: Asylum Officer Validation of Basic Training Final Report (Phase One), Oct. 2001**

<b>Task/ Skill #</b>	<b>Task Description</b>
001	Read and apply all relevant laws, regulations, procedures, and policy guidance.
006	Determine applicant's identity and nationality.
012	Identify issues of claim.
024	Determine if applicant is a refugee.
SS 8	Ability to read and interpret statutes, precedent decisions and regulations.
SS 13	Ability to analyze complex issues.

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**Presentation****References****I. INTRODUCTION**

Asylum may be granted in the discretion of the Secretary of the Department of Homeland Security (DHS) or the Attorney General if an applicant establishes that he or she is a refugee and that no mandatory bars apply. The asylum officer first must determine whether an applicant meets the statutory definition of refugee. The next step is deciding whether the applicant is subject to any mandatory bar. If the applicant meets the statutory definition of refugee and no mandatory bars apply, the asylum officer must determine whether discretion should be exercised to grant asylum to the applicant.

This is the first lesson in a series of five lessons on eligibility for asylum. This lesson provides an overview of the legal requirements an asylum seeker must meet in order to establish that he or she is a refugee. It covers, in detail, the following topics: the definition of refugee, how to determine the nationality of the applicant, agents of persecution, the definition of persecution, and eligibility based on past persecution.

Subsequent lessons on asylum eligibility discuss eligibility based on fear of future persecution, *Asylum Eligibility Part II, Well-Founded Fear*; the motive of the persecutor and the five protected characteristics in the refugee definition, *Asylum Eligibility Part III, Nexus and the Five Protected Characteristics*; the burden of proof and evidence, *Asylum Eligibility Part IV, Burden of Proof, Standards of Proof, and Evidence*; and mandatory reasons to deny asylum and the role of discretion, *Mandatory Bars to Asylum and Discretion*.

**II. BASIC DEFINITION OF “REFUGEE”**

The statute provides that an alien may be granted asylum in the exercise of discretion if the alien is a refugee within the meaning of section 101(a)(42)(A) of the INA. Therefore, a firm understanding of the definition of refugee is critical to determine whether an alien is eligible for asylum.

INA § 208; INA § 101(a)(42).

**A. Section 101(a)(42)(A) of the Act**

1. A refugee is “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person

last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

2. The statute further provides that “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.”
3. “Refugee” does *not* include “any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”

[INA § 101\(a\)\(42\)](#)

This provision was added in 1996 by [section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act \(IIRIRA\)](#).

[INA § 101\(a\)\(42\)](#). Note that this is also specifically listed as a basis of ineligibility for asylum under [INA § 208\(b\)\(2\)\(A\)\(i\)](#).

See lessons, [Mandatory Bars to Asylum and Discretion, section IV.A, Persecution of Others](#) and [Bars to Asylum Relating to National Security](#)

## B. Comparison with Convention Definition

As explained in previous lessons, the U.S. definition of refugee was derived from the definition of “refugee” in the *1951 Convention relating to the Status of Refugees (1951 Convention)*, as amended in the *1967 Protocol relating to the Status of Refugees (1967 Protocol)*. The *1951 Convention* definition of refugee, as modified, is

Any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership [in] a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.”

The [1967 Protocol](#) modified the definition of refugee in the [1951 Convention](#) by removing the language that limited refugee status to individuals who became refugees as a result of events occurring before January 1, 1951.

The 1980 Refugee Act and the IIRIRA expanded the Convention definition in the following aspects.

1. Past persecution

The U.S. definition recognizes refugee status based on *either* past persecution *or* a well-founded fear of future persecution.

INA § 101(a)(42).

In contrast, the UN definition focuses on well-founded fear. The *1951 Convention* does provide in the cessation clauses that there may be some cases where a refugee who no longer fears future persecution should still be given protection due to compelling reasons arising from previous persecution.

1951 Convention relating to the Status of Refugees, Art. 1, paras. I(5) and I(6).

2. Statutory requirement that a particular type of serious harm is deemed to be on account of political opinion.

The INA specifies that “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.” There are no such provisions in the Convention definition.

INA § 101(a)(42).

3. Location of individual

To meet the Convention definition of “refugee,” an individual must be outside of his or her country of nationality or, if stateless, country of last habitual residence. For the purposes of the admission of refugees under Section 207 of the INA, the US definition of refugee at section 101 (a)(42)(B) allows, under special circumstances specified by the President, inclusion of a person within the country of nationality or, if stateless, last habitual residence.

4. Persecutors

The U.S. definition explicitly excludes from the refugee definition anyone who has ordered, incited, assisted or otherwise participated in the persecution of others on account of a protected characteristic. This exclusion from the refugee definition is not present in the *1951 Convention* definition.

See lessons, *Mandatory Bars to Asylum and Discretion* and *Bars to Asylum Relating to National Security*

Persecutors may be barred from receiving protection consistent with exclusion provisions found in Article 1 F of the *1951 Convention*.

### C. Elements of the Refugee Definition

For asylum adjudication purposes, the following are the pertinent elements of the refugee definition:

1. Is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of the country of nationality (or if stateless, the country of last habitual residence);
- 2a. Because of past persecution

or

- 2b. Because of a well-founded fear of persecution;
3. On account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(a)(42)(A)

An applicant must establish all three elements (1, 2 (a or b), and 3) to meet the definition of a refugee. The applicant can establish that he or she is a refugee by demonstrating *either* actual past persecution *or* a well-founded fear of future persecution, but does not need to establish both.

INA § 101(a)(42)(A);  
See 8 C.F.R. § 208.13(b)  
(providing parameters for the discretionary grant of asylum to individuals who meet the definition of a refugee)

## III. DETERMINING COUNTRY OF NATIONALITY OR, IF STATELESS, COUNTRY OF LAST HABITUAL RESIDENCE

### A. Definition of Nationality

For purposes of the first part of the refugee definition – “outside any country of such person’s nationality” – nationality refers to “citizenship.”

UNHCR Handbook, para. 87; INA § 101(a)(22)

Contrast this with the definition of “nationality” in the second part of the refugee definition – “on account of nationality.” In the second part of the definition, “nationality” is *not* to be understood only as “citizenship,” but also refers to ethnic or linguistic groups.

UNHCR Handbook, para. 74

The INA defines “national” as a citizen or a person owing permanent allegiance to a State. The Court of Appeals for the Second Circuit has noted that “[n]ationality is a status conferred

INA § 101(a)(22); *Dhoumo v. BIA*, 416 F.3d 172, 175 (2d Cir. 2005) (per curiam),



by a state, and will generally be recognized by other states provided it is supported by a ‘genuine link’ between the individual and the conferring state.” Asylum officers must consider how the State views the applicant to determine whether the applicant is a national of the State or is stateless. See discussion below on statelessness.

(referencing *Restatement (Third) of Foreign Relations § 211*).

## B. Identifying Nationality

### 1. Passports

#### a. presumption of nationality

Possession of a passport creates a presumption that the holder is a national of that country, unless the passport states otherwise.

*UNHCR Handbook, para. 93*

#### b. overcoming the presumption of nationality

(i) There may be reliable information that a travel document or passport does not establish citizenship. The asylum officer must consider the circumstances under which the applicant obtained the passport and available information on whether a country issues passports to non-nationals.

**Instructor Note #2**

(ii) Some countries have issued passports to non-nationals for the sole purpose of allowing these individuals to leave the country issuing the passport.

(iii) Some applicants have obtained passports through misrepresentation or payment of bribes.

(iv) An unsupported assertion by the holder that a passport was issued only for travel purposes is generally insufficient to rebut the presumption of nationality. However, an assertion that a passport is a travel document only, combined with information indicating that the issuing country issues passports to non-nationals for travel purposes, and a consistent and detailed explanation of the circumstances could rebut the presumption of nationality established by the passport.

*UNHCR Handbook, para. 93*

When determining whether the presumption of citizenship created by the presentation of a passport is overcome, the officer must weigh all of the available evidence, including the applicant's testimony.

See *Palavra v. INS*, 287 F.3d 690, 694 (8<sup>th</sup> Cir. 2002) (finding that the BIA failed to perform its fact-finding function when it ignored testimony by the applicant in an affidavit claiming that a passport was issued as a humanitarian accommodation.)

## 2. Inability to establish nationality

a. An applicant is not required to establish nationality in order to be eligible for asylum. If nationality is not established, then the applicant should be considered stateless and eligibility will be determined based on the country of last habitual residence. (See section D, below, for a discussion of statelessness.)

See *Dulane v. INS*, 46 F.3d 988 (10<sup>th</sup> Cir. 1995)

b. There is no precedent caselaw directly on point describing the standard of proof required to establish nationality. The *UNHCR Handbook* indicates that when nationality cannot be clearly established an applicant is considered stateless. The UNHCR does not appear to be speaking to a standard of proof in this paragraph, but to the more practical issue that a person who cannot establish nationality should be considered "stateless."

*UNHCR Handbook*, para. 89

c. In general, the evidentiary standard to establish a fact in asylum adjudications is a preponderance of the evidence. If the adjudicator finds upon consideration of all available evidence that it is more likely than not that a fact is true, then the fact is established. Therefore, for purposes of asylum adjudications, nationality must be established by a preponderance of the evidence, or an applicant is treated as stateless.

## C. Multiple Nationality

### 1. Eligibility

The refugee definition provides that the applicant must be unable or unwilling to return to "**any** country of such person's nationality . . . ." A dual citizen must establish persecution or a well-founded fear of persecution in **both** countries of nationality to be eligible for asylum.

See *INA § 101(a)(42)(A)* (emphasis added); 1951 *Convention relating to the Status of Refugees*, Article 1 A(2); *UNHCR Handbook*, para. 106

2. Residency requirement and/or personal ties

The asylum officer must evaluate asylum eligibility with respect to any country of which the applicant is a citizen, even if the applicant never resided in, or established personal ties to, a country of citizenship.

Rationale: National protection takes precedence over international protection, where available. *UNHCR Handbook*, para. 106

**Example:** An applicant is a citizen of country X and lived there from birth until coming to the United States. She is a citizen of country Y through her mother. To be eligible for asylum, she would need to establish persecution or a well-founded fear of persecution in both country X and country Y.

3. Distinction between issue of multiple nationality and firm resettlement

The fact that an applicant became a resident in a third country after fleeing his or her country of nationality does not make that applicant a national or citizen of that country, or a dual citizen.

Residency does not necessarily indicate citizenship. The fact that an applicant resided in a country could mean that the applicant was firmly resettled in that country, which is a bar to asylum, or it could have no impact on the adjudication if the applicant was not firmly resettled. Firm resettlement is a separate and distinct issue from multiple nationality.

Firm resettlement (8 C.F.R. § 208.15) is covered in lesson, *Mandatory Bars to Asylum and Discretion*.

4. Citizens of North Korea

Section 302 of the North Korean Human Rights Act provides that asylum applicants from North Korea are not to be rendered ineligible for asylum in the United States on account of “any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea.”

Pursuant to the above, an asylum officer shall not treat a citizen of North Korea as also a national of South Korea, unless the applicant is a former North Korean citizen who has already availed him or herself of the rights of citizenship in South Korea.

*North Korean Human Rights Act of 2004*. H.R. 4011, P.L. 108-333 (Oct. 18, 2004), 118 Stat. 1287; *see also* Joseph E. Langlois. USCIS Asylum Division. *North Korean Human Rights Act of 2004*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 22 Oct. 2004), 2pp. Adjudication of asylum applications filed by applicants with dual North and South Korean citizenship should be analyzed under the guidance given in this lesson plan at

## D. Statelessness

If stateless, the applicant must establish persecution or a well-founded fear of persecution in the country where he or she last habitually resided. The fact that an applicant is stateless is not in itself sufficient to establish eligibility for asylum.

See *INA § 101(a)42*; *Faddoul v. INS*, 37 F.3d 185, 190 (5<sup>th</sup> Cir. 1994); *Ahmed v. Keisler*, 504 F.3d 1183, 1191 n.5 (9<sup>th</sup> Cir. 2007); *UNHCR Handbook*, para. 102

### 1. Definition of statelessness

The UN has defined “stateless person” as “a person who is not considered as a national by any State under the operation of its law.” The INA defines “national” as a person owing permanent allegiance to a State. Both definitions should be considered when determining whether an individual is stateless for purposes of the asylum adjudication. Even if the applicant believes he or she owes allegiance to a State, if the State does not consider the applicant to be a national of that State, the applicant should be considered stateless.

*Convention relating to the Status of Stateless Persons*, Art. I. para. 1, United Nations Treaty series, No. 5158, Vol. 360, p. 117  
*INA § 101(a)(22)*

### 2. Country where applicant last habitually resided

#### a. General definition

Although section 208 of the INA does not define “last habitually resided” for purposes of asylum eligibility, the INA does define “residence” as “the place of general abode; the place of general abode of a person means his principal, actually dwelling place in fact, without regard to intent.”

*INA § 101(a)(33)*; *see also 8 CFR § 214.7(a)(4)(i)* (defining “habitual residence” in the territories and possessions of the U.S. as the “place of general abode or a principal, actual dwelling place of a continuing or lasting nature”)

In one of the only precedent decisions addressing the issue of last habitual residence, the Court of Appeals for the Third Circuit considered the Immigration Judge’s (IJ’s) application of this general definition in the asylum context. The court found that the IJ properly concluded that the fact that a stateless Serb from Croatia did not intend to reside in a refugee camp in Serbia was not relevant in determining that Serbia was his place of last habitual residence. The Court also found that it was permissible for the IJ to consider the amount of time spent in Serbia in determining whether the applicant’s residence there was “habitual.”

*Paripovic v. Gonzales*, 418 F.3d 240 (3d Cir. 2005)

There is no bright-line rule for how long an applicant must live in a country for residence there to be considered “habitual.” In the case noted above, the applicant resided in Serbia for more than two years in a semi-permanent dwelling. This was found sufficient to be considered his last habitual residence.

b. No requirement of firm resettlement

Last habitual residence is distinct from firm resettlement. An applicant may have habitually resided in a country, even if he or she has not been firmly resettled there.

**Example:** A Palestinian born in the Israeli Occupied Territories, who then moved to Kuwait, where he worked legally but did not receive permanent residency rights. The applicant is stateless, and the country of last habitual residence is Kuwait.

c. *Last* habitual residence

A stateless person may have formerly resided in more than one country and may fear persecution in more than one of those countries. However, eligibility for asylum should be analyzed based on the country of *last* habitual residence only.

*UNHCR Handbook*, para. 104. See also INA § 101(a)(42), referring to *country of last* habitual residence.

d. Case-by-case determination

There is no clear case law indicating how to determine the country of last habitual residence. Determinations must be made on a case-by-case basis. When the country of last habitual residence is not readily apparent, the SAO and QA/Trainer should be consulted. HQ Quality Assurance is available if the issue requires further review.

## IV. UNABLE OR UNWILLING TO RETURN

### A. General Principles

To meet refugee definition requirements, the asylum applicant must establish that he or she is unable *or* unwilling to return to his or her country of past or feared persecution. In most cases, the fact that the applicant applied for asylum is evidence that the applicant is unwilling to return to that country.

INA § 101(a)(42).

There may be cases in which the applicant is willing to return, despite a risk, but is unable to do so. For example, the applicant may be stateless and the country of last habitual residence will not allow the applicant to return, or the country may have denied the applicant travel documents or refused to renew a passport and therefore the applicant cannot return.

## B. Return to Country of Past or Feared Persecution

The fact that an asylum applicant returned to a country of persecution or feared persecution *may indicate* that the applicant is willing and able to return, but does not in and of itself preclude establishment of eligibility. The reasons that motivated the applicant's temporary visit, the circumstances surrounding that visit, and any problems or lack of problems the applicant faced upon return must be evaluated to determine if the applicant is unable or unwilling to return.

Procedurally, asylum applicants who return to the country of feared persecution, absent "compelling reasons" are considered to have abandoned their asylum applications. The presumption of abandonment is overcome by a preponderance of the evidence indicating that the application is not abandoned. [8 C.F.R. § 208.8\(b\)](#). The applicant's appearance at the asylum office generally establishes that he or she has not abandoned the application.

1. Does return indicate that the applicant is able and willing to return?

The fact that the applicant returned to the country of claimed persecution, on its face, seems to indicate that he or she is both willing and able to return. However, there may be circumstances that compel the applicant to return. For example, one of the applicant's immediate family members may have died or may have been in a grave situation that compelled the applicant to return. The applicant remained unwilling to return, but the circumstances compelled him or her to return. The asylum officer must elicit and evaluate information concerning the applicant's reasons for return. The officer should not conclude that return due to compelling factors establishes that the applicant is able and willing to return.

*See De Santamaria v. US Att'y Gen.* 525 F.3d 999, (11th Cir. 2008) (rejecting the principle "that a voluntary return to one's home country always and inherently negates completely a fear of persecution." The applicant was actively involved in Colombian political and civic life. She left Colombia five times but returned because she wanted to be with her family and to work against her persecutors; she later left permanently due to continued serious risk of harm.)

2. What happened when the applicant returned?

The asylum officer must also elicit information to determine if harm or threats occurred after the applicant

Issues regarding the applicant's safety, or lack of

returned to the country of claimed persecution, or if circumstances have subsequently occurred that put the applicant at risk. Such subsequent harm, threats, or risk, may establish that the applicant, while willing and able to return for the last visit, is no longer willing and able to return.

safety, upon return are also relevant to whether the applicant's fear of future persecution is well-founded. See lesson, [Asylum Eligibility Part II, Well-Founded Fear](#).

## V. UNABLE OR UNWILLING TO AVAIL ONESELF OF PROTECTION

In most cases, the fact that an individual has applied for asylum in the United States is sufficient proof that he or she is *unwilling* to seek protection in the country from which he or she fled. The definition of refugee requires that the applicant be unable *or* unwilling to avail him or herself of protection. Therefore, the applicant is not required to prove that he or she is *unable* to avail himself or herself of protection if he or she is *unwilling* to avail himself or herself of that protection.

See also, [Section VII.A., Identifying a Persecutor](#), below, discussing the requirement that an applicant establish that the persecutor is either the government, or an entity that the government is unable or unwilling to control.

Note that whether an applicant is unable or unwilling to avail himself or herself of the protection of the country from which he or she fled could be important to determining whether it would be reasonable for the applicant to internally relocate within that country. Whether there is a reasonable internal relocation option relates to whether the applicant has a well-founded fear of persecution and is discussed in lesson [Asylum Eligibility II: Well-Founded Fear](#).

See lesson, [Asylum Eligibility II: Well-Founded Fear, section XI., Internal Relocation](#)

## VI. PERSECUTION

### A. General Elements

To establish past persecution, an applicant must show that the harm that the applicant experienced or fears is sufficiently serious to amount to persecution.

The degree of harm must be addressed before an asylum officer may find that the harm that the applicant suffered or fears can be considered "persecution."

To establish that he or she is a refugee based on past persecution, an applicant must prove that the persecutor was motivated to harm him or her on account of his or her race, religion, nationality, membership in a particular social group, or political opinion. Some courts evaluate the motivation of the persecutor as part of the inquiry into whether the applicant endured persecution. Asylum officers should separate the analysis of motivation from the evaluation of whether the harm

Evaluating whether the persecutor is motivated to harm the applicant on account of one of the protected characteristics in the refugee definition is discussed in detail in lesson, [Asylum Eligibility Part III, Nexus and the Five Protected Characteristics](#).

is persecution, in order to make the basis of their decision as clear as possible.

Further, the applicant must show that the entity that harmed the applicant (the persecutor) is either an agent of the government or an entity that the government is unable or unwilling to control.

Considerations in evaluating the identity of the persecutor are discussed in section VII., “Identifying a Persecutor,” below.

Whether an applicant could have avoided persecution by relocating to another part of the country from which he or she fled is *not* relevant in determining whether that applicant suffered past persecution. Instead, such information is relevant to whether the applicant’s risk of future persecution is well-founded. Evidence that the applicant could avoid future persecution through internal relocation could rebut the presumption of a well-founded fear established by proof of past persecution, if such internal relocation is reasonable under all the circumstances.

See 8 C.F.R. 208.13(b)(3) (determining reasonableness of internal relocation).

## B. Whether the Harm Experienced Amounts to Persecution

### 1. Guidance from the Board of Immigration Appeals (BIA)

In an often-cited BIA decision, the BIA defined persecution as harm or suffering inflicted upon an individual in order to punish the individual for possessing a belief or characteristic the entity inflicting the harm or suffering seeks to overcome.

*Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), modified by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). This is only somewhat helpful, as there are varying degrees of harm. For example, a single slap on the face causes harm, but would not be considered persecution.

The BIA later modified this definition and explicitly recognized that a “punitive” or “malignant” intent is *not* required for harm to constitute persecution. The BIA concluded that persecution can consist of objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm.

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

Intent is discussed in greater length in lesson, *Asylum Eligibility Part III, Nexus and the Five Protected Characteristics*.

Additionally, the BIA has found that the term “persecution” encompasses more than physical harm or the threat of physical harm so long as the harm inflicted or feared rises to the level of persecution. Non-physical harm may include “the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or

*Matter of T-Z-*, 24 I&N Dec. 163, 169-71 (BIA 2007) (adopting the standard applied in *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983), *rev’d on other grounds*, 750 F.2d



other essentials of life.”

1427 (9<sup>th</sup> Cir. 1985) to assess whether economic harm rises to the level of persecution).

## 2. Guidance from the Department of Justice

65 Fed. Reg. 76588, 76590 (Dec. 7, 2000)

In a proposed rule providing guidance on the definition of persecution, the Department of Justice indicated its approval of the conclusion in *Kasinga* that the existence of persecution does not require a malignant or punitive intent. The Department also emphasized that the victim must experience the treatment as harm in order for persecution to exist. Thus, under this reasoning, in a case involving female genital mutilation, whether the applicant at hand would experience or has experienced the procedure as serious harm, not whether the perpetrator intends it as harm is a key inquiry.

## 3. Guidance from federal courts

### a. Persecution encompasses more than threats to life or freedom

The Supreme Court has held that “persecution” is a broader concept than threats to “life or freedom.”

*INS v. Stevic*, 467 U.S. 407, 104 S.Ct. 2489 (1984)

The Ninth Circuit has defined “persecution” as “infliction of suffering or harm upon those who differ . . . in a way regarded as offensive” and “oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate.”

*See, e.g., Kovac v. INS*, 407 F.2d 102, 107 (9<sup>th</sup> Cir. 1969); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9<sup>th</sup> Cir. 1985)

Similarly, the Seventh Circuit described persecution as “punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.” The term “persecution” includes actions less severe than threats to life or freedom; however, “actions must rise above the level of mere ‘harassment’ to constitute persecution.”

*Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7<sup>th</sup> Cir. 2000) (internal quotation marks omitted)

The First Circuit has described persecution as an experience that “must rise above unpleasantness, harassment and even basic suffering.”

*Nelson v. INS*, 232 F.3d 258, 263 (1<sup>st</sup> Cir. 2000)

### b. There is no requirement that an individual suffer “serious injuries” to be found to have suffered persecution. However, the presence or absence of

*Asani v. INS*, 154 F.3d 719, 723 (7<sup>th</sup> Cir. 1998) (remanding for determination whether

physical harm is a relevant consideration in determining whether the harm suffered by the applicant rises to the level of persecution.

having two teeth knocked out and two-week detention with insufficient food and water constituted persecution); *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9<sup>th</sup> Cir. 2004) (holding that 10-day detention with daily beatings and hard labor constituted past persecution, even though no serious bodily injury); *see also, Sanchez-Jimenez v. US Atty Gen.*, 492 F.3d 1223 (11<sup>th</sup> Cir. 2007) (finding that the applicant fortuitously escaping injury did not undermine the fact that being shot at while driving is sufficiently extreme to constitute persecution.), *Ruiz v. Mukasey*, 526 F.3d 31, 37 (1<sup>st</sup> Cir. 2008) (the BIA can properly consider the absence of physical harm as a factor in deciding whether the level of harm the applicant suffered was serious)

- c. The violation of an individual’s fundamental beliefs may, in some circumstances, constitute persecution.

*Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (assuming “that the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs”).

- d. Serious threats made against an applicant may constitute persecution even if the applicant was never physically harmed. Consider the following factors when evaluating whether a threat is serious enough to rise to the level of persecution:

*Salazar-Paucar v. INS*, 281 F.3d 1069, 1074 (9<sup>th</sup> Cir. 2002) (holding that multiple death threats, harm to family, and murders of counterparts constituted past persecution), *amended by* 290 F.3d 964 (9<sup>th</sup> Cir. 2002) *See Navas v. INS*, 217 F.3d 646 (9<sup>th</sup> Cir. 2000) (finding that an applicant suffered past persecution when military officers, who had just killed the applicant’s

- (i) Has the persecutor attempted to act on the threat?

- aunt, chased and shot at him, and the applicant and his mother were threatened with death when the officers, not finding the applicant at home, beat the applicant's mother)
- (ii) Is the nature of the threat itself indicative of its seriousness? *See Garrovillas v. INS*, 156 F.3d 1010 (9<sup>th</sup> Cir. 1998) (receipt of three letters in three months containing black ribbons was a threat sufficiently serious to constitute persecution when many other people in the same area had been killed after receiving such letters)
- (iii) Has the persecutor harmed or attempted to harm the applicant in other ways? *See Mejia v. U.S. Atty Gen*, 498 F.3d 1253, 1257-58 (11<sup>th</sup> Cir. 2007) (past persecution found where, in addition to receiving death threats- including a condolence letter about his own death-, the applicant was beaten with the butt of a rifle and a large rock was thrown at him)
- (iv) Has the persecutor attacked, harassed or threatened the applicant's family? *See Gonzales-Neyra v. INS*, 122 F.3d 1293, 1295-96 (9<sup>th</sup> Cir. 1997), *amended by* 133 F.3d 726 (9<sup>th</sup> Cir. 1998) (finding that the applicant suffered persecution when members of Sendero Luminso threatened him with death, repeatedly came to his house to find him, loitered in front of the family home, and forced the applicant's brother into hiding after threats that the brother would be harmed for not disclosing the applicant's whereabouts); *Sangha v. INS*, 103 F.3d 1482, 1487 (9<sup>th</sup> Cir. 1997) (finding that applicant suffered persecution when militants beat his father in his presence when demanding that the applicant be turned over to them); *see also Navas v. INS*, 217 F.3d 646

(9<sup>th</sup> Cir. 2000); *Sanchez Jimenez v. US Att’y Gen’l*, 492 F.3d 1223, 1233 (11<sup>th</sup> Cir. 2007) (past persecution found where, in addition to receiving personal death threats, the Colombian applicant’s family members were also threatened with death and his daughter kidnapped to force him to abandon his anti-FARC political activities)

(v) Has the persecutor executed threats issued to others similarly situated to the applicant?

See *Garrovillas v. INS*, 156 F.3d 1010 (9<sup>th</sup> Cir. 1998)

(vi) Did the applicant suffer emotional or psychological harm as a result of the threat(s)?

See section, VI.G., “Psychological Harm,” below

e. Cumulative instances of harassment or discrimination, considered in totality, may constitute persecution on account of a protected characteristic, so long as the discrete instances of harm were each inflicted on account of a protected characteristic.

*Chand v. INS*, 222 F.3d 1066, 1073 (9<sup>th</sup> Cir. 2000); *Singh v. INS*, 94 F.3d 1353, 1360 (9<sup>th</sup> Cir. 1996); *Korablina v. INS*, 158 F.3d 1038, 1045 (9<sup>th</sup> Cir. 1998); *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998); cf. *Mihalev v. Ashcroft*, 388 F.3d 722, 728 (9<sup>th</sup> Cir. 2004) (finding that an applicant who had established that only one of three incidents occurred on account of his nationality had to base his claim of past persecution on that one incident).

Asylum officers should evaluate the entire scope of harm experienced by the applicant to determine if he or she was persecuted.

#### 4. Guidance from the *UNHCR Handbook*

*UNHCR Handbook*, paras. 51-55

The *UNHCR Handbook* explains the following:

- a. A threat to life or freedom, or other serious violation of human rights on account of any of the protected grounds constitutes persecution.
- b. Other, less serious harm, may constitute persecution depending on the circumstances.
- c. Acts that do not amount to persecution when considered separately can amount to persecution when considered cumulatively.

## 5. General considerations

### a. individual circumstances

It is important to take into account the individual circumstances of each case and to consider the feelings, opinions, age, and physical and psychological characteristics of the applicant.

*UNHCR Handbook*, para. 52

For example, harm caused to an individual that generally would not be considered serious enough to be persecution may amount to persecution where the unique circumstances of the individual causes the harm to affect the applicant more severely. In such a circumstance, the asylum officer should consider whether the persecutor was aware of these circumstances and whether the persecutor exploited them in harming the applicant.

See *Liu v. Ashcroft*, 380 F.3d 307, 314 (7<sup>th</sup> Cir. 2004) (considering the applicant's age, 16 years old, in making a determination that the harm she suffered did not rise to the level of persecution); see also *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006) (finding that the IJ erred in failing to view the harm suffered by the applicant from the perspective of a child of 7 years – the age of the child at the time the harm was experienced). Considerations for evaluating when harm to a child amounts to persecution are discussed in greater detail in the lesson, *Guidelines for Children's Asylum Claims*.

**Example:** The harm caused to a physically healthy individual who is forced to stand in the sun without water for several hours may be less severe than that caused to an elderly or visibly ailing individual for whom such punishment may be life threatening.

### b. no set number of incidents required

There is no minimum number of acts or incidents that must occur in order to establish persecution. One serious incident may constitute persecution, or there may be several incidents or acts, which considered together, constitute persecution.

See, e.g., *Vaduva v. INS*, 131 F.3d 689, 690 (7<sup>th</sup> Cir. 1997) (Court found single serious beating to constitute persecution); see also *Lumaj v. Gonzales*, 462 F.3d 574, 577 (6<sup>th</sup> Cir. 2006) (holding that while an isolated incident of persecution can give rise to a finding of past persecution, the single attack must be of "sufficient

severity” to rise to the level of persecution. The court found that an incident at a political rally in which the female applicant was beaten, suffered minor injuries from the beating, and escaped being kidnapped by police officers did not rise to the level of persecution.)

## C. Human Rights Violations

1. Certain violations of “core” or “fundamental” human rights, as prohibited by customary international law, may constitute harm amounting to persecution (Note that the harm must be connected to one of the five grounds in the refugee definition for the applicant to be eligible for asylum):

- a. genocide
- b. slavery
- c. torture and other cruel, inhuman, or degrading treatment

Torture can take a wide variety of forms. It can include severe physical pain by beating or kicking, or pain inflicted with the help of objects such as canes, knives, cigarettes, or metal objects that transmit electric shock. Torture, under certain circumstances, can include deliberate infliction of mental as well as physical harm. The suffering inflicted must be severe.

- d. prolonged detention without notice of and an opportunity to contest the grounds for detention
- e. rape and other severe forms of sexual violence

“Core” rights are rights that a government cannot violate, even in time of national emergency. *See* Guy S. Goodwin-Gill, *The Refugee in International Law Second Edition* (New York: Oxford University Press, 1998) pp.68-69; James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1992) p. 109

*See* J. Herman Burgers & Hans Danelius, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 117-18 (1988)

*See also* discussion of the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), covered in lesson, [International Human Rights Law](#). Note that, for purposes of determining whether the act constitutes persecution, certain provisions of the Convention against Torture, such as the requirement that the perpetrator be a government actor or acting with the government’s acquiescence, are not required.

This may also constitute torture.

2. Other fundamental rights are also protected by customary international law, such as the right to recognition as a person in the law, and the right to freedom of thought, conscience, and religion or belief. Deprivation of these rights may also constitute persecution.

See Guy S. Goodwin-Gill, *The Refugee in International Law Second Edition* (New York: Oxford University Press, 1998) p.69. Regarding violations of the fundamental right to religious freedom, see lesson *The International Religious Freedom Act (IRFA) and Religious Persecution Claims*

### Examples:

The BIA has found that the enforcement of coercive family planning policy through forced abortion or sterilization is a violation of fundamental human rights. Forced abortion or sterilization deprives the individual of the right to make individual or conjugal decisions regarding reproductive rights.

*Matter of S-L-L-*, 24 I&N Dec. 1, 5-7 (BIA 2006) (en banc), *overruled on other grounds by Matter of J-S-*, 24 I&N Dec. 520 (AG 2008); *Matter of Y-T-L-*, 23 I&N Dec. 601, 607 (BIA 2003) (holding that “[c]oerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them”); see also UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (Aug. 2005).

The Third Circuit has stated that compelling an individual to engage in conduct that is abhorrent to that individual’s deepest beliefs may constitute persecution.

*Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (stating that being forced to renounce one’s religious beliefs or to desecrate an object of religious importance might be persecution if the applicant holds strong religious beliefs).

The UNHCR guidelines on religious-based refugee claims indicate that forced compliance could constitute persecution “if it becomes an intolerable interference with the individual’s own religious belief, identity, or way of life and/or if noncompliance would result in disproportionate punishment.”

UNHCR. *Guidelines on International Protection: “Religion-Based Refugee Claims” under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,*”

(HCR/GIP/04/06, 28 April 2004), para. 21

A policy with which an individual merely disagrees or finds contrary to his or her notion of fairness or freedom is not, without more, considered persecutory.

#### D. Discrimination and Harassment

1. Less preferential treatment and other forms of discrimination and harassment generally are not considered persecution.

*UNHCR Handbook*, paras. 54-55; *see also*, *Matter of A-E-M-*, 21 I&N Dec. 1157, 1159 (BIA 1998) (single instance of harassment – threat painted on house – did not rise to the level of persecution); *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA, 2006) (harassment and discrimination based on religion did not amount to persecution); *Baka v. INS*, 963 F.2d 1376, 1379 (10<sup>th</sup> Cir. 1992) (harassment by coworkers and employment discrimination did not constitute persecution); *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6<sup>th</sup> Cir. 1998) (harassment by KGB)

Discrimination or harassment may amount to persecution if the adverse practices or treatment accumulates or increases in severity to the extent that it leads to consequences of a substantially prejudicial nature.

*Sangha v. INS*, 103 F.3d 1482 (9<sup>th</sup> Cir. 1997) (death threats and violence against father was persecution); *see also Ivanishvili v. USDOJ*, 433 F.3d 332, 342 (2d Cir. 2006) (stating that “violent conduct generally goes beyond the mere annoyance and distress that characterize harassment”)

The Second Circuit Court of Appeals has indicated that differentiating between harassment and persecution can be a matter of degree and that adjudicators must consider the context in which mistreatment occurs. For example, a minor beating may only constitute harassment when inflicted by a non-governmental entity but in the context of an arrest or detention by a government official a minor beating, if inflicted on account of a protected characteristic, may rise to the level of persecution.

*Bescovik v. Gonzalez*, 467 F.3d 223, 226 (2d Cir. 2006).

The fact that a non-citizen does not enjoy all of the same rights as citizens in the country of last habitual residence is generally, by itself, not harm sufficient to rise to the level

*Ahmed v. Ashcroft*, 341 F.3d 214, 217 (3d Cir. 2003) (discrimination against



of persecution.

stateless Palestinians in Saudi Arabia did not amount to persecution); *Najjar v. Ashcroft*, 257 F.3d 1262, 1291 (11<sup>th</sup> Cir. 2001); *Faddoul v. INS*, 37 F.3d 185, 189 (5<sup>th</sup> Cir. 1994)

2. As mentioned above, in determining whether the applicant was persecuted, the asylum officer should consider whether all of the discrimination experienced by the applicant, in its totality, constitutes persecution.

*See, e.g., Krotova v. Gonzales*, 416 F.3d 1080 (9<sup>th</sup> Cir. 2005) (discussing case examples and holding that combination of sustained economic pressure, physical violence, and inability to practice religion amounted to persecution).

### Examples:

- a. Discrimination against an Armenian living in Russia, including harassment and pushing by Russian officers because of her ethnicity and being denied a job because “there were no jobs for Armenians,” did not rise to the level of past persecution because incidents of hostility alone do not constitute persecution. Note, however, that evidence of these incidents, and of the applicant’s friend’s daughter (who was also Armenian) being raped and beaten by police officials, and of the general pattern of mistreatment of Armenians in Russia, was deemed sufficient to establish that the applicant had a well-founded fear of persecution.
- b. An Egyptian Coptic Christian claimed that his career as a medical doctor would suffer because of discrimination against Christians. The Ninth Circuit found that this level of discrimination was insufficient to amount to persecution.

*Avetova-Elisseva v. INS*, 213 F.3d 1192 (9<sup>th</sup> Cir. 2000); *cf. Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998) (finding that three physical attacks, a break-in and ransacking of the applicant’s apartment, repeated anti-Semitic fliers, written threats and extreme humiliation of the applicant’s son cumulatively rose to persecution.)

*Ghaly v. INS*, 58 F.3d 1425, 1431 (9<sup>th</sup> Cir. 1995); *see also Mansour v. Ashcroft*, 390 F.3d 667 (9<sup>th</sup> Cir. 2004) (finding that discrimination against Coptic Christian applicant did not amount to persecution)

3. General factors to consider:
- a. How long has the discrimination or harassment lasted?
- b. Which human rights were affected?
- c. How has the discrimination or harassment affected the particular applicant?

- d. How many types of discriminatory practices or how much harassment has been imposed on the applicant, cumulatively?
4. Some specific, significant factors to consider in determining whether discrimination or harassment amounts to persecution:
    - a. serious restrictions on the right to earn a livelihood
    - b. serious restrictions on the access to normally available educational facilities
    - c. arbitrary interference with privacy
    - d. relegation to substandard dwellings
    - e. enforced social or civil inactivity
    - f. passport denial
    - g. constant surveillance
    - h. pressure to become an informer
    - i. confiscation of property
    - j. the accumulation and type of instances of discriminatory practices or harassment that have been imposed on the applicant

If the individual is paid compensation or property was taken pursuant to a neutral national redistribution plan, then the act probably is not persecution. *See, e.g., Gormley v. Ashcroft*, 364 F.3d 1172 (9<sup>th</sup> Cir. 2004) (considering fact that South African government provided unemployment compensation to couple laid off pursuant to affirmative action program).

## E. Arrests and Detentions

1. In evaluating whether a detention is persecution, consider:
  - a. The length of the detention
  - b. The legitimacy of the government action

- c. Whether the applicant was mistreated during the detention
- d. Whether the applicant was ever brought before a judge, given access to an attorney, or accorded other due process rights
2. Generally, a brief detention, for legitimate law enforcement reasons, without mistreatment, will not constitute persecution. Prolonged detention is a deprivation of liberty, which in some circumstances constitutes the violation of a fundamental human right. Evidence of mistreatment during detention may establish persecution.
- Compare the following situations:
- a. A Kosovar Albanian was interrogated on three occasions by Serbian police, one time during a 24-hour detention, and suffered an injury to his hands caused by the police.
- b. A 16-year old Chinese girl was detained for two days by police, during which time she was pushed and her hair was pulled, she was expelled from school, and her home was ransacked by police.
- c. A Chinese national was detained at a police station for three days, during which time he was interrogated for two hours and hit on his back with a rod approximately ten times, causing him pain and temporary red marks, but not requiring any medical treatment.
- d. A Bulgarian Christian was detained by police twice, each for two days, and on a third occasion was beaten by police in her home, resulting in a miscarriage of her pregnancy.
- e. A Bulgarian of Roma descent was detained by police for ten days, during which time he was beaten daily
- This may also be relevant in evaluating whether the harm is connected to a protected ground, which is discussed in lesson, *Asylum Eligibility Part III: Nexus and the Five Protected Characteristics*.
- See *Asani v. INS*, 154 F.3d 719, (7<sup>th</sup> Cir. 1998) (remanding for determination whether having two teeth knocked out and two-week detention with insufficient food and water constituted persecution); cf. *Zalega v. INS*, 916 F.2d 1257 (7<sup>th</sup> Cir. 1990) (short detentions without mistreatment did not amount to persecution)
- Prela v. Ashcroft*, 394 F.3d 515 (7<sup>th</sup> Cir. 2005)
- Mei Dan Liu v. Ashcroft*, 380 F.3d 307 (7<sup>th</sup> Cir. 2004)
- Xiaoguang Gu v. Gonzalez*, 454 F.3d 1014 (9<sup>th</sup> Cir. 2006)
- Vladimirova v. Ashcroft*, 377 F.3d 690 (7<sup>th</sup> Cir. 2004)
- Mihalev v. Ashcroft*, 388 F.3d 722 (9<sup>th</sup> Cir. 2004)

with sandbags and forced to perform heavy labor.  
The applicant suffered no significant injury.

In the first two cases (*Prela* and *Liu*), the Seventh Circuit held that substantial evidence supported a finding that the applicants in those situations had not suffered past persecution. Similarly, in the third case (*Gu*), the Ninth Circuit found that the facts did not compel a finding of past persecution.

*Prela*, 394 F.3d at 518; *Liu*, 380 F.3d at 313-14; *Gu*, 454 F.3d 1020-21. Keep in mind that the reviewing court will not disturb the BIA's or immigration judge's finding unless record evidence *compels* the opposite conclusion.

In the last two cases (*Vladimirova* and *Mihalev*), the Seventh and Ninth Circuit Courts, respectively, found that treatment suffered by those applicants was so severe as to compel a finding of past persecution.

*Vladimirova*, 377 F.3d at 696-97; *Mihalev*, 388 F.3d at 729-30.

## F. Economic Harm

To rise to the level of persecution economic harm must be deliberately imposed and severe. Severe economic harm must be harm “above and beyond [the economic difficulties] generally shared by others in the country of origin and involve more than the mere loss of social advantages or physical comforts.” However, the applicant does not need to demonstrate “a total deprivation of livelihood or a total withdrawal of all economic opportunity.”

In *Matter of T-Z-*, the Board indicated that in determining whether an applicant suffered or would suffer severe economic harm adjudicators should consider:

1. the applicant's and his or her family members' earnings;
2. any sources of income or housing available to the applicant upon loss of employment or housing;
3. whether the applicant is able to secure other employment or an education;
4. whether the economic disadvantage the applicant suffered or would suffer differs from that of others in the country of origin and how they differ; and
5. the specific losses the applicant would suffer, including, for example, health benefits, school tuition, food rations, household furniture and appliances.

*Matter of T-Z-*, 24 I&N Dec. 163,173 (BIA 2007) (rejecting the “substantial economic disadvantage” formulation used by the Ninth Circuit in *Kovac v. INS*, 407 F.2d 102 (9th Cir. 1969), and other circuits, to the extent that the word “substantial” may suggest a lesser standard than the term “severe”); *Vicente-Elias v. Mukasey*, 532 F.3d 1086 (10th Cir. 2008) (adopting *Matter of T-Z-* standard on economic persecution); *see also Borca v. INS*, 77 F.3d 210 (7th Cir. 1996) (noting that total economic deprivation is not required in order to establish persecution).

In *Yun Jian Zhang v. Gonzales*, the Seventh Circuit held that that partial destruction of the applicant’s house was not severe economic harm where damage could be repaired, particularly given that the applicant worked in construction; the applicant continued to be gainfully employed; the family found shelter at his in-laws’ home; and the government did not continue to harm him or his family. In contrast, in *Zhen Hua Li v. Attorney General*, the Third Circuit held that a fine worth eighteen-months’ salary, combined with being blacklisted from any government employment and from most other forms of legitimate employment, the loss of health benefits, school tuition and food rations, and the confiscation of his household furniture and appliances, would constitute the deliberate imposition of severe economic disadvantage which could threaten his family’s freedom, if not their lives.

*Yun Jian Zhang v. Gonzales*, 495 F.3d 773 (7<sup>th</sup> Cir. 2007); *Zhen Hua Li v. Attorney General*, 400 F.3d 157, 166-69 (3d Cir. 2005)

Applying the BIA’s standard in *Matter of T-Z-*, the Eighth Circuit has held that being relegated to low-level jobs despite advanced schooling did not amount to severe economic deprivation. Because private employment remained available, the economic discrimination was not sufficiently harsh so as to constitute persecution.

*Beck v. Mukasey*, 527 F.3d 737, 741 (8<sup>th</sup> Cir. 2008) (finding unfair prejudice and discrimination against Romani family in Hungary)

An applicant’s loss of employment as a result of a government-sponsored employment program instituted to correct past discrimination is not sufficient to support a finding of past persecution on account of a protected characteristic where the government provided considerable unemployment compensation to the applicant, and other similarly situated individuals were able to maintain or regain employment.

*Gormley v. Ashcroft*, 364 F.3d 1172 (9<sup>th</sup> Cir. 2004)

On the other hand, a program of state-sponsored economic discrimination against a disfavored group within the society that could lead to extreme economic harm may amount to past persecution.

*Himri v. Ashcroft*, 378 F.3d 932, 937 (9<sup>th</sup> Cir. 2004) (finding that a Palestinian applicant’s inability to avoid Kuwaiti state-sponsored economic discrimination, which may include denial of the rights to work, attend school, and to obtain drinking water, would amount to persecution), *as amended by* 2004 WL 1879255 (9<sup>th</sup> Cir. 2004).

For other examples of cases in which “substantial” economic persecution was

not established, *see* *Minwalla v. INS*, 706 F.2d 831, 835 (8<sup>th</sup> Cir. 1983); *Ambati v. Reno*, 233 F.3d 1054, 1060 (7<sup>th</sup> Cir. 2000); *Guan Shan Liao v. INS*, 293 F.3d 61, 69-70 (2d Cir. 2002).

## G. Psychological Harm

1. Psychological harm may be sufficient to constitute persecution.

The asylum officer should consider evidence, including the applicant's testimony, that the event(s) caused psychological harm to the applicant. Evidence of the applicant's psychological and emotional characteristics, such as the applicant's age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution.

*See* lesson, *Interviewing Part V: Interviewing Survivors*.

*See* *Matter of A-K-*, 24 I&N Dec 275 (BIA 2007) (recognizing that an emotional persecution case could be recognized "where a person persecutes someone close to an applicant, such as a spouse, parent, child or other relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself"); *cf. Niang v. Gonzales*, 492 F.3d 505, 512 (4<sup>th</sup> Cir. 2007) (holding that parent's psychological suffering based on daughter's feared subjection to FGM upon removal was insufficient to establish persecution).

2. Under the Convention against Torture, severe mental suffering may constitute torture under certain circumstances. Some examples of mental suffering that fall within this definition of torture, and thus would be considered serious enough to rise to the level of persecution, include:
  - a. mental harm caused by the intentional infliction or threatened infliction of severe physical pain;
  - b. administration or threatened administration of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
  - c. threat of imminent death;

136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990) (explaining torture definition in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*); *see also* 8 CFR § 208.18.

- d. or threat that another person will imminently be subjected to death or torture.
3. Other forms of mental harm that may not constitute torture but may be sufficiently serious to constitute persecution include:
    - a. receipt of threats over a prolonged period of time, causing the applicant to live in a state of constant fear; and
    - b. being forced to witness the harm of others.

For example, the Ninth Circuit found in *Mashiri v. Ashcroft* that the emotional trauma suffered by a native of Afghanistan living in Germany, was sufficiently severe so as to amount to persecution. The cumulative harm resulted from watching as a foreign-owned store in her neighborhood was burned, finding her home vandalized and ransacked, running from a violent mob that attacked foreigners in her neighborhood, reading in the newspaper about a man who lived along her son's path to school who shot over the heads of two Afghan children, and witnessing the results of beatings of her husband and children.

*Mashiri v. Ashcroft*, 383 F.3d 1112 (9<sup>th</sup> Cir. 2004); *see also Khup v. Ashcroft*, 376 F.3d 898, 904 (9<sup>th</sup> Cir. 2004) (finding that a Burmese Christian preacher suffered past persecution based on death threats and anguish caused when a similarly-situated fellow minister was tortured, killed, and dragged through the streets of the town); *but see Shoaira v. Ashcroft*, 377 F.3d 837, 844 (8<sup>th</sup> Cir. 2004) (holding that psychological trauma that resulted from applicant's witnessing three of her father's four arrests did not amount to past persecution, even where applicant exhibited symptoms of post-traumatic stress disorder).

- c. forced compliance with religious laws or practices that are abhorrent to an applicant's beliefs

The U.S. Court of Appeals for the Third Circuit has indicated that forced compliance with laws that fundamentally are abhorrent to a person's deeply held religious convictions may constitute persecution. For example, being forced to renounce religious beliefs or to desecrate an object of religious importance might be persecution if the victim holds strong religious beliefs.

*Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993).

## H. Sexual Harm

1. Rape and other sexual abuse

*See* Coven, Phyllis. INS Office of International Affairs. *Considerations For Asylum Officers*

- a. Rape and other severe forms of sexual harm constitute harm amounting to persecution, as they are forms of serious physical harm. Rape is regarded as a “form of aggression constituting an egregious violation of humanity,” which can constitute torture.
- b. Less severe sexual harm or harassment may also constitute harm amounting to persecution. Consideration should be given to the entire circumstances of the case, including any resulting psychological harm, the social or cultural perceptions of the applicant as a victim of the sexual harm, and other effects on the particular applicant resulting from the harm.
2. Forced female circumcision and other forced genital mutilation (FGM) (also referred to as “forced genital cutting”)

*Adjudicating Asylum Claims From Women (Gender Guidelines)*, Memorandum to INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p.; UNHCR. *Guidelines on International Protection: “Gender Related Persecution” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.* (HCR/GIP/02/02, 7 May 2002), para. 9; *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097-98 (9<sup>th</sup> Cir. 2000) (finding that an applicant who was sodomized and forced to perform oral sex suffered harm rising to the level of persecution); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9<sup>th</sup> Cir. 1996) (discussing the physical and psychological harm caused by rape); *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) (discussing rape as form of torture).

*See, e.g., Angoucheva v. INS*, 106 F.3d 781 (7<sup>th</sup> Cir. 1997) (per curiam) (remanding to the BIA for consideration of whether a sexual assault that could have led to rape amounted to persecution on account of the applicant’s political opinion)

The BIA has held that female genital mutilation imposed against one’s will may constitute persecution. Generally, in determining whether FGM is persecution to the applicant, the asylum officer should consider whether the applicant experienced or would experience the procedure as serious harm. If an individual applicant welcomed, or would welcome, FGM as an accepted cultural right, then it

*Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464 (BIA 2008); *see also Toure v. Ashcroft*, 400 F.3d 44 (1<sup>st</sup> Cir. 2005); *Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008);



is not persecution to that applicant. Existing case law does not definitively address how to determine whether FGM imposed on a young child in the past, who did not have the capacity to welcome or reject the practice, constitutes past persecution. However, since FGM is clearly serious harm objectively, the asylum officer should consider FGM under such circumstances as persecution unless the evidence establishes that the child affirmatively welcomed it.

Even in countries that have prohibited the practice of female circumcision, the government may condone, tolerate, or be unable to protect against the practice. The fact that a state has enacted a law prohibiting female circumcision or mutilation does not necessarily indicate that the government is willing and able to protect an applicant for protection.

## I. Coercive Population Control

### 1. General overview

In 1996, Congress amended the refugee definition to allow for the recognition of asylum claims based upon certain types of harm related to coercive population control programs. Under the amended INA,

a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

The amended refugee definition thus created four new and specific classes or categories of refugees:

- a. persons who have been forced to abort a pregnancy;

*Abankwah v. INS*, 185 F.3d 18, 23 (2d Cir. 1999); *Niang v. Gonzales*, 492 F.3d 505 (4<sup>th</sup> Cir. 2007); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6<sup>th</sup> Cir. 2004); *Agbor v. Gonzales*, 487 F.3d 499 (7<sup>th</sup> Cir. 2007); *Nwaokolo v. INS*, 314 F.3d 303, 308 (7<sup>th</sup> Cir. 2002); *Hassan v. Gonzales*, 484 F.3d 513 (8<sup>th</sup> Cir. 2007) *Mohammed v. Gonzales*, 400 F.3d 785, 796 (9<sup>th</sup> Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187 (10<sup>th</sup> Cir. 2005).

See section VII.B., “Entity the Government is Unable or Unwilling to Control,” below

INA § 101(a)(42), as amended by § 601 of IIRIRA, effective September 30, 1996; *Matter of X-P-T-*, 21 I&N Dec 634 (BIA 1996) (recognizing change in law and granting asylum to applicant who was forcibly sterilized); see generally, Martin, David A. INS Office of General Counsel. *Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Memorandum to Management Team, (Washington, DC: 21 October 1996) 6 p.

*Matter of J-S-*, 24 I&N Dec 520 (AG 2008) (internal quotation marks and alterations omitted).

- b. persons who have been forced to undergo involuntary sterilization;
- c. persons who have been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program; and
- d. persons who have a well founded fear that they will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance.

Forced abortion and forced sterilization performed on an applicant (categories one and two, above) constitute persecution on account of political opinion within the meaning of the refugee definition. Individuals who have not physically undergone forced abortion or sterilization procedures may qualify for refugee status under the third category above, if they show persecution for failure or refusal to undergo these procedures, or persecution inflicted because of other resistance to a coercive population control program. A well-founded fear of forced abortion, sterilization, or other persecution for failing or refusing to undergo such a procedure, or for resisting a coercive population control program, may provide a basis for refugee status under the fourth category above.

## 2. Element of “force”

In order for an abortion or sterilization procedure to constitute persecution, the applicant must establish that he or she was “forced” to undergo the procedure. In *Matter of T-Z-*, the BIA held that a procedure is “forced” within the meaning of the INA when:

- a reasonable person would objectively view the threats for refusing the procedure to be genuine, and
- the threatened harm, if carried out, would rise to the level of persecution.

The applicant does not have to demonstrate physical harm or threats of physical harm because “persecution” is not limited to physical harm or threats of physical harm. However, the applicant must demonstrate that the harm he or she feared, if carried out, would rise to the level of

*Matter of T-Z-*, 24 I&N Dec. 163, 168 (BIA 2007) (considering whether undergoing two abortions because of threat of job loss established that the procedures were forced).

*Matter of T-Z-*, 24 I&N Dec. at 16; *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 636-40 (BIA 2008) (holding that the insertion or removal of an IUD in a routine

persecution.

medical procedure does not rise to the level of persecution, unless aggravating circumstances exist, because unlike sterilization and abortion the insertion of an IUD not is not a permanent measure).

Threats of economic harm, for example, could suffice, “so long as the threats, if carried out, would be of sufficient severity that they amount to past persecution.” However, not all threats involving economic sanctions will rise to the level of persecution. The harm must involve:

- a. the deliberate imposition of *severe* economic disadvantage; or
- b. the deprivation of liberty, food, housing, employment or other essentials of life.

*Matter of T-Z*, 24 I&N Dec. at 169-70 (rejecting *Lidan Ding v. Ashcroft* (below) and *Wang v. Ashcroft*, 341 F.3d 1015 (9<sup>th</sup> Cir. 2003) in so far as those decisions suggest that economic harm that does not rise to the level of persecution could show that an abortion was “forced”).

However, “pressure” or persuasion applied to submit to a course of action not preferred is not “force” unless the harm suffered or feared rises to the level of persecution. Thus, for example, economic harm that would not rise to the level of persecution would constitute pressure but would not make an abortion “forced.”

In *Yuqing Zhu v. Gonzales*, a case involving an unmarried woman who underwent an abortion before the authorities discovered that she was pregnant, the Fifth Circuit adopted the *Matter of T-Z* standard for determining whether an abortion was “forced,” but reversed the BIA’s finding that the applicant’s abortion was not forced. The applicant underwent an abortion because she believed that the law required abortion, and she feared: (1) later physically compelled abortion; (2) loss of her job, benefits and housing; (3) imprisonment; (4) sterilization; (5) that her child would not be recognized as a Chinese citizen; and (6) her child would be denied services. The court held that the applicant’s “abortion was indeed forced, as a reasonable person in Zhu’s position ‘would objectively view the threats for refusing the abortion to be genuine,’ and that harm, ‘if carried out, would rise to the level of persecution.’” Specifically, the threat of a later physically compelled abortion or forcible sterilization rose to the level of persecution. The fact that the applicant’s boyfriend wanted her to undergo an abortion did not keep the abortion from having been “compelled” by the government.

*Yuqing Zhu v. Gonzales*, 493 F.3d 588 (5<sup>th</sup> Cir. 2007); cf. *Xiu Fen Xia v. Mukasey*, 510 F.3d 162 (2<sup>d</sup> Cir. 2007)

In *Xiu Fen Xia v. Mukasey*, the Second Circuit held that an applicant's abortion was not forced, under the interpretation set forth in *Matter of T-Z-*. Fearing sterilization, a "really heavy fine," arrest, forced abortion, and arrest of her family members, the married applicant from Zhejiang Province obtained an abortion from a private hospital before government authorities knew of her pregnancy. The court held that "force" requires evidence as to the pressure actually exerted on a particular petitioner. Here, no government official was aware of Xia's pregnancy, and therefore no government official forced her to terminate her pregnancy or threatened her with other harm. Additionally, the court held that even if she would face some harm when her pregnancy was discovered, the applicant did not show that she risked anything more than modest fees or fines, which would not be severe enough to rise to the level of persecution.

The Ninth Circuit has held, and the BIA recognizes, that an applicant seeking to prove that he or she was subjected to a coercive population control program "need not demonstrate that he [or she] was physically restrained during a 'forced' procedure. Rather, 'forced' is a much broader concept, which includes compelling, obliging, or constraining by mental, moral, or circumstantial means, in addition to physical restraint."

*Lidan Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9<sup>th</sup> Cir. 2004) (finding that an applicant who was forced from her home into a van, taken to a hospital, pulled off the floor by two officials when she refused to get up, forced onto a hospital bed, and watched over by two officials underwent a "forced" abortion, despite fact that she was not physically restrained during the procedure); *Zi Zhi Tang v. Gonzales*, 489 F.3d 987 (9<sup>th</sup> Cir. 2007) (Abortion was "forced," even though applicant and wife did not express opposition to or attempt to avoid the procedure, where the gynecological test was mandatory, performed by the wife's employer on whom she was economically dependent, the employer's policy required that the abortion take place, the employer actually took her to have the procedure performed, and the procedure was "barbarically" performed

3. Eligibility of spouses, partners, and others who have not been physically subjected to a forced abortion or sterilization procedure

a. No *per se* spousal eligibility

In 2008, the Attorney General ruled that individuals who have not physically undergone a forced abortion or sterilization procedure, such as spouses of persons forced to undergo these procedures, are not *per se* entitled to refugee status.

The Attorney General reasoned in *Matter of J-S-*, as did the Second Circuit in *Shi Liang Lin*, that the statutory text is limited to *the person* who was forced to *undergo* the involuntary procedure. Accordingly, the unambiguous meaning of these clauses is that *per se* refugee protection is to be afforded only to the person forced to undergo the procedure. Spouses and other partners of individuals who have been physically subjected to a procedure may be able to qualify for asylum on a case-by-case basis, but may not benefit from a presumption of eligibility. Although the Attorney General noted “that application of coercive population control procedures may constitute ‘obtrusive government interference into a married couple’s decisions regarding children and family’ that may ‘have a profound impact on both parties to the marriage,’” he found no basis to afford automatic eligibility to the spouse who was not physically subjected to a forced procedure.

The Attorney General’s decision in *Matter of J-S-* vacated the BIA’s earlier decisions in *Matter of C-Y-Z-* and *Matter of S-L-L-*, in so far as those decisions held that an applicant whose spouse was forced to undergo an abortion or sterilization procedure was *per se* eligible for asylum on the basis of past persecution on account of political opinion.

without the benefit of anesthetics.)

See *Matter of J-S-*, 24 I&N Dec. 520 (AG 2008) (overruling BIA’s *per se* rule of spousal eligibility); *Shi Liang Lin v. United States Dep’t. of Justice*, 494 F.3d 296 (2d Cir. 2007) (en banc). (same).

See section VI.I.3, “Definition of ‘resistance’ in the context of coercive population control,” below.

*Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997) vacated in part by *Matter of J-S-*, 24 I&N Dec. 520 (AG 2008); *Matter of S-L-L-*, 24 I&N Dec. 1, 6 (BIA 2006) (same); see also *Zhuang Ping Lin v. Mukasey*, 2009 WL 188569 (11th Cir. Jan. 28, 2009) (“unmarried partners . . . do not automatically qualify for protection under the forced abortion and sterilization provisions”).

b. Eligibility of other family members

Even before the Attorney General’s decision in *Matter of J-S-*, circuit courts had found that *per se* asylum eligibility did not extend to family members, including parents, parents-in-law, and children of individuals subject to coercive population control measures. These individuals may be able to qualify for asylum on a case-by-case basis, considering the factors set forth below.

*See Tao Jiang v. Gonzales*, 500 F.3d 137 (2d Cir. 2007) (child); *Ai Feng Yuan v. Dept. of Justice*, 416 F.3d 192 (2d Cir. 2005) (parents and parents-in-law); *Shao Yen Chen v. Dept. of Justice*, 417 F.3d 303 (2d Cir. 2005) (per curiam) (child); *Wang v. Gonzales*, 405 F.3d 134 (3d Cir. 2005) (child); *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005) (child).

c. Case-by-case consideration of eligibility based on resistance to coercive population control

In order to determine whether an applicant who has not physically undergone a forced abortion or sterilization procedure can demonstrate eligibility for asylum, asylum officers must conduct a case-by-case assessment of the relevant factors.

*See Matter of J-S-, supra*; *Shi Liang Lin*, 494 F.3d 296 (2d Cir. 2007); *see also section VI.I.3*, “Definition of ‘resistance’ in the context of coercive population control,” below.

The applicant must establish that he or she:

- (i) failed or refused to undergo an abortion or sterilization procedure, or resisted a coercive population control program;
- (ii) suffered harm, or has a well-founded fear of suffering harm, rising to the level of persecution; and
- (iii) the persecution was inflicted, or he or she has a well-founded fear that it would be inflicted, for the resistance to the coercive population control program or for the failure or refusal to undergo the procedure.

4. Definition of “resistance” in the context of coercive population control

In *Matter of S-L-L-* the BIA indicated that “resistance” may take many forms and cover a wide range of circumstances. Resistance can include, for example:

- expressions of general opposition;
- attempts to interfere with enforcement of

*Matter of S-L-L-*, 24 I&N Dec. at 11-12 (holding that the applicant’s efforts in seeking waivers of the age restrictions were not indicative of resistance but rather were indicative of a desire to comply with the coercive population control program); *see also Ru-Jian*

- government policy in particular cases; or
- other overt forms of resistance to the requirements of the family planning law.

The BIA held, however, that merely impregnating a girlfriend or fiancée or seeking permission to marry or have children outside age limits does not constitute “resistance” under the refugee definition.

In *Matter of M-F-W- & L-G-*, the BIA stated that removal of an intrauterine device or failure to attend a mandatory gynecological appointment could constitute other resistance to family planning policies. “[S]uch acts, while arguably not comprising active or forceful opposition to China’s family planning policy, would certainly thwart the goals of the plan and be viewed with disfavor by Chinese officials implementing the plan.” The Board warned, however, that the harm must rise to the level of persecution, and the applicant must establish that the device was inserted or reinserted on account of her “resistance” to the family planning policies, not just as part of a routine medical procedure.

In *Xu Ming Li v. Ashcroft*, the Ninth Circuit held that the applicant demonstrated both vocal and physical resistance to a coercive population control program. The applicant “vocally resisted the marriage-age restriction when she told the village official that she wanted ‘freedom for being in love’ and when she publicly announced her decision to marry even after a license was refused. She also resisted the one-child policy when she told the official she intended ‘to have many babies,’ that she did ‘not believe in the policy’ limiting family size, and that she did not want him to ‘interfere.’ Second, she resisted physically by kicking and struggling when forced to undergo a gynecological examination.”

## 5. Harm rising to the level of persecution

Individuals who offered “other resistance” to a coercive population control program must demonstrate that they suffered harm, or have a well-founded fear of suffering harm, rising to the level of persecution.

### a. physical harm/restraint

In *Yi Qiang Yang. v. Gonzales*, the Eleventh Circuit upheld the BIA’s finding that the harm – a brief

*Zhang v. Ashcroft*, 395 F.3d 531 (5th Cir. 2004) (holding that impregnating girlfriend, who was forced to have an abortion, is not alone a legally cognizable act of resistance).

*Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 638 (BIA 2008) (holding that applicant’s removal of first IUD and refusal to have second IUD inserted qualified as resistance to China’s family planning policy, but that applicant could not show harm rising to the level of persecution or that the harm was because of her resistance).

*Xu Ming Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc); see also *Li Bin Lin v. Gonzales*, 472 F.3d 1131 (9th Cir. Jan. 9, 2007) (holding that applicant’s physical altercation with birth control officials when they attempted to use coercive measures to enforce birth quotas constituted resistance).

*Yi Qiang Yang. v. Gonzales*, 494 F.3d 1311 (11th Cir. 2007) (*Yang II*) (per curiam), *superseding* 2007

physical altercation with family planning officials, a summons to a local security office, and an ongoing interest in the applicant by family planning authorities – suffered by an applicant whose wife was subsequently forced to abort her pregnancy, did not rise to the level of persecution.

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(*Yang D.*)

b. psychological harm

*Matter of J-S-*, *supra*; *Matter of S-L-L-* at 10-11, *supra*.

In *Matter of J-S-*, the Attorney General recognized that the application of coercive population control policies may have a profound impact on both parties to the marriage. When judging the psychological harm to an applicant based on a forced abortion or sterilization procedure performed on a spouse or other partner, the BIA instructs a review of the following factors:

- (i) whether the couple have other children together;
- (ii) the length of cohabitation;
- (iii) whether the couple holds itself out as a committed couple;
- (iv) whether the couple took any steps to have the relationship recognized in some fashion;
- (v) whether the couple is financially interdependent; and
- (vi) whether there is objective evidence that the relationship continues while the applicant is in the United States.

c. other forms of harm resulting from forced compliance with a coercive population control program

The Ninth Circuit has found that a forced gynecological exam that lasted for half an hour and was followed by threats of being subjected to a similar procedure at any time in the future was harm serious enough to rise to the level of persecution.

*Xu Ming Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc); *cf. Yun Yan Huang v. United States Atty. Gen.*, 429 F.3d 1002 (11th Cir. 2005) (holding that an intrusive state-ordered gynecological exam, which caused pain and discomfort, along with a 20-day detention because of her refusal to submit to a second exam, did not amount to



Other measures imposed on an individual as part of a coercive population control program, such as substantial monetary fines, the denial of schooling, and forced medical examinations and procedures, may cumulatively rise to the level of persecution. Claims of such experience should be examined for severity, accumulation, and effect on the individual, as would any claim of past mistreatment.

- d. continuing nature of harm resulting from forced abortions and sterilizations

Forced abortion or sterilization has been found by the BIA to be a “permanent and continuing act of persecution that ...deprive[s] ...couple[s] of the natural fruits of conjugal life, and the society and comfort of the child or children than might eventually have been born to them.”

6. Harm for resistance to coercive population control

The applicant must show that the past or threatened persecution was or would be inflicted for the resistance to a coercive population control program. In *Shi Liang Lin*, the Second Circuit held that an individual must demonstrate “past persecution or a fear of future persecution for ‘resistance’ that is directly related to his or her own opposition to a coercive family planning policy.” In *Matter of M-F-W- & L-G-*, the BIA explained that “[t]he statute requires more than proof of an act of resistance and an unconnected imposition of harm that rises to the level of persecution. There must be a link between the harm and the ‘other resistance.’” The BIA held that the applicant could not meet this requirement because the reinsertion of her IUD was carried out as part of a routine medical procedure, rather than to target her for her opposition or resistance to the family planning policy.

The Second Circuit held in *Shi Liang Lin* that where an applicant himself has not demonstrated resistance to coercive family control policies, but his spouse or partner

persecution).

See also *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007) (discussing economic persecution).

*Matter of Y-T-L-*, 23 I&N Dec. 601, 607 (BIA 2003); see also *Yuqing Zhu v. Gonzales*, 493 F.3d 588 (5<sup>th</sup> Cir. 2007), *Qu v. Gonzales*, 399 F.3d 1195 (9<sup>th</sup> Cir. 2005) (agreeing with *Matter of Y-T-L-*). See lesson, *Eligibility Part II: Well-Founded Fear*, section XIV.E. and F. for a discussion the impact of the BIA’s characterization of a forced abortion or sterilization as “permanent and continuing” harm on the analysis of a well-founded fear of persecution.

*Shi Liang Lin v. United States Dep’t. of Justice*, 494 F.3d 296 (2d Cir. 2007) (en banc); see also *Xu Ming Li v. Ashcroft*, 356 F.3d 1153 (9<sup>th</sup> Cir. 2004) (en banc);

*Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 638 (BIA 2008)

*Shi Liang Lin v. United States Dep’t. of Justice*, 494 F.3d 296 (2d Cir. 2007) (en banc); *Zhang v. Gonzales*, 408 F.3d 1239 (9<sup>th</sup> Cir. 2005) (finding that the hardships suffered by the

has, whether by failure or refusal to undergo a procedure, or for other resistance, he may be able to demonstrate, through persuasive direct or circumstantial evidence, that his partner's resistance has been or will be imputed to him.

While persecution of a parent due to resistance to population control measures does not automatically make the child of that parent eligible for asylum, the child may be able to establish eligibility for asylum if the child establishes that he or she herself suffered persecution on account of a protected characteristic, including any political opinion imputed to the child based on the parent's resistance.

applicant, including economic deprivation resulting from fines against her parents, lack of educational opportunities, and trauma from witnessing her father's forcible removal from the home, were on account of imputed political opinion based on her parents' resistance to CPC measures); *cf. Ai Feng Yuan v. Dept. of Justice*, 416 F.3d 192 (2d Cir. 2005) (Although parents-in-law suffered harm resulting from daughters-in-law's resistance to CPC measures, they failed to establish that they were opposed to the policy and therefore failed to establish persecution account of a protected ground); *Tao Jiang v. Gonzales*, 500 F.3d 137 (2d Cir. 2007) (no evidence that resistance was imputed to child of women who had forced sterilization procedure).

## J. Harm to Family Members or Other Third Parties

Harm to an applicant's family member or another third party may constitute persecution of the applicant where the harm is serious enough to amount to persecution, and also where the persecutor's motivation to harm the third party is to act against the applicant. For example, the wife of a political dissident may be abducted and killed as a way of teaching her husband a political lesson.

An applicant may suffer severe psychological harm from the knowledge that another individual has been harmed in an effort to persecute the applicant. The harm may be intensified if the applicant feels that his or her status or actions led the persecutor to harm the family member and/or if the applicant witnessed the harm to the family member. The witnessing of harm to a family member or third party will not constitute persecution of the applicant, unless the intent in harming the third party is to target the applicant on account of a protected characteristic.

For example, if a persecutor severely assaults an applicant's spouse and indicates that the harm was motivated by the applicant's political activity, the applicant may be able to

For greater detail on the circumstances under which harm to a third party constitutes persecution, *see* Langlois, Joseph, INS Office of International Affairs, *Persecution of Family Members*, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 30 June 1997), 5 p.

*See* lesson, *Interviewing Part V: Interviewing Survivors*.

*See Matter of A-K-*, 24 I&N Dec 275, 278 (BIA 2007) (recognizing that eligibility can be established based on emotional persecution "where a person persecutes someone close to an applicant, such as a spouse, parent, child or other relative, with the intended

establish that he was persecuted on account of his political opinion. However, psychological harm suffered from the loss or witnessed suffering of a family member who was targeted solely because of the family member’s protected characteristic (rather than the protected characteristic(s) of the applicant) would not constitute persecution of the applicant. In that case, the harm was not directed at the applicant.

purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself”).

The definition of torture includes threats that another person would be imminently subjected to death or torture.

8 CFR § 208.18(a)(4)(iv).

## VII. IDENTIFYING A PERSECUTOR

Inherent in the meaning of persecution is the principle that the harm that an applicant suffered or fears must be inflicted either by the *government* of the country where the applicant fears persecution, or by *a person or group that the government is unable or unwilling to control*. The entity that harmed the applicant must be a government actor, or a non-government actor that the government is unable or unwilling to control, or the applicant has not established past persecution.

See *Matter of Villalta*, 20 I.&N. Dec. 142, 147 (BIA 1990) (paramilitary death squads); *Matter of H-*, 21 I.&N. Dec. 337 (BIA 1996) (members of opposition political party and clan); *Matter of Kasinga*, 21 I.&N. Dec. 357 (BIA 1996) (en banc) (family members).

The *UNHCR Handbook*, para. 65 provides context:

Persecution is normally related to the action taken by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizable fractions of the population do not respect the religious beliefs of their neighbors. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to provide effective protection.

Note that the reference to “sections of the population” in this paragraph does not preclude the non-state actor from being an individual acting independently of others. In addition, the state actor requirement does not require that the individual act in a manner that violates the state’s laws.

### A. The Government

If the applicant was harmed by an agent or agents of the government of the country from which he or she is seeking asylum, and the harm is sufficiently serious to constitute persecution, then the applicant has established that he or she was persecuted within the meaning of the refugee definition. Agents of the government may include, for example, police, military, civilian death-squads or other paramilitary units controlled by the government.

Note that the applicant also bears the burden to demonstrate that the persecution was on account of one of the five protected characteristics.

The Court of Appeals for the Ninth Circuit has stated that where a government agent is responsible for the persecution, there need not be an inquiry into whether the petitioner sought protection from the police or other government entity.

*Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9<sup>th</sup> Cir. 2004)

## B. Entity the Government is Unable or Unwilling to Control

### 1. General Principles

An applicant may establish that he or she suffered past persecution by a non-government actor, if the applicant demonstrates that, at the time of the incident, the government of the country from which the applicant fled was unable or unwilling to control the entity doing the harm. To meet this burden, the applicant is not required to show direct government involvement or complicity in the action that harmed him or her.

See *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9<sup>th</sup> Cir. 2004) (IJ erred in discounting persecution suffered by applicants at the hands of their family members when the applicants had established that the government was unable or unwilling to control their persecutors); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8<sup>th</sup> Cir. 2007) (finding error where an IJ concluded that to qualify for asylum the applicant had to demonstrate government persecution).

In determining whether the government was unable or unwilling to control the entity that harmed the applicant, the following issues should be addressed:

- a. whether there were reasonably sufficient governmental controls and restraints on the action[s] that harmed the applicant;
- b. whether the government had the ability and will to enforce those controls and restraints with respect to the entity that harmed the applicant;
- c. whether the applicant had access to those controls and constraints; and
- d. whether the applicant attempted to obtain protection from the government and the government's response, or failure to respond, to those attempts.

See *UNHCR Handbook*, paragraphs 98 and 99.

See *Surita v. INS*, 95 F.3d 814, 819-20 (9<sup>th</sup> Cir. 1996); *Ortiz-Araniba v. Keisler*, 505 F.3d 39 (1<sup>st</sup> Cir. 2007).

### 2. Guidance from Federal Courts

In determining whether a government is unable or unwilling to protect, the Ninth Circuit Court of Appeals looks at both general country conditions and the applicant's

*Andriasian v. INS*, 180 F.3d 1033, 1042-43 (9<sup>th</sup> Cir. 1999)

specific circumstances:

While the acts of persecution were not perpetrated directly by government officials, the widespread nature of the persecution of ethnic Armenians documented by the State Department Country Report, combined with the police officer's response when Mr. Andriasian turned to him for help, clearly establishes that the government of Azerbaijan either could not or would not control Azeris who sought to threaten and harm ethnic Armenians living in their country.

A number of courts have explained that the requisite connection to government action or inaction may be shown in one of the following three ways:

- a. evidence that government actors committed or instigated the acts;
- b. evidence the government actors condoned the acts; or
- c. evidence of an inability on the part of the government to prevent the acts.

The Court of Appeals for the Eighth Circuit found it reasonable to require the applicant to show more than "difficulty . . . controlling private behavior" and to show that the government "condoned it or at least demonstrated a complete helplessness to protect the victims." The First Circuit has further explained that the applicant must demonstrate more than "a general difficulty *preventing* the occurrence of particular future crimes."

*Roman v. INS*, 233 F.3d 1027, 1034 (7<sup>th</sup> Cir. 2000) (citing *Galina v. INS*, 213 F.3d 955, 958 (7<sup>th</sup> Cir. 2000)); *Harutyunyan v. Gonzales*, 421 F.3d 64, 68 (1<sup>st</sup> Cir. 2005); *Shehu v. Gonzales*, 443 F.3d 435, 437-38 (5<sup>th</sup> Cir. 2006).

*Menjivar v. Ashcroft*, 416 F.3d 918, 921 (8<sup>th</sup> Cir. 2005) (citing *Matter of McMullen*, 17 I&N Dec. 542, 546 (BIA 1980) and *Galina v. INS*, 213 F.3d 955, 958 (7<sup>th</sup> Cir. 2000)); *Setiadi v. Gonzales*, 437 F.3d 710, 713-14 (8<sup>th</sup> Cir. 2006); *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1<sup>st</sup> Cir. 2007) (upholding finding that Salvadoran government was able and willing to control the persecutor where he was prosecuted for his crimes against the applicant and served 4 years in prison; the court rejected claim that the government would be unable to protect her because she lived far from the nearest police station, and had no telephone)

3. Affirmative effort to gain the protection of the government

To demonstrate that the government is unable or unwilling to protect an asylum applicant, the applicant must show that he or she sought the protection of the government, or provide a reasonable explanation as to why he or she did not seek that protection.

See *Roman v. INS*, 233 F.3d 1027, 1035 (7th Cir. 2000) (finding that applicant's failure to show that he sought police protection supported conclusion that he did not suffer past persecution at the hands of coworkers).

Reasonable explanations for not seeking government protection include evidence that the government has shown itself unable or unwilling to act in similar situations, that the applicant would have increased his or her risk by affirmatively seeking protection, or that the applicant was so young that he or she would not have been able to seek government protection.

See *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (finding that testimony and country conditions indicated that it would be unproductive and possibly dangerous for a young female applicant to report father's abuse to government); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006) (holding that reporting not required if applicant can convincingly establish that doing so would have been futile or have subjected him or her to further abuse); see also, *Ixtilco-Morales v. Keisler*, 507 F.3d 651, 653 (8th Cir. 2007) (agreeing with a BIA finding that the applicant was too young to seek government protection); cf. *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (applicant failed to show that government was unwilling or unable to control the harm).

In determining whether an applicant's failure to seek protection is reasonable, asylum officers should consult and consider country conditions information, in addition to the applicant's testimony.

#### 4. *Unwilling to Control*

There may be situations in which the government is unwilling to control the persecutor for reasons enumerated in the refugee definition (the government shares, or does not wish to oppose, the persecutor's opinion about the applicant's race, religion, etc.).

*UNHCR Handbook*, paras. 65, 98, 99

A government may be also be unwilling to intervene in what are perceived to be domestic disputes within a family, or in disputes between tribes, or in a dispute that involves societal customs. The asylum officer may need to evaluate country conditions information concerning relevant laws

UNHCR. *Guidelines on International Protection: "Gender Related Persecution" within the context of Article 1A(2) of the 1951 Convention and/or*

and the enforcement of those laws, as well as the applicant's testimony, to determine if the government is unwilling to control the persecutor.

*its 1967 Protocol relating to the Status of Refugees.* (HCR/GIP/02/02, 7 May 2002), para. 19.

Evidence that the government is unwilling or unable to control the persecutor could include a failure to investigate reported acts of violence, a refusal to make a report of acts of violence or harassment, closing investigations on bases clearly not supported by the circumstances of the case, statements indicating an unwillingness to protect certain victims of crimes, and evidence that other similar allegations of violence go uninvestigated.

See *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9<sup>th</sup> Cir. 2004)

## 5. *Unable to Control*

No government can guarantee the safety of each of its citizens or control all potential persecutors at all times. In most cases, the determination of whether a government is unable to control the entity that harmed the applicant requires careful evaluation of the most current country conditions information available, as well as an evaluation of the applicant's circumstances.

A government in the midst of a civil war, or one that is unable to exercise its authority over portions of the country (e.g. Colombia, Indonesia, Somalia) will be unable to control the persecutor in areas of the country where its influence does not extend. An evaluation of how people similarly situated to the applicant are treated, even in portions of the country where the government does exercise its authority, is relevant to the determination of whether the government is unable to control the entity that persecuted the applicant.

See *Matter of H-*, 21 I&N Dec. 337, 345 (BIA 1996); *Matter of Villalta*, 20 I&N Dec. 142, 147 (BIA 1990)

In order to establish that he or she is a refugee based on past persecution, the applicant is *not* required to demonstrate that the government was unable or unwilling to control the persecution on a nationwide basis. The applicant may meet her burden with evidence that the government was unable or unwilling to control the persecution in the specific local where the applicant was persecuted.

*Mashiri v. Ashcroft*, 383 F.3d at 1122. Note, however, that the government can rebut the presumption of a well-founded fear of persecution with evidence that the applicant could *reasonably* avoid persecution through internal relocation.

## VIII. ELIGIBILITY BASED ON PAST PERSECUTION

### A. Presumption of Well-Founded Fear

1. If an applicant has established past persecution on account

8 C.F.R. § 208.13(b)(1); *see*,

of a protected characteristic, the applicant is not required to separately establish that his or her fear of future persecution based on the original persecution is well founded. It is presumed that the applicant's fear of future persecution, on the basis of the original claim is well founded, and the burden of proof shifts to the Department of Homeland Security to establish by a preponderance of the evidence 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 applicant's country of nationality or, if stateless, the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

2. If DHS does not meet this burden, it must be concluded that the applicant's fear is well founded.

Persecution based on the original claim means persecution feared on account of the protected characteristic on which the applicant was found to have suffered past persecution.

## **B. Exercise of Discretion to Grant Based on Past Persecution, No Well-Founded Fear**

If past persecution on account of a protected characteristic is established, then the applicant meets the statutory definition of refugee. Regulation and case law provide guidelines on the exercise of discretion to grant asylum to a refugee who has been persecuted in the past, but who no longer has a well-founded fear of persecution.

1. Granting asylum in the absence of a well-founded fear

Regulations direct that the adjudicator's discretion should be exercised to deny asylum to an applicant whose fear of future persecution is no longer well founded, unless

- a. "The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution," or

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

This is discussed in lessons, *Asylum Eligibility Part II: Well-Founded Fear* and *Asylum Eligibility Part IV: Burden of Proof, Standards of Proof, and Evidence*.

8 C.F.R. § 208.13(b)(1)(i)(A)

8 C.F.R. § 208.13(b)(1)(i)(B)

For a discussion of what factors to consider in evaluating reasonableness of the internal relocation option see lesson, *Asylum Eligibility Part II, Well-Founded Fear, Section XI.C*.

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

Exception: an individual who has suffered past persecution on account of a protected characteristic but has been found to have participated in the persecution of others is statutorily excluded from the definition of a "refugee." INA 101(a)(42).

8 C.F.R. § 208.13(b)(1)(iii)

8 C.F.R. § 208.13(b)(1)(iii)(A)



- b. “The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.”

8 C.F.R. §  
208.13(b)(1)(iii)(B)

## 2. Severity of past persecution

- a. Factors to consider when evaluating when to exercise discretion to grant asylum based on past persecution alone:

- (i) duration of persecution;
- (ii) intensity of persecution;
- (iii) age at the time of persecution;
- (iv) persecution of family members;
- (v) conditions under which persecution inflicted;
- (vi) whether it would be unduly frightening or painful for the applicant to return to the country of persecution;
- (vii) whether there are continuing health or psychological problems or other negative repercussions stemming from the harm inflicted.

- b. BIA precedent decisions

Several BIA decisions provide guidance on the circumstances in which persecution has been so severe as to provide compelling reasons to grant asylum in the absence of a well-founded fear.

Note: There are several federal court cases, discussed below, that also recognize eligibility in the absence of a well-founded fear.

- (i) Matter of Chen

In *Matter of Chen*, the BIA held that discretion should be exercised to grant asylum to an applicant for whom there was little likelihood of future persecution. The applicant in that case related a long history of persecution suffered by both himself and his family during the Cultural Revolution in China. As a young boy (beginning when he was eight years old) the applicant was held under house arrest for six months and deprived of an opportunity to go to school and later abused by teachers and classmates in

*Matter of Chen*, 20 I&N  
Dec. 16 (BIA 1989)

school. The applicant later was forced to endure two years of re-education, during which time he was physically abused, resulting in hearing loss, anxiety, and suicidal inclinations. In finding that the applicant was eligible for asylum based on the past persecution alone, the BIA considered the fact that the applicant no longer had family in China and that though there was no longer an objective fear of persecution, the applicant subjectively feared future harm.

*Matter of Chen* is a leading administrative opinion on asylum eligibility based on past persecution alone; however, the case does not establish a threshold of severity of harm required for a discretionary grant of asylum. In other words, the harm does not have to reach the severity of the harm in *Matter of Chen* for asylum to be granted based on past persecution alone. However, if the harm described is comparable to the harm suffered by Chen, an exercise of discretion to grant asylum may be warranted.

(ii) *Matter of H-*

In *Matter of H-*, the BIA did not decide the issue of whether the applicant should be granted asylum in the absence of a well-founded fear, but remanded the case to the IJ to decide whether a grant of asylum was warranted. The BIA held that “[c]entral to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past.”

*Matter of H-*, 21 I&N Dec. 337, 347 (BIA 1996) (noting that the Somali applicant was detained for five days and beaten and his father and brother were killed in clan warfare)

(iii) *Matter of B-*

In *Matter of B-*, the BIA found that an Afghani who had suffered persecution under the previous Communist regime was no longer at reasonable risk of persecution. Nevertheless, the BIA held that discretion should be exercised to grant asylum based on the severity of the persecution the applicant had suffered in the past – a 13-month detention, during which time the applicant

*Matter of B-*, 21 I&N Dec. 66 (BIA 1995)

endured frequent physical (sleep deprivation, beatings, electric shocks) and mental (not knowing the fate of his father who was also detained and separation from his family) torture, inadequate diet and medical care, and integration with the criminal population – and the on-going civil strife in Afghanistan at the time of decision.

(iv) Matter of N-M-A-

In *Matter of N-M-A-* the BIA found that a grant of asylum in the absence of a well-founded fear was not warranted where the applicant's father was kidnapped, the applicant's home was searched twice, and the applicant was detained for one month (during which time he was beaten periodically and deprived of food for three days). In reaching that conclusion, the BIA noted that the harm was not of a great degree, suffered over a great period of time, and did not result in severe psychological trauma such that a grant in the absence of a well-founded fear was warranted.

*Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998)

(v) Matter of S-A-K- and H-A-H-

In *Matter of S-A-K- and H-A-H-*, the BIA held that discretion should be exercised to grant asylum to a mother and daughter who had been involuntarily subjected to FGM based on the severity of the persecution they suffered. Some of the factors the Board considered in finding that the persecution was severe were: the applicant's daughter was subjected to FGM at an early age and was not anesthetized for the procedure; the mother nearly died from an infection she developed after the procedure; both mother and daughter had to have their vaginal opening reopened later on in their lives, in the case of the mother about five times; mother and daughter continued to experience medical problems related to the procedure (e.g., the mother experienced great pain and the daughter had difficulty urinating and cannot menstruate); and the mother was beaten because she opposed having her daughters circumcised.

*Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008)

c. Federal court decisions

A comparison of the facts of the decisions noted above with two cases in which federal courts upheld the BIA's finding that the applicants *did not* establish that the past persecution suffered was sufficiently serious to compel a discretionary grant in the absence of a well-founded fear is helpful to understand the application of this standard.

For federal court decisions finding that the evidence compelled a finding that the applicants were eligible for asylum based on the severity of the past persecution, even without a well-founded fear, see *Lal v. INS*, 255 F.3d 998, 1009–10, *as amended by* 268 F.3d 1148 (9th Cir. 2001) (Indo-Fijian arrested, detained three times, beaten, tortured, urine forced into mouth, cut with knives, burned with cigarettes, forced to watch sexual assault of wife, forced to eat meat, house set ablaze twice, temple ransacked, and holy text burned); *Vongsakdy v. INS*, 171 F.3d 1203, 1206–07 (9th Cir. 1999) (Laotian applicant threatened, beaten and attacked, forced to perform hard manual labor and to attend “reeducation,” fed once a day, denied adequate water and medical care, and forced to watch the guards kill one of his friends).

(i) *Fourth Circuit* – *Ngarurih v. Ashcroft*

*Ngarurih v. Ashcroft*, 371 F.3d 182 (4th Cir. 2004)

In *Ngarurih v. Ashcroft*, the applicant was first detained at a local police station and taken from there to a wooded area where, under threat of execution, he was asked to give names of protest leaders. Later he was taken to a prison where he was held for several months. The applicant was stripped of his clothing and held in a cement cell that had no light, windows or toilets. During the first week at the prison his cell was intermittently flooded with cold water that at times reached his chest. He was held incommunicado and could neither eat nor sleep and experienced hallucinations.

(ii) *Eighth Circuit* – *Reyes-Morales v. Gonzales*

*Reyes-Morales v. Gonzales*, 435 F.3d 937, 942 (8th Cir. 2006)

In *Reyes-Morales v. Gonzales*, members of the Salvadoran military beat the applicant to unconsciousness, resulting in a physical

deformity and several scars. The applicant's friend was killed during the same incident.

- d. The severity of past harm cannot provide the basis for a grant of asylum in the absence of a well-founded fear where the applicant has not established that the harm was inflicted on account of a protected characteristic. Such an applicant would not meet the definition of a refugee and is not eligible to receive asylum.

See *Lukwago v. Ashcroft*, 329 F.3d 157, 173-74 (3d Cir. 2003) (holding that an applicant who had not established that the atrocious and severe harm he had suffered was on account of a protected ground would not be entitled to a discretionary grant of asylum)

### 3. "Other serious harm"

Even where the past persecution suffered by an applicant does not rise to the higher level of severe persecution, a grant in the absence of a well-founded fear may be justified where there is a reasonable possibility that an applicant who suffered past persecution may face other serious harm upon return.

8 C.F.R. 208.13(b)(1)(iii)(B)

Note: This provision was added to the regulations by the final rule on asylum published in the Federal Register on December 6, 2000, at 65 FR 76121. In *Matter of B-*, the BIA did consider, in part, current civil strife in Afghanistan in exercising discretion to grant relief,<sup>21</sup> I&N Dec. 66 (BIA 1995).

By "other serious harm," the Department means harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but that is so serious that it equals the severity of persecution. Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as "other serious harm."

65 FR 76121 at 76127

In *Matter of T-Z-* the BIA found that to rise to the level of persecution and, thus, be considered "serious" economic disadvantage must be not just substantial but "severe," and deliberately imposed. When analyzing whether economic disadvantage constitutes "other serious harm" officers also need to determine if the harm is "serious." In making that determination asylum officers need to focus their analysis on whether the economic disadvantage feared is "severe" as required by *Matter of T-Z-*, but do not need to find that the economic harm will be deliberately imposed. The deliberate imposition requirement of *Matter of T-Z-* is not required in the context of analyzing "other serious harm" because in that context the harm feared does not necessarily have to be volitionally imposed by a persecutor on account

See, Section VI.F. of this Lesson Plan for a discussion of *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007).

of a protected characteristic but can be the result as well from non-volitional situations and events such as, for example, natural disasters.

The “other serious harm” that the applicant may suffer upon return must be more than the hardship(s), absent special circumstances, that an alien may experience upon removal to his or her country of nationality after having spent a significant amount of time in the United States.

#### 4. Additional humanitarian factors

To the extent that the revised regulations changed the parameters governing the exercise of discretion to grant asylum in the absence of a well-founded fear, the current regulations supersede discussions of discretion contained in precedent decisions rendered prior to December 6, 2000.

For example, in *Matter of H-*, the BIA indicated that on remand the Immigration Judge could consider humanitarian factors independent of the applicant’s past persecution, such as age, health, or family ties, when exercising discretion to grant asylum. However, in the supplemental information to the final rule, the Department of Justice specifically stated that it did not intend for adjudicators to consider additional humanitarian factors unrelated to the severity of past persecution or other serious harm in exercising discretion to grant asylum in the absence of a well-founded fear. Thus, under the current rules, humanitarian factors such as those that the BIA referenced in *Matter of H-*, are considered in the exercise of discretion analysis only if they have a connection to either the severity of past persecution or to other serious harm that the applicant may suffer.

*Matter of H-*, 21 I&N Dec. 337, 347 (BIA 1996)

[65 FR 76121 at 76127](#)

## IX. SUMMARY

### A. Definition of Refugee

For purposes of asylum adjudication, a refugee is an individual in the United States or at a port of entry who is unable or unwilling to return to his or her country of nationality (or if stateless, the country of last habitual residence) because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Certain individuals who have been harmed because of a coercive population control program shall be deemed to have been persecuted on account of political

opinion.

Individuals who have ordered, incited, assisted, or otherwise participated in the persecution of others on account of a protected basis are excluded from the refugee definition.

Note that asylum may be granted based on a finding of *either* past persecution *or* well-founded fear of future persecution.

## **B. Country of Nationality**

In the first part of the refugee definition, nationality refers to citizenship. Unless it explicitly states otherwise, a passport creates a presumption of citizenship. This presumption may be overcome by credible evidence that the passport was issued only so that the holder could travel and that the passport does not accord rights of nationality or citizenship. The presumption could also be overcome by proof the passport was obtained through misrepresentation.

If the applicant is a dual national, he or she must establish past persecution or a well-founded fear of persecution in each country of nationality.

If an applicant is stateless, the claim must be evaluated based on the country of the applicant's last habitual residence.

## **C. Return to Country of Feared Persecution**

An asylum applicant can meet the unable or unwilling to return component of the refugee definition even after a temporary visit to the country of past or feared persecution. The reasons that motivated the applicant's temporary visit and the circumstances surrounding that visit must be evaluated to determine if the applicant still is unable or unwilling to return.

The asylum officer must elicit and evaluate information concerning the applicant's reasons for return. The officer should not conclude that return due to compelling factors establishes that the applicant is able and willing to return.

## **D. Persecution**

1. To establish persecution, an applicant must prove that the harm he or she experienced was inflicted by the government or an entity the government was unable or unwilling to control.

2. To establish persecution, the level and type of harm experienced by the applicant must be sufficiently serious to constitute persecution.
3. There is no single definition of persecution. Guidance may be found in precedent decisions, the proposed rule, the *UNHCR Handbook*, and international human rights law. The determination of whether an act or acts constitute persecution must be decided on a case-by-case basis, taking into account all the circumstances of the case including the physical and psychological characteristics of the applicant.
4. Serious violations of core or fundamental human rights that are prohibited by customary international law almost always constitute persecution. Less severe human rights violations may also be considered persecution. Discrimination, harassment, and economic harm may be considered persecution, depending on the severity and/or duration of the harm. The harm may be psychological, such as the threat of imminent death, or the threat that another person will imminently be subjected to death or torture.
5. Acts that in themselves do not amount to persecution may, when considered cumulatively, constitute persecution.

#### **E. Eligibility Based on Past Persecution**

If an applicant establishes past persecution, it is presumed that his or her fear of future persecution is well founded. The burden of proof shifts to DHS to establish that the applicant no longer has a well-founded fear of future persecution or that it would be reasonable for the applicant to relocate to another part of the country of claimed persecution to avoid future persecution.

A refugee may be granted asylum based on past persecution, even when there is no reasonable possibility of future persecution, if he or she demonstrates compelling reasons arising out of the severity of the past persecution for being unwilling to return to the country of persecution, or there are reasons to believe that the applicant would suffer some other serious harm if returned to the country of persecution.