Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	Affirmative Asylum Process and Procedures
Rev. Date	September 3, 2019
Lesson Description	This lesson provides an overview of the affirmative asylum adjudication process. The lesson explains the jurisdiction of the asylum program, describes the application process, and explains who may be included as a dependent to an asylum application. The lesson provides basic information on each step of the affirmative asylum process from time of filing an application through adjudication.
Terminal Performance Objective	The Asylum Officer will be able to determine whether an applicant for affirmative asylum is eligible to apply, determine jurisdiction of the case, and establish whether claimed dependents may be included in the request for asylum.
Enabling Performance Objectives	1. Define the jurisdiction of Asylum Officers to adjudicate requests for asylum. (AA1) (AAS3)(OK4) 2. Define the jurisdiction of the Office of the Immigration Judge to adjudicate requests for asylum. (AAS3)(OK8) 3. Identify the procedures for adjudicating asylum claims. (AIL1)(ACRR1) 4. Explain when a spouse or child is eligible to derive asylum status from an approved principal applicant. (ACRR1)(AA1)
Instructional Methods	Lecture, class discussion, visual aids
Student Materials/ References	Lesson Plan Affirmative Asylum Procedures Manual (AAPM) Asylum Officer Performance Plan & Appraisal (PPA) and related documents
Method of Evaluation	Written test

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Background Reading

1. Langlois, Joseph E., Director, Asylum Division, US Citizenship and Immigration Services. Securing Compliance with Fingerprinting Requirements Prior to the Asylum Interview and Amending Procedures for Issuance of Recommended Approvals, Memorandum to Asylum Office Directors and Deputy Directors, Supervisory Asylum Officers, Quality Assurance/Training Officers and Asylum Officers (Washington, DC: 12 September 2006), 14 pp., plus attachments.

2. USCIS Customer Guide: I Am a Refugee or Asylee. How Do I Show My Employer I am Authorized to Work? (Washington, DC: August 2008), 2 pp.

3. Joseph E. Langlois. Director, Asylum Division, US Citizenship and Immigration Services. *The Effect of the "Real ID" Act on the* Processing of Coercive Population Control (CPC) Cases, Memorandum for all Asylum Office Personnel (Washington, DC: 16 June 2005), 3pp.

4. Joseph E. Langlois. Director, Asylum Division, US Citizenship and Immigration Services. Updated Fact Sheet on Confidentiality, Memorandum to Asylum Office Directors and Deputy Directors (Washington, DC: 18 October 2012), 1 p., plus attachment.

5. Langlois, Joseph E., Director, Asylum Division, US Citizenship and Immigration Services. Letter to Donald M. Kerwin, Executive Director, Catholic Legal Immigration Network, Inc. (CLINIC), 23 September 2004, 1 p., plus attachment (CLINIC, Asylee Eligibility for Resettlement Assistance: A Short Guide)

6. Yates, William R., Assoc. Director for Operations, US Citizenship and Immigration Services. The Child Status Protection Act – Children of Asylees and Refugees, Memorandum to Regional Directors, et al. (Washington, DC: 17 August 2004), 4 pp., plus attachments.

7. Aguirre, Eduardo, Director, US Citizenship and Immigration Services. Delegation to Asylum Office Directors of District Director Authority and Discretion to Issue Form I-*863, "Notice of Referral* to *Immigration Judge," to Certain Asylum Applicants*, Memorandum to Regional Directors, Asylum Office Directors, and District Office Directors (Washington, DC: 26 July 2004), 2 pp.

8. Langlois, Joseph E., Director, Asylum Division, US Citizenship and Immigration Services. Procedures for Handling Approved Asylum Cases Returned to the Asylum Office Based on Possible Grounds for

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Termination Discovered During the Asylee Adjustment Process, Memorandum for Asylum Office Directors (Washington, DC: 19 July 2004), 6 pp., plus 6 attachments (See Lesson, Fraud in the Context of Asylum Adjudications)

9. Langlois, Joseph E., Director, Asylum Division, Office of International Affairs. Issuance of Final Affirmative Asylum Procedures Manual (AAPM), Memorandum for Asylum Office Personnel (Washington, DC: 6 February 2003), 2 pp., plus attachment.

10. Langlois, Joseph E., Director, Asylum Division, Office of International Affairs. H.R. 1209 – Child Status Protection Act, Memorandum to Asylum Office Directors, et al. (Washington, DC: 7 August 2002), 2 pp., plus attachment.

11. Langlois, Joseph E., Acting Director, Asylum Division, Office of International Affairs. Final Rule amending the asylum regulations in 8 C.F.R. 208, Memorandum to Asylum Office Directors, et al. (Washington, DC: 6 December 2000), 8 pp., plus attachment. (See, lesson, History of the Affirmative Asylum Program)

12. Langlois, Joseph E., Chief, Asylum Division, Refugee, Asylum and International Operations Directorate. Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS, Memorandum to Asylum Office Directors, et al. (Washington, DC: 14 August 2007), 9 pp.

13. Langlois, Joseph E., Chief, Asylum Division, Refugee, Asylum and International Operations Directorate. Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children, Memorandum to Asylum Office Staff (Washington, DC: 25 March 2009), 7 pp., plus attachment.

14. Kim, Ted, Acting Chief, Asylum Division, Refugee, Asylum and International Operations Directorate. Termination and related Post-Adjudication Eligibility Review (PAER) procedures for cases in which the alien was granted asylum affirmatively and has already adjusted to lawful permanent resident status, Memorandum to Asylum Office Directors, et al. (Washington, DC: 5 June 2012), 6 pp., plus attachment.

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CRITICAL TASKS

Knowledge of U.S. case law that impacts RAIO
Knowledge of the Asylum Division jurisdictional authority.
Knowledge of procedures and legal requirements for Asylum and Withholding of Removal (I-589)
Knowledge of policies and procedures for reviewing case files.
Knowledge of Executive Office for Immigration Review.
Knowledge of Asylum Division guidelines and procedures for processing children's claims.
Knowledge of case law that impacts the Asylum Division policies and procedures.

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I. INTRODUCTION

The purpose of this lesson is to introduce the student to the asylum process. This lesson provides an overview of the laws, regulations, and procedures pertaining to asylum and refugee status. The lesson follows the path that an asylum applicant takes from the point of filing with U.S. Citizenship and Immigration Services (USCIS) through adjudication by the asylum program.

Each aspect of the asylum process will be covered in greater detail in subsequent lessons.

II. OVERVIEW OF ASYLUM ELIGIBILITY

A. Statutory Authority

Under the Immigration and Nationality Act (INA), the Department of Homeland Security (DHS) has the authority to grant asylum to aliens who meet the definition of a refugee.

INA § 208(b)(1); see Asylum lesson, History of the Asylum Program for more information on the development of the definition of a refugee in US law.

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 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...[forced abortion, involuntary sterilization, or* persecution for resistance to coercive population control programs constitute persecution on account of political opinion].

INA § 101(a)(42); see RAIO Modules: Refugee Definition; Past Persecution; Well Founded Fear; Nexus and Protected Grounds; and Nexus – PSG for more information on the definition of a refugee.

An alien who meets the definition of a refugee may not be granted asylum if he or she:

INA § 208(b)(2); see RAIO Modules:, Discretion; Firm Resettlement; Persecutor Bar; National Security; Inadmissibility; and Asylum Lesson: Mandatory Bars – Criminal Bars for more information on the mandatory bars to granting asylum.

1. Participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

2. Has been convicted of a particularly serious crime;

3. Has committed a serious nonpolitical crime outside the

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United States;

4. Poses a danger to the security of the United States;

5. Is described in particular inadmissibility or removability grounds relating to terrorism; or

6. Was firmly resettled in another country prior to arriving in the United States.

An alien who has been granted asylum may not be returned to his or her country of nationality or, in the case of a person having no nationality, the country of the alien's last residence.

INA § 208(c)(1)(A)

B. Regulatory Framework

Because asylum is a discretionary benefit, DHS is not required to grant asylum to an alien, even if the alien meets the definition of a refugee and is otherwise eligible for asylum.

The administrative regulations that establish the procedure for an alien present in the U.S. or at a land border or port of entry to apply for asylum are found at Title 8 of the Code of Federal Regulations (C.F.R.) § 208, et seq. These regulations govern not only basic asylum procedures, but also substantive eligibility issues such as burden of proof, standard of proof, and mandatory grounds for denial.

The regulations delineate how DHS will exercise its discretion to grant asylum to refugees. For example, an asylum applicant who meets the definition of a refugee based on past persecution, but due to a fundamental change in circumstances no longer has a well-founded fear of persecution or can avoid persecution by relocating internally in the country of nationality will generally not be granted asylum, unless the past persecution suffered was severe or there is a reasonable possibility that the applicant will suffer other serious harm upon return to the country of nationality.

8 C.F.R. § 208.13(b)(1)(iii)
See also RAIO Module: Discretion

III. APPLYING FOR ASYLUM

A. Jurisdiction

INA § 208(a)

Regulations provide that an asylum seeker may apply for asylum any time while physically present in the United States or at a port of entry, regardless of the individual's immigration status.

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1. Affirmative applications

An asylum officer has jurisdiction to adjudicate or refer a request for asylum if the applicant is not in immigration proceedings before the Office of the Immigration Judge. 8 C.F.R. § 208.2

An applicant is in the jurisdiction of the Immigration Court when he or she has been served with a: 8 C.F.R. § 208.2(b)

a. Form I-221 Order to Show Cause,

b. Form I-122 Notice to the Applicant for Admission Detained for a Hearing before an Immigration Judge, or

c. Form I-862 Notice to Appear,

and the charging document has been filed with the Immigration Court.

8 C.F.R. § 208.2(b)

The Immigration Court also has jurisdiction over any asylum applications filed prior to April 1, 1997 by alien crewmembers who have remained in the United States longer than authorized, applicants for admission under the Visa Waiver Pilot Program (VWPP), and aliens who have been admitted to the United States under the VWPP.

2. Defensive applications

Immigration judges have exclusive jurisdiction over asylum applications after a charging document has both been served on the applicant and filed with the Office of the Immigration Judge. 8 C.F.R. § 208.2

This means that if charging documents are filed with the Office of the Immigration Judge at any time, even after an individual has affirmatively applied for asylum (and may have been interviewed), the Asylum Office loses jurisdiction.

This also means that, even if the applicant has been personally served with charging documents, the Asylum Office retains jurisdiction until those charging documents are actually filed with the Office of the Immigration Judge.

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3. Unaccompanied Alien Children

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110-457, signed into law on December 23 and effective 90 days thereafter on March 23, 2009, provided asylum officers with "initial jurisdiction over any asylum application filed by" an unaccompanied alien child (UAC). This means that UACs will have an opportunity to file for asylum with USCIS, even if the UAC has been issued a Notice to Appear. This applies to all UACs who file for asylum on or after March 23, 2009 as well as to the asylum claims filed by UACs with pending proceedings in Immigration Court or cases on appeal to the Board of Immigration Appeals or on petition for review in federal court.

4. Determining jurisdiction

When reviewing a file prior to the asylum interview, the asylum officer should check for any documents indicating that the applicant has been placed in deportation, exclusion, or removal proceedings.

If it appears that an applicant may have had previous contact with an immigration officer, the asylum officer should ask the asylum applicant appropriate questions to determine whether the applicant has been placed in proceedings and the outcome of those proceedings. If the asylum officer determines that proceedings against the applicant were terminated, the application for asylum is properly in the jurisdiction of the asylum office and can be interviewed by the asylum officer. If it is determined that proceedings were administratively closed, all matters relating to the alien are in the jurisdiction of the Immigration Court and the alien cannot be interviewed by the asylum officer.

If after an approval of an asylum it is discovered that the applicant was not properly in the jurisdiction of the asylum office, the offer of asylum is rescinded.

5. Jurisdiction of asylum offices

The jurisdiction of an asylum office to adjudicate a particular

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asylum applicant is determined by the place of residence of the asylum applicant. Most applicants within an asylum office's jurisdiction are interviewed at the asylum office's home office. However, those applicants who live far from the home office are scheduled to be interviewed at a USCIS district office closer to the applicant's residence. These locations are called "circuit ride" locations.

For specific information on the localities over which each asylum office has jurisdiction, see "Asylum Office Locator," on the USCIS website.

B. Restrictions on Filing

8 C.F.R. § 208.4(a)(1)

Only an asylum officer, immigration judge, or the Board of Immigration Appeals (BIA) can make a determination on whether a restriction to filing applies.

1. One-year filing deadline

Asylum applications must be filed within one year after the alien's arrival in the U.S., unless the applicant can demonstrate "changed circumstances" that materially affect eligibility for asylum or "extraordinary circumstances" for failing to apply for asylum within one year.

INA §§ 208(a)(2)(B) and (D); 8 C.F.R. §§ 208.4(a)(2), (4), and (5)

The one-year filing deadline is discussed in detail in the Asylum lesson One-Year Filing Deadline

The one-year deadline is calculated from the date of the alien's last arrival in the U.S. or April 1, 1997, whichever is later.

2. Prior denial

Prior denial of an asylum application makes an alien ineligible to apply for asylum, unless the applicant demonstrates "changed circumstances" that materially affect eligibility for asylum.

INA §§ 208(a)(2)(C) and (D); 8 C.F.R. §§ 208.4(a)(3) and (4)

This denial must have been made by an immigration judge or the BIA. Therefore, an applicant who received a final denial from an asylum office is not precluded from filing a subsequent asylum application, even if there have been no changed circumstances.

3. Safe third country

An asylum applicant who may be returned to a "safe third country," other than the country of nationality (or last habitual residence, if the applicant is stateless) is ineligible to apply for asylum.

INA § 208(a)(2)(A)

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A "safe" country is one that has entered into a bilateral or multilateral agreement with the United States so that an applicant will not be returned to a country where his or her life or freedom would be threatened on account of one of the five grounds and where the applicant will have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.

On December 5, 2002, the governments of the United States and Canada entered into a safe-third country agreement. A final rule implementing this agreement was published on November 29, 2004. See Asylum lesson Safe Third Country Threshold Screening for more information.

C. Who May Be Included in the Asylum Application

1. Principal applicant

Any alien physically present in the United States or who arrives in the United States, irrespective of immigration status may apply for asylum. The principal applicant is the individual within the case who is claiming to be a refugee eligible for asylum.

INA § 208(a)

2. Dependents

The applicant's spouse and children who are physically present in the United States may be included in the request for asylum. To be included, a child must be under 21 years of age and unmarried at the time of filing.

The spouse and children of an alien granted asylum may be granted the same status, even if the spouse and children are not eligible for asylum. However, a spouse or child cannot be granted asylum if he or she is subject to one of the mandatory bars listed above, with the exception of firm resettlement.

8 C.F.R. §§ 208.3(a); 208.21(a); INA § 208(b)(3) Spouse and child are defined in section INA §§ 101(a)(35) and 101(b)(1). See, Joseph E. Langlois, Director, Asylum Division, Office of International Affairs. H.R. 1209 – Child Status Protection Act, Memorandum to Asylum Office Directors, et al. (Washington, DC: 7 August 2002), 2 pp., plus attachment.

D. What to File

1. Completed form I-589 (Application for Asylum and for Withholding of Deportation), with any additional supporting material and evidence of relationship to any dependents included in the application, in triplicate (original plus two copies)

   Documents that are not in English must be accompanied by a certified translation into English.

Supporting documents could include, but are not limited to, country conditions information, newspaper articles, affidavits of witnesses or experts, medical and psychological records.

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2. An additional copy of the principal applicant's I-589 for each dependent included as a derivative and a copy of the evidence of relationship to the principal applicant

For applications filed on the October 18, 2001 or December 10, 2001 revisions of the I-589 (the only versions accepted after June 30, 2002), the principal applicant need only submit one copy of pages 1, 2, 3 (including Supplement A Form I-589 as needed) and 9 of his or her application for each dependent included as a derivative.

3. One passport-style photograph of the principal applicant and each dependent

4. One copy of Form G-28, Notice of Entry of Appearance as Attorney or Representative for the principal applicant and each dependent, if the applicant is represented by an attorney or other representative

E. Where to File

8 C.F.R. § 208.4(b)

In most cases, affirmative asylum applications must be filed by mail with the appropriate Service Center. Certain applications, however, may be filed with the Asylum Office, the Immigration Judge, the Board of Immigration Appeals, or the District Director.

IV. POST-FILING PROCESS

The following procedures are followed for most cases; different procedures are followed for certain cases, such as class members to the settlement agreement under American Baptist Churches v. Thornburgh, and cases in which expeditious processing is required.

A. Pre-Interview Process

1. The Service Center prepares the application to be sent to the asylum office with jurisdiction over the asylum application.

The Service Center also sends applications to the Department of State. 8 C.F.R. § 208.11(a)

The Service Center is responsible for:

a. receiving and receipting the I-589;

b. checking available databases for duplicate filings and

See Affirmative Asylum Procedures Manual (AAPM), sec. II(C), "INS Receives I-589," for more

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multiple alien-numbers (A-numbers) or for evidence that the applicant is or has been in proceedings;

c. matching an I-589 with already existing alien-files (A-files) where they exist;

d. creating a new A-file where there is no prior A-file for the asylum applicant;

e. entering the biographical information from the I-589 into the Refugee Asylum and Parole System (RAPS); and

f. forwarding the file to the appropriate asylum office.

The Service Center forwards the new files to the appropriate asylum office within 21 days of receipt of the complete I-589.

information.

RAPS tracks the processing of affirmative asylum and NACARA cases under the asylum program's jurisdiction through the adjudication by the asylum program. The system allows the user to see whether a particular A-number pertains to a case within the Immigration Court system. See AAPM, sec. I(B)(3), "Computer Databases," for more information.

2. Service Center schedules all applicants for biometrics (signature and photograph) collection at a USCIS Application Support Center. Individuals between 12 years and nine months and 75 years of age have fingerprints collected for forwarding to the FBI. RAPS automatically requests scheduling of a fingerprint appointment within 3 days of the case being entered into RAPS, except for cases that will be interviewed at a circuit ride location.

3. Asylum Office schedules interview.

Most interviews are scheduled automatically by RAPS according to established priorities. Interviews can be manually scheduled in the discretion of the asylum office director. After an interview is scheduled in RAPS, the system automatically generates an interview notice, which will be mailed to the applicant (and the representative of record, if applicable), no less than 18 days before the scheduled interview date. The majority of cases are interviewed within 43 days after the filing date. Applicants interviewed at a circuit ride location are generally interviewed more than 43 days after filing

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B. Interview Process

1. Asylum applicant is enrolled in Asylum-IDENT.

   IDENT is an automated single, left and right index fingerprint identification system, designed to quickly identify entries against selected DHS records. Through the Asylum-IDENT database, the asylum office can determine whether an applicant has appeared before for interview at any asylum office, perhaps under a different name.

   For more information on Asylum-IDENT and the other IDENT databases against which asylum applicants are checked, see, Asylum materials on Fraud in the Context of Asylum Adjudications

2. Case is assigned to an asylum officer for interview.

   Cases are assigned to asylum officers for interview at random. Only an asylum office director or deputy director can make any exceptions to the random assignment of cases.

3. Asylum officer interviews applicant.

   See 8 C.F.R.§ 208.9

   The asylum officer conducts a non-adversarial interview of the applicant. At the outset of the interview, the applicant is informed of purpose of the interview, the rights and responsibilities of those present, and what can be expected after the interview. During the interview, the asylum officer has an affirmative duty to elicit all information relevant to the applicant's claim.

   For more information on the asylum interview, see, RAIO Modules: Non-Adversarial Interviewing; Eliciting Testimony; and other interviewing modules

C. Post-Interview Process

1. Asylum officer verifies that all information in RAPS is correct and updates as appropriate.

2. Asylum office personnel complete the Asylum and NACARA § 203 Background Identity and Security Checklist.

   The Asylum and NACARA § 203 Background Identity and Security Checklist is Appendix 62 to the AAPM

   a. INA § 208(d)(5) prohibits an asylum office from granting asylum to an applicant who filed for asylum on or after April 1, 1997, until the identity of the applicant has been checked against all appropriate records.

   INA § 208(d)(5)

   b. Currently the asylum program checks applicants against the:

      (i) Central Index System (CIS);

   For more information on these databases, see, AAPM, section I(B)(3),

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"Computer Databases," and Asylum materials on Fraud in the Context of Asylum Adjudications

(ii) Deportable Alien Control System (DACS);

(iii) Interagency Border Inspection System (IBIS);

(iv) IDENT databases (includes IDENT-Asylum, Lookout and Recidivist databases); and

(v) FBIQUERY (for fingerprint and name checks).

c. Local office policy dictates who is responsible for completing the Checklist and at what stage in the processing it is completed.

3. Asylum officer prepares a written decision and appropriate decision letters.

a. If the decision is to grant asylum, the asylum officer will prepare a grant assessment and either:

(i) a recommended approval letter when the results of identity and security checks for the principal applicant and all dependents are incomplete, or when the asylum office has only a working file or temporary file (not the A-file); or

(ii) final approval letter and I-94 (Arrival Record/Departure Record) when the results of all identity or security checks for the principal applicant and all dependents are current and complete, and the case is not being granted solely on the basis of CFP or the asylum office has received a CFP Authorization number for a case granted solely on CFP.

Preparation of the I-94 and charging documents may be completed by support staff, depending on office procedures and circumstances.

b. If the decision is not to grant asylum and the applicant is not in lawful status, the officer prepares:

(i) an assessment to refer;

(ii) a referral notice; and

(iii) charging documents.

c. If the decision is not to grant asylum and the applicant

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is maintaining valid immigrant, nonimmigrant or Temporary Protected States ("in-status"), then the asylum officer prepares a Notice of Intent to Deny (NOID), which the applicant will have an opportunity to rebut.

4. Supervisor fully reviews all required documents as noted in the Affirmative Asylum Procedures Manual, including assessments, decision notices, and charging documents (if required), or the NOID for all cases adjudicated within the first six months an asylum officer has been conducting affirmative asylum interviews or for the first 150 cases adjudicated, whichever comes first. Supervisor will also review all cases involving fraud and/or national security concerns, egregious public safety concerns, terrorist-related inadmissibility grounds (TRIG), the taking of a sworn statement, NOIDs, or other complex issues or populations requiring full supervisory review. If an asylum officer has not adjudicated an affirmative asylum case in the previous 6 months or longer, an SAO will fully review the first 15 cases that the asylum officer completes upon returning to affirmative adjudications. Supervisor then signs the documents or, if necessary, returns them to the asylum officer for corrections.

5. Supervisor conducts a random review of a small number of assessments and decision notices for all cases adjudicated by asylum officers who have been competently conducting interviews and writing legally sufficient assessments for six months or more or who have competently conducted interviews and written legally sufficient assessments for 150 cases, whichever comes first. If an asylum officer has not adjudicated an affirmative asylum case in the previous 6 months or longer, an SAO will fully review the first 15 cases that the asylum officer completes upon returning to affirmative adjudications. Supervisor will review and sign all charging documents, if necessary, and the Asylum and NACARA § 203 Background Identity and Security Checklist for all asylum grants. Reviewed documents can also be returned to the asylum officer for corrections, if necessary.

6. For cases undergoing full supervisory review, when the assessment and all accompanying paperwork are completed to the supervisor's satisfaction, the file is turned over to the

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clerical section for additional processing.

7. For cases not undergoing full supervisory review, the supervisor will review and sign the charging document (if required) and the Asylum and NACARA § 203 Background Identity and Security Checklist for all asylum grants, and the file is turned over to the clerical section for additional processing.

8. If the determination is to refer, then a hearing date is scheduled with the appropriate Office of the Immigration Judge.

9. If a NOID was sent to the applicant, the asylum officer reviews any rebuttal received within the prescribed time, then makes a final decision, which is mailed to the applicant's last known address.

10. In most cases, the applicant returns to the Asylum Office to pick up the final decision to grant or the referral. In more than 75% of the cases, a decision is served on the applicant within 60 days after filing. — 8 C.F.R. § 208.19

    a. If the determination is to refer, the applicant is also served with documents initiating removal proceedings.

    b. If the applicant receives a final grant of asylum, through an interface with RAPS, the asylum office triggers the automatic generation of an Employment Authorization Document.

D. Termination of Asylum Status

Asylum does not convey a right to remain permanently in the United States and may be terminated under certain circumstances. — INA § 208(c)(2); 8 C.F.R. 208.24

1. Any grant of asylum can be terminated if there is a showing of fraud in the alien's application such that he or she was not eligible for asylum at the time it was granted. — 8 C.F.R. § 208.24(a)(1)

2. For an application filed on or after April 1, 1997, asylum may be terminated if the alien: — INA § 208(c)(2)

    a. no longer meets the definition of a refugee due to a fundamental change in circumstances;

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b. meets the conditions of one of the mandatory bars for asylum under INA § 208(b)(2);

c. may be removed pursuant to a safe third country agreement;

d. has voluntarily re-availed him- or herself of the protection of the country of feared persecution by returning to such country with the reasonable possibility of obtaining permanent resident status with the same rights and obligations of other permanent residents of the country; or

e. has acquired a new nationality and enjoys the protection of that country.

3. For an application filed before April 1, 1997, asylum may be terminated if the alien: — 8 C.F.R. § 208.24(a)(3)

a. no longer has a well-founded fear of persecution due to a change of country conditions in the alien's country of nationality or last habitual residence; or

b. has committed any act that would have been grounds for a mandatory denial of asylum under 8 C.F.R. § 208.13(c)(2).

4. Asylum office termination procedure — See generally, AAPM, section III(X), "Termination of Asylum Approval"

a. The asylum office does not have jurisdiction to terminate asylum granted by an Immigration Judge.

b. Prior to termination of a grant of asylum, the asylum office notifies the individual of USCIS's intent to terminate asylum status through the issuance of a Notice of Intent to Terminate (NOIT). To issue a NOIT, the asylum office must have information establishing a prima facie case supporting termination. The NOIT notifies the applicant of the grounds for termination and includes a summary of the unclassified information that supports the ground of termination.

c. A termination interview is conducted at least 30 days after the date of mailing the NOIT. The termination

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interview, like an asylum eligibility interview, is non-adversarial in nature.

d. USCIS has the burden to demonstrate that a preponderance of the evidence supports termination.

e. If the asylum status of the principle applicant is terminated, the asylum status of all dependents who obtained derivative asylum status through that principal applicant will also be terminated. If the termination grounds apply only to a dependent, only the asylum status of the dependent is terminated.

V. ASYLUM VS. OVERSEAS REFUGEE PROGRAM

Congress created two separate programs to provide protection to refugees -- one applies to refugee applicants outside the United States seeking resettlement (overseas refugee program) and the other to asylum-seekers within the United States or at a port of entry (asylum program). Traditionally, most refugees assisted by the United States have been granted refugee status and resettled in the United States through the overseas refugee program. According to data from the Office of Immigration Statistics (OIS) and internal statistics, the Asylum Division has approved 291,823 cases from FY1980 through FY2012. From 1980 - 2012, the cumulative total number of refugees admitted to the U.S. through overseas programs is 2,651,463. Note that the number of refugees admitted refers to individuals, while the asylum number refers to total cases, and not individuals.

INA §§ 207, 208; Beyer, Reforming Affirmative Asylum Processing in the United States, 9 American University Journal of International Law & Policy, pp. 43-44.

Asylum and overseas refugee processing are closely related functions, but there are distinctions. Because asylum officers may have the opportunity to participate in overseas refugee processing details, all should be aware of the distinctions between the two.

For more information regarding refugee processing, see appendix at the end of this lesson and see RAIO and Refugee Affairs Division training modules.

A. Location of the Applicant

1. Laws governing asylum apply to asylum-seekers physically present in the United States or seeking admission at a port of entry.

INA § 208(a); 8 C.F.R. § 208.2

2. Refugee status is only granted to eligible individuals who are neither physically present in the United States nor seeking admission at a port of entry. Individuals seeking refugee

INA § 207; 8 C.F.R. § 207.1

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status generally apply for admission to the United States by filing the appropriate application with the USCIS overseas officer in charge responsible for the area where the applicant is located.

B. Quotas

1. There are no quotas limiting the number of individuals who may be granted asylum.

INA § 207(a)(5)

2. The number of refugees to be admitted each year is determined by the President in consultation with Congress and varies each fiscal year.

INA § 207
The FY 2013 annual admissions ceilings is 70,000

C. Eligibility

1. To be eligible for asylum, the applicant must meet the definition of "refugee" under the INA. Additionally, asylum is a discretionary benefit. Therefore, even if the applicant meets the definition of refugee and is otherwise eligible for asylum, there are some circumstances in which the applicant may be denied asylum in the exercise of discretion.

INA § 208(a)

Note that there are mandatory bars both to a grant of asylum and to a grant of refugee status.

2. To be admitted as a refugee, the applicant must meet the definition of "refugee" as defined by statute, must be of special humanitarian concern to the United States, and must be admissible to the United States. Additionally, certain overseas refugee applications are governed by the Lautenberg Amendment, which created special evidentiary procedures for establishing eligibility for refugee status.

INA § 207; 8 C.F.R. § 207.2(d)

Martin, David. INS General Counsel. Legal Opinion: Application of the Lautenberg Amendment to asylum applications under INA section 208, Memorandum to John Cummings, Acting Assistant Commissioner, CORAP (Washington, DC: 6 October 1995), 3 p.

D. Adjustment of Status

1. Individuals granted refugee status are required to apply for adjustment of status to lawful permanent resident one year after admission to the United States as a refugee as long as they have not had their refugee status terminated, and have not already acquired permanent resident status. There is no

8 C.F.R. § 209.1(a)

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quota for the number of individuals admitted as refugees who can adjust to permanent resident status each year.

2. Individuals granted asylum are entitled to apply for adjustment of status to lawful permanent resident one year after receiving the asylum grant as long as asylee status has not been abandoned or terminated, they continue to be admissible, they have not been firmly resettled in a third country, and they continue to meet the definition of a refugee.

INA § 208(c)(2)

E. Termination of Refugee Status

1. Unlike Asylum status, Refugee status is only terminated if it is determined that the original grant was in error and the individual did not actually meet the refugee definition at that time.

8 C.F.R. § 207.9; INA § 207(c)(4)

VI. SUMMARY

A. Overview of Asylum Eligibility

Asylum, a discretionary benefit, may be granted to aliens physically present in the United States who meet the definition of a refugee and are not subject to a mandatory denial of asylum.

B. Applying for Asylum

Asylum officers have jurisdiction to adjudicate or refer requests for asylum filed by individuals who 1) are present in the United States and 2) have not been placed in deportation, exclusion, or removal proceedings.

Immigration judges have exclusive jurisdiction over asylum applications filed by applicants who have been served with charging documents after charging documents have been filed with the Office of the Immigration Judge.

An applicant's spouse and children (as defined by the INA) may be included in the asylum request and may be granted derivative asylum status if the principal applicant's request is approved.

C. Post-Filing Procedure

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After the asylum application is processed at the Service Center and sent to the asylum office with jurisdiction, an asylum interview will be automatically scheduled for an interview to take place within 43 days of filing, in most cases.

A non-adversarial interview is conducted, and the interviewing asylum officer will write an assessment or NOID and prepare required decision documents. In most cases, decision documents are served on the applicant in person within 60 days of filing.

D. Asylum vs. Overseas Refugee Program

Though both the asylum process and overseas refugee processing program provide protection to aliens who meet the definition of a refugee, there are significant difference in the location and identification of the applicants, the number of individuals authorized to receive such protection each year, and the requirements for adjustment to lawful permanent resident status.

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APPENDIX

OVERVIEW OF REFUGEE PROCESSING

Section 207 of the INA gives the Attorney General the statutory authority to admit, in his or her discretion, any refugee who is not firmly resettled in a third country, who is determined to be of special humanitarian concern, and who is admissible as an immigrant. This authority has been delegated to USCIS.

1. Application process

   a. Each applicant must submit a Form I-590 (Registration for Classification as Refugee). Applicants 14 years of age and older must also submit a Form G-325C (Biographical Information), and a Form G-646 (Sworn Statement of Refugee Applying for Entry into the United States).

   b. Voluntary agencies or Overseas Processing Entities (OPE), under contract to the Department of State usually assist in prescreening applicants, preparing forms, and presenting cases to USCIS for adjudication.

      The role of the OPE varies in locations where the U.S. operates in-country programs.

      The following agencies are among those which have been under such contract to the Department of State: International Catholic Migration Commission (ICMC); International Rescue Committee (IRC); Hebrew Immigrant Aid Society (HIAS); Church World Service (CWS); and Immigration and Refugee Services of America (IRSA).

   c. The applicant is interviewed by a USCIS officer, in a nonadversarial setting, under oath. As in asylum, the burden of proof for establishing a claim to refugee status rests with the applicant.

   d. Applicants found eligible for refugee status must be medically cleared and must receive a sponsorship assurance prior to traveling to the United States. A sponsorship assurance ensures that a refugee will receive resettlement assistance during the first 30 days after his or her arrival.

      JVAs usually assist U.S. approved refugee applicants in completing post-interview processing requirements.

   e. The spouse and unmarried minor children of a refugee shall be entitled to the same status if accompanying or following to join the refugee, provided they are admissible to the United States as

      INA § 207(c)(2)

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immigrants, and are not otherwise ineligible under INA Section 101(a)(42). There is no requirement that they establish a refugee claim.

2. Ineligibility for consideration for the U.S. refugee program — 8 C.F.R. § 207.1(d)

Individuals who are not eligible to apply for the U.S. refugee program include:

a. individuals who qualify as the immediate relative of a U.S. citizen or as a special immigrant, and — See INA § 101(a)(27) for definition of special immigrant.

b. individuals who do not fall within designated processing priorities

3. Ineligibility for approval — INA §207(c)(1)

a. firm resettlement in a third country

Aliens who are firmly resettled in a third country may not be granted refugee status under INA §207.

A refugee is considered to be 'firmly resettled if he or she has been "offered resident status, citizenship, or some other type of permanent resettlement by a country other than the United States and has traveled to and entered that country as a consequence of his/her flight from persecution." — 8 C.F.R. § 207.1(b). See also 8 C.F.R. § 207.1(c); INA § 207(c)(1)

b. inadmissibility grounds

Refugees must be admissible as immigrants to be granted refugee status under INA §207. However, not all inadmissibility grounds found in INA Section 212(a) (Classes of Aliens Ineligible for Visas or Admission) apply to refugees. The following grounds do not apply to refugees: — INA § 207(c)(1)

- 212(a)(4) (public charge);
- 212(a)(5) (labor certification); and
- 212(a)(7)(A) (documentation requirements).

Refugees may file for a waiver of an inadmissibility ground on Form I-602. Waivers may be granted for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. The Attorney General may waive all other exclusion grounds except for:

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- 212(a)(2)(C) (drug trafficking);
- 212(a)(3)(A) (national security);
- 212(a)(3)(B) (terrorist activity);
- 212(a)(3)(C) (adverse foreign policy consequences); and
- 212(a)(3)(E) (participants in Nazi persecution or genocide).

4. Refugee Admission to the U.S.

Refugees are authorized employment incident to their status and do not need to apply for an Employment Authorization Document (EAD). Their I-94 is accepted as a document which establishes employment authorization.

Refugee admissions codes in CIS: Principal Applicant - RE1; Spouse – RE2; Child - RE3.

a. At the port of entry, the refugee's I-94 is endorsed with the following: "Admitted as a Refugee pursuant to Section 207 of the Act for an indefinite period of time. If you depart the U.S. you will need prior permission to return. Employment authorized."

b. From the port of entry, the refugee's travel packet is forwarded to the Files Control Office (FCO) with jurisdiction over the refugee's place of residence.

A refugee (or asylee) who wishes to temporarily travel abroad must be in possession of a valid Refugee Travel Document (Form I-571) to return to the U.S. Applicants need to complete Form I-131 (Application for Travel Document) for this purpose.

8 C.F.R. §§ 223.2(b)(2)

Form I-131 is filed with the Lincoln, Nebraska Service Center.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

CREDIBILITY

TRAINING MODULE

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

CREDIBILITY

Training Module

MODULE DESCRIPTION

This module provides guidance on evaluating the credibility of an applicant's testimony, including factors to consider in making and documenting a credibility determination, and determining how any non-credible aspects of a claim may affect eligibility. Additionally, the module provides guidance on how to follow up on any credibility concerns that arise during the interview.

TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing the applicant and adjudicating the case, you, the officer, will be able to assess credibility and articulate appropriate reasons supporting your credibility determination.

ENABLING PERFORMANCE OBJECTIVES

1. Explain the legal and analytical framework for making credibility determinations in RAIO adjudications.
2. Explain the significance of the REAL ID Act in RAIO credibility determinations and define key terms, such as "relevance" and "totality of the circumstances."
3. Identify relevant factors to consider in evaluating the credibility of testimony.
4. Distinguish between the various types of credibility concerns that can arise during a RAIO adjudication.
5. Explain the factors an officer must consider when analyzing individual credibility concerns that arise in the course of an adjudication.
6. Make a determination as to the applicant's credibility in the totality of the circumstances, assigning the appropriate weight to factors impacting credibility based on the context of the record as a whole.

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INSTRUCTIONAL METHODS

Interactive presentation

Discussion

Practical exercises

METHOD(S) OF EVALUATION

Multiple-choice exam

Observed practical exercises

REQUIRED READING

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

Additional Resources – International and Refugee Adjudications

Additional Resources – Asylum Adjudications

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR16	Knowledge of the relevant laws and regulations for requesting and accepting evidence (4)
ILR22	Knowledge of the criteria for establishing credibility (4)
DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5)
DM4	Skill in determining applicants' credibility (5)
DM7	Skill in making legally sufficient decisions (5)
DM9	Skill in making legally sufficient decisions with limited information (5)
RI4	Skill in integrating information and materials from multiple sources (e.g., interviews/testimony, legal documents, case law) (4)
RI5	Skill in identifying the relevance of collected information and materials (4)
IRK3	Knowledge of the procedures and guidelines for establishing an individual's identity (4)
IRK4	Knowledge of policies, procedures and guidelines for requesting and accepting evidence (3)
ITS7	Skill in identifying inconsistencies and false statements (4)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
10/16/2012	Entire Lesson Plan	Lesson Plan published (minus ASM supplement)	RAIO Training
11/23/2015	Throughout document	Corrected links and minor typos	RAIO Training
6/20/2016	Supplement B	Added Supplement B – Asylum Division	RAIO Training
3/9/2018	Section 3 and throughout document; Supplement A	Minor updates to clarify analytical framework; added Supplement A – Refugee Affairs Division	RAIO Training
9/26/2019	Entire Lesson Plan	Reorganized Lesson Plan, made comprehensive updates, added new sections and examples, edited for clarity, streamlined text, and removed duplicative content from division supplements	RAIO Training & Divisions
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training

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Throughout this training module, you will come across references to adjudication-specific supplemental information located at the end of the module, as well as links to documents that contain adjudication-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to the adjudications that you will be performing.

For easy reference, supplements for international and refugee adjudications are in pink and supplements for asylum adjudications are in yellow.

You may also encounter references to the legacy Refugee Affairs Division (RAD) and the legacy International Operations Division (IO). RAD has been renamed the International and Refugee Affairs Division (IRAD) and has assumed much of the workload of IO, which is no longer operating as a separate RAIO division.

1 INTRODUCTION

Evaluating the credibility of testimony is fundamental to the evaluation of an applicant's eligibility and, in many cases, is the determining factor. You must make an independent judgment as to the applicant's credibility in every case.[1] You may also need to evaluate the credibility of witness testimony in order to assess whether the applicant has met his or her burden of proof.[2]

All applicants for asylum and refugee status must submit an application form and must be interviewed.[3] When an individual submits an application for asylum or refugee status, he or she is asserting eligibility for an immigration benefit based on his or her identity, past events, and fear of what might happen upon return to the home country.[4] Other interviews conducted by officers in the Refugee, Asylum, and International Operations (RAIO) Directorate, such as asylee/refugee follow-to-join petitions and credible/reasonable fear screenings, also require a credibility determination.[5] The main purpose of the interview is to elicit all relevant and useful information related to eligibility for an immigration

[1] *See, e.g.*, 8 C.F.R. § 208.13(a).

[2] INA § 208(b)(1)(B)(iii).

[3] 8 C.F.R. §§ 208.3(a), 208.9, 207.1(a), 207.2(a).

[4] *See* I-589, Application for Asylum and for Withholding of Removal, available at: https://www.uscis.gov/sites/default/files/files/form/i-589.pdf; *see also* I-590, Registration for Classification as Refugee, available at: https://www.uscis.gov/sites/default/files/files/form/i-590.pdf.

[5] *See, e.g.*, 8 C.F.R. § 208.21.

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benefit.[6] The interview also provides a unique opportunity for you, the adjudicator, to evaluate an applicant's credibility. It is the only live interaction that you will typically have with an applicant before making a decision on his or her case. Therefore, it is a critical step in assessing the applicant's familiarity with his or her claim and evidence, reliability as a witness, and ability to meet his or her burden of proof.[7]

This module provides guidance on evaluating the credibility of an applicant's testimony, including general considerations, the legal framework for making credibility determinations, and factors relevant to a credibility determination. It also provides guidance on how to follow up on any credibility concerns that arise during the interview, and on determining how any non-credible aspects of a claim may affect eligibility. Division-specific materials provide further guidance on considerations unique to the types of adjudications and screenings handled by each division and how to record your credibility analysis in your decision.

2 General Considerations

2.1 Duty to Conduct Interview in a Non-Adversarial Manner

As an officer in the RAIO Directorate, you will conduct different types of interviews. The Code of Federal Regulations, 8 C.F.R. § 208.9(b), requires that asylum officers conduct interviews in a non-adversarial manner.[8] Although this regulation applies specifically to asylum adjudications, all interviews conducted by the directorate are non-adversarial based on the nature of the proceeding, in which the officer is a neutral fact-finder.[9]

Your duty as an officer is to remain non-adversarial throughout the interview.[10] You must evaluate the record as a whole and assess the testimony and evidence you have gathered

[6] 8 C.F.R. § 208.9(b).

[7] *See* 8 C.F.R. § 208.13(a).

[8] 8 C.F.R. §§ 208.9(b) (asylum adjudications); *see also* 208.30(d) (credible fear); 208.31(c) (reasonable fear).

[9] *See, e.g.*, 8 C.F.R. § 207.2(a); Adjudicator's Field Manual (AFM) § 15.1 ("Interviews conducted by adjudication officers are non-adversarial in nature, as opposed to a court proceeding involving two attorneys where each advocates a particular position."); AFM, Appendix 15-2 ("An immigration officer will conduct an interview for each applicant, petitioner or beneficiary where required by law or regulation, or if it is determined that such interview is appropriate. The interview will be conducted in a non-adversarial manner, separate and apart from the general public. The officer must always keep in mind his or her responsibility to uphold the integrity of the adjudication process. As representatives of the United States Government, officers must conduct the interview in a professional manner."); *see also* Immigration and Naturalization Service, *Worldwide Guidelines for Overseas Refugee Processing*, August 1983, p. 20 ("The burden of proof rests with the applicant claiming refugee status. However, INS has a responsibility to identify bona fide refugees, and the interview process provides such a mechanism. The atmosphere of the interview should not be adversarial. It should be conducted so as to gather information to achieve an equitable decision."); RAIO Training module, *Interviewing – Introduction to the Non-Adversarial Interview*, p. 11.

[10] 8 C.F.R. § 208.9(b).

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and which the applicant has presented to you.[11] The issue before you is whether the applicant is credible and has met his or her burden of proof.[12]

2.2 No Presumption of Credibility

The INA explicitly states, "There is no presumption of credibility . . ."[13] An applicant must establish his or her credibility as a component of meeting his or her burden of proof.[14]

Testimony alone can establish eligibility. You have a dual responsibility to elicit all relevant and useful information bearing on the applicant's eligibility and to probe the credibility of the testimony provided.[15] You must evaluate credibility in every case.[16] In many cases, your credibility assessment may be the single biggest factor in determining whether an applicant is able to meet his or her burden of proof.

2.3 Credibility Concerns Must Be Based on Evidence in the Record

A credibility finding, whether positive or negative, must be based on objective facts and must be clearly articulated.[17] Any credibility concerns that arise or are addressed during the interview must be clearly documented in your interview notes.[18]Your notes will form the primary record of the interview and will be relied upon by subsequent reviewers.[19] When credibility concerns do arise, you are expected to elicit an explanation from the applicant, which will help you better assess his or her credibility. For more information, see Section 4.5.1, *Eliciting and Analyzing an Explanation*. Your interview notes must accurately reflect your questions regarding the potentially adverse information, as well as the interviewee's responses, if any.[20]

It is also important to distinguish credibility issues from legal conclusions about the applicant's eligibility. Whether an applicant qualifies for asylum or refugee status is the

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[11] *See* INA § 208(b)(1)(B)(3).

[12] *See* 8 C.F.R. § 208.13(a).

[13] INA § 208(b)(1)(B)(iii).

[14] INA § 208(b)(1)(B)(i); 8 C.F.R. § 208.13(a).

[15] *See* INA § 208(b)(1)(B)(ii); 8 C.F.R. § 208.9(b).

[16] *See* INA § 208(b)(1)(B).

[17] *See, e.g.*, *Chawla v. Holder*, 599 F.3d 998, 1001 (9th Cir. 2010) (adverse credibility determination was not supported by substantial evidence where the IJ and BIA failed to offer "specific and cogent reasons for any stated disbelief.")

[18] For more information on note-taking requirements, *see* RAIO Training module, *Interviewing - Note-Taking*.

[19] *See id.*

[20] *See id.*

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ultimate legal conclusion.[21] Your credibility determination will inform your legal conclusion regarding the applicant's eligibility, but it is only one component of the analysis. For example, it is possible that an applicant for asylum or refugee status testifies credibly about his or her fear of future harm, but his or her fears are not objectively reasonable based on country conditions information. In such circumstances, the lack of an objective fear would not be a credibility concern in and of itself, because people often fear things that are not objectively reasonable.

3 LEGAL FRAMEWORK

In all applications for immigration benefits, the applicant bears the burden of proof to establish eligibility for the benefit he or she is seeking.[22] This means that as a threshold matter, an applicant seeking asylum or refugee status must persuade the officer that his or her evidence is credible.[23]

3.1 Burden of Proof

The burden of proof refers to the duty of one party to prove facts that meet the relevant legal standard.[24] An applicant or petitioner for a benefit under the INA must establish (i.e., bears the burden of proof to establish) that he or she meets the requirements for the benefit being sought and is not subject to any bars or other disqualifying factors.[25] This means that the applicant must produce evidence that establishes the facts of the case, and those facts must meet the relevant legal standard. Such evidence usually includes the applicant's credible testimony, and may be supplemented by additional, corroborative evidence, including another individual's credible testimony.[26]

3.2 Standard of Proof

[21] *See, e.g.*, INA § 208(b)(1)(B)(i); *cf.* INA § 208(b)(1)(B)(iii).

[22] INA § 291; *Matter of Acosta*, 19 I&N Dec. 211, 215 (BIA 1985); *see also* UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Dec. 2011) ("UNHCR Handbook"), at ¶ 196. This also applies to requests for credible or reasonable fear determinations. *See* Asylum Lesson Plan, *Credible Fear of Persecution and Torture Determinations*.

[23] *See* INA § 208(b)(1)(B); *see also Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1262 (9th Cir. 1984).

[24] *See* Black's Law Dictionary: Free Online Dictionary (2d ed. 1910).

[25] INA § 291; INA § 208(b)(1)(B).

[26] INA § 208(b)(1)(B)(ii). Keep in mind that testimony is only one kind of evidence. The applicant is not required to testify to all the facts required to meet his or her burden of proof if those facts are established by non-testimonial evidence. Adjudicators must assess all the evidence (testimony, documents, country conditions, etc.) and find facts, then determine whether the facts found are sufficient to meet the legal standard. For more information about burden of proof, see RAIO Training module, *Evidence*.

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The burden of proof is different from the standard of proof. The standard of proof refers to the amount of evidence, or level of certainty, required to prove a given fact.[27] Different standards of proof apply during different stages of the adjudication process.[28] In refugee and asylum adjudications, the applicant must establish the facts of his or her claim by a preponderance of the evidence.[29] As part of determining whether the applicant has met this burden, it is necessary to assess the credibility and "probative force" of the evidence he or she puts forward.[30]

3.3 Eliciting All Relevant and Useful Information

In order to meet his or her burden of proof, the applicant has a duty to provide testimony in support of his or her claim.[31] You will place the applicant under oath and inform the applicant that he or she must answer your questions truthfully and to the best of his or her knowledge.[32]

You will elicit all relevant and useful information bearing on the applicant's eligibility.[33] To ensure that you are prepared to elicit all such testimony, you usually will need to research country of origin information, carefully review the applicant's file, and consider the individual circumstances of each applicant.[34]

3.4 REAL ID Requirements

In 2005, Congress passed the REAL ID Act, which specifically addressed credibility determinations and corroboration requirements in adjudications of immigration benefits.[35] Congress enacted these provisions in order to "bring clarity and consistency to evidentiary determinations by codifying standards for determining the credibility of applicant testimony, and determining when corroborating evidence may be required."[36]

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[27] *See* Black's Law Dictionary: Free Online Dictionary (2d ed. 1910).

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

[29] *Matter of Acosta*, 19 I&N Dec. 211, 215-16 (BIA 1985).

[30] *Id.*

[31] *See* INA § 208(b)(1)(B).

[32] *See* 8 C.F.R. § 208.9(c). For additional information, see RAIO Training module, *Interviewing – Introduction to the Non-Adversarial Interview*. *See also*, UNHCR Handbook, at ¶ 205(a).

[33] 8 C.F.R. § 208.9(b).

[34] *See* H.R. REP. NO. 109-72, at 167 (2005) (directing adjudicators to take the "individual circumstances" of the applicant or witness into account).

[35] Pub.L. 109–13, Div. B, 119 Stat. 231, 302 (enacted May 11, 2005).

[36] H.R. REP. NO. 109-72, at 165 (2005).

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These provisions of the REAL ID Act were based on principles that had been articulated in prior decisions of the Board of Immigration Appeals and circuit courts of appeals, but also modified these principles.[37]

The REAL ID Act added to the Immigration and Nationality Act four major provisions addressing credibility determinations and corroboration to sections 208 (governing applications for asylum) and 240 (governing all applications for relief made in removal proceedings before an immigration judge). Although the REAL ID Act did not explicitly amend INA § 207, which addresses applications for refugee status, as a matter of policy, USCIS applies the same standards to refugee adjudications.[38]

The new provisions included:

- A requirement that the adjudicator consider the "totality of the circumstances, and all relevant factors" in making a credibility determination;[39]
- A listing of factors that an adjudicator may consider in making such a determination, including demeanor, candor, responsiveness, inherent plausibility of the account, consistency between oral and written statements, internal consistency of a statement, consistency of statements with other evidence of record (including country conditions reports), inaccuracies or falsehoods in such statements, and "any other relevant factor";[40]

[37] Prior case law introduced the concept that an officer must evaluate an applicant's credibility in light of the record as a whole. *See* Matter of Kasinga, 21 I&N Dec. 357, 364 (BIA 1996); Matter of S-M-J-, 21 I&N Dec. 722, 729 (BIA 1997). It also established that testimony could be considered credible in the context of an asylum adjudication if it was "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for [the applicant's] fear." *See* Matter of A-S-, 21 I&N Dec. 1106, 1108-09 (BIA 1998); *see also* Matter of S-M-J-, 21 I&N Dec. at 729; Singh-Kaur v. INS, 183 F.3d 1147, 1153 (9th Cir. 1999). The Ninth Circuit imposed an additional requirement, later adopted by other circuits, that inconsistencies used to determine that an applicant is not credible must go "to the heart of [the applicant's] claim," meaning they must be material to the claim, i.e., relating to a required legal element of the refugee definition. *See, e.g.,* Singh v. Ashcroft, 301 F.3d 1109, 1111 (9th Cir. 2002); Secaida-Rosales v. INS, 331 F.3d 297, 308 (2d Cir. 2003); Tarrawally v. Ashcroft, 338 F.3d 180, 187 (3d Cir. 2003); Yu v. Ashcroft, 364 F.3d 700, 703 (6th Cir. 2004); Pop v. INS, 270 F.3d 527, 531 (7th Cir. 2001); Kondakova v. Ashcroft, 383 F.3d 792, 796 (8th Cir. 2004) (adopting the Ninth Circuit's approach); *see also* Sylla v. INS, 388 F.3d 924, 926 (6th Cir. 2004) ("If discrepancies cannot be viewed as attempts by the applicant to enhance his claims of persecution, they have no bearing on credibility."); Vilorio-Lopez v. INS, 852 F.2d 1137, 1142 (9th Cir. 1988) ("Minor inconsistencies in the record such as discrepancies in dates which reveal nothing about an asylum applicant's fear for [her] safety are not an adequate basis for an adverse credibility finding.").

[38] Rex W. Tillerson, Department of State, et al., *Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities*, Memorandum to the President (Washington, DC; October 23, 2017).

[39] INA § 208(b)(1)(B)(iii).

[40] *Id.*

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- A clarification that, contrary to earlier holdings in some circuit courts, inconsistencies, inaccuracies, or falsehoods do not need to "go to the heart of the applicant's claim" to be considered in the overall determination; [41] and

- A provision that an applicant's testimony may be sufficient to sustain his or her burden of proof without corroboration if it "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee," but that if the adjudicator determines that additional evidence is needed to corroborate otherwise credible testimony, the applicant must either provide the evidence or provide a reasonable explanation as to why he or she cannot provide it.[42]

The REAL ID Act did not expressly list "detail" as a factor to be considered in evaluating the credibility of an applicant or witness in INA § 208(b)(1)(iii). However, detailed testimony is still considered a hallmark of credibility, based on congressional intent to codify existing factors that had been "identified in case law" and the inclusion of the catch-all phrase, "any other relevant factor."[43]

As noted above, an applicant may establish eligibility through testimony alone, but you, as the adjudicator, may determine that other evidence is needed to corroborate otherwise credible testimony.[44] Failure to produce the required evidence or a reasonable explanation of why it cannot be produced is a failure of proof.[45] The BIA has indicated that a failure of proof—lack of specificity or lack of corroboration—is usually considered as part of the burden of proof analysis, not as part of the credibility determination.[46] As the BIA has explained:

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[41] *Id.*

[42] INA § 208(b)(1)(B)(ii).

[43] *See* H.R. REP. NO. 109-72, at 166; *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987); *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010) ("[E]ven though lack of detail is not expressly listed as a factor that may be considered, the pre-REAL ID Act practice of looking to the level of detail of the claimant's testimony to assess credibility . . . remains viable under the REAL ID Act as it is a 'relevant factor.'"); *see also Dorosh v. Ashcroft*, 398 F.3d 379, 382 (6th Cir. 2004); *Capric v. Ashcroft*, 355 F.3d 1075, 1085 (7th Cir. 2004); *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004).

[44] INA § 208(b)(1)(B)(ii).

[45] *See* RAIO Training module, *Evidence*, for a more detailed discussion of corroboration and the appropriate considerations for determining when a request for corroboration is reasonable.

[46] While lack of specificity or corroboration are factors normally considered to be part of the burden of proof analysis, there may be circumstances in which an applicant's success or failure in providing specific testimony or corroborating documents could nonetheless be cited as a factor in the credibility determination, especially in conjunction with other relevant credibility factors, such as consistency, demeanor, candor, and responsiveness. *See, e.g., Esaka v. Ashcroft*, 397 F.3d 1105, 1110 (8th Cir. 2005); *Ombongi v. Gonzalez*, 417 F.3d 823, 826 (8th Cir. 2005); *see also Zhao Lin Chen v. Holder*, 531 F. App'x 364, 369 (4th Cir. 2013) ("A lack of detail and generalized testimony can be both a factor in assessing whether an applicant has satisfied his or her overall burden of proof and a factor in considering the credibility of an applicant's testimony. While the two analyses are distinct, they do sometimes overlap."); *but see Chen v. Gonzales*, 434 F.3d 212, 221 (3d Cir. 2005) (stating that the corroboration analysis should remain separate from the credibility analysis: "It might seem intuitive that a lack of corroboration

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> [T]here may be instances in which an [adjudicator] finds an applicant to be credible, but finds that she has failed to meet her burden of proof. For example, it may be that an applicant's testimony is plausible in light of general country conditions information, but that it is overly general. In such a case, we would find that the applicant had failed to meet the required burden of proof, but an adverse credibility determination would not be appropriate. . . . A failure of proof is not a proper ground *per se* for an adverse credibility determination.[47]

For more information about corroboration and burden of proof issues, see RAIO Training module, *Evidence*.

4 CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES AND ALL RELEVANT FACTORS

You must consider the totality of the circumstances when making a credibility determination.[48] In order to consider the totality of circumstances, you are expected to elicit and analyze all relevant information bearing on the applicant's eligibility.[49] This includes the individual circumstances of the applicant; when Congress enacted the REAL ID Act, it said the following:

> [A]lthough [the statute] would allow an adjudicator to base an adverse credibility determination on any of the factors set forth therein, such a determination must be reasonable and take into consideration the individual circumstances of the specific witness and/or applicant. While the [adjudicator] is not required to state expressly that [he or she] has considered each factor in assessing credibility, Congress expects that the [adjudicator] will describe those factors that form the basis of the [decision].[50]

As discussed in further detail in this section, you must consider the record as a whole when making a credibility determination, taking into account all factors that are relevant to an applicant's credibility or "veracity as a witness." If there are credibility concerns in

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could cast doubt on the veracity of a witness's testimony, even a witness whose story was delivered with an appealing demeanor, internally consistent, and not inherently improbable . . . However, it is clear that the BIA's own rule requires a credibility determination to be independent of an analysis of the sufficiency of an applicant's evidence.").

[47] *Matter of S-M-J-*, 21 I&N Dec. 722, 731 (BIA 1997).

[48] INA § 208(b)(1)(B)(iii).

[49] 8 C.F.R. § 208.9(b).

[50] H.R. REP. NO. 109-72, at 167 (2005).

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an applicant's testimony, considering the totality also means providing the applicant with an opportunity to explain those concerns and determining the relative weight of the concerns in the totality of the circumstances.[51]

4.1 Consideration of the Entire Record

You must consider all the evidence available to you when analyzing an applicant's credibility. In discussing the proper approach to credibility determinations, the Third Circuit stated, "[An] overall credibility determination does not necessarily rise or fall on each element of the witness's testimony, but rather is more properly decided on the cumulative effect of the entirety of all such elements."[52]

With the passage of the REAL ID Act, Congress essentially codified this approach originally developed in case law by requiring the adjudicator to consider the entire record.[53] The REAL ID Act offers broad discretion to administrative fact finders. However, that discretion is not limitless. As explained by the Fourth Circuit, "It does not . . . permit a judge to 'cherry pick' facts or inconsistencies to support an adverse credibility finding that is unsupported by the record as a whole."[54]

Examples

- The BIA upheld an immigration judge's (IJ's) negative credibility finding in the case of an asylum applicant who submitted a fraudulent national identity card in an attempt to establish central elements of his claim – his identity and nationality – and failed to provide an explanation for doing so. There were also inconsistencies found between the applicant's testimony in his Form I-589 asylum application and his testimony at the immigration hearing. The BIA reviewed the IJ's credibility determination based upon the totality of the circumstances, considering not only the submission of the fraudulent document, but the entirety of the record and found "that the remaining inconsistent record presented by the

[51] The analysis of individual credibility concerns is discussed in further detail in section 4.5, *Analyzing Individual Credibility Concerns*.

[52] *Jishiashvili v. U.S. Att'y Gen.*, 402 F.3d 386, 396 (3d Cir. 2005).

[53] *See* INA § 208(b)(1)(B)(iii).

[54] *Ilunga v. Holder*, 777 F.3d 199, 207 (4th Cir. 2015), citing *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014); *accord Jabri v. Holder*, 675 F.3d 20, 24 (1st Cir. 2012) ("[W]hile the Real ID Act permits the IJ to consider inconsistencies that do not go to the heart of the applicant's claim, he may only do so as part of his consideration of the totality of the circumstances, and all relevant factors. The IJ must, in other words, present a reasoned analysis of the evidence as a whole.") (internal citations and quotations omitted); *Lin v. Gonzales*, 446 F.3d 395, 401 (2d Cir. 2006) (emphasizing that adverse credibility findings are appropriate when based on the "record as a whole."); *Shah v. Att'y Gen. of U.S.*, 446 F.3d 429, 437 (3d Cir. 2006) (IJs are not expected to "selectively consider evidence"); *Hanaj v. Gonzales*, 446 F.3d 694, 700 (7th Cir. 2006) (same).

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respondent is insufficient to overcome the pall cast on the respondent's credibility by virtue of his submission of the counterfeit document."[55]

- The BIA upheld an IJ's negative credibility finding although some of the inconsistencies relied upon by the IJ did not relate to the "heart of the [applicant's] claim." The BIA found that the inconsistencies were nonetheless indicative of the applicant's credibility under the standards of the REAL ID Act, and noted that the implausibility of the applicant's claim, the IJ's demeanor findings, and the lack of reasonably obtainable corroborating documentation all supported the adverse credibility finding.[56]

- The Sixth Circuit Court of Appeals rejected an adverse credibility finding in a post-REAL ID case where the conclusions of the IJ and BIA "rested on speculation and conjecture, and showed no sensitivity to language barriers and the use of translators." The court further found that "the [applicants'] thorough and coherent account of their repeated persecution holds together and compels the conclusion that they testified credibly, despite the minor flaws that emerged in their long hours of testimony and large volume of evidence submitted."[57]

4.2 Defining Relevance

All credibility factors, by definition, must be relevant to an applicant's "veracity as a witness," meaning that they are indicative of the truthfulness, or reliability, of an applicant's testimony. A factor is relevant if it is "logically connected and tending to prove or disprove a matter in issue."[58] The credibility factors identified in the REAL ID Act and in case law (consistency, detail, plausibility, demeanor, candor, responsiveness, inaccuracies, and falsehoods) are relevant to the applicant's veracity as a witness.[59] See Section 4.4, *Identifying Credibility Concerns*, for a more detailed discussion of each of these factors.

Under the INA, as amended by the REAL ID Act, officers may base a credibility determination on the enumerated factors, "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim,"[60] as long as the factors are ***relevant*** to the evaluation in light of the ***totality of the circumstances***.[61] This

[55] *Matter of O-D-*, 21 I&N Dec. 1079, 1084 (BIA 1998).

[56] *Matter of J-Y-C-*, 24 I&N Dec. 260, 265-66 (BIA 2007).

[57] *Marouf v. Lynch*, 811 F.3d 174, 182 (6th Cir. 2016).

[58] Black's Law Dictionary (10th ed. 2014).

[59] *See* INA § 208(b)(1)(B)(iii).

[60] *Id.*

[61] *See Chen v. U.S. Att'y Gen.*, 463 F.3d 1228, 1231 (11th Cir. 2006); *Xu Xia Lin v. Mukasey*, 534 F.3d 162, 163 (2d Cir. 2008) ("[I]n evaluating an asylum applicant's credibility, an IJ may rely on omissions and inconsistencies that

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means you may encounter credibility factors that have no direct bearing on the applicant's asylum or refugee claim, or other eligibility issue, but are nonetheless still relevant to the applicant's veracity, or reliability, as a witness. As the Ninth Circuit has stated, "[u]nder the REAL ID Act, even minor inconsistencies that have a bearing on [an applicant's] veracity may constitute the basis for an adverse credibility determination."[62] However, the court also emphasized that issues that are "manifestly trivial" considering the totality of the circumstances, or rest largely on mischaracterizations of the applicant's testimony, have "no bearing" on the applicant's veracity as a witness.[63]

Factors such as your personal views of a country or claim, your moral judgments, or your opinions about appropriate behavior are also irrelevant to the applicant's veracity as a witness.[64] Your personal experiences and opinions cannot be substituted for objective evidence.[65] People do not always behave rationally or conform to common stereotypes.[66]

For a discussion of how relevance impacts the relative weight, or importance, of an individual credibility concern in your totality of the circumstances analysis, see Section 4.5.2, *Analyzing the Relative Weight of Credibility Concerns*.

4.3 Considerations that May Influence the "Totality of the Circumstances" Analysis

The following factors may influence your overall totality of the circumstances analysis. These factors may inform how you analyze individual credibility concerns, or whether you consider certain issues to be credibility concerns.

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do not directly relate to the applicant's claim of persecution as long as the totality of the circumstances establish that the applicant is not credible.").

[62] *Ren v. Holder*, 648 F.3d 1079, 1089 (9th Cir. 2011).

[63] *Id.*; *see also Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1092, 1095 (9th Cir. 2014) ("In light of [the] significant record evidence . . . no reasonable fact-finder could have determined that the discrepancy in dates was anything but an utterly trivial discrepancy that under the totality of the circumstances [has] no bearing on [the applicant's] veracity.") (internal quotations omitted).

[64] *See, e.g.*, *Dia v. Ashcroft*, 353 F.3d 228, 255 (3d. Cir. 2003); *Musollari v. Mukasey*, 545 F.3d 505, 509 (7th Cir. 2008); *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986); *see also Matter of A-S-*, 21 I&N Dec. 1106, 1109 (BIA 1998) (requiring "specific and cogent reasons" in support of an adverse credibility determination).

[65] *See, e.g.*, *Musollari*, 545 F.3d at 509 (IJ's implausibility finding based on his personal experience with Albanian asylum seekers was insufficient to support an adverse credibility finding); *Damaize-Job*, 787 F.2d at 1337 (it was inappropriate for an IJ to find that an applicant was not credible because he failed to marry the mother of his two children); *but see Lamim v. Holder*, 760 F.3d 135, 138 (1st Cir. 2014) (the BIA did not "unduly" focus on an applicant's affair or base its decision on a "moral judgment" about the applicant's infidelity, despite the IJ's consideration of these factors). Moral judgments may also deprive an applicant of due process and a fair hearing. *See, e.g.*, *Reyes–Melendez v. INS*, 342 F.3d 1001, 1007 (9th Cir. 2003).

[66] *See e.g.*, *Dia*, 353 F.3d at 255 (IJ's disbelief that the applicant's wife would urge him to flee the country without her after she had just been raped, among other issues, was based on speculation, conjecture, and unsupported personal opinion); *Razkane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2009) (IJ's statement that the applicant did not have the "appearance, dress and affect of a homosexual," leading him to conclude that the applicant would not be identified as such, was impermissibly influenced by stereotypes about homosexuals).

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4.3.1 Personal Background of the Applicant

You should ask the applicant foundational questions to ascertain his or her competence, level of understanding, or degree of involvement in relevant events or activities that form the basis of the applicant's claim. An applicant's age,[67] level of education, sophistication, or cognitive development[68] may affect his or her ability to respond to questions and must be considered as part of the totality of the circumstances.[69] For this reason, it is important to ask questions appropriate to the applicant's particular background and experiences.

Taking into account these factors may assist you in determining what types of details or other information it is reasonable to expect the applicant to provide. For example, in questioning an asylum or refugee applicant whose claim is based on religion or membership in an organization, you should establish a baseline sense of the applicant's level of participation. A low-level member or supporter may not have the same level of knowledge as a leader or intellectual in a movement. On the other hand, an applicant who is heavily involved in a particular organization or who is a high-ranking official within the organization may be able to testify in more detail about the organization. A clear distinction must be made between adherents and experts.[70]

Whether and the degree to which an applicant has suffered trauma is also a relevant factor when evaluating the applicant's manner of testifying.[71] "Trauma may cause memory loss or distortion, and may cause other applicants to block certain experiences from their minds in order not to relive their horror by the retelling."[72] For more information on how trauma may impact an applicant's ability to testify in an asylum or refugee interview, see RAIO Training module, *Interviewing Survivors of Torture and Other Severe Trauma*.

4.3.2 Cross-Cultural Factors

[67] *See* Matter of Kasinga, 21 I&N Dec. 357, 364 (BIA 1996) (taking into account the applicant's age at the time of flight from persecution)

[68] *See* Matter of J-R-R-A-, 26 I&N Dec. 609, 609-10 (BIA 2015) (overturning the IJ's adverse credibility determination due to suspected issues with the applicant's mental competency).

[69] *See* H.R. REP. NO. 109-72, at 167 (2005) (directing adjudicators to take the "individual circumstances" of the applicant or witness into account).

[70] Rizal v. Gonzales, 442 F.3d 84, 90 (2d Cir. 2006); Cosa v. Mukasey, 543 F.3d 1066, 1070 (9th Cir. 2008) ("Remarkably, the IJ set up a Bible quiz and an academic trivia contest as the foundation for the adverse credibility finding. Cosa claimed no expertise in Bible study or passages nor did she claim to have an intellectual's understanding of Millenism.").

[71] *See, e.g.*, Matter of A-S-, 21 I. & N. Dec. 1106, 1110 (BIA 1998) ("We recognize that in some cases, an applicant who has fled persecution may have trouble remembering exact dates when testifying before an Immigration Judge.").

[72] Phyllis Coven, INS Office of International Affairs. *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, Memorandum to INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995); *see also*

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Differences in culture are relevant to the evaluation of an applicant's credibility.[73] A perceived credibility concern may be due to the applicant's cultural background.[74] For example, eye contact is a form of body language that has different meanings in different cultures. An applicant may not maintain eye contact with you out of deference to or respect for a person of authority.[75] However, it is also possible that the applicant's cultural background does not resolve the credibility concern.[76] For further information on how cultural factors may influence an interview, see RAIO Training module, *Cross-Cultural Communication and Other Factors that May Impede Communication at an Interview*.

4.3.3 Interpretation Issues

You must pay close attention to the interpretation during a refugee or asylum interview. Interpretation issues may indicate a credibility or fraud concern.[77] For example, interpreters may try to "coach" the applicant in an interview, change the applicant's answers, or speak on behalf of the applicant during an interview. Some indicators of misinterpretation include the following: the interpreter uses more words to interpret than appears to have been required; the interpreter provides very short answers after the applicant speaks for a long time; there is dialogue between the interpreter and applicant without explanation; or words you recognize without interpretation are not interpreted.[78] You should recognize and carefully consider any red flags regarding interpretation that arise in the interview, determine whether these concerns indicate a miscommunication issue, and report suspicious activities according to your division-specific guidance.

Even in the absence of fraud, genuine misunderstandings may arise. The interpreter's and applicant's inexperience with interpretation and the interview process can create an

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[73] *See Ilunga v. Holder*, 777 F.3d 199, 212 (4th Cir. 2015) ("[L]inguistic and cultural differences, combined with the effects of trauma, caution against normative determinations.").

[74] *See, e.g., Rama v. Holder*, 607 F.3d 461, 466 (7th Cir. 2010) ("The IJ accepted the petitioners' explanation that the rape may not have been mentioned because of the cultural and other difficulties of disclosing it…"); *see also Cordero-Trejo v. INS*, 40 F.3d 482, 490 (1st Cir. 1994) (finding the fact that the applicant's spouse signed her full name on several letters to the applicant, as opposed to the "more familiar form" was not necessarily contrary to someone of the applicant's spouse's background).

[75] *See Dia v. Ashcroft*, 353 F.3d 228, 275-76 (3d Cir. 2003) ("[W]hile the failure to look someone in the eye while speaking is usually interpreted as an indication of deception by people in Western cultures, avoiding eye contact has a very different meaning in some other cultures."); *Iao v. Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005).

[76] *See Qing Hua Lin v. Holder*, 736 F.3d 343, 349 (4th Cir. 2013) (finding the applicant's "'cultural misunderstanding' explanation regarding [inconsistent statements about] her marital status was undermined by the fact that during her first hearing she repeatedly testified that she was married").

[77] *See, e.g.*, Joseph Goldstein & Kirk Semple, *Law Firms Are Accused of Aiding False Asylum Claims for Chinese*, N.Y. Times, Dec. 19, 2012, at A28; U.S. Attorney's Office, SDNY, Press Release, *Twenty-Six Individuals, Including Six Lawyers, Charged in Manhattan Federal Court with Participating in Immigration Fraud Schemes Involving Hundreds of Fraudulent Asylum Applications*, Dec. 18, 2012, Fed. Bureau of Investigation.

[78] *See* RAIO Training module, *Interviewing – Working with an Interpreter*, p. 17.

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obstacle to good communication.[79] The applicant may speak too rapidly or explain too much at once, making it difficult for all information to be interpreted accurately.[80] Likewise, an officer may ask several questions at once, speak too quickly or give a long or technically complex explanation.[81] Furthermore, the applicant and interpreter may not speak the same first language, or may speak distinct dialects of the same language.[82] In both the asylum and refugee context, different interpreters may be used at different stages of the application process. This can lead to the appearance of inconsistencies due to different interpreters using different terminology.

These factors may lead to misunderstandings that, if unresolved, can adversely affect the accuracy of the credibility evaluation.[83] Keep in mind that it is your responsibility as an officer to facilitate accurate interpretation through your interviewing skills.[84]

Example

> An immigration judge found that a Guatemalan applicant was not credible. The U.S. Court of Appeals for the Ninth Circuit found that the record indicated that the K'iche' (Quiché)-speaking applicant did not understand some of the questions being interpreted for him. Although the interpreter was interpreting in K'iche', the applicant's answers to the IJ's questions indicated a lack of understanding. The interpretation problem was exacerbated by the aggressive questions from the IJ.[85]

4.3.4 Similar Claims

The fact that an applicant's claim is very similar to other claims may be an indicator of possible credibility issues. Similar claims can present a starting point for additional lines of questioning in your interview,[86] but the fact that a claim is similar to another claim may not, in itself, be determinative of the applicant's credibility.[87] For information on

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[79] *See id.*, pp. 13, 19.

[80] *See id.*, pp. 25-27.

[81] *See id.*

[82] *See Amadou v. INS*, 226 F.3d 724, 725 (6th Cir. 2000).

[83] *See Abulashvili v. Attorney General of U.S.*, 663 F. 3d 197, 206 (3d Cir. 2011).

[84] *See* RAIO Training module, *Interviewing – Eliciting Testimony*, pp. 13-19.

[85] *Perez-Lastor v. INS*, 208 F.3d 773, 778-779 (9th Cir. 2000).

[86] *See* RAIO Training module, *Interviewing – Eliciting Testimony*.

[87] *See Matter of R-K-K-*, 26 I&N Dec. 658, 660-61 (BIA 2015) (upholding the IJ's adverse credibility determination where the applicant's asylum declaration used similar language to describe events that were almost identical to those described by his brother, including the same spelling and grammatical errors); *see also Mei Chai Ye v. USDOJ*, 489 F.3d 517 (2d Cir. 2007); *Wang v. Lynch*, 824 F.3d 587 (8th Cir. 2016).

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how to address similar claims or "boilerplate" applications in an asylum interview, see Asylum Adjudications Supplement – Boilerplate Claims, in this module.[88]

4.4 Identifying Credibility Concerns

When you are analyzing an applicant's credibility, you must identify the factors on which you base your determination. Below is a description of the different types of credibility concerns that may arise in your adjudications. As noted above, these factors are specifically mentioned in the REAL ID Act or in case law, and must be considered as part of your credibility analysis.[89]

4.4.1 Consistency

General Rule

You must examine an applicant's statements (oral or written) for internal consistency, consistency with the applicant's other statements, and consistency with other evidence in the record, such as country conditions reports. Inconsistencies in the applicant's testimony or other evidence may be a negative factor that must be assessed in the totality of the circumstances and may support an adverse credibility finding.[90]

Inconsistencies may arise during the course of the interview when the applicant contradicts himself or herself, or when the documentation presented by the applicant or in other records contradicts the claim. For example, a passport submitted to establish identity, or US government records, such as evidence of making a visa application in a particular location, may reveal travel that indicates that the applicant was not in the country during a period when he or she claims to have been persecuted.

Inconsistencies also may occur between testimony given by family members on the same case, on independent cases, or in overseas refugee processing, on cross-referenced cases. In the following-to-join context, you may identify inconsistencies between information in the principal refugee or asylum application and the following-to-join family member's testimony.[91]

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[88] There is no corresponding guidance on boilerplate statements for refugee adjudications because refugees do not submit self-generated written submissions.

[89] *See* INA § 208(b)(1)(B)(iii); *Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995); *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987); *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010); *cf. Dorosh v. Ashcroft*, 398 F.3d 379, 382 (6th Cir. 2004) ("Under BIA rulings, credibility encompasses not just consistency but also plausibility and sufficient detail."); *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004) (same).

[90] INA § 208(b)(1)(B)(iii); *Matter of Kasinga*, 21 I&N Dec. 357, 364 (BIA 1996).

[91] Refugee resettlement cases will often be cross-referenced with other family members. For purposes of refugee interviews, discrepancies between information presented in cross-referenced cases would be considered as inconsistencies, though confidentiality must be considered when addressing such issues with the applicant. In the asylum context, government databases may reveal cases of related family members, but for confidentiality purposes those cases should not usually be referenced in the decision making process. *See* 8 C.F.R. § 208.6. In the following-

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If you identify a potential inconsistency, you should elicit additional testimony to explore whether there is, in fact, an inconsistency, clarify the applicant's testimony, and investigate potential explanations for the inconsistency that the applicant might provide.

Examples

(Inconsistency Concerns Upheld)[92]

- According to the applicant's written statement, he was shot "during his college years, from 1983 to 1988, at a party hosted by his college boyfriend Henry." However, the applicant later testified that the shooting happened "nearly a decade later at the house of a boyfriend named Steven in 1997."[93]

- The applicant claimed that she suffered lasting economic harm and was unable to earn a livelihood because she received poor conduct grades in school on account of her religion. However, examination of her school transcript indicated that she received high marks in conduct throughout her years in school.[94]

- The applicant stated that he had witnessed only his father's kidnapping, not his uncle's, but later stated that he witnessed both being kidnapped. He stated that he never saw his father again after the uniformed men took him away, but also stated that his father and his uncle were both paraded past his house after the kidnapping. His mother's letter, introduced as evidence, conflicted with all of the applicant's versions of the story.[95]

(Inconsistency Concerns Not Upheld)

- There were discrepancies between the applicant's testimony and a medical report submitted in support of his claim. While the medical report stated that the

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to-join context, information in the petitioner's refugee or asylum application may relate to family relationships, including when and how the following-to-join beneficiary last had contact with the petitioner. While confidentiality rules preclude you from informing the beneficiary of those inconsistencies, they may direct the line of questioning to probe more deeply into the related issues.

[92] Throughout this section, examples of credibility concerns that were "upheld" refers to credibility factors that were found to support an adverse credibility determination by a reviewing authority (BIA or circuit court), usually prompting the reviewing authority to uphold the Immigration Judge's credibility determination on appeal. In most cases, there were multiple factors that contributed to the ultimate credibility determination in addition to those illustrated in the examples. Examples of credibility concerns that were "not upheld" refers to credibility factors that were found not to support an adverse credibility determination by a reviewing authority, usually prompting the court or BIA to overturn the Immigration Judge's credibility determination on appeal.

[93] *Fuller v. Lynch*, 833 F.3d 866, 869 (7th Cir. 2016).

[94] *Pop v. INS*, 270 F.3d 527, 531 (7th Cir. 2001).

[95] *Bojorques-Villanueva v. INS*, 194 F.3d 14, 16-17 (1st Cir. 1999).

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applicant had a blood transfusion, the applicant described receiving an "IV"; the medical report also indicated he had "surgery," but the applicant testified only that physicians had to "open up his hand and find the veins" to repair a cracked bone and severed nerve. The applicant had very limited education and testified that he did not fully understand the medical treatment he was given.[96]

- The applicant testified that he was dragged into a "car" when he was arrested, while his written statement indicated that he was taken to a "truck." However, the applicant stated that the "car" held 10 other people, all other pertinent information in his testimony about this incident remained the same, and the applicant's statements were being translated from French in both cases.[97]

- The applicant's statement on the application indicated that he and his brothers were accosted by "unknown armed men," while he testified that they were accosted by "death squads."[98]

The last example illustrates a type of perceived inconsistency that results when an officer fails to clarify language or lay a foundation in an interview. It is much better to address such issues by asking follow-up questions during the interview prior to asking for an explanation.

Omissions vs. Inconsistencies

Although the REAL ID Act does not specifically mention omissions,[99] they are often equated with inconsistencies.[100] Case law establishes that a substantial omission of information in the applicant's testimony or evidence may be considered a negative credibility factor regardless of whether it goes to the heart of the applicant's claim.[101] Omissions may indicate an attempt by an applicant to embellish his or her claim by introducing new information late in the proceedings. On the other hand, an applicant is not required to list every incident of persecution or detail about the claim in his or her written application.[102] For this reason, omissions may be less probative of credibility than inconsistencies created by direct contradictions in testimony and other evidence.[103]

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[96] *Chun Sui Yuan v. Lynch*, 827 F.3d 648, 654 (7th Cir. 2016).

[97] *Kueviakoe v. U.S. Atty. Gen.*, 567 F.3d 1301, 1305 (11th Cir. 2009).

[98] *Cordero-Trejo v. INS*, 40 F.3d 482, 488 (1st Cir. 1994).

[99] *See* INA § 208(b)(1)(B)(iii).

[100] *See Hong Fei Gao v. Sessions*, 891 F.3d 67, 78 (2d Cir. 2018) (noting that inconsistencies and omissions are "functionally equivalent" for adverse credibility purposes).

[101] *See Matter of A-S-*, 21 I&N Dec. 1106, 1109-10 (BIA 1998); *Segran v. Mukasey*, 511 F.3d 1, 6 (1st Cir. 2007) ("It beggars credulity that so momentous an event—if it occurred—would have been inadvertently omitted from the petitioner's original account."); *Hong Fei Gao*, 891 F.3d at 77.

[102] *See Lianping Li v. Lynch*, 839 F.3d 144, 150 (2d Cir. 2016) ("[A]sylum applicants are not required to list every incident of persecution on their I–589 statement . . ."); *Hong Fei Gao v. Sessions*, 891 F.3d 67, 78 (2d Cir. 2018);

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As with all credibility considerations, the significance of an omission must be evaluated in the context of the applicant's testimony as a whole.[104] The Second Circuit has explained that an adjudicator must distinguish between omissions that arise merely because an applicant's oral testimony is more detailed than his or her written application and omissions that tend to show that an applicant has fabricated his or her claim.[105]

Examples

(Omission Concern Upheld)

- An applicant claimed to have suffered persecution in Azerbaijan based on his participation in a political opposition party. After his application was referred to the immigration court, he submitted a supplemental declaration detailing two additional arrests and a beating that he failed to mention in his initial application or during his asylum interview, despite being given the opportunity to do so. The Ninth Circuit upheld the IJ's adverse credibility determination, finding that the omissions constituted "material alterations" in the applicant's account of persecution that made it much more compelling, and he failed to provide a reasonable explanation for not disclosing these incidents earlier.[106]

(Omission Concern Not Upheld)

- A Chinese applicant who claimed to fear persecution on account of his religion failed to mention in his application or on direct examination before the IJ that a former church friend had been arrested in China and his wife was recently

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Kaba v. Mukasey, 546 F.3d 741, 749, n.2 (6th Cir. 2008) ("In considering applications filed after May 11, 2005, 'a trier of fact may base a credibility determination on the ... consistency between the applicant's ... written and oral statements.'. . . Even so, such a determination must take into account 'the circumstances under which the statements were made.' Thus, as long as statements in an application are not inconsistent with oral testimony, mere lack of specificity in an application, compared with more detailed testimony at an evidentiary hearing, will not provide support for a finding that a petitioner is not credible.") (internal citations omitted); Lai v. Holder, 773 F.3d 966, 971 (9th Cir. 2014); *see also* Lopez–Reyes v. INS, 79 F.3d 908, 911 (9th Cir. 1996) ("It is well settled that an applicant's testimony is not *per se* lacking in credibility simply because it includes details that are not set forth in the asylum application.").

[103] Hong Fei Gao, 891 F.3d at 78; Lai, 773 F.3d at 971.

[104] *See* Ismaiel v. Mukasey, 516 F.3d 1198, 1204 (10th Cir. 2008) ("[T]he significance of an omission must be determined by the context, and rigid rules cannot substitute for common sense.").

[105] Hong Fei Gao, 891 F.3d at 82. In discussing the probative value of omissions in the immigration context, the Second Circuit also explained that a fact finder "should consider whether those facts are ones that a credible petitioner would reasonably have been expected to disclose under the relevant circumstances." *Id.* at 78-79; *cf.* Hassan v. Holder, 571 F.3d 631, 639 (7th Cir. 2009) (making a distinction between "material" omissions and those that are "trivial" in nature); Lai, 773 F.3d at 973 (distinguishing omissions where the additional information is "supplemental" rather than "contradictory" in nature); *see also* Jenkins v. Anderson, 447 U.S. 231, 239 (1980) ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted.").

[106] Zamanov v. Holder, 649 F.3d 969, 972-74 (9th Cir. 2011).

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arrested because of him. However, the Ninth Circuit rejected the IJ's adverse credibility determination based on these factors alone, finding that the new information had been adduced as a result of specific questions posed by the government attorney on cross-examination, not as a result of the applicant volunteering this information to bolster his claim. In addition, the applicant was never put on notice or given an opportunity to explain the first omission, and he provided a reasonable explanation for the second; he stated he only found out about his wife's arrest days before the asylum hearing, and he did not understand that he should have added additional information about his wife at the beginning of his hearing.[107]

Consistency with Country of Origin Information (COI)

Researching COI is an essential part of your overall credibility analysis and your ability to spot potential inconsistencies.[108] Where relevant, you are required to conduct research into COI.[109]

Facts asserted by the applicant should be consistent with generally known facts and COI.[110] For example, you will rarely find evidence that the applicant was a participant at a specific protest at a specific place and time. However, you may find COI information to support the applicant's claim that there was such a protest at that place and time. While not all protests or other events will be documented in COI, the applicant's testimony and evidence must still be generally consistent with known facts about his or her country of origin to be found credible.

Note that Section 601 of the International Religious Freedom Act prohibits adjudicators from making an adverse credibility determination based solely on the fact that an applicant's claims are not mentioned in the Department of State annual report on religious freedom.[111] For more information on conducting COI research, see the RAIO Training module, *Researching and Using Country of Origin Information in RAIO Adjudications*.

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[107] *Lai*, 773 F.3d at 971-74.

[108] *See* RAIO Training module, *Researching and Using Country of Origin Information in RAIO Adjudications*, p. 12.

[109] *See Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997), overruled on other grounds by *Ladha v. INS*, 215 F.3d 889, 901 (9th Cir. 2000) (finding that "general country condition information is essential for an [adjudicator's] evaluation of an applicant's credibility" and therefore adjudicators "should place general country condition information into evidence.").

[110] *See* INA § 208(b)(1)(B)(iii) (allowing a trier of fact to base a credibility determination on "the consistency of [the applicant's] statements with other evidence of record," including country conditions reports); 8 C.F.R. § 208.12(a) (providing that an adjudicator may base his or her decision on "material provided by the Department of State, other USCIS offices , or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions.").

[111] RAIO Training module, *International Religious Freedom Act (IRFA) and Religious Persecution*, Asylum Adjudications Supplement – Use of DOS Annual Report, p. 48.

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Examples

(Inconsistency with COI Concerns Upheld)

- The applicant claimed that she received an abortion certificate following her forced abortion in 1998, but reliable COI indicated that the only such certificates issued at that time in China were given after a voluntary abortion.[112]

- The applicant claimed to have been detained for one year in Burma as a political opponent, but he managed to obtain a passport and endorsements from the Burmese government during the time he was allegedly incarcerated, despite COI showing that Burma restricts travel for political opponents.[113]

- COI submitted by the applicant failed to support the applicant's claim to have been attacked by armed Sikh militants in 1998 and again in 2006. An Amnesty International report and other COI evidence submitted by the government indicated that the armed Sikh militancy in Punjab ended in the 1990s.[114]

Be sure the COI you consult relates to the relevant time period and geographical area of the applicant's claim. Also keep in mind that the most recent country reports may not reflect the current situation, as countries' circumstances can change rapidly.[115]

In many instances, there will be no corroborative COI evidence that a claimed incident or event actually took place. This does not necessarily indicate that the incident/event did not occur, particularly where the claim is based on an applicant's "personal experiences not reasonably subject to verification."[116] The availability of information about an event might depend on the scale of the incident, the country situation, and the ability of the media or other organizations to report information.

When questioning an applicant about his or her knowledge of an event or organization, you must to take into account the totality of the circumstances, including the extent of the applicant's own knowledge of events or organizations in his or her country.[117] Many factors can impact an applicant's knowledge of COI. For example, an applicant with only low-level involvement in an organization may have limited knowledge about its overall structure or may be unaware of its clandestine activities due to a high level of secrecy

[112] *Xiao Xing Ni v. Gonzales*, 494 F.3d 260, 263 (2d Cir. 2007).

[113] *Thu v. Holder*, 596 F.3d 994, 998 (8th Cir. 2010).

[114] *Singh v. Lynch*, 802 F.3d 972, 976 (9th Cir. 2015).

[115] *See* RAIO Training module, *Researching and Using Country of Origin Information in RAIO Adjudications*, p. 22.

[116] *Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997), overruled on other grounds by *Ladha v. INS*, 215 F.3d 889, 898-99 (9th Cir. 2000) and INA § 208(b)(1)(B)(ii) (sustaining burden).

[117] INA § 208(b)(1)(B)(iii).

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within the organization. In refugee cases, an applicant may have left his or her country of origin and have lived in a refugee camp for many years after flight, impacting the applicant's access to information or knowledge about conditions in his or her country of origin.[118]

4.4.2 Detail

General Rule

An applicant should be able to provide sufficient detail to indicate personal knowledge of the events that form the basis of his or her claim.[119] Therefore, the applicant's ability or inability to provide detailed descriptions of the events that form the basis of the claim is critical to the credibility evaluation.[120] Keep in mind that some applicants may not have experienced persecutory events first-hand, such as a refugee applicant born in a refugee camp after his or her family fled the country of origin. In such cases, the applicant's personal knowledge of "events that form the basis of the claim" would be the conversations the applicant had with family members or others that led the applicant to have a fear of persecution, or the characteristics he or she shares with others who were similarly targeted.[121]

Generally, a person relating a genuine account of events that he or she has experienced first-hand should be able to provide a significant level of detail, especially sensory detail, about that event. Research has shown that events with greater significance and higher emotional charge, whether positive or negative, are more likely to be stored in the memory than events of lesser significance.[122] However, the more detailed testimony an

[118] *See* RAIO Training modules, *Researching and Using Country of Origin Information in RAIO Adjudications*, p. 13 and *Gender-Related Claims* (discussing interviewing considerations related to gender and culture).

[119] *See Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) ("The alien's own testimony . . . can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear."); *Matter of A-S-*, 21 I&N Dec. 1106, 1111 (BIA 1998) (upholding adverse credibility finding based on numerous inconsistencies, as well as the IJ's observation that the testimony was "all too often . . . vague and lacking in specifics and details."); *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010); *see also* UNHCR Handbook, at ¶ 205(a)(iii) ("The applicant should supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him.").

[120] *See Matter of Y-B-*, 21 I&N Dec. 1136, 1145 (BIA 1998) (Lory D. Rosenberg, dissenting) ("Judges and attorneys are, or should be, well aware that every well-told narration of events relies on the 'who, what, where, when, and how.' The demand for specificity and detail as a measure of credibility, therefore, should be a relatively straightforward and comprehensible requirement.").

[121] *Kiareldeen v. Ashcroft*, 273 F.3d 542, 549 (3d Cir. 2001) (explaining that hearsay evidence is admissible in immigration cases).

[122] Babette Rothschild, *The Body Remembers: The Psychophysiology of Trauma and Traumatic Treatment* 26 (W.W. Norton & Co., Inc. 2000); C. Morgan, et al., *Accuracy of eyewitness memory for persons encountered during exposure to highly intense stress*, 27 Int'l J. L. & Psychiatry 276 (2004); Robert Sapolsky, *Why Zebras Don't Get Ulcers* 110-113 (Henry Holt & Co., LLL, 3rd ed., 2004).

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applicant gives, the more opportunities there will be for it to contain inconsistencies and contradictions. This is true for even the most truthful applicant.[123] It is your job to determine whether those inconsistencies and/or contradictions are due to a lack of credibility or may be explained by other factors, as discussed below.

Examples

(Lack of Detail Concerns Upheld)

- An applicant from Nepal supplied only vague assertions that Maoists had been inquiring about him and gave few details. The applicant did not identify the names of any of the Maoists or describe them in any way. Nor did he state how many were inquiring about him; why they were looking for him; what they wanted; why he thought their interest in him persisted given that they had not inquired about him since 2001; or why he continued to fear the Maoists in light of their apparent loss of interest in him. The IJ gave the applicant an opportunity to supplement his responses to provide more detail concerning any "fear [he has] of anything bad happening to [him] or [anything that] has happened to [him]," but the applicant declined to do so.[124]

- An applicant from China claimed a fear of being forcibly sterilized because his wife had a "skin problem" that prevented her from being sterilized after her abortion. However, his testimony about why his wife could not be sterilized was vague and unclear. When asked for more details about the operation his wife had undergone, he said "[i]t should be the abortion," but admitted he was not certain. The only details he offered about his wife's post-operative condition were that she looked pale and weak, was having difficulty walking, and had a bandage around her stomach. The applicant's testimony about the circumstances of his flight from China was equally vague. He testified that the same day he received the sterilization notice, he consulted with his family and decided to flee. His family was immediately able to arrange for a smuggler to get him out of China. He then left home and hid in another part of Fuzhou City for two days. When asked about this experience, he gave the following responses:

  Q. ... [W]hen did you leave your house?
  A. In the morning of November 30, 2008 ....
  Q. And where did you go?
  A. I hid[ ] in Fuzhou City, Mawei District.
  ...
  Q. With whom did you stay?
  A. Somebody.
  Q. Who?

[123] *See* Kadia v. Gonzales, 501 F.3d 817, 821 (7th Cir. 2007).

[124] Shrestha v. Holder, 590 F.3d 1034, 1046 (9th Cir. 2010).

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A. Just myself.
Q. How is it you hid yourself? Where did you sleep? Where did you eat? Where did you go at night?
A. I hid in the small room the entire day.
Q. In whose house was the small room located?
A. My friend helped me to arrange for that room.
Q. And who is your friend?
A. My friend, just my friend.
Q. You don't have a name?
A. The name is Tao Wang.[125]

- An applicant from Cambodia was unable to remember any details about his imprisonment by police other than the beatings. In addition, the applicant was unable to remember significant details about the political party he joined and when authorities threatened to burn down his restaurant. In addition to these points raised in the asylum officer's assessment to refer, the IJ also provided a number of specific, independent reasons supporting his decision, including the applicant's admitted lies on his visa application and discrepancies between the applicant's testimony and his passport.[126]

(Lack of Detail Concern that Would Not Be Upheld)

- The applicant claimed that she was raped, but could not provide a description of the clothes the assailant was wearing.[127]

Factors That Impact Memory

In evaluating whether an applicant has provided sufficient detail to indicate personal knowledge of events, you must take into account the totality of the circumstances surrounding that event and the applicant's ability to recount it.[128] Many factors can impact an applicant's memory, including the amount of time that has elapsed since the events

[125] *Hui Pan v. Holder*, 737 F.3d 921, 928-30 (4th Cir. 2013).

[126] *Long v. Gonzales*, 422 F.3d 37, 39 (1st Cir. 2005).

[127] *Cf. Matter of A-S-*, 21 I. & N. Dec. 1106, 1110 (BIA 1998) ("We recognize that in some cases, an applicant who has fled persecution may have trouble remembering exact dates when testifying before an Immigration Judge."); *Fiadjoe v. Attorney General of U.S.*, 411 F.3d 135, 157-58 (3rd Cir. 2005) (finding it "unreasonable to expect a person to remember whether the repeated sexual abuse she suffered at age seven constituted attempted rape or actual rape"); *Marouf v. Lynch*, 811 F.3d 174, 185 (6th Cir. 2016) ("An inability to accurately recall the date when a traumatic event occurred is not particularly probative of a witness's credibility when alleging traumatic persecution, because such traumatic persecution itself may cause the witness difficulty in recalling details of the incident."); *Singh v. Gonzales*, 403 F.3d 1081, 1091 (9th Cir. 2005) ("Victims of repeated physical or sexual abuse, for example, remember the gist of their experiences. However, they often confuse the details of particular incidents . . ."), quoting Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421, 1514–15 (2001).

[128] *See* INA § 208(b)(1)(B)(iii).

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occurred;[129] the possible effects of trauma;[130] the applicant's age,[131] background, education, and culture.[132]

In the last example, above, it would be incorrect to conclude that the applicant has failed to provide a sufficient level of detail regarding a traumatic incident, such as a rape, simply because he or she could not describe the clothes the assailant was wearing. An applicant suffering from Post-Traumatic Stress Disorder (PTSD) may be unable to recall peripheral details of a traumatic event.[133]

Additionally, you should be judicious in determining the type of detail you expect the applicant to remember and take into account the fact that different people notice and remember different things. This means that if several people are questioned about an event they experienced together, each will probably remember different details. Some applicants may not remember the type of detail you would remember in a similar situation, but may be able to provide other, important details from the applicant's unique perspective.

Eliciting Detail

Finding that an applicant failed to provide sufficient detail without first posing questions that provide an opportunity for detailed testimony is likely to lead to inaccurate or unsupported conclusions.[134] The purpose of the interview is to elicit all relevant and useful information bearing on the applicant's eligibility for the benefit being sought.[135] Keep in mind that in a non-adversarial interview, you control the interview.[136] Therefore, you must pose questions identifying the specific detail or types of details you are requesting.

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[129] *Matter of Fedorenko*, 19 I&N Dec. 57, 72 n.9 (BIA 1984) (respondent's testimony found "entirely straightforward and consistent" despite lapses in memory due to his age and the amount of time that had elapsed since the events in question).

[130] *Fiadjoe v. Attorney General of U.S.*, 411 F.3d 135, 154 (3d Cir. 2005) (applicant's testimony impacted by the effects of trauma).

[131] *See Matter of A-T-*, 24 I&N Dec. 617, 619 (BIA 2008) (applicant was a "young girl" at the time of persecution and did not recall the actual event).

[132] *See, e.g., Rama v. Holder*, 607 F.3d 461, 466 (7th Cir. 2010) ("The IJ accepted the petitioners' explanation that the rape may not have been mentioned because of the cultural and other difficulties of disclosing it…").

[133] Jane Herlihy & Stuart Turner, MD, *Should discrepant accounts given by asylum seekers be taken as proof of deceit?*, 16 Torture, no. 2 at 86 (2006). For more information, see RAIO Training module, *Interviewing Survivors of Torture and Other Severe Trauma*.

[134] *Cf. Mukamusoni v. Ashcroft*, 390 F.3d 110, 121-22 (1st Cir. 2004) (the BIA's failure to consider details provided in the applicant's written testimony was "particularly egregious" in light of the IJ's limitation of her oral testimony during the hearing).

[135] 8 C.F.R. § 208.9(b).

[136] *See id.* (requirement to conduct a non-adversarial interview); RAIO Training module, *Interviewing – Introduction to the Non-Adversarial Interview*, pp. 13, 34.

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4.4.3 Plausibility

General Rule

To be found credible, the facts asserted by the applicant must be plausible;[137] that is, they must conform to generally known facts and reliable COI.[138] If it is not plausible that the events in the applicant's country occurred as the applicant described, then the claim properly may be found not credible. Keep in mind, however, that the reality in many countries may be quite different than in the United States. What may appear to be implausible in the United States may be common in another country.[139] Therefore, in determining whether an applicant's story is plausible, you must avoid substituting your own subjective judgments about how the world works for an objective determination of whether the events described by the applicant could be possible.[140] "Personal beliefs cannot be substituted for [the] objective and substantial evidence" necessary to support a plausibility/implausibility finding.[141]

If you determine that an applicant's testimony is not plausible, you must provide an explanation with specific and clearly articulated reasons for your determination. An adjudicator's finding of plausibility or implausibility depends on the specific assertions, the country, and the context of the claim.[142] As explained by the Third Circuit, "[b]y requiring the [adjudicator] to tether a plausibility determination to evidence in the record, including evidence of country conditions or other contextual features, and rejecting speculative or conjectural reasoning, we ensure that there is a reasoned foundation to support the conclusion that the witness's testimony was objectively implausible."[143]

Examples

(Implausibility Concerns Upheld)

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[137] INA § 208(b)(1)(B)(iii).

[138] *Matter of S-M-J-*, 21 I&N Dec. 722, 724-25 (BIA 1997) (background evidence should provide a "plausible context" for the persecution claim and applicant's statements "must not run counter to generally known facts" [internal citations omitted]).

[139] *See Cordero-Trejo v. INS*, 40 F.3d 482, 491 (1st Cir. 1994) ("As a general rule, in considering claims of persecution . . . it [is] highly advisable to avoid assumptions regarding the way other societies operate.")

[140] *See Dia v. Ashcroft*, 353 F.3d 228, 255 (3d Cir. 2003); *Elzour v. Ashcroft*, 378 F.3d 1143, 1153 (7th Cir. 2004) (the finding that aspects of an applicant's claim are implausible may not be based on "speculation, conjecture, or unsupported personal opinion."); *accord Jishiashvili v. U.S. Att'y Gen.*, 402 F.3d 386, 393 (3d Cir. 2005); *Todorovic v. U.S. Atty. Gen.*, 621 F.3d 1318, 1325 (11th Cir.2010).

[141] *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000).

[142] *See, e.g.*, *Jishiashvili*, 402 F.3d at 394-95.

[143] *Id.* at 393.

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- In *Matter of M-B-C-*, the applicant served as a soldier in the Bosnian Serb army, and later as an infantry commander, during the Bosnian civil war. Despite expert witness testimony that Serbian soldiers were responsible for summary executions and forced expulsions in the specific locations where respondent served and during the same time periods when respondent served, the applicant maintained that he never heard of any Muslim civilians being captured, killed, or forced to leave their homes during his time of service. The IJ found this testimony to be implausible in light of COI. The BIA upheld the determination that this implausibility undermined the applicant's credibility, along with inconsistencies in the applicant's testimony about when and where he served.[144]

- The Second Circuit found it entirely reasonable that the IJ considered aspects of the applicant's claim implausible, where she asserted that the authorities in China "could quickly locate her in a city of one million people just by looking in a neighborhood where young people live" and that she was able to escape from detention just because her jailors were not paying attention. These concerns, in combination with concerns about her demeanor and inconsistencies in her testimony, supported the IJ's adverse credibility determination.[145]

- The Eleventh Circuit upheld a negative credibility finding based on the cumulative effect of numerous inconsistencies and implausibilities in the applicant's testimony regarding his past experiences in Eritrea. The applicant testified that he was punished after he refused to arrest the elderly mother of a deserter from the military, but he did not mention this incident or any other incident in which he was punished for disobeying an order in either his credible-fear interview or his asylum application. He alleged that he was under constant surveillance while in the military, but he was able to leave by walking away from his barracks and using public transportation to travel to the home of his family. He stated in his application that the military did not allow him to practice his religion, but he testified at his hearing that he was never punished on the basis of his religion. He also testified that, after he deserted the military in 2001, soldiers constantly searched for him and he was forced to go into hiding, but he lived with his parents without incident for about three months after his desertion; obtained employment in a government-owned port; lived at the port without incident for three years; obtained a government-issued identification card in person; returned to the same school from which he had been conscripted; and visited his family at least once every two weeks.[146]

(Implausibility Concerns Not Upheld)

[144] *Matter of M-B-C-*, 27 I&N Dec. 31 (BIA 2017).

[145] *Chen v. Bd. of Immigration Appeals*, 435 F.3d 141, 146 (2d Cir. 2006).

[146] *Mohammed v. U.S. Atty. Gen.*, 547 F.3d 1340, 1345–46 (11th Cir. 2008).

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- An IJ found it implausible that the applicant fled her country without saying goodbye to her family. The court found this to be "pure speculation or conjecture" on the part of the IJ.[147]

- According to the Eleventh Circuit, an IJ inappropriately found it "implausible that [the applicant] would have presented herself for a pregnancy examination as an unaccompanied female and not been asked for a marriage certificate or other proof of her marital status." Neither the IJ nor the BIA pointed to any evidence to support their conclusion that the claim was implausible, or that Chinese doctors routinely inquire as to a patient's marital status when administering a pregnancy test.[148]

- An IJ found it "completely and wholly implausible that the respondent would have been beaten for a period of 20 minutes with a rubber hose and not bleed." The Ninth Circuit found the IJ's assertion to be "based solely on her subjective view of when a person should bleed given her view of the severity of the flogging." The court further held that, "Personal beliefs cannot be substituted for objective and substantial evidence."[149]

When an applicant testifies in an interview to a fact that seems implausible to you, always question the applicant closely about the details surrounding that fact. Testimony that seems improbable at first glance often requires additional follow-up to provide the applicant an opportunity to explain exactly what happened. If, after probing for additional details, the applicant is unable to explain the event in question, or provides contradictory information, then it may become a credibility concern based on implausibility, lack of detail, or inconsistency. If the applicant is unable to provide a reasonable explanation for these concerns, then it may be considered a negative credibility factor.

4.4.4 Demeanor

General Rule

Demeanor refers to a person's outward manner of expression or behavior. It is not simply what a person says, but the way in which the person says it. Demeanor can include an individual's tone of voice, facial expressions, and gestures.[150]

Congress explained its reasoning for allowing adjudicators to base a credibility determination on demeanor as follows:

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[147] *Mwembie v. Gonzales*, 443 F.3d 405, 410 (5th Cir. 2006).

[148] *Xiu Ying Wu v. U.S. Atty. Gen.*, 712 F.3d 486, 494 (11th Cir. 2013).

[149] *Bandari v. INS*, 227 F.3d 1160, 1167 (9th Cir. 2000).

[150] West's Encyclopedia of American Law (2d ed. 2008); Black's Law Dictionary (8th ed. 2004).

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> Congress anticipates that triers of fact will rely on those aspects of demeanor that are indicative of truthfulness or deception… All aspects of the witness's demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely.[151]

However, courts have noted the difficulty of using demeanor as an indicator of honesty or deception.[152] Cultural differences, the circumstances of the interview, and the effects of trauma can make it difficult for an adjudicator to read non-verbal signals accurately. As explained by the U.S. Court of Appeals for the Seventh Circuit:

> The applicant for asylum normally bases his claim almost entirely on his own testimony, and it is extremely difficult for the judge to determine whether the testimony is accurate. Often it is given through a translator, and even if the applicant testifies in English, as a foreigner his demeanor will be difficult for the IJ to "read" as an aid to determining the applicant's credibility.[153]

In evaluating the impact of an applicant's demeanor on the credibility determination, you must consider demeanor in the context of the entire record. As illustrated by the examples below, courts have generally considered credibility concerns related to demeanor in conjunction with other credibility factors.

Examples

(Demeanor Concerns Upheld)

- In *Matter of A-S-*, in which the BIA upheld an adverse credibility determination based partly on demeanor, [154] the BIA explained that the "Immigration Judge's reasonable determination that the [applicant's] very halting and hesitant manner of testifying indicated deception [was] bolstered by the Immigration Judge's full range of specific and cogent credibility findings."[155] The other credibility findings included vague testimony, lack of detail, and significant inconsistencies and omissions regarding the dates of key events in his claim.[156]

[151] H.R. REP. NO. 109-72, at 168 (internal citations omitted).

[152] *Yang v. Lynch*, 832 F.3d 817, 821 (7th Cir. 2016) ("[W]e've commented on the unreliability of demeanor evidence generally . . . and the particular difficulty of using such evidence to evaluate the credibility of witnesses from other cultures. . .") (internal citations omitted).

[153] *Djouma v. Gonzales,* 429 F.3d 685, 687 (7th Cir. 2005).

[154] *Matter of A-S-*, 21 I&N Dec. 1106, 1111 (BIA 1998).

[155] *Id.* at 1111.

[156] *Id.* at 1109-11.

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- In *Matter of J-Y-C-*, the BIA upheld an adverse credibility determination based partly on demeanor.[157] In that case, the IJ cited the "rapid" or "agitated" manner of the applicant's testimony in response to various credibility confrontations, as well as numerous inconsistencies between the applicant's testimony, his statement given to DHS officers at the airport, and the testimony of his sister, which failed to corroborate his claim.[158]

(Demeanor Concern Not Upheld)

- In *Matter of B-*,[159] the BIA reversed the IJ's decision, which was based entirely on demeanor. The BIA found that the applicant's tendency while testifying to look at the wall behind the interpreter or down at the table, instead of at the IJ, was not necessarily an indication of deception.[160] Instead, the applicant's behavior could indicate he was concentrating on the question that was being interpreted to him. The BIA explained it considered the demeanor issue "within the context of the whole record" and noted the record showed the applicant appeared to be listening carefully to the questions and asking for clarification of questions several times before responding.[161] His testimony was also consistent throughout examination and cross-examination, and consistent with his application.[162]

As noted above, cultural factors can make it difficult to rely on demeanor as an indicator of truthfulness. Assumptions about what forms of body language suggest a lack of truthfulness, as well as the forms and meanings of body language itself, can vary greatly from culture to culture. In properly analyzing an applicant's demeanor, the Seventh Circuit cautioned, "Behaviors that in our culture are considered evidence of unreliability, such as refusing to look a person in the eyes when he is talking to you, are in [other] cultures a sign of respect."[163] For more information, see RAIO Training module, *Cross-Cultural Communication and Other Factors that May Impede Communication at an Interview*.

The psychological or physical effects of trauma suffered by some applicants may also impact an applicant's demeanor in a way that could otherwise be perceived as indicative

[157] *Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007).

[158] *Id.* at 264-65.

[159] *Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995).

[160] *Id.* at 70.

[161] *Id.*

[162] *Id.*

[163] *Iao v. Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005) (internal citations omitted).

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of evasiveness or untruthfulness.[164] For a more detailed discussion of the possible effects of trauma on an applicant's demeanor, see RAIO Training module, *Interviewing Survivors of Torture and Other Severe Trauma*.

Example

> The applicant in *Ilunga v. Holder* was deemed not credible because he appeared "uncomfortable" while testifying.[165] The Fourth Circuit reversed the negative credibility determination explaining that the BIA's decision "manifest[ed] a basic misunderstanding of the human condition."[166] In reviewing the record, the court determined that Ilunga not only suffered "vicious abuse, leaving both body and mind scarred by the experience[,]" but was diagnosed with PTSD as a result of the abuse, and when "[f]orced to revisit the trauma at the immigration hearing, Ilunga specifically testified about being raped by prison guards and subjected to other forms of sexual abuse."[167] The court concluded that "[f]or the BIA to dismiss the potential impact of such torture on Ilunga's testimonial disposition is unsettling . . ."[168]

Finally, the use of an interpreter in an interview can create situations in which it is difficult to draw conclusions about an applicant's demeanor.[169] For more information, see RAIO Training module, *Interviewing – Working with an Interpreter*.

Documenting Demeanor Findings

As with all credibility concerns, you are required to provide "specific and cogent reasons" supporting your credibility findings based on demeanor.[170] This means you must

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[164] Phyllis Coven, INS Office of International Affairs, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, Memorandum to INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995) ("The demeanor of traumatized applicants can vary. They may appear numb or show emotional passivity when recounting past events of mistreatment. Some applicants may give matter-of-fact recitations of serious instances of mistreatment."); *see also Fiadjoe v. Attorney General of U.S.*, 411 F.3d 135, 154 (3d Cir. 2005) (quoting favorably the Gender Guidelines).

[165] *Ilunga v. Holder*, 777 F.3d 199, 212 (4th Cir. 2015).

[166] *Id.*

[167] *Id.*

[168] *Id.* at 212-13.

[169] *See, e.g., Amadou v. INS*, 226 F.3d 724, 726-27 (6th Cir. 2000) (finding that the IJ's adverse credibility determination, including reference to the applicant's dispassionate demeanor when testifying, was flawed due to incompetent interpretation); *Ilunga v. Holder*, 777 F.3d 199, 207-08 (4th Cir. 2015) (holding that an inconsistency cannot be relied upon when "there is a strong indication it results from translation errors or language-based misunderstanding, particularly when it is belied by an extensive record of otherwise consistent statements and corroborating evidence"); INA § 208(b)(1)(B)(iii) (stating that adjudicators should take into account "the circumstances under which [an applicant's] statements were made").

[170] *See Shrestha v. Holder*, 590 F.3d 1034, 1042-43 (9th Cir. 2010); *Chen v. U.S. Atty. Gen.*, 463 F.3d 1228, 1232 (11th Cir. 2006).

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be explicit about what aspects of the applicant's demeanor undermine his or her credibility and why.[171] You can provide support for such a finding by tying your demeanor findings to specific portions of the applicant's testimony and documenting your observations of the applicant's demeanor in your interview notes.

Example

> The Ninth Circuit Court of Appeals upheld an IJ's reliance on demeanor as one factor in an adverse credibility determination that also cited inconsistencies and inaccuracies in the evidence. In explaining why the IJ's decision was supported by substantial evidence, the court noted that the IJ provided specific observations about the applicant's demeanor that were tied to problematic portions of the applicant's testimony and weighed against the totality of the circumstances:
>
> > The IJ stated that Manes was "visibly nervous" when confronted with evidence that contradicted his claim and "would move his hands to the extent that his bracelets would make a noise." The IJ also found that Manes' speech was "notably faster" and "had an almost desperate tone" when Manes was responding to confrontations or difficult questions. Moreover, the IJ explained that Manes' anxious demeanor on cross-examination was "in sharp contrast" to his "calm and measured" demeanor on direct, characterizing the contrast as "remarkable."[172]

4.4.5 Candor or Responsiveness

General Rule

"Candor" is "the quality of being open, sincere and honest."[173] The ability and willingness of an applicant to respond to all the questions asked of him or her in a direct and forthright manner is a relevant consideration in making a credibility determination. If you find an applicant to be evasive in responding to questions, or if he or she fails to respond at all, these factors may support an adverse credibility determination in the totality of the circumstances.[174]

In deciding whether an applicant has testified with candor and in a responsive manner during an asylum or refugee interview, you have the difficult task of determining certain

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[171] *See* H.R. REP. NO. 109–72, at 167 ("Congress expects that the trier of fact will describe those factors that form the basis of the trier's opinion. This is true even where the trier of fact bases a credibility determination in part or in whole on the demeanor of the applicant."); *see also* "Documenting Instances of Evasive or Unresponsive Behavior" in Section 4.4.5, *Candor or Responsiveness*.

[172] *See Manes v. Sessions*, 875 F.3d 1261, 1263 (9th Cir. 2017).

[173] Merriam-Webster's Advanced Learner's English Dictionary (1st ed. 2008).

[174] INA § 208(b)(1)(B)(iii).

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issues, such as "whether a question that may appear poorly worded was, in fact, confusing or well understood by those who heard it; whether a witness who hesitated in a response was nevertheless attempting truthfully to recount what he recalled of key events or struggling to remember the lines of a carefully crafted 'script;' and whether inconsistent responses are the product of innocent error or intentional falsehood."[175]

When an applicant uses an interpreter during an interview, what may appear to be evasive or unresponsive answers by the applicant may instead indicate interpretation problems or interpreter incompetence. [176]

The applicant may also appear evasive or unresponsive as a result of past trauma, which may cause memory loss or distortion, or may cause the applicant to block certain experiences from his or her mind.[177]

Documenting Instances of Evasive or Unresponsive Behavior

In *Baljit Singh v. Ashcroft,* the Ninth Circuit said that to support an adverse credibility finding based on unresponsiveness, the BIA "must identify particular instances in the record where the [applicant] refused to answer questions asked of him" and further indicated that "[a] general statement that the [applicant] was 'unresponsive' to questions is insufficient."[178]

Your notes are the record of the interview and must contain documented instances of evasiveness or unresponsiveness in order to support an adverse credibility finding based on either ground. [179] Your notes must contain the questions asked and the applicant's response or lack of response.

As with demeanor, the examples below illustrate that courts have generally considered credibility concerns related to candor or responsiveness in conjunction with other credibility factors.

Examples

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[175] Zhang v. US DOJ, 386 F.3d 66, 73 (2d Cir. 2004).

[176] Perez-Lastor v. INS, 208 F.3d 773, 778 (9th Cir. 2000); Zahedi v. INS, 222 F.3d 1157, 1166-67 (9th Cir. 2000); Giday v. Gonzales, 434 F.3d 543 (7th Cir. 2006), superseded by statute on other grounds, as stated in N.L.A. v. Holder, 744 F.3d 425, 435 (7th Cir. 2014).

[177] Zubeda v. Ashcroft, 333 F.3d 463, 476 (3d Cir. 2003), overruled on other grounds by Auguste v. Ridge, 395 F.3d 123, 148 (3d Cir. 2005).

[178] Singh v. Ashcroft, 301 F.3d 1109, 1114 (9th Cir. 2002); *see also* Shrestha v. Holder, 590 F.3d 1034, 1045 (9th Cir. 2010) (finding that, "the REAL ID Act did not alter the requirement that the IJ must identify specific instances, supported by the record, where the petitioner did not respond.").

[179] *See* Nigussie v. Ashcroft, 383 F.3d 531, 537 (7th Cir. 2004) (stating that the IJ's observation—that Nigussie's demeanor at the evidentiary hearing was "evasive," and, therefore indicated a lack of credibility—could not be fully appreciated based on the cold record).

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(Lack of Candor/Responsiveness Concerns Upheld)

- While testifying in support of his asylum claim, the applicant in *Aramjit Singh v. Gonzales* "tended to return to a recitation of the story contained in his application for asylum, … had trouble answering direct questions which did not come directly from facts contained in his application, … [and] corrected himself on several occasions." In addition, his testimony was found to be internally inconsistent and implausible.[180]

- In *Wang v. INS*, the applicant's evasive answers to questions regarding an inconsistency in his testimony provided further support for an adverse credibility determination based on internal inconsistencies and inconsistencies with supporting documents.[181] The applicant claimed to have been targeted for sterilization in China in December 1989 after the birth of his second child, but other evidence in the record showed his child was not born until 10 months later. When given the chance to explain this inconsistency, the applicant gave the following nonresponsive answers:

  Q: If officials wanted to sterilize either you or your wife after the birth of your second child it could not have been on December 7, 1989, can you explain this?
  A: Well, according to Chinese law one child is enough for the family.
  Q: But the second child hadn't already been born.
  A: Well, they say one is enough for you.
  Q: Are you now saying that they attempted to sterilize you before your wife gave birth to the second child?
  A: Yes.
  …
  Q: [A]ccording to the birth certificate your second child wasn't even born yet, at the time of this demand in December of 1989.
  A: Yeah, but they allow you to have one.[182]

- In *Shrestha v. Holder*, the Ninth Circuit upheld an IJ's negative credibility finding based, in part, on the fact that the applicant had "no response" to questions concerning the Maoists' continued interest in him, his most recent address before coming to the United States, and whether he had any additional information to tell the judge, demonstrating a "pattern" of unresponsiveness throughout the

[180] *Singh v. Gonzales*, 413 F.3d 156, 160 (1st Cir. 2005).

[181] *Wang v. INS*, 352 F.3d 1250, 1256 (9th Cir. 2003).

[182] *Id.*

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hearing.[183] In this case, the negative credibility finding was also supported by evidence that the applicant's testimony was vague and internally inconsistent.[184]

(Lack of Candor/Responsiveness Concerns Not Upheld)

- The applicant's behavior in *Matter of B-,* which included having to ask several times for questions to be clarified before answering them, was believed by the IJ to be a sign of evasiveness, but was found by the BIA to be an inadequate basis for the IJ's negative credibility finding.[185] The BIA found that the applicant's "requests for clarification appear to have been conscientious attempts to provide the information sought by the questioner rather than attempts to evade answering."[186]

- In *Zahedi v. INS*, the IJ found the applicant's testimony not credible because it was evasive, general, and inconsistent. However, a review of the record showed that the applicant "tried to give specific dates but was often hampered by his reliance on the translator to convert those dates from the Islamic to Christian calendar."[187] The record showed that the applicant tried to overcome this problem by noting how much time passed between the events he was describing.[188] The court noted that "[w]hile it is true that these answers might be frustrating to one trying to make a clear timeline, since they were relational rather than fixed dates, these answers are by no means evasive."[189]

4.4.6 Inaccuracies or Falsehoods

General Rule

Inaccuracies or falsehoods generally relate to false statements or fraudulent documents[190] put forth by the applicant, which are either proven or admitted to be false.[191] The BIA has

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[183] *Shrestha v. Holder*, 590 F.3d 1034, 1045 (9th Cir. 2010).

[184] *Id.* at 1046-48.

[185] *Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995).

[186] *Id.*

[187] *Zahedi v. INS*, 222 F.3d 1157, 1166 (9th Cir. 2000).

[188] *Id.*

[189] *Id.*

[190] Fraudulent documents generally fall into one of three categories: counterfeit, altered, or genuine documents fraudulently obtained. For more information, see RAIO Training module, *Fraud in the Context of RAIO Adjudications and Overview of the Fraud Detection and National Security (FDNS) Directorate*. *See also* USCIS FDNS, Fraud Division, *Fraud Detection Standard Operating Procedure*.

[191] This section addresses inaccuracies and falsehoods in the context of the credibility analysis and determination. A false statement or fraudulent document put forth by the applicant may be a basis for a finding that a refugee applicant is inadmissible for fraud/material misrepresentation under INA § 212(a)(6)(C)(i). The inadmissibility

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held that knowingly submitting fraudulent documents may cast doubt on an applicant's veracity as a witness.[192] "Ordinarily, it is reasonable to infer that a respondent with a legitimate claim does not usually find it necessary to invent or fabricate documents" in order to establish eligibility.[193]

Such falsehoods may be proffered in support of the applicant's asylum or refugee claim, or they may arise in the context of a prior application or proceeding. Falsehoods may be tangential or unrelated to the applicant's eligibility for asylum or refugee status.[194] These factors must be considered in the totality of the circumstances, taking into account the context in which such statements were made, due to their tendency to undermine the applicant's veracity as a witness.[195]

Considering the Circumstances

The context of a false statement or submission of a fraudulent document will determine whether or not it is a credibility concern. For example, in a case where the applicant submitted at least one counterfeit identity document to establish his identity and nationality, the BIA distinguished between two categories of false document presentations: (1) the presentation of a fraudulent document in an asylum adjudication for the purpose of establishing the elements of an asylum claim; and (2) the presentation of a fraudulent document for the purpose of escaping immediate danger from an alien's country of origin or resettlement, or for the purpose of gaining entry into the United States.[196] The BIA concluded in *Matter of O-D-* that the applicant's presentation of fraudulent documents, "submitted to prove a central element of the claim in an asylum adjudication, indicates his lack of credibility." However, it differentiated such false presentations from those in the second category of cases, noting that the use of false

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analysis is legally distinct from the credibility determination. For further guidance, please refer to the Refugee Affairs Division Lesson Plan, *Inadmissibility Grounds (minus TRIG) and Waivers*.

[192] *Matter of O-D-*, 21 I&N Dec. 1079, 1083 (BIA 1998); *but see Niang v. Mukasey*, 511 F.3d 138, 141 (2d Cir. 2007) ("We hold that where, as here, an applicant's testimony is otherwise credible, consistent and compelling, the agency cannot base an adverse credibility determination solely on a speculative finding that the applicant has submitted inauthentic documents in support of his application."); *Corovic v. Mukasey*, 519 F.3d 90, 97-98 (2d Cir. 2008) (holding that when an applicant contests that he or she knowingly submitted a fraudulent document, the IJ must make an explicit finding that the applicant knew the document to be fraudulent before the IJ can use the fraudulent document as a basis for an adverse credibility determination).

[193] *Matter of O-D-*, 21 I&N Dec. at 1083.

[194] INA § 208(b)(1)(B)(iii) (providing that inaccuracies and falsehoods may be considered regardless of whether they go "to the heart" of the applicant's claim).

[195] *See* INA § 208(b)(1)(B)(iii) (directing fact finders to "consider[] the circumstances under which [an applicant's or witness's written and oral statements] were made"); *Matter of O-D-*, 21 I&N Dec. at 1079 ("Presentation by an asylum applicant of an identification document that is found to be counterfeit by forensic experts not only discredits the applicant's claim as to the critical elements of identity and nationality, but, in the absence of an explanation or rebuttal, also indicates an overall lack of credibility regarding the entire claim.").

[196] *Matter of O-D-*, 21 I&N Dec. at 1081.

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documents to facilitate travel or gain entry does not necessarily indicate a lack of credibility.[197]

Examples

(Inaccuracy/Falsehood Concerns Upheld)

- In *Kifleyesus v. Gonzales*, an Eritrean applicant admitted that she lied on her U.S. asylum application and in her IJ hearing about the fact that she lived in Qatar. The applicant also testified that she lied in her German asylum application about living in Ethiopia and made false representations about her relationship to her fiancé in a domestic violence proceeding in the United States. The Eighth Circuit upheld the IJ's negative credibility finding based, in part, on these factors, in addition to inconsistencies concerning the applicant's detention in Sudan and time spent in Eritrea.[198]

- In *Bingxu Jin v. Holder*, the applicant stated on his asylum application that he had lived in Tucson for one year. In the applicant's immigration hearing, he testified that "he did not live in Arizona, but stayed with friends" and conceded that he sought a venue transfer because his attorney told him that it would be easier to have his asylum application approved in a different court. The Ninth Circuit upheld the IJ's adverse credibility finding based on his "affirmative misrepresentations of his residency for the purpose of gaining an advantage in forum" in addition to fraudulent documents he submitted for the same purpose, his lack of detailed testimony, and non-responsive demeanor.[199]

- The Eighth Circuit upheld a negative credibility finding against an applicant from Haiti who "submitted fraudulent documents relating to a core asylum issue (i.e., that supporters of the former president killed his brother and he feared a similar fate), failed to provide a satisfactory explanation for having done so, and failed to present other credible documentary evidence to support his allegations of political persecution."[200]

- In a case involving an applicant who alleged to have been persecuted for writing newspaper articles critical of the Albanian government, the IJ "found that [the applicant] was not a credible witness because the [Forensic Document Lab]

[197] *Id.* at 1083 ("On the other hand, there may be reasons, fully consistent with the claim of asylum [or refugee status], that will cause a person to possess false documents, such as the creation and use of a false document to escape persecution by facilitating travel.").

[198] *Kifleyesus v. Gonzales*, 462 F.3d 937, 939-43 (8th Cir. 2006).

[199] *Bingxu Jin v. Holder*, 748 F.3d 959, 962, 967 (9th Cir. 2014).

[200] *Ambroise v. Gonzales*, 411 F.3d 932, 933 (8th Cir. 2005); *see also Kourski v. Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004); *Yeiman-Behre v. Ashcroft*, 393 F.3d 907, 912 (9th Cir. 2004); *Selami v. Gonzales*, 423 F.3d 621, 625 (6th Cir. 2005).

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determined that the author attributions in the newspaper articles were added after publication and, in one of the papers, other text had been erased from the author name area on the page before [the applicant's] name had been added on top of it. Because the newspaper articles were so central to [the applicant's] asylum claim and because the articles were altered, the [IJ] declined to believe [the applicant's] testimony."[201] The Seventh Circuit upheld the negative credibility finding that was based solely on the submission of these allegedly false newspaper articles.[202]

4.5 Analyzing Individual Credibility Concerns

Under the framework of the REAL ID Act, once you have determined that you have a credibility concern and identified the type of concern at issue, you must evaluate the significance of the concern, including any explanation provided by the applicant, and analyze the relative weight of the concern in the totality of the circumstances.

4.5.1 Eliciting and Analyzing an Explanation

Officers are expected to clearly communicate to the applicant any relevant credibility concerns and give him or her an opportunity to explain.[203] Doing so helps to ensure that you elicit all relevant evidence, minimizes misunderstandings, and creates a complete record on which to base your credibility determination in the totality of the circumstances.[204]

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[201] *Hysi v. Gonzales*, 411 F.3d 847, 852 (7th Cir. 2005).

[202] *Id.*

[203] *See Matter of M-S-*, 21 I&N Dec. 125, 129 (BIA 1995) ("It would certainly aid in the development of a full and complete record for this Board's review were the asylum officer to draw an applicant's attention to any inconsistencies in his account which may be apparent at the time of the interview and to accord the applicant an opportunity to address those inconsistencies at the interview."); *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1093 (9th Cir. 2014) (holding an IJ made a legal error by basing an adverse credibility determination on concerns related to an entry visa without first soliciting an explanation about the visa from the Petitioner); *see also Ming Shi Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 121–22 (2d Cir. 2006) ("[W]here the perceived incongruities in an asylum applicant's testimony are not plainly obvious, an IJ cannot rely on them to support an adverse credibility ruling without first identifying the alleged inconsistencies for the applicant and giving the applicant an opportunity to address them."); *Matter of R-K-K-*, 26 I & N Dec. 658 (BIA 2015) (When relying on inter-proceeding similarities, the Immigration Judge should give the applicant meaningful notice of the similarities and a reasonable opportunity to explain them prior to making a credibility determination that is based on the totality of the circumstances); *but, cf. Ye v. Dept. of Homeland Security*, 446 F.3d 289 (2d Cir. 2006) (finding that the applicant failed to include any reference to a detention and beating in his asylum application, which he never sought to amend or supplement, and the incident was "the only persecutory event which the [applicant] claims happened to him directly, aside from his wife's alleged abortion…"; under these circumstances, the court distinguished *Ming Shi Xue*, holding that the applicant's testimony about this event was self-evidently inconsistent, and the IJ and BIA were not required to give him an opportunity to respond before basing an adverse credibility determination on the omissions in his written application).

[204] INA § 208(b)(1)(B)(iii); *Shrestha v. Holder*, 590 F.3d 1034, 1044 (9th Cir. 2010) ("To ignore a petitioner's explanation for a perceived inconsistency and relevant record evidence would be to make a credibility determination on less than the total circumstances in contravention of the REAL ID Act's text."); *see also Munoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008) (applicants "must have a meaningful opportunity to present evidence and be

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Asking an applicant about any credibility concerns during an interview is standard practice because it allows you to more fully analyze the concern and all relevant factors in your overall credibility determination. If the applicant is not clearly informed of and given an opportunity to explain credibility concerns, the record as a whole may not support your credibility determination.

After giving the applicant the opportunity to explain a credibility concern, you need to consider whether the explanation offered is reasonable.[205] Reasonable explanations are those that directly address the credibility concern raised, are consistent with other evidence in the record, and contain a level of detail sufficient to coherently account for the issues raised by the concern.[206] You must also consider the totality of the circumstances when assessing reasonableness.[207]

Example

> The Seventh Circuit upheld an adverse credibility determination based in part on omissions from the applicant's asylum application of events he described in immigration court, where he initially testified that he had reviewed the application in a language he understood and verified that all the information was true, correct, and complete, but when asked to explain the omission, he later testified that the application questions confused him.[208]

As demonstrated by the example above, in addition to assessing *whether* an explanation for a credibility concern is reasonable, you must also be able to articulate *why* the

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heard by an impartial judge"); *Cham v. Attorney General of U.S.*, 445 F.3d 683, 691 (3d Cir. 2006) (holding that asylum applicant was entitled "to a full and fair hearing on his application").

[205] *See* *Hong Fei Gao v. Sessions*, 891 F.3d 67, 79 (2nd Cir. 2018) ("An IJ must also engage or evaluate an asylum applicant's explanations for apparent inconsistencies in the record.") (internal quotes and citations omitted); *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 403 (2nd Cir. 2005) ("Absent a reasoned evaluation of [petitioner's] explanations, the IJ's conclusion that his story is implausible was based on flawed reasoning and, therefore, cannot constitute substantial evidence supporting her conclusion.") (internal citations and quotations omitted); *Ilunga v. Holder*, 777 F.3d 199, 207 (4th Cir. 2015) ("[A]t a minimum the IJ must consider the petitioner's explanation for any inconsistency to verify that an inconsistency actually exists, and then evaluate whether the discrepancy renders the entire testimony incredible in light of the record as a whole."); *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1092-93 (9th Cir. 2014) ("An IJ must consider and address all plausible and reasonable explanations for any inconsistencies that form the basis of adverse credibility determination.") (internal citations and quotation omitted); *Matter of R-K-K-*, 26 I & N Dec. 658, 665-66 (BIA 2015) ("The Immigration Judge considered the totality of the circumstances in making his adverse credibility determination. Not only did he detail the numerous inter-proceeding similarities in the case, he also thoroughly analyzed the respondent's explanations for them and outlined his reasons for finding them to be unpersuasive.").

[206] *See* INA § 208(b)(1)(B)(iii).

[207] *See id.*

[208] *Hassan v. Holder*, 571 F.3d 631 (7th Cir. 2009).

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explanation is reasonable or not reasonable. Doing so ensures that your analysis is supported by objective evidence in the record.[209]

4.5.2 Analyzing the Relative Weight of Credibility Concerns

Under the framework of the REAL ID Act, when credibility concerns arise, you must evaluate them to determine not only whether they are relevant to the applicant's veracity, but also the amount of importance, or weight, they should be given within the totality of the circumstances analysis.[210] Determining the weight of a credibility concern involves assessing both its relationship to the applicant's eligibility (i.e., how central or peripheral it is to the applicant's eligibility) and its significance, as discussed below. You must analyze these factors together to determine the relative weight of any credibility concerns in the totality of the circumstances.[211]

As discussed above, the REAL ID Act allows adjudicators to consider "all relevant factors," regardless of whether they go "to the heart of the claim."[212] Nonetheless, the Seventh Circuit has noted that, "inconsistencies that do not relate to the basis of the applicant's alleged fear of persecution are less probative than inconsistencies that do."[213]

Generally, credibility concerns that are central to an applicant's asylum/refugee claim or other eligibility issue (such as a mandatory bar/ground of inadmissibility, the applicant's identity, or a threshold issue such as timeliness or access) will be given greater weight in the totality of the circumstances analysis and are more likely to support an adverse credibility determination. By contrast, credibility concerns that are only tangentially related to the applicant's eligibility, or relate only to ancillary issues, would be less likely to support an adverse credibility determination on their own.

Example

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[209] *See, e,g.*, Shrestha v. Holder, 590 F.3d 1034, 1044 (9th Cir. 2010); Chen v. U.S. Atty. Gen., 463 F.3d 1228, 1232 n. 4 (11th Cir. 2006).

[210] *See* Hong Fei Gao v. Sessions, 891 F.3d 67, 77 (2d. Cir. 2018) ("Thus, although IJs may rely on non-material omissions and inconsistencies, not all omissions and inconsistencies will deserve the same weight.").

[211] *See, e.g.*, Qing Hua Lin v. Holder, 736 F.3d 343, 353 (4th Cir. 2013).

[212] INA § 208(b)(1)(B)(iii).

[213] Balogun v. Ashcroft, 374 F.3d 492, 504 (7th Cir. 2004); *see also* Cojocari v. Sessions, 863 F.3d 616, 620 (7th Cir. 2017) (explaining that, post-REAL ID, IJ's "must still distinguish between inconsistencies ... that are material and those that are not."); Chun Sui Yuan v. Lynch, 827 F.3d 648, 656 (7th Cir. 2016) (finding that "that the lone unresolved inconsistency in the applicant's testimony about his brother's whereabouts was "not sufficiently material to warrant an adverse credibility finding under the REAL ID Act."); Krishnapillai v. Holder, 563 F.3d 606, 617 (7th Cir. 2009); Shrestha v. Holder, 590 F.3d 1034, 1046–47 (9th Cir. 2010); Hong Fei Gao v. Sessions, 891 F.3d 67, 77 (2d. Cir. 2018).

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In upholding an adverse credibility determination in *Shrestha v. Holder*, the Ninth Circuit contrasted two inconsistencies and the relative weight given to each.[214] The court noted that although there may have been some "slight inconsistency" between Shrestha's indication that his parents' address was his most recent address and his statement that he had stayed with his uncle temporarily, "it is too trivial [. . .] alone to form the basis of the adverse credibility determination." However, the court agreed that greater weight should be given to an inconsistency about the frequency with which Maoists had inquired about Shrestha's whereabouts, as Shrestha's asserted fear of the Maoists "formed the crux" of his claim. The Ninth Circuit specified that "[a]lthough inconsistencies no longer need to go to the heart of the [. . .] claim, when an inconsistency is at the heart of the claim it doubtless is of great weight."[215]

False testimony given on a peripheral matter may also be significant if it demonstrates that the applicant has a propensity to provide false testimony under oath or conceal the truth.[216] On the other hand, relatively trivial differences in the applicant's testimony or other evidence, even if they relate to a central aspect of the applicant's claim, may not undermine the veracity of the testimony when taking into account the totality of the circumstances.

Examples

- In *Malkandi v. Holder*, the applicant was "caught in a lie of significant magnitude" when he admitted to presenting a false claim to UNHCR in support of his eligibility for refugee status after fleeing from Iraq to Pakistan in the 1990s, and he continued to perpetuate this lie at each stage of his immigration process. Years later, Malkandi was less than forthcoming with government agents who were investigating his apparent relationship with a known member of Al Qaeda, and he demonstrated evasive behavior when questioned by the IJ about this relationship during a hearing on his application for asylum, repeatedly claiming he did not know or could not recall significant pieces of relatively recent information. The Ninth Circuit upheld the IJ's and BIA's adverse credibility determination in his application for asylum, finding "[i]t is inescapable that Malkandi's history of misrepresentations about his past and continued evasion of the truth casts a shadow over his present story."[217]

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[214] *Shrestha*, 590 F.3d at 1046-47.

[215] *Id.*

[216] *See Toure v. Ashcroft*, 400 F.3d 44, 48 (1st Cir. 2005) (holding that, in addition to major inconsistencies in her claim, the applicant's false testimony under oath in her husband's hearing "fairly illustrated her propensity to dissemble under oath" and was relevant to the applicant's credibility in her own case); *Laurent v. Ashcroft*, 359 F.3d 59, 64 (1st Cir. 2004) (stating that "an alien's fraudulent asylum application, coupled with false testimony under oath before an asylum officer, support a finding that the alien had a 'propensity to dissemble under oath.'").

[217] *Malkandi v. Holder*, 576 F.3d 906, 915, 917-18 (9th Cir. 2009).

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- By contrast, in *Hong Fei Gao v. Sessions*, the Second Circuit overturned an adverse credibility determination, finding that the IJ gave excessive weight to "trivial" inconsistencies related to Gao's claim of persecution, such as the difference between his hearing testimony that he was interrogated by the police "four times" and his application statement that he was interrogated "several times." Likewise, the difference between September 1, 2010 and September 4, 2010 as the date when the applicant contacted his cousin was a "trivial discrepancy."[218]

4.6 Cumulative Effect of Multiple Credibility Concerns

In addition to the amount of relative weight you assign to individual credibility concerns, the cumulative effect of multiple credibility concerns will be a key factor influencing your overall credibility determination.[219] You may find that the applicant is not credible based on an accumulation of relatively minor credibility issues, which may appear tangential or insignificant when viewed is isolation, but which cumulatively tip the scales towards finding the applicant not credible.[220]

Example

In finding the applicant not credible in *Xiu Xia Lin v. Mukasey*, the IJ relied on three inconsistencies and omissions that were all ancillary to her claim: 1) an inconsistency regarding whether Lin's friend was ever in hiding in connection with the friend's own Falun Gong activities; 2) an omission from Lin's application and her father's letter about the length of time Lin was in detention; and 3) an omission from her father's letter about the purported bribe Lin's family had to pay to secure her release, which the court described as "only indirectly" related to Lin's claim of persecution. The Second Circuit held that under post-

[218] *Hong Fei Gao v. Sessions*, 891 F.3d 67, 77 (2d. Cir. 2018).

[219] *See Lin v. Gonzales*, 446 F.3d 395, 402 (2d Cir. 2006) (finding that it would be appropriate to base an adverse credibility determination on matters that are "collateral" or "ancillary" to the claim if the "cumulative effect" is found to be significant by the fact-finder).

[220] *See, e.g., Dankam v. Gonzales*, 495 F.3d 113, 122-23 (4th Cir. 2007) (While some inconsistencies "at first glance appear to be tangential and minor, they add to and create a cumulative effect that is sufficient to support a finding that Dankam's claims are not credible."); *Berri v. Gonzales*, 468 F.3d 390, 395-96 (6th Cir. 2006) ("Some inconsistencies, such as the circumstances of Sami's treatment in Kuwait (which, of course, has no bearing on whether he should be returned to Lebanon), and the statement that they left Kuwait with nothing even though they had an apartment in Lebanon, are arguably minor or irrelevant. However, it is "their cumulative effect" that lends support to the IJ's adverse credibility finding. We hold that given the number of inconsistencies and the lack of corroborating evidence to support the Berris' statements, the IJ's credibility determination was a reasonable one, and we are inclined to follow it.") (internal citations omitted).

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REAL ID standards, the "cumulative effect" of these inconsistencies provided a reasonable basis to find Lin not credible.[221]

5 CREDIBILITY DETERMINATION

In every case, you must make a credibility determination in the totality of the circumstances and articulate the basis for your determination. Under the REAL ID Act, an accumulation of unresolved credibility concerns that are relevant to the applicant's veracity as a witness, even if they are tangential to the applicant's eligibility, may be a sufficient basis to find the applicant not credible in the totality of the circumstances. In other cases, you may find that the totality of the circumstances supports a finding that the applicant is credible despite remaining inconsistencies, implausibilities, or other credibility concerns, particularly where there is corroborating evidence that bolsters the applicant's testimony.[222] In such circumstances, you must explain why the applicant is credible in the totality of the circumstances despite the identified issue(s).

6 CONCLUSION

Evaluating the credibility of testimony is a fundamental part of asylum and refugee adjudications. The applicant bears the burden of establishing his or her credibility. As a RAIO officer, you must conduct all interviews in a non-adversarial manner and review the applicant's testimony and other evidence to spot potential credibility issues. While the REAL ID Act provides adjudicators with a significant amount of discretion in making credibility determinations, this discretion is not limitless. Credibility findings must be based on "specific and cogent reasons" and objective facts. The factors outlined in this lesson are relevant to your assessment of the applicant's veracity as a witness, where applicable, and must be considered as part of your credibility analysis. In every case, you must make a final credibility determination based on all relevant factors in the totality of the circumstances, including any credibility concerns that rise during the adjudication, the applicant's explanation for those concerns, and the individual circumstances of the applicant and interview.

7 SUMMARY

7.1 General Considerations

The main purpose of an asylum or refugee interview is to elicit all relevant and useful information related to the applicant's eligibility for the benefit. It also provides an

[221] *Xiu Xia Lin v. Mukasey*, 534 F.3d 162 (2d. Cir. 2008).

[222] *See, e.g.*, *Shouchen Yang v. Lynch*, 822 F.3d 504, 508 (9th Cir. 2016) (holding that the doctrine of *falsus in uno, falsus in omnibus* is discretionary rather than mandatory); *see also Salifou v. Mukasey*, 281 Fed. Appx. 51, 54 (2d Cir. 2008) (unpublished); *Ali v. Sessions*, 706 Fed. Appx. 223, 227 (6th Cir. 2017) (unpublished).

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opportunity to probe the credibility of the applicant's testimony, which you are required to do in every case. There is no presumption of credibility in RAIO adjudications; the applicant must establish his or her credibility as a component of meeting the burden of proof. You will need to be informed of country conditions information and carefully review the applicant's file in order to identify potential credibility concerns. Credibility concerns must be clearly articulated, based on objective facts, and documented in your notes.

7.2 The REAL ID Act

The REAL ID Act added four major provisions addressing credibility determinations and corroboration to INA sections 208 and 240, including:

- A requirement that the adjudicator consider the "totality of the circumstances, and all relevant factors" in making a credibility determination;
- A listing of factors that an adjudicator may consider in making such a determination, including demeanor, candor, responsiveness, inherent plausibility of the account, consistency between oral and written statements, internal consistency of a statement, consistency of statements with other evidence of record, inaccuracies or falsehoods in such statements, and "any other relevant factor";
- A clarification that inconsistencies, inaccuracies, or falsehoods do not need to "go to the heart of the applicant's claim" to be considered in the overall determination; and
- A provision that an applicant's testimony may be sufficient to sustain his or her burden of proof without corroboration if it "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee," but that if the adjudicator determines that additional evidence is needed to corroborate otherwise credible testimony, the applicant must either provide the evidence or provide a reasonable explanation as to why he or she cannot provide it.

While the REAL ID Act did not expressly list "detail" as a factor to consider in evaluating the credibility of an applicant's testimony, detailed testimony is still considered a hallmark of credibility. USCIS applies these same standards to asylum and refugee adjudications as a matter of policy.

7.3 Totality of the Circumstances

You must consider the totality of the circumstances when making a credibility determination. This means that you must consider all testimony and other evidence in the record together as a whole. In order to do so, you will elicit and analyze all relevant information, including the individual circumstances of the applicant. You must consider all the evidence available to you in the record when analyzing an applicant's credibility.

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All credibility concerns, by definition, must be relevant to an applicant's "veracity as a witness," meaning that they are indicative of the truthfulness, or reliability, of an applicant's testimony. A factor is relevant if it is "logically connected and tending to prove or disprove a matter in issue," regardless of whether the issue is central to the eligibility determination. There are a number of considerations that may influence your totality of the circumstances analysis, including the personal background and experiences of the applicant, cross-cultural factors, interpretation issues, and any indicators of fraud.

When you are analyzing an applicant's credibility, you must identify the factors on which you base your determination. As provided in the REAL ID Act, there are a number of factors that you must consider in making a credibility determination, where applicable, including: consistency, detail, plausibility, demeanor, candor or responsiveness, inaccuracies or falsehoods, and "any other relevant factor."

Under the REAL ID framework, you must identify and evaluate credibility concerns to determine not only whether the credibility concerns are relevant, but also the amount of importance, or weight, that you assign the credibility concerns in your totality of the circumstances analysis. The relative weight or impact of a credibility concern will depend on 1) how central or peripheral the concern is to the applicant's eligibility, and 2) the extent to which the concern undermines the applicant's veracity.

In addition to the amount of relative weight you assign to individual credibility concerns, the cumulative effect of multiple credibility concerns will be a key factor in your overall credibility determination. When considering the totality of the circumstances, credibility issues that are not directly relevant to the applicant's eligibility or to discretionary factors will not, in most cases, be sufficient to support an adverse credibility determination *in isolation*. However, you may find that the applicant is not credible based on an accumulation of relatively minor credibility issues, which cumulatively tip the scales towards finding the applicant not credible.

In every case, you must make a credibility determination based on the totality of the circumstances by weighing any unresolved credibility issues together with the record as a whole.

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PRACTICAL EXERCISES

Practical Exercise # 1

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

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OTHER MATERIALS

There are no Other Materials for this module.

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SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

The following information is specific to international and refugee adjudications. Information in each text box contains adjudication-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

There are no International and Refugee Adjudications Supplements

REQUIRED READING

ADDITIONAL RESOURCES

SUPPLEMENTS

International and Refugee Adjudications Supplement

Module Section Subheading

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SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

REQUIRED READING

1. RAIO Combined Training Program – Credibility Training Module
2. RAIO Combined Training Program – Evidence Training Module

ADDITIONAL RESOURCES

1.
2.

SUPPLEMENTS

Asylum Adjudications Supplement

"Boilerplate" Applications

You may come across "boilerplate" applications that are identical (word for word) or unusually similar in content. The fact that one application is identical to another may not in itself form the sole basis of an adverse credibility determination, but it should alert you to look particularly closely at the claim and ask additional questions to probe the applicant's credibility. You must provide the applicant with an opportunity to present his or her full claim and explain any inconsistencies or lack of detail in the applicant's testimony in order to determine whether the applicant's claim is credible. While inter-proceeding similarities may be considered by an adjudicator as part of a credibility analysis based on the totality of the circumstances, it is imperative that certain procedural safeguards are put in place, as discussed below.

The Second Circuit upheld an IJ's adverse credibility finding based on a comparison of

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striking similarities found in affidavits that were submitted separately in unrelated asylum applications.[223] The Court warned of the problems that such findings could entail, identifying four possible explanations for such similarities:[224]

- Both applicants may have inserted truthful information into a standardized template
- Different applicants may have employed the same preparer who wrote up both stories in their own rigid style
- The other applicant may have plagiarized the truthful statements of the applicant
- The similarities resulted from inaccurate or formulaic translations

The Court noted, favorably, the way the proceedings were handled, with the IJ "…meticulously follow[ing] certain procedural safeguards which, taken together, sufficiently addressed the dangers inherent in relying on inter-proceeding similarities."[225] The Court then went on to describe the procedural safeguards in detail. The Court found that, in relying on inter-proceeding similarities, a trier of fact should:

1. Carefully identify the similarities
2. Consider the number and nature of the similarities to determine if there is an alternate explanation for the similarities
3. Rigorously comply with procedural safeguards concerning notice,[226] by allowing the applicant meaningful opportunity
   a. to explain or contest the similarities;
   b. to investigate the possibility that her affidavit might somehow have been plagiarized; or
   c. to consider whether the seemingly similar affidavits might merely have been translated or recorded inaccurately or formulaically.[227]

Following the lead of the Second Circuit, the BIA subsequently held that it is

[223] *Mei Chai Ye v. USDOJ*, 489 F.3d 517 (2d Cir. 2007).

[224] *Id.* at 524.

[225] *Id.*

[226] *Id.* at 525 n.5 (explaining in greater detail the protections afforded by the notice requirements).

[227] *Id.* at 526, 527 n.9 (stating that "[t]here is nothing novel about our insisting on the application of heightened procedural protections to a context in which they are necessary to safeguard the integrity of the agency's fact-finding function.").

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permissible for an IJ to consider *significant* inter-proceeding similarities submitted by applicants in different proceedings, so long as procedural steps are taken to preserve the fairness of the proceedings, largely adopting the three-part framework followed by the Second Circuit.[228]

The Board held that the IJ must:

1. Give the applicant meaningful notice of the similarities that are considered to be significant. This includes:

   a. Identifying the similarities between documents or other evidence that are being considered;

   b. Providing the applicant with a copy of the documents; and

   c. Explaining to the applicant how the similarities appear to undermine the applicant's credibility on the record.

2. Give the applicant a reasonable opportunity to explain the similarities (including the possibility of continuing the proceedings for the applicant to obtain evidence in support of his or her explanation, as necessary).

3. Consider the totality of the circumstances in making a credibility determination.

Significantly, the Board cited the same possible, non-credibility related explanations for the similarities as identified by the Second Circuit, noting that a reviewing court can be more confident in deferring to the credibility determination of an IJ who has considered these alternate explanations. Regarding the totality of the circumstances analysis, the Board also noted that, "the presence of even a relatively few similarities could raise . . . credibility concerns if, in the context of an overall asylum claim, distinct language was used or unique factual circumstances were repeated without reasonable explanation."[229]

Confidentiality and Other Considerations When Addressing Inter-Proceeding Similarities

Confronting an applicant about significant similarities between the applicant's and others' applications raises a number of issues that must be carefully handled pursuant to

[228] *Matter of R-K-K-*, 26 I&N Dec. 658, 660-61 (BIA 2015) (upholding the IJ's adverse credibility determination where the applicant's asylum declaration used similar language to describe events that were almost identical to those described by his brother, including the same spelling and grammatical errors); *see also Wang v. Lynch*, 824 F.3d 587 (8th Cir. 2016).

[229] *Matter of R-K-K-*, 26 I&N Dec. at 662.

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division-specific guidance.

First, the confidentiality of the applicant must not be violated. The court in *Mei Chai Ye*[230] made it clear that an applicant must be given meaningful notice of the similarities and a full opportunity to offer an explanation of those similarities before an adverse credibility determination may be based on boilerplate considerations. This may require you to allow an applicant to examine portions of the other similar applications, which raises confidentiality issues. The confidentiality issues may be addressed through proper redaction of identifying information.

Second, confronting an applicant with the fact that other significantly similar applications have been submitted by other applicants could possibly jeopardize an on-going fraud investigation. In some cases, most often in the asylum context, DHS may be investigating a particular "boilerplate preparer" for prosecution. Thus, it is important that you first consult with your supervisor and the FDNS officer assigned to your office to ensure that any ongoing investigation is not jeopardized.

Third, an asylum applicant who does not speak English may submit an application in English that is very similar to other applications filed by other applicants, yet insist that the applicant completed it himself or herself. Such lack of candor is appropriate to consider along with other relevant factors when evaluating credibility. Being truthful about the preparation of an application is relevant to the applicant's knowledge of its contents and thus relevant to the overall credibility of the claim.

Intra-Proceeding Similarities

Another type of "boilerplate" that you may encounter in the asylum context involves intra-proceeding similarities. In *Surinder Singh v. BIA*, the Second Circuit upheld an IJ's adverse credibility finding based, in part, on "the nearly identical language in the written affidavits allegedly provided by different people in India in support of Singh's applications."[231] Citing *Singh* in a later decision, the Court stated, "…our case law on intra-proceeding similarities has firmly embraced the commonsensical notion that striking similarities between affidavits are an indication that the statements are 'canned.'"[232]

If you encounter a case where affidavits of nearly identical language are submitted in support of a claim, you should closely question the applicant about the preparation of the affidavits: who prepared them; under what circumstances; and how the people who signed the affidavits had knowledge of the content. After obtaining as much

[230] *Mei Chai Ye v. USDOJ*, 489 F.3d 517, 524-26 (2d Cir. 2007).

[231] *Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006).

[232] *Mei Chai Ye*, 489 F.3d at 524-26 ("We have repeatedly allowed IJs to take into account such 'intra-proceeding' similarities because, in most cases, it is reasonable and unproblematic for an IJ to infer that an applicant who herself submits the strikingly similar documents is the common source of those suspicious similarities.").

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information from the applicant as possible about the preparation of the affidavits, you should point out the extreme similarity in the documents to the applicant and provide him or her an opportunity to explain why they are so similar. Such questioning will inform you about the evidentiary weight to give to the affidavits and their impact on the overall credibility determination.

Asylum Adjudications Supplement

Consular Consolidated Database

Since October 2006, Asylum Officers have had authorized access to the Department of State's Consular Consolidated Database (CCD). The CCD holds selected history and outcome information concerning immigrant and nonimmigrant visa applications processed by consular officers at visa issuing posts worldwide. This can be a powerful tool for you to use at the time of the interview. There are a few caveats in using CCD information both during the interview and in the assessment.[233]

Confidentiality – visa application information is considered confidential.[234] You should keep in mind the distinction between information contained in the CCD that has been supplied by the applicant (which may be revealed to the applicant) and information that comes from official sources (such as comments added by consular officials, which may not be revealed to the applicant). Some types of information contained in the CCD that may be revealed to the applicant include:

- the fact that the applicant applied for a visa,
- the fact that the applicant was present at a U.S. Embassy or Consulate in a particular location on a particular date,
- the fact that the applicant presented a particular document to the consular officer as part of the visa adjudication process,
- the fact that the applicant was issued or refused a visa, or
- any biographical information such as name, date of birth, or address available in the CCD record as provided in a visa application (for example, the DS-156 form).

[233] Langlois, Joseph, INS Office of International Affairs, *Asylum Division Access to the Department of State's Consular Consolidated Database and Use of Consular Affairs Visa Data in Asylum Adjudications,* Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: October 6, 2006).

[234] Langlois, Joseph, INS Office of International Affairs, *Disclosure of Consular Affairs Visa Data in Asylum Adjudications*, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 24 January 2008).

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You must never refer to the CCD by name during the interview or in the written assessment. When confronting an applicant with contradictory information found in the CCD, you should refer to the information in general terms such as, "government records indicate…", or "our records show…". If CCD information is referenced in the assessment, you should refer to "Department of State records."

Contradictions between CCD information and an applicant's asylum testimony, both in the application and the interview, will often raise the issue of fraud. You should follow the appropriate established procedures when this issue is raised.

For more information on the use of the CCD please refer to, Langlois, Joseph, INS Office of International Affairs, *Disclosure of Consular Affairs Visa Data in Asylum Adjudications*, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 24 January 2008).

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Lesson Plan Overview

Course	Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	***Credible Fear of Persecution and Torture Determinations***
Rev. Date	September 24, 2019
Lesson Description	The purpose of this lesson is to explain how to determine whether an alien subject to expedited removal or an arriving stowaway has a credible fear of persecution or torture.
Terminal Performance Objective	The Asylum Officer will be able to correctly make a credible fear determination consistent with the statutory provisions, regulations, policies, and procedures that govern whether the applicant has established a credible fear of persecution or a credible fear of torture.
Enabling Performance Objectives	1. Identify which persons are subject to expedited removal. (ACRR7)(OK4)(ACRR2)(ACRR11)(APT2) 2. Examine the function of credible fear screening. (ACRR7)(OK1)(OK2)(OK3) 3. Define the standard of proof required to establish a credible fear of persecution. (ACRR7) 4. Identify the elements of "torture" as defined in the Convention Against Torture and the regulations that are applicable to a credible fear of torture determination (ACRR7) 5. Describe the types of harm that constitute "torture" as defined in the Convention Against Torture and the regulations. (ACRR7) 6. Define the standard of proof required to establish a credible fear of torture. (ACRR7) 7. Identify the applicability of bars to asylum and withholding of removal in the credible fear context. (ACRR3)(ACRR7)
Instructional Methods	Lecture, practical exercises
Student Materials/ References	Lesson Plan; Procedures Manual, Credible Fear Process (Draft); INA § 208; INA § 235; INA § 241(b)(3); 8 C.F.R. § 1.2; 8 C.F.R. §§ 208.16-18; 8 C.F.R. § 208.30; 8 C.F.R. § 235.3. Credible Fear Forms: **Form I-860**: Notice and Order of Expedited Removal; **Form I-867-A&B**: Record of Sworn Statement; **Form I-869**:

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Record of Negative Credible Fear Finding and Request for Review by Immigration Judge; **Form I-863**: Notice of Referral to Immigration Judge; **Form I-870**: Record of Determination/Credible Fear Worksheet; **Form M-444**: Information about Credible Fear Interview

Method of Evaluation

Written test

Background Reading

1. Immigration and Naturalization Service, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312 (March 6, 1997).

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

3. Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68924 (November 13, 2002).

4. Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, ICE Directive No. 11002.1 (effective January 4, 2010).

5. Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air*, 82 Fed. Reg. 4769 (January 17, 2017).

6. Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (January 17, 2017).

7. Department of Homeland Security, *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35409-01 (July 23, 2019).

8. H.R. Rep. No. 109-72 at 161-68 (2005).

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Critical Tasks

Knowledge of U.S. case law that impacts RAIO (3)
Knowledge of the Asylum Division history. (3)
Knowledge of the Asylum Division mission, values, and goals. (3)
Knowledge of how the Asylum Division contributes to the mission and goals of RAIO, USCIS, and DHS. (3)
Knowledge of the Asylum Division jurisdictional authority. (4)
Knowledge of the applications eligible for special group processing (e.g., ABC, NACARA, Mendez) (4)
Knowledge of relevant policies, procedures, and guidelines establishing applicant eligibility for a credible fear of persecution or credible fear of torture determination. (4)
Skill in identifying elements of claim. (4)
Skill in assessing credibility of aliens in credible fear interviews (4)
Knowledge of inadmissibility grounds relevant to the expedited removal process and of mandatory bars to asylum and withholding of removal. (4)
Knowledge of the appropriate points of contact to gain access to a claimant who is in custody (e.g., attorney, detention facility personnel) (3)
Skill in organizing case and research materials (4)
Skill in applying legal, policy, and procedural guidance (e.g., statutes, case law) to evidence and the facts of a case. (5)
Skill in analyzing complex issues to identify appropriate responses or decisions. (5)

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I. INTRODUCTION

The purpose of this lesson plan is to explain how to determine whether an alien seeking admission to the United States, who is subject to expedited removal or is an arriving stowaway, has a credible fear of persecution or torture using the credible fear standard defined in the Immigration and Nationality Act (INA or the Act), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and implementing regulations.

II. BACKGROUND

The expedited removal provisions of the INA were added by section 302 of IIRIRA, and became effective on April 1, 1997.

INA § 235(a)(2); § 235 (b)(1); *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. No. 104-208, 110 Stat. 3009, Sept. 30, 1996).

In expedited removal, certain aliens seeking admission to the United States are immediately removable from the United States by the Department of Homeland Security (DHS), unless they indicate an intention to apply for asylum or express a fear of persecution or torture or a fear of return to their home country, in which case they are referred to an asylum officer to determine whether they have a credible fear of persecution or torture. Aliens who are present in the United States, and who have not been admitted, are treated as applicants for admission. In general, aliens subject to expedited removal are not entitled to a full immigration removal hearing or further review by a federal court unless they are able to establish a credible fear of persecution or torture.

INA § 235(a)(1).

INA section 235 and its implementing regulations provide that certain categories of aliens are subject to expedited removal. Those include the following: arriving stowaways; certain arriving aliens at ports of entry who are inadmissible under INA section 212(a)(6)(C) (because they have presented fraudulent documents or made a false claim to U.S. citizenship or other material misrepresentations to gain admission or other immigration benefits) or 212(a)(7) (because they lack proper documents to gain admission); and certain designated aliens who have not been admitted or paroled into the U.S.

Those aliens subject to expedited removal who indicate an intention to apply for asylum, a fear of persecution or torture, or a fear of return to their home country are referred to asylum officers to determine whether they have a credible fear of persecution or torture. An asylum officer will then conduct a credible fear interview to determine whether there is a significant possibility that the alien can establish eligibility for asylum as a refugee under section 208 of the

INA § 235(b)(1)(A); 8 C.F.R. § 208.30.

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INA or withholding of removal under section 241(b)(3) of the INA. Pursuant to regulations implementing the Convention Against Torture (CAT) issued under the authority of the Foreign Affairs Reform and Restructuring Act of 1998, if an alien does not establish a credible fear of persecution, the asylum officer will then determine whether there is a significant possibility the alien can establish eligibility for protection under the Convention Against Torture through withholding of removal or deferral of removal.

Sec. 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, Div. G, Oct. 21, 1998) and 8 C.F.R. § 208.30(e)(3).

A. Aliens Who May Be Subject to Expedited Removal

The following categories of aliens may be subject to expedited removal:

1. Arriving aliens coming or attempting to come into the United States at a port of entry or an alien seeking transit through the United States at a port of entry.

   Aliens attempting to enter the United States at a land border port of entry with Canada must first establish eligibility for an exception to the Safe Third Country Agreement, through a Threshold Screening interview, in order to receive a credible fear interview.

8 C.F.R. § 235.3(b)(1)(i); *see* 8 C.F.R. § 1.2 for the definition of an "arriving alien."

8 C.F.R. § 208.30(e)(6). *See also* ADOTC Lesson Plan, *Safe Third Country Threshold Screening.*

2. Aliens who are interdicted in international or United States waters and brought to the United States by any means, whether at a port of entry or not.

   This category does not include aliens interdicted at sea who are never brought to the United States.

8 C.F.R. § 1.2; *see also* Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68924 (Nov. 13, 2002); Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 8431 (Jan. 25, 2017).

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3. Aliens who have been paroled under INA section 212(d)(5) on or after April 1, 1997, may be subject to expedited removal upon termination of their parole.

   This provision encompasses those aliens paroled for urgent humanitarian or significant public benefit reasons.

   This category does not include those who were given advance parole as described in Subsection B.6. below.

4. Aliens who have arrived in the United States by sea (either by boat or by other means) who have not been admitted or paroled, and who have not been physically present in the United States continuously for the two-year period immediately prior to the inadmissibility determination.

Customs and Border Protection, *Designating Aliens For Expedited Removal*, 84 Fed. Reg. 35409 (Jul. 23, 20019); Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 8431 (Jan. 25, 2017).

5. Aliens who did not arrive by sea, who are encountered anywhere in the United States more than 100 air miles from a U.S. international land border, and who have been continuously present in the United States for less than two years; or aliens who did not arrive by sea, who are encountered within 100 air miles from a U.S. international land border, and who have been continuously present in the United States for at least 14 days but for less than two year.

Customs and Border Protection, *Designating Aliens For Expedited Removal*, 84 Fed. Reg. 35409 (Jul. 23, 20019); Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*,

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82 Fed. Reg. 8431 (Jan. 25, 2017).

B. Aliens Seeking Admission Who are Exempt from Expedited Removal

While Cuban citizens and nationals were previously exempt from expedited removal, the regulations at 8 C.F.R. § 235.3(b)(1)(i) were modified to remove the exemption. *See* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air*, 82 Fed. Reg. 4769 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air*, 82 Fed. Reg. 8353 (Jan. 25, 2017).

The following categories of aliens are exempt from expedited removal:

1. Stowaways

   Stowaways are not eligible to apply for admission to the United States, and therefore they are not subject to the expedited removal program under INA section 235(b)(1)(A)(i). They are also not eligible for a full hearing in removal proceedings under INA section 240. However, if a stowaway indicates an intention to apply for asylum under INA section 208 or a fear of persecution, an asylum officer will conduct a credible fear interview and refer the case to an immigration judge for an asylum and/or Convention Against Torture hearing if the stowaway satisfies the credible fear standard.

   INA § 235(a)(2).

2. Persons granted asylum status under INA section 208.

   8 C.F.R. § 235.3(b)(5)(iii).

3. Persons admitted to the United States as refugees under INA section 207.

   8 C.F.R. § 235.3(b)(5)(iii).

4. Persons admitted to the United States as lawful permanent residents.

   8 C.F.R. § 235.3(b)(5)(ii).

5. Persons paroled into the United States prior to April 1, 1997.

6. Persons paroled into the United States pursuant to a grant of advance parole that the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States.

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7. Persons denied admission on charges other than or in addition to INA Section 212(a)(6)(C) or 212(a)(7).

8. Persons applying for admission under INA Section 217, Visa Waiver Program for Certain Visitors ("VWP").

   This exemption includes nationals of non-VWP countries who attempt entry by posing as nationals of VWP countries.

   Individuals seeking admission under the Guam and Northern Mariana Islands visa waiver program under INA section 212(l) are not exempt from expedited removal provisions of the INA.

9. Asylum seekers attempting to enter the United States at a land border port of entry with Canada must first establish eligibility for an exception to the Safe Third Country Agreement, through a Threshold Screening interview, in order to receive a credible fear interview.

8 C.F.R. § 235.3(b)(3).

8 C.F.R. § 235.3(b)(10); *see also Matter of Kanagasundram*, 22 I&N Dec. 963 (BIA 1999); Procedures Manual, Credible Fear Process (Draft), sec. IV.L., "Visa Waiver Permanent Program"; and Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations. Visa Waiver Pilot Program (VWPP) Contingency Plan, Wire #2 (Washington DC: Apr. 28, 2000).

8 C.F.R. § 208.30(e)(6).

III. FUNCTION OF CREDIBLE FEAR SCREENING

In applying the credible fear standard, it is critical to understand the function of the credible fear screening process. As explained by the Department of Justice when issuing regulations adding Convention Against Torture screening to the credible fear process, the function of the process is to "quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch."

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999).

IV. DEFINITION OF CREDIBLE FEAR OF PERSECUTION AND CREDIBLE FEAR OF TORTURE

A. Definition of Credible Fear of Persecution

According to statute, an alien has a credible fear of persecution only if "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum" as a refugee under section 208 of the INA. Regulations further provide that the applicant will be found to have a credible fear of persecution if the applicant establishes that there is a significant possibility that he or she can establish eligibility for withholding of removal

INA § 235(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2).

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under section 241(b)(3) of the INA.

B. Definition of Credible Fear of Torture

An applicant will be found to have a credible fear of torture if the applicant establishes that there is a significant possibility that he or she is eligible for withholding of removal under section 241(b)(3) of the Act or deferral of removal, if the applicant is subject to a mandatory bar to withholding of removal under the regulations issued pursuant to the legislation implementing the Convention Against Torture.

8 C.F.R. § 208.30(e)(3); 8 C.F.R. § 208.16; 8 C.F.R. § 208.17

V. BURDEN OF PROOF AND STANDARD OF PROOF FOR CREDIBLE FEAR DETERMINATIONS

A. Burden of Proof / Testimony as Evidence

See RAIO Training Module, *Evidence*.

The applicant bears the burden of proof to establish a credible fear of persecution or torture. This means that the applicant must produce sufficiently convincing evidence that establishes the facts of the case, and that those facts must satisfy every element of the relevant legal standard.

Matter of A-B -, 27 I&N Dec. 316, 340 (AG 2018).

Asylum officers are required by regulation to "conduct the interview in a nonadversarial manner." The regulation also instructs asylum officers that "[t]he purpose of the [credible fear] interview shall be to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture…."

8 C.F.R. § 208.30(d).

An applicant's testimony is evidence to be considered and weighed along with all other evidence presented. According to the INA, the applicant's testimony may be sufficient to sustain the applicant's burden of proof if it is "credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." An applicant is a refugee only if he or she has been persecuted or has a well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." An applicant's testimony must satisfy all three prongs of the "credible, persuasive, and … specific facts" test in order to establish his or her burden of proof without corroboration. An applicant may be credible, but nonetheless fail to satisfy his or her burden to establish the required elements of eligibility. "Specific facts" are distinct from statements of belief. When assessing the probative value of an applicant's testimony, the asylum officer must distinguish between fact and opinion

INA § 208(b)(1)(B)(ii).

INA § 101(a)(42)

INA § 208(b)(1)(B)(ii).

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testimony and determine how much weight to assign to any claimed facts.

Under the INA, the asylum officer is also entitled to determine that the applicant must provide evidence that corroborates the applicant's testimony, even where the officer might otherwise find the testimony credible. In cases in which the asylum officer determines that the applicant must provide such evidence, the asylum officer must provide the applicant notice and the opportunity to submit evidence, and the applicant must provide the evidence unless the applicant cannot reasonably obtain the evidence.

INA § 235(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2); *see* RAIO Training Module, *Country Conditions Research.*

Additionally, pursuant to the statutory definition of "credible fear of persecution," the asylum officer must take account of "such other facts as are known to the officer." Such "other facts" include relevant country conditions information.

8 C.F.R. §§ 208.16(c)(3)(iii), (iv).

Similarly, country conditions information should be considered when evaluating a credible fear of torture. The Convention Against Torture and implementing regulations require consideration of "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and [o]ther relevant information regarding conditions in the country of removal."

8 C.F.R. § 208.12(a),

The regulations instruct asylum officers as follows: "in deciding whether the alien has a credible fear of persecution or torture pursuant to § 208.30 of this part, …the asylum officer may rely on material provided by the Department of State, other USCIS offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions."

Thus, in evaluating the credibility of an applicant's claim to be a refugee, the asylum officer must consider information about the country from which the alien claims refugee status, such as the prevalence of torture or persecution based on race, religion, nationality, membership in a particular social group, or political opinion. Such information may be derived from several sources.

B. Credible Fear Standard of Proof: Significant Possibility

The party who bears the burden of proof must persuade the adjudicator of the existence of certain factual elements according to a specified standard of proof, or degree of certainty. The relevant standard of proof specifies how convincing or probative the applicant's evidence must be.

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In order to establish a credible fear of persecution or torture, the applicant must show a "significant possibility" that he or she could establish eligibility for asylum, withholding of removal, or deferral of removal.

See INA § 235 (b)(1)(B)(v); 8 C.F.R. §§ 208.30(e)(2), (3).

The showing required to meet the "significant possibility" standard is higher than the "not manifestly unfounded" screening standard favored by the Office of the United Nations High Commissioner for Refugees ("UNHCR") Executive Committee. **A claim that has no possibility, a minimal possibility, or a mere possibility of success would not meet the "significant possibility" standard.**

UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, pp. 438-40, 6th Ed., June 2011.

In a non-immigration case, the "significant possibility" standard of proof has been described to require the person bearing the burden of proof to "demonstrate a *substantial and realistic possibility* of succeeding." While that articulation of the "significant possibility" standard was provided in a non-immigration context, the "*substantial and realistic possibility*" of success description is a helpful articulation of the "significant possibility" standard as applied in the credible fear process.

See Holmes v. Amerex Rent-a-Car, 180 F.3d 294, 297 (D.C. Cir. 1999) (quoting *Holmes v. Amerex Rent-a-Car*, 710 A.2d 846, 852 (D.C. 1998)) (emphasis added).

The U.S. Court of Appeals for the D.C. Circuit found that the showing required to satisfy a "substantial and realistic possibility of success" is higher than the standard of "significant evidence" but lower than that of "preponderance of the evidence."

Id.

In sum, the credible fear "significant possibility" standard of proof can be best understood as requiring that the applicant "demonstrate a *substantial and realistic possibility* of succeeding," or establishing eligibility for asylum, withholding of removal, or deferral of removal. The standard requires the applicant to identify more than "significant evidence" that the applicant is a refugee entitled to asylum, withholding of removal, or deferral of removal, but the applicant does not need to show that the "preponderance" or majority of the evidence establishes that entitlement.

C. Important Considerations in Interpreting and Applying the Standard

1. When conducting a credible fear interview, an asylum officer must determine what law applies to the applicant's claim. The asylum officer should apply all applicable precedents of the Attorney General and the Board of Immigration Appeals (BIA), which are binding on all immigration judges and asylum officers

8 C.F.R. § 208.30(e)(4).

Matter of E-L-H-, 23 I&N Dec. 814, 819 (BIA 2005); *Matter of Gonzalez*, 16 I&N

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nationwide, to the extent those precedents have not been invalidated by subsequent binding federal court precedent.[1]

Dec. 134, 135–36 (BIA 1977); *Matter of Waldei*, 19 I&N Dec. 189 (BIA 1984).

Where there is disagreement among the United States Courts of Appeals as to the proper interpretation of a legal issue, the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.[2]

D. Identity

The applicant must be able to establish his or her Identity credibly. In many cases, an applicant will not have documentary proof of identity or nationality. However, testimony alone can establish identity and nationality if it is credible, is persuasive, and identifies specific facts. Documents such as birth certificates and passports are accepted into evidence, if available. The officer may also consider information provided by ICE or Customs and Border Protection (CBP).

See RAIO Training Module, *Refugee Definition*.

VI. CREDIBILITY

A. Credibility Standard

In making a credible fear determination, asylum officers are specifically instructed by statute to "[take] into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer."

INA § 235(b)(1)(B)(v).

The asylum officer should assess the credibility of the assertions underlying the applicant's claim to be a refugee entitled to asylum, considering the totality of the circumstances, including other statements made by the applicant, evidence of country conditions, State Department reports, and all other relevant facts and evidence, and all relevant factors.

[1] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, then officers must additionally follow the following guidance:

> The asylum officer should also apply the case law of the relevant federal court of appeals, together with the applicable precedents of the Attorney General and the BIA. The BIA applies precedents of the circuit in which the removal proceedings took place, *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989), except in certain special situations, *see id. See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U. S. 967, 982 (2005) ("A court's prior judicial construction of statute trumps agency construction otherwise entitled to *Chevron* deference only if prior court decision holds that its construction is required by unambiguous terms of statute and leaves no room for agency discretion.").

[2] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, this policy will no longer apply. Officers will be required to apply the law in the circuit in which the alien is located at the time of the interview.

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The Board of Immigration Appeals (BIA) has explained that the "burden of proof is upon an applicant for asylum to establish that the 'reasonable person' in her circumstances would fear persecution upon return" to her home country "'on account of' one of the five grounds specified in the Act." The applicant may satisfy that burden through a combination of credible testimony and the introduction of documentary evidence and background information that supports the claim.

INA § 208(b)(1)(B)(iii); See RAIO Training Module, *Credibility*; *see also Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995); *Matter of Kasinga*, 21 I&N Dec. 357, 364 (BIA 1996).

B. Evaluating Credibility in a Credible Fear Interview

1. General Considerations

See RAIO Training Module, *Credibility*.

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

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

   c. The applicant's ability or inability to provide specific facts supporting the main points of the claim is critical to the credibility evaluation. An applicant may claim that his or her ability to identify such facts is impacted by the context and nature of the credible fear screenings, but the INA requires the applicant to identify such facts in order to satisfy his or her burden of proof. It is the job of the asylum officer to determine whether that burden has been met.

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

See RAIO Training Module, *Credibility*.

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

Section 208 of the Act provides a non-exhaustive list of factors that may be used in a credibility determination in the asylum context. Those include the following: internal consistency;

INA § 208(b)(1)(B)(iii); *see also* RAIO Training Module,

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external consistency; plausibility; demeanor; candor; and responsiveness.

Credibility, for a more detailed discussion of these factors.

The amount of detail provided by an applicant is another factor that should be considered in making a credibility determination. The INA requires an applicant to identify "specific facts." In order to rely on "lack of detail" as a credibility factor, however, asylum officers must specify the level of detail sought. That can be done by asking specific, probing questions that seek to elicit specific facts from the applicant.

INA § 208(b)(1)(B)(ii)

8 C.F.R. § 208.30(d).

C. Assessing Credibility in Credible Fear when Making a Credible Fear Determination

1. In assessing credibility, the officer must consider the totality of the circumstances and all relevant factors, including any reports or data available to the officer regarding conditions in the country or region regarding which the applicant claims a fear of return. Credibility determinations must be made on a case-by-case basis, requiring the officer to consider the totality of the circumstances provided by the applicant's testimony and all relevant country conditions information available to the officer.

2. Officers should refer to all relevant country conditions reports made available to USCIS by the Department of State or other intelligence sources to assess whether the applicant's claims are credible and plausible in the regions in which the applicant claims they have or will occur, as well as to assess whether an applicant could relocate to another area of his or her home country in order to avoid the alleged persecution. If such internal relocation is reasonable, the applicant does not have a credible fear of persecution. Claims that are inconsistent with country conditions reports or are indicative of "boilerplate" language used in credible fear claims by applicants in different proceedings might be valid indications of fraud supporting an adverse credibility finding, although the applicant should be given the opportunity to explain.

See Matter of R-K-K-, 26 I&N Dec. 658 (BIA 2015).

3. The asylum officer should follow up on all credibility concerns during the interview by making the applicant aware of each concern, and the bases for questioning the applicant's testimony. The officer should give the applicant an opportunity to explain all concerns during the credible fear interview.

See RAIO Training Module, *Credibility*.

4. As recommended by Congress in enacting the REAL ID Act of 2005, in making credibility determinations, asylum officers should "rely on those aspects of demeanor that are indicative of truthfulness or deception…[and] a credibility determination

H.R. Rep. No. 109-72.

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should follow an examination of all relevant circumstances, including the circumstances of the individual applicant."

5. Inconsistencies between the applicant's initial statement to the CBP or ICE official and his or her testimony before the asylum officer must be probed during the interview. Such inconsistencies may provide support for a negative credibility finding when taking into account the totality of the circumstances and all relevant factors.

   The sworn statement completed by CBP (Form I-867A/B) does not always record detailed information about any fear of persecution or torture or other general information—such as the reason the individual came to the United States—However, the asylum officer may find that the CBP officer did, in fact, gather additional information from the applicant regarding the nature of his or her claim. In such cases, the applicant's prior statements should inform the asylum officer's line of questioning in the credible fear interview, and any inconsistencies between those prior statements and the statements made during the credible fear interview should be probed and assessed in determining the applicant's credibility.[3]

See 8 C.F.R. § 235.3(b)(4) (stating that if an applicant indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the "examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern," and should then refer the alien for a credible fear interview).

Matter of J-C-H-F-, 27 I&N Dec. 211 (BIA 2018).

[3] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, then officers must additionally follow the following guidance:

> A number of federal courts have cautioned adjudicators to keep in mind the circumstances under which an alien's statement to a CBP official is taken when considering whether an applicant's later testimony is consistent with the earlier statement. For instance, the Seventh Circuit Court of Appeals observed that although "airport interviews are not always reliable indicators of credibility[,] . . . . [i]n certain cases, . . . the interview can help support an adverse credibility finding," especially if "the record of [the] airport interview [has] markers of probative value and reliability." *Chatta v. Mukasey*, 523 F.3d 748, 752 (7th Cir. 2008) (quotation marks omitted). In addition, the Fourth Circuit Court of Appeals has advised that asylum adjudicators should exercise caution in relying "extensively" on statements made in airport interviews and in "basing an adverse credibility determination solely on inconsistencies and, especially, omissions that arise out of [such] statements." *Qing Hua Lin v. Holder*, 736 F.3d 343, 352-53 (4th Cir. 2013).
>
> Some factors to keep in mind include: (1) the extent to which the questions posed at the port of entry or place of apprehension were designed to elicit the details of an asylum claim; (2) whether the immigration officer asked relevant follow-up questions; (3) whether the alien was reluctant or afraid to reveal information during the first meeting with U.S. officials because of prior interrogations or other coercive experiences in the alien's home country; (4) whether the interview was conducted in a language other than the applicant's native language; (5) whether the alien's remarks were transcribed verbatim, rather than merely summarized; and (6) whether the inconsistency or omission concerns a minor evidentiary detail or a central facet of the protection claim. *See, e.g.*, Qing Hua Lin, 736 F.3d at 353; Guan v. Gonzales, 432 F.3d 391, 396-97 (2d Cir. 2005); *see also Ramsameachire v. Ashcroft*, 357 F.3d 169, 179-81 (2d Cir. 2004) (holding that the BIA was entitled to rely on fundamental inconsistencies between the applicant's airport interview statements and his hearing testimony where the applicant was provided with an interpreter, given ample opportunity to explain his fear of persecution in a careful and non-coercive interview, and signed and initialed the typed record of statement). The Second Circuit Court of Appeals has advised: "If, after reviewing the record of the [CBP] interview in light of these factors and any other relevant considerations suggested by the circumstances of the interview, the … [agency] concludes that the record of the interview and the alien's statements are reliable, then the agency may, in appropriate circumstances, use those statements as a basis for finding the alien's testimony incredible. Conversely, if it appears that either the record of

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Id. at 212-213.

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

If, after providing the applicant with an opportunity to explain or resolve any credibility concerns, the officer finds that the applicant has provided a reasonable explanation, for inconsistencies between prior statements and statements made at the credible fear interview, those inconsistencies alone need not preclude a positive credibility determination when considering the totality of the circumstances and all relevant factors.

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

D. Documenting a Credibility Determination

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

2. The officer must specify in the written case analysis the basis for the credibility finding, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear. In the case of a positive credibility determination, the officer should note any specific portions of testimony that contributed to the officer's overall credibility determination, including specificity of the presentation, consistency with corroborating evidence submitted or country condition reports available and any other factors about the applicant's narrative, demeanor, or presentation that weighed in favor of a positive credibility determination. In the case of a negative credibility determination, the officer should note any portions of the testimony found not credible, including the specific inconsistencies, lack of detail, or other factors, along with the applicant's explanation and the basis for determining that the explanation is deemed not to be reasonable.

8 C.F.R §§. 208.30(d)(7), (e)(1).

the interview or the alien's statements may not be reliable, then the … [agency] should not rely solely on the interview in making an adverse credibility determination." *Ramsameachire*, 357 F.3d at 180.

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

VII. ESTABLISHING A CREDIBLE FEAR OF PERSECUTION

For the most recent Asylum Division guidance on eligibility for asylum under section 208 of the INA, please consult the latest applicable RAIO Training Module.

A. General Considerations in Credible Fear

INA § 235(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2).

An applicant will be found to have a credible fear of persecution if there is a significant possibility the applicant can establish eligibility for asylum as a refugee under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or deferral of removal, if the applicant subject to the mandatory denial of withholding of removal.

8 C.F.R. § 208.13(b)(1).

1. In general, findings by the asylum officer that (1) there is a significant possibility – that is, a substantial and realistic possibility based on more than significant evidence – that the applicant experienced past persecution on account of a protected characteristic, (2) the conditions that gave rise to such persecution continue to exist in the applicant's home country, and (3) the applicant could not avoid such persecution by relocating within his or her home country, are sufficient to satisfy the credible fear standard.

   See 8 C.F.R. § 208.13(b)(1)(iii)(B), (b)(3).

   However, if the evidence does not establish a significant possibility of future persecution, or other serious harm or compelling reasons for being unwilling or unable to return to the applicant's home country given the severity of past persecution, or reasons why internal relocation is not possible, a negative credible fear determination is appropriate.[4]

4 Only aliens who have been found to have suffered past persecution are eligible for a grant of asylum based on "other serious harm." 8 C.F.R. § 208.13(b)(1)(iii). If the alien demonstrates past persecution, he or she can be granted asylum if: (1) the applicant has also demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of past persecution or if (2) the applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country. Thus, if an alien establishes a significant possibility that he or she has suffered past persecution and either of the conditions described above exist, the alien could establish a credible fear of persecution.

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2. In cases in which an applicant does not claim to have suffered any past persecution, or in which the evidence is insufficient to establish a significant possibility of past persecution under section 208 of the Act, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution on account of a protected characteristic under section 208 of the Act. An applicant establishes that he or she has a well-founded fear of persecution if a reasonable person in the applicant's circumstances would fear persecution upon return to his or her country of origin.

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

B. Past Persecution/Well-Founded Fear of Future Persecution

1. Elements Required to Establish a Credible Fear: In order to establish a credible fear of persecution, the applicant must establish each one of the elements below, to the satisfaction of the asylum officer. If the applicant is not able to establish all of the elements, the applicant must receive a negative credible fear determination.

See RAIO Training Module, *Well Founded Fear*.

2. Severity of Harm: For a credible fear of persecution, there must be a significant possibility the applicant can establish that the harm the applicant has experienced or fears he or she will experience if returned to his or her home country is sufficiently serious to amount to persecution.

INS v. Cardoza-Fonseca, 480 U.S. 421, 430-31 (1987).

3. Future Fear (Well-Founded Fear): Well-founded Fear of Persecution

See RAIO Training Module, *Well Founded Fear*, for more detailed information about the subjective and objective elements of well-founded fear, including the standards of proof needed to establish these elements. *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

   a. In cases in which an applicant does not claim to have suffered any past harm, or in which the evidence is insufficient to establish a significant possibility of past persecution on account of a protected characteristic under section 101(a)(42)(A) of the Act, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution under section 208 of the Act.

   b. To establish a well-founded fear of persecution on account of a protected characteristic, an applicant must show that (1) he or she has a subjective fear of persecution, and (2) that such fear has an objective basis.

See RAIO Training Modules, *Nexus and the Protected Grounds (minus PSG)* and *Nexus – Particular Social Group*.

   c. The applicant satisfies the subjective element if he or she credibly articulates a genuine fear of return. Fear

See Matter of Kasinga, 21 I&N Dec. 357, 366-67 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir.

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has been defined as an apprehension or awareness of danger.

1997).

d. The applicant satisfies the objective element if he or she demonstrates past persecution based on continuing country conditions, or has a "well-founded fear" of persecution. An applicant has a well-founded fear of persecution if a reasonable person in the applicant's circumstances would fear persecution upon return to his or her country of origin.

See RAIO Training Module, *Well Founded Fear.*

480 U.S. at 431.

The Supreme Court concluded that the standard for establishing the likelihood of future harm in asylum is lower than the standard for establishing likelihood of future harm in withholding of deportation: "One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."

Id. at 440.

To make the point, *Cardoza-Fonseca* used the following example: "In a country where every tenth adult male is put to death or sent to a labor camp, 'it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return.'"

Id. at 448.

Id. at 448 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984)).

Cardoza-Fonseca did *not*, however, hold that "well-founded fear" always equals a ten percent chance. Instead, *Cardoza-Fonseca* deemed the term "ambiguous," and explicitly declined to set forth guidance on how the well-founded fear test should be applied. The Court merely held that the government was "incorrect in holding that the two standards [i.e., well-founded fear and clear probability] are identical" and invited the affected *agencies* to expound on the meaning of "well-founded fear."

Cardoza-Fonseca's extreme example of every tenth adult male being put to death or sent to a labor camp may well satisfy this standard in a particular case (assuming that all other requirements are met, including nexus), but officers must bear in mind the unusual severity of this example. While the *Cardoza-Fonseca* example seems simple, the Court describes an extremely unusual and high murder rate of 10 percent of adult males. It is important for

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officers to note that such rate is extraordinarily high and incredibly rare. Indeed, it is significantly higher than the murder rates in countries with even the highest rates of violence. Additionally, the asylum officer must determine whether the applicant's testimony supports an objective finding that the applicant, himself or herself, will be persecuted, which requires a more extensive analysis than whether persecution is occurring at all in the country of origin. In doing that, the asylum officers must also determine whether any objective fear claimed by the applicant is credible. The officer may well find that a claimed rate of 10% chance of persecution, in light of the applicant's statements and the country conditions available to the officer, is not credible. It is important to note also that rarely will an applicant be able to demonstrate, with certainty, the rates of people being persecuted countrywide.

Id. at 448.

After *Cardoza-Fonseca*, neither the Board of Immigration Appeals nor DHS has definitively resolved how much fear is "well-founded." There is thus no single, binding interpretation of *Cardoza-Fonseca*'s discussion of "well-founded fear," including its suggestions about a one-in-ten chance.

INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992).

Thus, the determination of whether a fear is well-founded does not ultimately rest on the statistical probability of persecution, which is almost never available. Rather, the determination rests on whether the applicant's fear is based on facts that would lead a reasonable person in similar circumstances to fear persecution.

4. Motivation: For a credible fear of persecution, the applicant must establish that there is a significant possibility that the persecutor was or will be motivated to harm him or her on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

   a. Nexus analysis requires officers to determine the following: (1) whether the applicant possesses or is perceived to possess a protected characteristic; and (2) whether the persecution or feared persecution is at least in part on account of that protected characteristic.

Matter of A-B-, 27 I&N Dec. 316, 320, 337-38, 343-44 (AG 2018), *enjoined in part by Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018) (holding that *Matter of A-B-* raised the standard for "unable or willing" and enjoining that change), *appeal filed*, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

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b. There must be a significant possibility that at least one reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic.[5]

c. Particular Social Groups:

To determine whether the applicant can establish a significant possibility that he or she belongs to a viable particular social group, asylum officers must analyze the facts using the BIA test for evaluating whether a group meets the definition of a particular social group, set out by the Board in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), and reaffirmed by the Attorney General in *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).[6]

First, the group must comprise individuals who share a common, immutable characteristic, which is either a characteristic that members cannot change or is a characteristic that is so fundamental to the member's identity or conscience that he or she should not be required to change it.

Second, the group must be defined with particularity; it "must be defined by characteristics that provide a clear benchmark for determining who falls within the group." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239. A group is particular if the "group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008). A particular social group must not be "amorphous, overbroad, diffuse, or subjective," and "not every 'immutable characteristic' is sufficiently precise to define a particular social group." *Matter of M-E-V-G-*, 26 I&N Dec. at 239. *See also Matter of L-E-A-*, 27 I&N Dec. at 593 (citing *Matter of S-E-G-*, 24 I&N Dec. at 597, 585 (BIA 2008) (noting that the "proposed group of

[5] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, then officers must instead follow the following guidance:

> There must be a significant possibility that at least *one central* reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic. If the applicant's interview or hearing is in the Ninth Circuit, the alien need only establish a significant possibility that at least *a* reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic. *Barajas-Romero v. Lynch*, 846 F.3d 351, 359-60 (9th Cir. 2017).

[6] *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) is controlling nationwide. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U. S. 967, 982 (2005) ("A court's prior judicial construction of statute trumps agency construction otherwise entitled to Chevron deference only if prior court decision holds that its construction is required by unambiguous terms of statute and leaves no room for agency discretion."). Therefore, application of this decision is consistent with the court order in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), which requires officers to apply the case law most favorable to the alien in credible fear screenings.

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'family members,' which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is . . . too amorphous a category" to satisfy the particularity requirement)).

Third, the group must be socially distinct within the society in question. Social distinction involves examining whether "those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *See Matter of M-E-V-G-*, 26 I&N Dec. at 238. In other words, "[m]embers of a particular social group will generally understand their own affiliation with that group, as will other people in their country." *Id.* Social distinction relates to society's, not the persecutor's, perception, though the persecutor's perceptions may be relevant to social distinction. *See Matter of A-B-*, 27 I&N Dec. 316, 320 (AG 2018).

Asylum officers should analyze claims based on membership in a particular social group defined by family or kinship ties as required under *Matter of L-E-A-*, *supra*. Under that decision, officers must analyze whether a specific family group is immutable, particular and socially distinct. The relevant question in this analysis is *not* whether the degree and type of relationship that defines a potential family-based particular social group is immutable, particular and socially distinct. Rather, "[i]f an applicant claims persecution based on membership in his father's immediate family, then the adjudicator must ask whether *that* specific family is 'set apart, or distinct, from other persons within the society in some significant way.' It is not sufficient to observe that the applicant's society (or societies in general) place great significance on the concept of the family." *Matter of L-E-A-*, 27 I&N Dec. at 594 (citing *M-E-V-G-*, 26 I&N Dec. at 238). *Matter of L-E-A-* instructs that "[t]he fact that 'nuclear families' or some other widely recognized family unit generally carry societal importance says nothing about whether a *specific* nuclear family would be 'recognizable by society at large.'" *Id.* Therefore, officers must analyze the specific group of people identified as a family group in making this assessment. Previous guidance that instructed officers to assess whether the society in question recognizes the type of relationship shared by the group as significant or distinct is no longer valid under *Matter of L-E-A-*.

5. Persecutor: For a credible fear of persecution, there must be a significant possibility the applicant can establish 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.

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Asylum officers must recognize that no government can guarantee the safety of each of its citizens or control all potential persecutors at all times. It is not sufficient for an applicant to assert that the government lacks sufficient resources to address criminal activity. Rather, the government must have abdicated its responsibility to control persecution. A determination of whether a government is unable to control the entity that harmed the applicant requires evaluation of country of origin information and the applicant's circumstances. For example, a government in the midst of a civil war or one that is unable to exercise its authority over portions of the country might be unable to control the persecutor in areas of the country where its influence does not extend. Asylum officers must consult all available and salient information, including the objective country conditions set forth in Department of State country reports. In order to establish a significant possibility of 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 his or her burden with evidence that the government was unable or unwilling to control the persecution to which the applicant was subject.

6. Applicant Did Not Remain in Country after Threats or Harm

    a. A significant lapse of time between the occurrence of incidents that form the basis of the claim and an applicant's departure from the country may be evidence that the applicant's fear is not well-founded. The lapse of time may indicate that the applicant does not possess a genuine fear of harm, or the persecutor does not possess the ability or the inclination to harm the applicant.

    b. However, there may be valid reasons why the applicant did not leave the country for a significant amount of time after receiving threats or being harmed, including the following: lack of funds to arrange for departure from the country and time to arrange for the safety of family members; belief that the situation would improve; promotion of a cause within the home country; and temporary disinclination by the persecutor to harm the applicant.

7. Applicant Has Not Acted Inconsistent with Subjective Fear of Persecution

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An applicant's return to the country of feared persecution generally weakens the applicant's claim of a well-founded fear of persecution. It may indicate that the applicant does not possess a genuine (subjective) fear of persecution, or that the applicant's fear is not objectively reasonable.

8 CFR 208.13(b)(1)(i)(B), (b)(2)(ii), (b)(3); *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012).

8. Internal Relocation

a. In cases in which the feared persecutor is a government or is government-sponsored, there is a presumption that there is no reasonable internal relocation option. That presumption may be overcome if a preponderance of the evidence shows that, under all of the circumstances, the applicant could avoid future persecution by relocating to another part of the applicant's country, and that it would be reasonable to expect the applicant to relocate. Asylum officers must consult all available and salient information, including information in the objective country conditions set forth in Department of State country reports.

b. If the persecutor is a non-governmental entity, there must be a significant possibility that the applicant cannot reasonably internally relocate within his or her country. In cases in which the persecutor is a non-governmental entity and the applicant has not established past persecution, the applicant has the burden of establishing that internal relocation is not reasonable.

8 C.F.R. § 208.13(b)(3)(i).

c. In assessing an applicant's well-founded fear and internal relocation, apply the following two-step approach:

(i) Determine whether an applicant could avoid future persecution by relocating to another part of the applicant's home country. If the applicant will not be persecuted in another part of the country, then:

(ii) Determine whether an applicant's relocation, under all of the circumstances, would be reasonable. Some factors that could be considered—but are in no way controlling or determinative—are listed in 8 C.F.R. § 208.13(b)(3).

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C. Multiple Citizenship

Persons holding multiple citizenship or nationalities must demonstrate a credible fear of persecution or torture from at least one country in which they are a citizen or national to be eligible for referral to immigration court for a full asylum or withholding of removal hearing. If the country of removal indicated is different from the applicant's country of citizenship or nationality, fear from the indicated country of removal must also be evaluated.

See RAIO Training Module, *Refugee Definition*, for more detailed information about determining an applicant's nationality, dual nationality, and statelessness.

In addition, if the applicant raises a fear with respect to another country, aside from the country of citizenship or nationality or the country of removal, the officer should memorialize it in the file to ensure that the fear is explored in the future if DHS ever contemplates removing the person to such other country.

D. Statelessness/Last Habitual Residence

The asylum officer does not need to make a determination of whether an applicant is stateless or the applicant's country of last habitual residence. The asylum officer should determine whether the applicant has a credible fear with respect to any country of proposed removal. If the applicant demonstrates a credible fear with respect to any country of proposed removal, regardless of citizenship or habitual residence, the applicant should be referred to the Immigration Judge for a full proceeding, because he or she may be eligible for withholding of removal with respect to that country.

VIII. ESTABLISHING A CREDIBLE FEAR OF TORTURE

An applicant will be found to have a credible fear of torture if the applicant establishes that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under 8 C.F.R. §§ 208.16 or 208.17, the regulations issued pursuant to the legislation implementing the Convention Against Torture (CAT). In order to be eligible for withholding or deferral of removal under CAT, an applicant must establish that it is more likely than not that he or she would be tortured in the country of removal. The credible fear process is a "screening mechanism" that attempts to identify whether there is a significant possibility that an applicant can establish that it is more likely than not that he or she would be tortured in the country in question.

See ADOTC Lesson Plan, *Reasonable Fear of Persecution and Torture Determinations* for a detailed discussion of the background of CAT and legal elements of the definition of torture; Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8484 (Feb. 19, 1999).

In the CAT withholding or deferral of removal hearing, the applicant will have to establish that it is more likely than not that he

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or she will be tortured in the country of removal. As discussed above, for asylum the applicant must establish either past persecution or a well-founded fear of persecution. Well-founded fear is a lower standard than "more likely than not."

Therefore **a significant possibility of establishing eligibility for CAT withholding or deferral of removal is necessarily a greater burden than establishing a significant possibility of eligibility for asylum**. In other words, to establish a credible fear of torture, the applicant must show there is a significant possibility that he or she could establish in a full hearing that it is more likely than not he or she would be tortured in that country.

A. Definition of Torture

8 C.F.R. § 208.18(a) defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

8 C.F.R. § 208.18(a); *see* ADOTC Lesson Plan, *Reasonable Fear of Persecution and Torture Determinations*.

B. General Considerations

1. U.S. regulations require that several elements be met before an act is found to constitute torture.

8 C.F.R. §§ 208.18(a)(1)-(8). Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (Feb. 19, 1999).

2. After establishing that the applicant's claim is credible, the applicant satisfies the other elements of the credible fear of torture standard where there is a significant possibility that he or she could establish in a full withholding of removal hearing that:

   a. The torturer specifically intends to inflict severe physical or mental pain or suffering;

   b. The harm constitutes severe pain or suffering;

   c. The torturer is a public official or other person acting in an official capacity, or someone acting at the

See section VI., *Credibility*, above, regarding establishing credibility. An adverse credibility determination on the persecution claim does not necessarily defeat a claim made under the Convention Against Torture. *Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004); *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001); *Mansour v. INS*, 230 F.3d 902 (7th Cir. 2000.

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instigation of or with the consent or acquiescence of a public official or someone acting in official capacity; and

Matter of J-E-, 23 I&N Dec. 291 (BIA 2002).

8 C.F.R. § 208.18(a)(5).

d. The applicant is in the torturer's custody or physical control.

8 C.F.R. § 208.18(a)(2).

Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions, including the death penalty and other judicially imposed sanctions. However, sanctions that defeat the object and purpose of the Convention are not lawful sanctions. Harm arising out of such sanctions may constitute torture.

3. The Convention Against Torture does not require that the torture be connected to any of the five protected characteristics identified in the definition of a refugee, or any other characteristic the individual possesses or is perceived to possess.

8 C.F.R. § 208.18(a)(6).

8 C.F.R. § 208.18(a)(3).

C. Specific Intent

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

8 C.F.R. §§ 208.18(a)(1), (5).

Specific intent is "intent to accomplish the precise criminal act that one is later charged with" while "general intent" commonly "takes the form of recklessness . . . or negligence."

Matter of J-E-, 23 I&N Dec. 291, 301 (BIA 2002) (citing Black's Law Dictionary 813-14 (7th ed. 1999).

D. Degree of Harm

1. For harm to constitute torture, the applicant must establish that it is more likely than not that the harm rises to the level of severity of torture.

2. Torture requires severe pain or suffering, whether physical or mental. "Torture" is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture. Therefore, many forms of harm that may be considered persecution may not be considered severe enough to amount to torture.

8 C.F.R. § 208.18(a)(1); 8 C.F.R. § 208.18(a)(2).

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

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

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

c. The credible threat of imminent death; or

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

8 C.F.R. § 208.18(a)(4).

E. Identity of the Torturer

1. For an act to constitute torture, the applicant must establish that it is more likely than not that the harm he or she fears would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

8 C.F.R. § 208.18(a)(1).

See ADOTC Lesson Plan, *Reasonable Fear of Persecution and Torture Determinations* for a more extensive discussion on this element of CAT eligibility.

2. Harm by a Public Official

The term "public official" can include any person acting on behalf of a national or local authority or any national or local government employee regardless whether the official is acting in their official or personal capacity.[7]

3. Instigation, Consent, or Acquiescence

a. When the "torturer" is not a public official, a successful CAT claim requires that a public official or other person acting in an official capacity

[7] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, then officers must instead follow the following guidance:

> In the withholding or deferral of removal setting, when a public official acts in a wholly private capacity, outside any context of governmental authority, the state action element of the torture definition may not be satisfied depending on the circuit. *See, e.g.*, *Barajas-Romero v. Lynch*, 846 F.3d 351, 362-63 (9th Cir. 2017) (holding that the public official need not be acting on behalf of the government); *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1185 (7th Cir. 2015) ("It is irrelevant whether the police are 'rogue' (in the sense of not serving the interests of the Mexican government)."); *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009) (While our circuit has yet to adopt the agency's interpretation of 'in an official capacity' as the equivalent of 'under color of law' as used in the civil-rights context as reasonable, we do so now."); *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) ("[W]hen it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons.").

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instigates, consents, or acquiesces to the torture. Asylum officers must consult all available and salient information, including information in the objective country conditions set forth in Department of State country reports.

b. Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

8 C.F.R. § 208.18(a)(7).

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

c. There is no acquiescence when law enforcement does not breach a legal responsibility to intervene to prevent torture.

8 C.F.R. § 208.18(a)(7).

In the context of government consent or acquiescence, the court in *Ramirez-Peyro v. Holder* reiterated its prior holding that "use of official authority by low level officials, such a[s] police officers, can work to place actions under the color of law even when they act without state sanction." Therefore, even if country conditions show that a national government is fighting against corruption, that fact will not necessarily preclude a finding of consent or acquiescence by a local public official.

Ramirez-Peyro v. Holder, 574 F.3d 893, 901 (8th Cir. 2009).

See Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 354-55 (5th Cir. 2002).

d. Evidence that private actors have general support in some sectors of the government, without more, is insufficient to establish that the officials would acquiesce to torture by the private actors.

4. Consent or Acquiescence vs. Unable or Unwilling to Control

The public official requirement under CAT is distinct from the inquiry into a government's ability or willingness to control standard applied under the refugee definition.

Reyes-Sanchez v. U.S. Atty. Gen., 369 F.3d 1239 (11th Cir. 2004) ("That the police did not catch the culprits

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does not mean that they acquiesced in the harm.")

a. A finding that a government is unable to control a particular person(s) is not dispositive of whether a public official would instigate, consent to, or acquiesce in the feared torture.

b. A more relevant query is whether a public official who has a legal duty to intervene would be unwilling to do so. In that circumstance, the public official would also have to be aware or deliberately avoid being aware of the harm in order for the action or inaction to qualify as acquiescence under CAT.

F. Past Harm

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

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

Credible evidence of past torture is strong evidence in support of a claim for protection based on fear of future torture. For that reason, an applicant who establishes that he or she suffered past torture also establishes a credible fear of torture, unless changes in circumstances are so substantial that the applicant has no significant possibility of future torture as a result of the change.

G. Internal Relocation

1. Regulations require immigration judges to consider evidence that the applicant could relocate to another part of the country of removal where he or she is not likely to be tortured, in assessing whether the applicant can establish that it is more likely than not that he or she would be tortured. Therefore, asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in assessing whether there is a significant possibility that he or she is eligible for CAT withholding of removal or deferral of removal. Asylum officers must consult all available and salient information, including the objective country conditions set forth in Department of State country reports.

8 C.F.R. § 1208.16(c)(3)(ii).

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

8 C.F.R. § 208.16(c)(3)(ii).

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

IX. APPLICABILITY OF BARS TO ASYLUM AND WITHHOLDING OF REMOVAL

Please consult the appropriate RAIO Training Module for a full discussion on mandatory bars.

A. No Bars Apply

Pursuant to regulations, evidence that the applicant is, or may be, subject to a bar to asylum or withholding of removal does not have an impact on a credible fear finding.

8 C.F.R. § 208.30(e)(5).

B. Asylum Officer Must Elicit Testimony

Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether a bar to asylum or withholding applies or not. The immigration judge is responsible for finally adjudicating whether or not the applicant is barred from receiving asylum or withholding of removal.

INA § 208(b)(2); INA § 241(b)(3); 8 C.F.R. § 208.30(d)

There are no bars to a grant of deferral of removal to a country where the applicant would be tortured.

8 C.F.R. § 208.17(a).

Information should be elicited about whether the applicant:

1. Participated in the persecution of others;

2. Has been convicted by a final judgment of a particularly serious crime (including an aggravated felony), and constitutes a danger to the community of the United States;

INA § 208(b)(2)(B)(i).

3. Is a danger to the security of the United States;

4. Is subject to the inadmissibility or deportability grounds relating to terrorist activity as identified in INA section 208(b)(2)(A)(v);

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5. Has committed a serious nonpolitical crime;

6. Is a dual or multiple national who can avail himself or herself of the protection of a third state; and,

This bar and the firm resettlement bar are not bars to withholding or deferral of removal. *See* INA § 241(b)(3).

7. Was firmly resettled in another country prior to arriving in the United States.

C. Flagging Potential Bars

The officer must keep in mind that the applicability of those bars requires further evaluation that will take place in the full hearing before an immigration judge if the applicant otherwise has a credible fear of persecution or torture. In such cases, the officer should consult a supervisory officer, follow procedures on "flagging" such information for the hearing, and prepare the appropriate paperwork for a positive credible fear finding. Officers may be asked to prepare a memorandum to file outlining the potential bar that may be triggered. Although positive credible fear determinations that involve a possible mandatory bar no longer require USCIS-HQ review, supervisory officers may use their discretion to forward the case to USCIS-HQ for review.

Procedures Manual, Credible Fear Process (Draft); Joseph E. Langlois. Asylum Division, Refugee, Asylum and International Operations Directorate. *Revised Credible Fear Quality Assurance Review Categories and Procedures*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 23 Dec. 2008).

X. OTHER ISSUES

A. Treatment of Dependents

8 C.F.R. § 208.30(b).

A spouse or child of an applicant may be included in the alien's credible fear evaluation and determination, if the spouse or child arrived in the United States concurrently with the principal alien and desires to be included in the principal alien's determination. USCIS maintains discretion under this regulation not to allow a spouse or child to be included in the principal's credible fear request.

Any alien also has the right to have his or her credible fear evaluation and determination made separately, and it is important for asylum pre-screening officers to question each member of the family to be sure that, if any member of the family has a credible fear, his or her right to apply for asylum or protection under CAT is preserved. When questioning family members, special attention should be paid to the privacy of each family member and to the possibility that victims of domestic abuse, rape, and other forms of persecution might not be comfortable speaking in front of other family members.

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The regulatory provision that allows a dependent to be included in a principal's determination does not change the statutory rule that any alien subject to expedited removal who has a credible fear has the right to be referred to an immigration judge.

B. Attorneys and Consultants

The applicant may consult with any person prior to the credible fear interview. The applicant is also permitted to have a consultant present at the credible fear interview. Asylum officers should determine whether or not an applicant wishes to have a consultant present at the credible fear interview. Although an alien is permitted by regulation to have a consultant present at a credible fear interview, the availability of a consultant cannot unreasonably delay the process. A consultant may be a relative, friend, clergy person, attorney, or representative. If the consultant is an attorney or representative, he or she is not required to submit a Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, but may submit one if he or she desires.

8 C.F.R. § 208.30(d)(4).

8 C.F.R. § 208.30(d)(4); Procedures Manual, Credible Fear Process (Draft).

C. Factual Summary

For each credible fear interview, the asylum officer must create a summary of material facts as stated by the applicant. At the conclusion of the interview, the asylum officer must review the summary with the applicant and provide to the applicant an opportunity to correct any errors therein. The factual summary and its review should be contemporaneously recorded at the end of the asylum officer's interview notes.

8 C.F.R. § 208.30(d)(6).

D. No General Presumptions Against Certain Types of Cases.

Each claim must be evaluated on its own merits. Therefore, there is no general presumption against officers recognizing any particular type of fear claim.

Matter of A-B-, 27 I&N Dec. 316 (AG 2018).

For example, there is no general rule against claims involving domestic violence and gang-related violence as a basis for membership in a particular social group. Similarly, there is no general rule that proposed particular social groups whose definitions involve an inability to leave a domestic relationship are circular and therefore not cognizable. While a particular social group cannot be defined exclusively by the claimed persecution, each particular social group should be evaluated on its own merits. If the proposed social group definition contains characteristics independent from the feared

See *Matter of M-E-V-G-*, 26 I&N Dec. 227, 242 (BIA 2014).

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persecution, the group may be valid. Analysis as to whether a proposed particular social group is cognizable should take into account the independent characteristics presented in each case.

E. No Need for the Applicant to Formulate or Delineate a Particular Social Group.

In evaluating whether the applicant has established a credible fear of persecution, if the claim is based on a particular social group, then the asylum officer cannot require an applicant to formulate or delineate particular social groups. The asylum officer must consider and evaluate possible formulations of particular social groups as part of the officer's obligation to elicit all relevant information from the applicant in this non-adversarial setting.

XIII. SUMMARY

A. Expedited Removal

In expedited removal, certain aliens seeking admission to the United States are immediately removable from the United States by DHS, unless they indicate an intention to apply for asylum or express a fear of persecution or torture or a fear of return to their home country. Aliens subject to expedited removal are not entitled to an immigration hearing or further review unless they are able to establish a credible fear of persecution or torture.

B. Function of Credible Fear Screening

The purpose of the credible fear screening process is to identify persons subject to expedited removal who have a significant possibility of ultimately being found eligible for asylum under section 208 of the INA or withholding of removal or deferral of removal under CAT, and to identify and screen out non-meritorious asylum claims.

C. Credible Fear Standard of Proof: Significant Possibility

In order to establish a credible fear of persecution or torture, the applicant must show a "significant possibility" that he or she could establish eligibility for asylum, withholding of removal, or deferral of removal.

The "significant possibility" standard of proof required to establish a credible fear of persecution or torture must be applied in conjunction with the standard of proof required for

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the ultimate determination on eligibility for asylum, withholding of removal, or protection under CAT.

Where there is disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue, or the claim otherwise raises an unresolved issue of law, then the interpretation most favorable to the applicant is used when determining whether the applicant satisfies the credible fear standard.[8]

D. Credibility

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

E. Establishing a Credible Fear of Persecution

In general, findings that (1) there is a significant possibility that the applicant experienced past persecution on account of a protected characteristic, (2) such conditions continue in the applicant's home country, and (3) the applicant could not avoid such persecution by relocating within his or her home country are sufficient to satisfy the credible fear standard. However, if the applicant fails to present evidence demonstrating that there is a significant possibility of future persecution or other serious harm, or if there are no reasons to grant asylum based on the severity of the past persecution, a negative credible fear determination is appropriate.

When an applicant does not claim to have suffered any past harm, or where the evidence is insufficient to establish a significant possibility of past persecution under INA section 208, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution on account of a protected characteristic under INA section 208.

F. Establishing a Credible Fear of Torture

[8] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, then officers must instead follow the following guidance:

> The asylum officer should also apply the case law of the relevant federal circuit court, together with the applicable precedents of the Attorney General and the BIA. The BIA defers to precedents of the circuit in which the removal proceedings took place, *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989), except in certain special situations, *see id. See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U. S. 967 (2005) ("A court's prior judicial construction of statute trumps agency construction otherwise entitled to Chevron deference only if prior court decision holds that its construction is required by unambiguous terms of statute and leaves no room for agency discretion.").

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In order to be eligible for withholding or deferral of removal under CAT, an applicant must establish that it is *more likely than not* that he or she would be tortured in the country of removal. Therefore, a significant possibility of establishing eligibility for withholding or deferral of removal is necessarily a greater burden than establishing a significant possibility of eligibility for asylum.

After establishing that the applicant's claim would be found credible, the applicant satisfies the credible fear of torture standard where there is a significant possibility that he or she could establish in a full withholding of removal hearing that: (a) the torturer specifically intends to inflict severe physical or mental pain or suffering; (b) the harm constitutes severe pain or suffering; (c) the torturer is a public official or other person acting in an official capacity, or someone acting at the instigation of or with the consent or acquiescence of a public official or someone acting in official capacity; and (d) the applicant is in the torturer's custody or physical control.

In order to assess whether an applicant faces torture in the proposed country of removal, an officer must consider all relevant evidence, which includes but is not limited to the following: credible evidence of past torture; credible evidence that the applicant could internally relocate to avoid torture; and credible evidence of gross, flagrant, or mass violations of human rights within the country of removal, for which determination the officer must consult the objective country conditions set forth in Department of State country reports.

8 C.F.R. § 208.16(c)(3).

Under CAT, the burden is on the applicant to show that it is more likely than not that he or she will be tortured, and one of the relevant considerations is the possibility of internal relocation.

G. Other Issues

While the mandatory bars to asylum and withholding of removal do not apply to credible fear determinations, asylum officers must elicit and make note of all information relevant to whether a bar to asylum or withholding applies or not.

A spouse or child of an applicant may be included in the alien's credible fear evaluation and determination if the spouse or child arrived in the United States concurrently with the principal alien and desires to be included in the principal alien's determination.

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The applicant may consult with any person prior to the credible fear interview. The applicant is also permitted to have a consultant present at the credible fear interview. A consultant may be a relative, friend, clergy person, attorney, or representative.

For each credible fear interview, the asylum officer must create a summary of material facts as stated by the applicant and review the summary with the applicant.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

DISCRETION

TRAINING MODULE

DATE (see schedule of revisions): 12/20/2019

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

DISCRETION

Training Module

MODULE DESCRIPTION

This module provides guidelines for adjudicating immigration benefits or other immigration-related requests that are subject to the discretion of the Department of Homeland Security (DHS). The module addresses the basis for determining when discretion is warranted and for performing the legal analysis of claims that involve discretion.

TERMINAL PERFORMANCE OBJECTIVE(S)

Given a petition or application that requires a discretionary determination, you will be able to weigh discretionary factors properly and articulate your exercise of discretion in a written decision when appropriate.

ENABLING PERFORMANCE OBJECTIVES

1. Explain what adjudicative discretion is.
2. Identify the different circumstances that will require an officer to exercise discretion in an adjudication.
3. Apply the positive and negative factors properly in making a decision on a given case.
4. Explain the reasoning for an exercise of discretion.

INSTRUCTIONAL METHODS

- Interactive presentation
- Discussion
- Practical exercises

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METHOD(S) OF EVALUATION

Written exam

Practical exercise exam

REQUIRED READING

1. Divine, Robert C., Acting Director, USCIS. Legal and Discretionary Analysis for Adjudication, Memorandum to Office of Domestic Operations, Office of Refugee, Asylum, and International Operations, and Office of National Security and Records Verification (Washington, DC: 03 May 2006)

2. *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987)

3. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978)

ADDITIONAL RESOURCES

Kanstroom, Daniel, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, *Tulane Law Review*, Volume 7, Number 3, p. 703 (February 1997).

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Critical Tasks

Task/ Skill #	Task Description
DM5	Skill in analyzing complex issues to identify appropriate responses or decisions (5)
DM7	Skill in making legally sufficient decisions (5)
DM10	Skill in developing a logical argument to support a determination or conclusion (5)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
12/12/2012	Entire Lesson Plan	Lesson Plan published	RAIO Training
11/23/2015	Throughout document	Corrected links and minor typos	RAIO Training
3/2/2018	RAD Supplement	Expanded and updated RAD Supplement	RAD Policy
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training

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SUPPLEMENT B – ASYLUM ADJUDICATIONS 43

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Throughout this training module, you will come across references to adjudication-specific supplemental information located at the end of the module, as well as links to documents that contain adjudication-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to the adjudications you will be performing.

For easy reference, supplements for international and refugee adjudications are in pink and supplements for asylum adjudications are in yellow.

You may also encounter references to the legacy Refugee Affairs Division (RAD) and the legacy International Operations Division (IO). RAD has been renamed the International and Refugee Affairs Division (IRAD) and has assumed much of the workload of IO, which is no longer operating as a separate RAIO division.

1 INTRODUCTION

Some decisions made by USCIS are mandatory once facts meeting the applicable standard have been established. Other decisions are made in the exercise of discretion after the officer finds facts that establish eligibility.

1.1 Decisions That Are Mandatory

Mandatory decisions involve no discretion, only an inquiry into whether the facts of the case meet the relevant standard. The adjudicator is concerned only with the evidence that establishes eligibility; once the applicant has met his or her burden of proof, the analysis ends. An example of a benefit that is conferred once the applicant establishes eligibility is the approval of Form I-130, Petition for Alien Relative.[1]

1.2 Decisions that are made in the Exercise of Discretion

Although the applicant may have met the burden of proof by showing that he or she is statutorily eligible, statutory eligibility depends on the exercise of discretion. Eligible applicants may be denied a benefit through an officer's exercise of discretion.

1.2.1 Nonexclusive List of USCIS Case Types in which Discretion is Exercised

[1] USCIS officers must approve the I-130 Petition for Alien Relative when the qualifying relationship between the petitioner and the alien beneficiary and the individuals' identities have been established. The approved I-130 permits the beneficiary to apply for an immigrant visa from the Department of State. The consular officer then exercises discretion in determining whether to issue the visa. If the I-130 is being adjudicated under INA §245, in the U.S. concurrently with an I-485 application to adjust status, the grant of the I-485 by the USCIS officer would be discretionary.

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- Adjustment of status under Immigration and Nationality Act (INA) §§ 245 and 209(b) (with limited exceptions such as NACARA § 202 and Haitian Refugee Immigration Fairness Act (HRIFA)) and creation of record under section 249 (registry)
- Employment authorization (with limited exceptions, such as for asylum applicants)
- Waivers of various inadmissibility grounds and advance permission to return to the U.S., INA §§ 211, 212 and 213
- Extension of nonimmigrant stay and change of nonimmigrant status, INA § 248
- Advance parole and reentry permits, INA §§ 212(d)(5)(A) and 223
- Waiver of labor certification requirement "in the national interest", INA § 203(b)(2)(B)
- Revocation of visa petitions, INA § 205
- Waiver of joint filing requirement to remove conditions on permanent residence, INA § 216(b)(4)
- Fiancé(e) petitions, INA § 214(d)
- Special Rule Cancellation of Removal for Battered Spouses and Children, INA § 240A(b)(2)(D)
- Furnishing of information otherwise protected by the legalization confidentiality provisions, INA § 245A(c)(5)(C)[2]
- Refugee status, INA § 207
- Asylum, INA § 208

This lesson covers what discretion is, and how it is exercised. As an adjudicator, you may have the authority to deny a benefit in the exercise of discretion, but that is not license to deny a benefit for just any reason. As this lesson will explain, there are serious limits on exercising your discretion in making a decision on an application.

2 OVERVIEW OF DISCRETION

2.1 Definition

As a practical matter, in the immigration context, the Board of Immigration Appeals (BIA) has described discretion as a balancing of "the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations

[2] *See* Devine, Robert C., Acting Director, USCIS. *Legal and Discretionary Analysis for Adjudication*, Memorandum to Office of Domestic Operations, Office of Refugee, Asylum, and International Operations, and Office of National Security and Records Verification (Washington, DC: 03 May 2006).

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presented in his behalf to determine whether … relief appears in the best interests of this country."[3]

Discussion

For our purposes, a simple definition of discretion is the "[a]bility or power to decide responsibly."[4] Alternatively, discretion can be defined as, "freedom or authority to make judgments and to act as one sees fit."[5] Of the two, the second definition is probably what "discretion" is more commonly understood to mean; however, the law imposes restrictions on the exercise of discretion by an adjudicator, which makes the first definition more accurate for our purposes. While discretion gives the adjudicator some freedom in the way in which he or she decides a particular case after eligibility has been established, that freedom is always constrained by legal restrictions. It is the restrictions that define scope of the adjudicator's power of discretion.

The concept of discretion is not simple, as it implies certain limitations, without explaining just what those limitations are. One commentator has described discretion thus: "like the hole in a doughnut, [it] does not exist except as an area left open by a surrounding belt of restriction."[6] The rules as to how to exercise discretion are scarce, but there are many restrictions that have been imposed by the courts in order to ensure that the official exercising discretion does not abuse that power. Discretion is defined in a negative manner, by what is impermissible rather than by what is permissible. In addition, in some instances, regulations or policy guidance may elucidate what factors should be considered in discretion.

2.2 Two Types of Discretion

There are two broad types of discretion that may be exercised in the context of immigration law: prosecutorial (or enforcement) discretion and adjudicative discretion. The scope of discretion is defined by what type of discretionary decision is being made. For the purposes of your work with RAIO, you will be involved in exercising adjudicative discretion, but it is important to know about prosecutorial discretion to help you understand the limitations that are placed on you in your exercise of adjudicative discretion.

2.2.1 Adjudicative Discretion

[3] *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

[4] *The American Heritage Dictionary of the English Language*, Fourth Edition Houghton Mifflin Company (2000), available at: http://www.thefreedictionary.com/discretion (last visited November 23, 2015).

[5] *Collins English Dictionary – Complete and Unabridged*, HarperCollins Publishers 2003, available at http://www.thefreedictionary.com/discretion (last visited November 23, 2015).

[6] Ronald M. Dworkin, Is Law a System of Rules?, in *The Philosophy of Law* 52 (R.M. Dworkin ed., 1977).

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Adjudicative discretion involves the affirmative decision of whether to exercise discretion favorably or not under the standards and procedures provided by statute, regulation, or policy that establish an applicant's eligibility for the benefit and guide the exercise of discretion. Adjudicative discretion has been referred to as "merit-deciding discretion."[7] The exercise of discretion is specifically provided in statute for certain benefits. Some mandatory benefits may have a discretionary component, while other types of adjudicative actions may have no discretionary component. In the case of a waiver-of-inadmissibility application, a favorable exercise of discretion on that application, absent any other negative factors, may lead to a mandatory positive decision on the underlying application.

Example

> The beneficiary of an I-730 Refugee/Asylee Relative Petition is seeking to join his spouse, who has been resettled in the United States as a refugee. He has an approved I-730, but you find that he had been living in the United States without documentation prior to their marriage and his wife's resettlement as a refugee and is therefore inadmissible and not eligible for derivative status. He may submit an I-602 Application by Refugee for Waiver of Grounds of Excludability in order to cure that defect in eligibility. Your decision to grant the waiver is discretionary, but once you grant the waiver, the I-730 benefit must be granted.

In general, absent any negative factors, discretionary decisions should be to grant once the applicant has met the requirements of the application or petition.[8] A formal exercise of discretion to deny, rather than to grant, may be appropriate when the applicant has met the requirements of the application or petition, but negative factors have been found in the course of the adjudication and outweigh the positive factors.

However, adjudicative discretion does not allow an adjudicator to grant an immigration benefit in cases where the individual is not otherwise eligible for that benefit.

2.2.2 Prosecutorial Discretion

Prosecutorial discretion is a decision to enforce—or not enforce—the law against someone made by an agency charged with enforcing the law. The term "prosecutorial" can be deceptive, because the scope of decisions covered by this doctrine includes the decision of whether to arrest a suspected violator and the decision of whether to file a charging document against someone. Prosecutorial discretion is not an invitation to violate or ignore the law. Rather, it is a means to use the agency resources in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

[7] *INS v. Doherty*, 502 U.S. 314 (1992).

[8] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

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Most prosecutorial discretion is exercised by enforcement agencies such as ICE and CBP in the context of their enforcement function (*i.e.*, removal proceedings). Prosecutorial discretion may be exercised at different points in the removal process, from the decision of who to detain or release on bond; to issue, or rescind a detainer, or a Notice to Appear (NTA); a decision to join in a motion for relief or benefit; or even to enforce an order of removal.[9]

One example of prosecutorial discretion exercised by some USCIS officers involves the issuance of an NTA, the document that puts an individual into removal proceedings after the denial of a petition or application. In certain situations, officers have the authority to exercise their discretion and not issue an NTA, despite the applicant's lack of immigration status. In RAIO, only Asylum Officers issue NTAs. This, however, is not a discretionary action by the Asylum Division. Under current regulations,[10] if an applicant is out of status and asylum is not granted, Asylum Officers do not issue denials, but must refer the case to the immigration court.

2.2.3 The Difference between Prosecutorial Discretion and Adjudicative Discretion

As noted earlier, officers have no adjudicative discretion to grant a claim that does not meet eligibility requirements. By contrast, prosecutorial discretion may be exercised before any legal finding and therefore may be exercised in cases of individuals who would be ineligible for any other form of relief.

2.3 Who Exercises Discretion?

Each time you render a decision on an application in a situation where the benefit is discretionary, you are doing so in the exercise of discretion. This is not an exercise of your own personal discretion; rather, you are exercising discretion as an official of the U.S. Government.

In the Immigration and Nationality Act (INA), Congress has expressly granted discretion to the Secretary of the Department of Homeland Security in deciding when to grant some benefits. For example, the INA contains provisions such as: "Subject to the numerical limitations established pursuant to subsections (a) and (b), the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee… "[11] Most of the time the grant of discretion

[9] *See*, *e.g.*, Jeh Johnson, Secretary of Homeland Security, Memo, "Policies for the Apprehension, Detention,and Removal of Undocumented Immigrants," (November 20, 2014).

[10] 8 C.F.R. § 208.14(c).

[11] INA § 207(c)(1).

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is explicit in the statute;[12] in other instances it is implied, based on the language of the statute.

When Congress enacts a law and allows discretion in the enforcement of that law, it usually grants discretion to the head of the agency tasked with enforcing that law. When you exercise discretion in adjudicating an application for a benefit, you are exercising discretion on behalf of the Secretary of Homeland Security. The Secretary's discretionary power is delegated to you, the adjudicator, through DHS and USCIS.

In many cases, such as the waiver provisions in INA § 212, the statute still reads that is the Attorney General's discretion. In most instances, the statute has not been changed since the creation of the DHS and the transfer of many functions from the Department of Justice to DHS. If USCIS has adjudicative authority over the benefit, the statute should be read as conferring the power to exercise discretion on the Secretary of Homeland Security.[13]

The Secretary or the Director may, by regulation, or directive, set how you exercise your discretion in specific instances. For example, in the particular instance of asylum adjudications, regulations provide that when the applicant has met the refugee definition through a showing of past persecution, you must consider whether there is still a well-founded fear of persecution in the future. If you can show, by a preponderance of the evidence, that there is no well-founded fear, the regulations require you to exercise discretion to deny or refer the claim, unless the applicant shows compelling reasons arising from severe past persecution for being unwilling to return or shows that he or she would face other serious harm upon return.[14]

2.4 Limits on Discretion

Some clear limitations on the exercise of discretion must be kept in mind at all times, and are described in the following subsections.

2.4.1 Eligibility Threshold

There is never discretion to grant a benefit or relief in a case where the applicant has not met the eligibility requirements for the benefit or relief sought. As a legal matter, it is permissible to deny an application as a matter of discretion, without determining whether

[12] *See, e.g.*, INA § 209(b) (The Secretary of Homeland Security or the Attorney General, **in the Secretary's or the Attorney General's discretion** and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—…).

[13] 6 U.S.C. § 275.

[14] 8 C.F.R. § 208.13(b)(1)(i). NOTE: This is a different standard than th used in adjudicating refugee claims. For refugee claims an applicant need establish either past persecution or well-founded future fear. See INA 101(a)(42)(A) and (B).

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the person is actually eligible for the benefit.[15] As a matter of policy, however, you should generally make a specific determination of statutory eligibility before addressing the exercise of discretion. If an application is denied as an exercise of discretion, and your decision is overturned, the record necessary for making a decision on eligibility for the benefit will be incomplete if the adjudicator did not establish eligibility prior to the discretionary analysis. Ideally, if you deny the petition or application, the denial notice will include a determination on both (1) statutory eligibility grounds and (2) discretionary grounds.

In the case of refugee admissions, to be eligible for refugee resettlement, the applicant must first establish that he or she has access to the U.S. Refugee Admissions Program (USRAP), meets the refugee definition, is not firmly resettled and is otherwise admissible to the United States. Most grounds of inadmissibility may be waived for refugee applicants—drug trafficking and certain security and related grounds are the only exceptions[16]—but you cannot consider the waiver request until the applicant has first established that he or she has access to the USRAP, is not firmly resettled and meets the definition of refugee. Your decision on the waiver application itself is an exercise of discretion.

2.4.2 Lack of Negative Factors

Absent any negative factors, you will always exercise discretion positively. The fact that an applicant is eligible for a particular benefit is, by itself, a strong positive factor in the weighing process. If there are no negative factors to weigh against that positive factor, denial of the benefit would be an abuse of discretion. This general rule does not apply to waiver adjudications, since the waiver process is predicated on the existence of at least one negative factor.[17]

Discretion gives the adjudicator authority to deny a benefit or a form of relief even when the applicant is eligible according to the law, but that power cannot be exercised arbitrarily or capriciously. When you use discretion to deny a claim, you must explain your reasons clearly and cogently.

3 APPLYING DISCRETION

As an adjudicator, you have an obligation to evaluate any application that comes before you, but, in the course of your adjudication, you may become aware of negative factors. Discretion is the power that allows you to make a decision to deny the benefit when the applicant is eligible for the benefit, but for other reasons it would not be appropriate to

[15] *INS v. Abudu*, 485 U.S. 94, 105 (1988); *INS v. Bagamasbad*, 429 U.S. 24, 26 (1976).

[16] *See* INA § 207(c)(3).

[17] *Matter of Marin*, 16 I&N Dec. 581, 586-87 (BIA 1978).

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exercise discretion favorably. Discretion is the authority you exercise when weighing any negative factors against the positive factors before you make the final decision on the application.

3.1 Three-Step Process

Generally, the process you follow in rendering a decision on an application, when that application is discretionary, is:

- Find the facts
- Apply the law
- Balance any negative factors against positive factors before making a decision.

The third step is the exercise of discretion.[18] Each of the steps has a role in determining what constitutes a reasonable exercise of discretion.

3.1.1 Finding the Facts

Finding the facts is a matter of gathering and assessing evidence. While the focus of fact-finding should be to obtain evidence that will help establish eligibility, you should also elicit information concerning the applicant's background such as family ties that they might have in the United States, any serious medical conditions, or other connections that they have in the community. Part of the reason for eliciting information on the applicant's background is to aid in the exercise of discretion, should it become necessary after eligibility is established. The fact that your discretion has become an issue will generally presuppose some negative factors have emerged in the course of processing the claim, you will need to have some idea of what equities the applicant has in order to properly weigh the factors.

In removal proceedings in immigration court the applicant has an affirmative duty to present evidence showing that a favorable exercise of discretion is warranted for any form of relief where discretion is a factor.[19] In adjudications outside the immigration court, however, there is no such requirement; therefore, it is important for you to explore this issue during the interview.

For example, in cases involving possible provision of material support to terrorist groups, where an exemption might be possible, your fact-finding during the interview will be crucial in determining whether an exemption is available and whether to grant the exemption in the exercise of discretion. The testimonial evidence that you elicit during an interview will often be the only evidence upon which to determine "whether the duress

[18] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press, 1969

[19] INA §240(c)(4)(A)(ii).

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exemption is warranted under the totality of the circumstances."[20] Your follow-up questions during the interview must focus on the nature and the circumstances of the applicant's interactions with the suspected terrorist group.[21]

If there appear to be any negative factors present, you should always ask the applicant directly why he or she feels that he or she deserves to have discretion exercised favorably.

3.1.2 Applying the Law

The legal analysis of eligibility may also affect the discretionary determination in your adjudication. If, for example, an applicant for a benefit has been convicted of a crime, it may raise the possibility that the applicant may be inadmissible or, in the case of an asylum applicant, that the applicant is subject to a mandatory bar of asylum for having committed a particularly serious crime.[22] In adjudications where admissibility is an issue, the determination whether a particular crime is an aggravated felony will determine whether a waiver is available to the applicant. In some cases, the question of whether a particular crime is an aggravated felony will be easily decided; in others, it will require a close legal analysis.

3.1.3 Balancing any Negative Discretionary Factors against Positive Factors before Making a Decision

The act of exercising discretion involves balancing any negative factors against positive factors before making a decision. Discretion always consists of a weighing of positive and negative factors. In the immigration context, the goal is generally to "balance the adverse factors evidencing an alien's undesirability as a resident of the United States with the social and humane considerations presented" in support of the alien's residence in the United States[23]. Since most of the benefits conferred by RAIO are based on humanitarian concepts such as family unity and protection from harm, an interviewee's eligibility for a benefit is always the main positive factor under consideration. The analysis of the negative factors should focus on what effect the alien's presence in the United States will have on the general welfare of the community. [International and Refugee Adjudications Supplement – Balancing Positive and Negative Factors] [Asylum Adjudications Supplement – Balancing Positive and Negative Factors]

3.1.4 Totality of the Circumstances

[20] Scharfen, Jonathan, Deputy Director, USCIS. *Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations*, Memorandum to Associate Directors; Chief, Office of Administrative Appeals Chief Counsel, (Washington, DC: 24 May 2007) at p. 7.

[21] *Id.*

[22] *See* INA § 208(b)(2)(A)(ii).

[23] *Matter of Marin*, 16 I&N Dec. 581, 586-87 (BIA 1978).

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It is important, when weighing the positive and negative factors, that you do not consider the various factors individually, in isolation from one another.[24] When you consider each factor individually, without considering how all the factors relate to each other, it becomes difficult to weigh the positive and negative factors properly.

Example

The BIA found that while the applicant's circumvention of orderly refugee procedures can be a serious adverse factor in considering an asylum application, "…it should not be considered in such a way that the practical effect is to deny relief in virtually all cases. This factor is only one of a number of factors which should be balanced in exercising discretion, and the weight accorded to this factor may vary depending on the facts of a particular case."[25] The BIA went on explain some of the factors that may influence how much weight should be given to the circumvention of orderly refugee procedures:

> "Instead of focusing only on the circumvention of orderly refugee procedures, the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted.
>
> Among those factors which should be considered are whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States.
>
> In addition, the length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residency there are also relevant. For example, an alien who is forced to remain in hiding to elude persecutors, or who faces imminent deportation back to the country where he fears persecution, may not have found a safe haven even though he has escaped to another country.
>
> Further, whether the alien has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere is another factor to consider. In this regard, the extent of the alien's ties to any other countries where he does not fear persecution

[24] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

[25] *Id.*

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should also be examined.

Moreover, if the alien engaged in fraud to circumvent orderly refugee procedures, the seriousness of the fraud should be considered. The use of fraudulent documents to escape the country of persecution itself is not a significant adverse factor while, at the other extreme, entry under the assumed identity of a United States citizen with a United States passport, which was fraudulently obtained by the alien from the United States Government, is very serious fraud." - *Matter of Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987).

It is clear that all the factors listed by the BIA are interrelated, and it would be difficult to consider any of those factors in isolation from the others and then assign the proper weight to each factor. You must consider all factors together and determine not just whether a particular factor is positive or negative, but how it affects the other factors under consideration. In some cases, one factor will directly cancel out another. A finding that an applicant's safety was in question may directly explain his/her circumvention of orderly refugee procedures. In other cases, a particular positive factor may just act to balance out a particular negative factor. An applicant's having relatives in the U.S. may explain why he or she did not attempt to take advantage of orderly refugee procedures in a third country as he or she passed through on the way to the United States.

3.2 Identifying the Factors That May Be Considered in the Exercise of Discretion

Anything about an applicant's background is potentially a factor to be considered in exercising discretion. However, you must be able to articulate and explain how the factor should be weighed in a particular case. Any facts related to the applicant's conduct, character, family relations in the United States, other ties to the United States, or any other humanitarian concerns are proper factors to consider in the exercise of discretion. Applicants' conduct can include how they entered the United States and what they have done since their arrival—such as employment, schooling, or any evidence of criminal activity. Employment history, schooling, and criminal activity may also be relevant factors to consider. It is important to know what family members the applicant may have living in the United States and the immigration status of those family members. Other ties to the United States may include owning real estate or a business. Other humanitarian concerns may include health issues. For example, if an applicant or a family member has a serious illness, can that applicant or family member obtain adequate treatment if removed?

3.2.1 Favorable Factors That May Be Considered

Courts have listed a number of factors that may be considered as favorable or positive factors in the exercise of discretion. There can be no exhaustive list of factors, since

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almost anything about a person's background can be considered. It is important to remember that the applicant's eligibility for the benefit being sought may be the first and strongest positive factor that you should consider. This is especially true in protection cases in which "discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors."[26] Other favorable factors that the BIA has identified include:

> [S]uch factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (*e.g.*, affidavits from family, friends, and responsible community representatives).[27]

3.2.2 Negative Factors That May Be Considered

Like the positive factors, it is impossible to list all of the possible negative factors that you may consider in exercise of discretion. Court decisions have referred to a number of factors that they have considered as negative in the exercise of discretion. As a general rule, any information that raises the possibility that an inadmissibility applies, or, in the case of asylum applications, a bar to asylum might apply, might constitute a negative discretionary factor even if it is determined that the inadmissibility or bar does not apply. You should consider carefully any indication that the applicant might pose a threat to public safety or national security. Any criminal conviction is always a negative factor that will weigh heavily against an applicant. Other negative factors that the BIA has looked at in waiver cases include:

> [T]he nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.[28]

3.3 Weighing Positive and Negative Factors

[26] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

[27] *Matter of Marin*, 16 I&N Dec. 581, 584-585 (BIA 1978).

[28] *Id.* at 585.

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Having established which factors are relevant to your exercise of discretion, the next step is to determine how to weigh them. Some factors are always going to be more important than other factors.

3.3.1 Factors Material to Eligibility Are Given the Most Weight

Any factor that is material to the applicant's eligibility for the benefit being sought generally should be given the most weight. The applicant's eligibility for the benefit is, by itself, a factor arguing for the benefit to be granted in the exercise of discretion. If there are no negative factors present, then in most instances, eligibility is all that is needed to exercise your discretion to grant a benefit.

However, as an exception to the general rule in the case of asylum, there is regulation that restricts the factors you may look at in a specific circumstance, without regard to underlying eligibility. While an applicant may establish eligibility based on past persecution alone, if you find, by a preponderance of the evidence, that the applicant has no well-founded fear of persecution in the future, regulations instruct you to exercise your discretion negatively to refer the application even when there do not appear to be any negative factors.[29] This instruction arises from the fact that the underlying protection basis for the benefit no longer exists. The same regulation also lists two positive factors that may outweigh the lack of future risk to the applicant. Discretion may still be exercised to grant asylum in the absence of well-founded fear if the past persecution suffered by the applicant was so severe that it would not be humane to return the applicant to the country of persecution.[30] You may also grant in the absence of well-founded fear if you find that the applicant would suffer some other serious harm, not related to the past persecution.[31] Both of the factors that would outweigh the lack of well-founded fear are related to the humanitarian goals of the benefit being sought, but only a grant based on severity of past harm is directly related to the underlying eligibility.

Another exception to the general rule would be an I-601 waiver for the 3 and10 year bars on re-entry for an alien who was unlawfully present and triggered the bars. For waiver of that ground of inadmissibility, the statute specifies that the only positive factor to be considered is extreme hardship to the qualifying relative even though that might not be directly relevant to the underlying benefit (issuance of an immigrant visa). [32]

4 DISCRETION IN DECISION WRITING

4.1 Positive Exercise of Discretion

[29] 8 C.F.R. § 208.13(b)(1)(i) (Discretionary referral or denial).

[30] 8 C.F.R. § 208.13(b)(1)(iii)(A).

[31] 8 C.F.R. § 208.13(b)(1)(iii)(B); *see Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012).

[32] INA §212(a)(9)(B)(v).

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Generally, a positive exercise of discretion does not require a detailed analysis or explanation in the written decision. If no adverse factors at all are present, a simple statement is sufficient, saying that the applicant is eligible, that there are no adverse factors, and that therefore the applicant is granted the benefit in the exercise of discretion.

You should discuss cases that are less clear-cut, particularly those involving criminality or national security issues, with supervisors, who may raise the issue with USCIS counsel; if you do not address the issue in the decision, the file should contain some record of your deliberations. According to USCIS guidance on such cases, "[t]he adjudicator should annotate the file to clearly reflect the favorable factors and consultations that supported the approval in close or complex cases."[33]

Whether addressing the discretionary issues in the written decision or by making an annotation in the file, you should state the rationale for your decision in a clear manner so that it is easily understandable to anyone reviewing the file.

4.2 Negative Exercise of Discretion

The written decision must contain a complete analysis of the factors considered in exercising discretion, with a specific and cogent explanation of why you exercised discretion negatively. Your decision will be reviewed, and it is imperative that those who review your decision are able to understand exactly how you reached it.

Negative factors must never be applied in a blanket fashion. Your decision must address negative factors on an individualized basis, applying the totality of the circumstances to the specific facts of the case. The decision should specify both the positive and negative factors that you identified and considered in coming to your decision and should explain how you weighed the different factors.

5 CONCLUSION

Understanding when and how to exercise discretion in your adjudications is important for all officers within the RAIO Directorate. Not all of the adjudications that you make require an exercise of discretion, but when a decision is discretionary it is essential that you understand how to identify the positive and negative factors you must consider and how to weigh those factors. When discretion is called for in your decision making, a careful application of the principles underlying discretion will help ensure that your decision will be legally sufficient and appropriate.

[33] Devine, Robert C., Acting Director, USCIS. *Legal and Discretionary Analysis for Adjudication*, Memorandum to Office of Domestic Operations, Office of Refugee, Asylum, and International Operations, and Office of National Security and Records Verification (Washington, DC: 03 May 2006).

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6 SUMMARY

6.1 Discretion Definition

As a practical matter, in the immigration context, the BIA has described discretion as a balancing of "the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether … relief appears in the best interests of this country." [34] Congress has provided the Secretary of Homeland Security discretion in making many decisions; the Secretary's authority to exercise discretion in many instances has been delegated to you, as an officer in USCIS.

6.2 Limitations on Discretion

There is no discretion to grant a claim where eligibility has not been established. If the applicant is eligible, however, you may then consider discretionary factors. Absent any identifiable negative factors you will grant the benefit.

6.3 Applying Discretion

- Find the facts
- Apply the law
- Balance any negative factors against positive factors before making a decision.

The third step is the exercise of discretion.

6.4 Totality of the Circumstances

In considering what factors you may consider in exercising discretion, you must be able to articulate clearly a relationship between a factor and the desirability of having the applicant living in the United States. Remember that the humanitarian concerns present in a particular case should always be considered. If the applicant is eligible for the benefit it should be granted absent any negative factors. When weighing the positive and negative factors you must always consider the totality of the circumstances and not weigh factors in isolation.

6.5 Discretion in Decision Writing

If you are exercising your discretion to grant a benefit, and there are no negative factors present, there is usually no need for further analysis. The fact that the applicant has established eligibility and there are no adverse factors is sufficient to justify the decision to grant a benefit. If you are exercising your discretion to deny a benefit, you must provide a complete analysis of your reasoning, specifying the positive and negative

[34] *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978).

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factors you considered, so that others reviewing your decision can clearly understand how you reached it. Negative factors should not be applied in a blanket fashion, but always individualized to particular circumstances of the applicant.

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PRACTICAL EXERCISES

There are no student materials for practical exercises.

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OTHER MATERIALS

There are no Other Materials for this module.

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SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

The following information is specific to international and refugee adjudications. Information in each text box contains adjudication-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

None

ADDITIONAL RESOURCES

None

SUPPLEMENTS

International and Refugee Adjudications Supplement – Discretion in Refugee Adjudications

The Immigration and Nationality Act provides that "the Attorney General may, **in the Attorney General's discretion**…admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible."[35] When adjudicating an application for refugee status, you must first determine whether the applicant is statutorily eligible. If the applicant has demonstrated that he or she is statutorily eligible, the ultimate decision on each application for refugee status involves the exercise of adjudicative discretion. As with all elements of the refugee adjudication, the burden of proof rests with the applicant to demonstrate that he or she merits the benefit in the exercise of discretion.

In all cases in which an applicant is otherwise eligible for refugee status, the applicant's eligibility for refugee status based on past persecution or a well-founded fear of persecution is itself a very strong positive discretionary factor. Some of the positive discretionary factors discussed in case law addressing applicants in removal proceedings (e.g., those relating to the applicant's length of residence in or ties to the United States)

[35] INA § 207(c)(1).

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are unlikely to be considerations in overseas refugee cases, and refugee applicants may be less likely to be in danger of *refoulement* to their countries of citizenship, depending on their individual situations in their place of residence, than asylum applicants in the United States who may be at risk of removal. Nevertheless, a refugee applicant's past persecution and/or likelihood of future persecution is generally such a strong positive factor that other positive factors are not necessary for the applicant to demonstrate that he or she merits refugee status. The Board of Immigration Appeals has instructed that in protection cases, "the danger of persecution should generally outweigh all but the most egregious of adverse factors."[36]

Furthermore, the bars, grounds of inadmissibility, and security vetting requirements that apply to refugees are relatively broad. Negative factors that would be sufficiently serious to weigh against the favorable exercise of discretion will generally render the applicant either statutorily ineligible for refugee status or subject to a security-related hold category that would require further review at IRAD Headquarters (IRAD HQ). For these reasons, the majority of refugee cases that are approvable in the field do not have adverse discretionary factors sufficient to outweigh the positive factors established by substantiation of the refugee claim.

Therefore, when you are approving a case (or recommending approval, pending required holds), IRAD policy does not require you as an adjudicating officer to document all the positive and negative factors in the case or your ultimate decision to exercise discretion in the applicant's favor on the Refugee Application Assessment. If you approve or recommend approval of a case, you are finding that the applicant merits refugee status in the exercise of discretion because the positive factors outweigh the negative factors in the case. Officers adjudicating refugee cases in the field are not permitted to deny cases in the exercise of discretion without written concurrence from IRAD HQ, which should be included in the file.

Nevertheless, the exercise of discretion is involved in every refugee adjudication. It is important for adjudicating officers to be aware of how a discretionary analysis may impact the ultimate adjudication. In cases that require holds for derogatory information uncovered through security checks or because there is a national security concern in the case, the Security Vetting and Program Integrity (SVPI) Branch at IRAD HQ will review the case and make a recommendation as to whether the case should be granted or denied

[36] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

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in the exercise of discretion. In cases in which the applicant is found to be inadmissible, but found eligible for a discretionary exemption to one of the Terrorism-Related Inadmissibility Grounds (TRIG) or for a discretionary waiver of one of the other inadmissibility grounds for which a waiver is available under INA § 207(c)(3), you must elicit testimony regarding positive and negative factors and document the reasons for any recommendation of an exemption or waiver based on these factors. In cases where the applicant is found to be statutorily eligible, but significant adverse discretionary factors not related to national security issues are present, you must elicit testimony regarding those factors. If you find that the adverse factors outweigh the positive factors, you should recommend the case for discretionary denial and place the case on hold for HQ review. These types of cases are discussed in more detail below.

Cases with Derogatory Information from Security Checks

All refugee applicants are subject to a range of biographic and biometric security checks that must be cleared before their cases may be approved.[37] If security checks return derogatory information about the applicant, the case must be placed on hold, and SVPI personnel will review the information to determine how it may affect the adjudication. Although SVPI personnel do not adjudicate refugee applications, they do routinely recommend final outcomes on applications when derogatory information is found in security checks and when national security concerns are involved.

As a matter of policy, USCIS's security vetting partners have set thresholds for determining when derogatory information from security checks will cause a not clear (NCL) result. In such cases, the derogatory information is a very significant negative discretionary factor, and in general, the applicant will not be able to demonstrate that he or she merits refugee status in the exercise of discretion. SVPI personnel will review derogatory information to verify that it relates to the applicant whose security check has a negative result. If the derogatory information that caused an NCL result is found to relate to the applicant, SVPI will generally recommend a discretionary denial, and that case will be denied.

Example

[37] For additional information about the security checks refugee applicants must undergo and possible results, see RAIO Lesson Plan, *National Security*, and RDOTC Lesson Plan, *Security Checks*.

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- When reviewing an applicant's security check results prior to the interview, you notice that the applicant's inter-agency check (IAC) is not clear (NCL). In Section VI of the Assessment, you will place the case on IAC hold, indicate that the IAC for the applicant is NCL, and indicate that you would recommend approval or denial for the applicant if IAC were to clear. An SVPI officer will review the derogatory information to confirm that it relates to the applicant and, if so, recommend the case for a discretionary denial. An adjudicating officer will deny the case in the exercise of discretion.

Cases with National Security Concerns

The Controlled Application Review and Resolution Program (CARRP) is the USCIS policy under which cases with national security concerns are identified, vetted, and adjudicated.[38] A national security concern exists in the case when an individual or organization has an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the INA. If you identify national security indicators in a case during your case file review or in the refugee interview, you must elicit testimony and develop the record to determine whether a national security concern exists. If you determine that a national security concern exists, you must develop the record as to positive and negative factors that are relevant to the concern and place the case on hold for CARRP even if you have determined that the applicant is not eligible for refugee status for a different reason.[39] If you believe, based on the record before you, that the negative factors outweigh the positive factors relevant to the national security concern, you should recommend that the case be discretionarily denied upon the completion of CARRP. If you believe that the positive factor relating to the concern outweigh the negative factors and the applicant is otherwise eligible for refugee status, you should recommend approval, contingent on a positive resolution of the issues reviewed during CARRP. If the applicant is not statutorily eligible for refugee status for a reason unrelated to the national security concern, you should indicate that the applicant is not eligible, but the case must be placed on hold for CARRP due to the national

[38] *See* "Policy for Vetting and Adjudicating Cases with National Security Concerns," Memorandum, Jonathan R. Scharfen, Deputy Director (April 11, 2008).
[39] For additional information about USCIS-wide CARRP policy and RAD-specific policies and procedures, see RAIO Lesson Plan, *National Security*, and RAD Standard Operating Procedure, *National Security Concerns in Refugee Cases*.

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security concern; you should then recommend that the case be denied if the concern is resolved.

After you place the case on hold for CARRP, an SVPI officer will conduct additional vetting. The SVPI officer will review the record in its entirety and balance negative factors against positive factors material to the national security concerns present in the case in order to determine whether the national security concern can be resolved. The SVPI officer will conduct an analysis of whether the concern is resolved in the totality of the circumstances.[40]

If the SVPI officer determines that the national security concern is resolved, SVPI will lift the CARRP hold, and the case can be approved or denied in the field according to the adjudicating officer's decision. If the SVPI officer determines that more information is needed to determine whether the national security concern can be resolved, SVPI will remand the case for re-interview by an officer in the field.

Under IRAD CARRP policy, an unresolved national security concern is an adverse discretionary factor that will not be outweighed by any positive discretionary factors elsewhere in the case. If the SVPI officer determines that a national security concern is unresolved, the officer will clearly articulate the discretionary analysis in internal systems by setting forth the positive and negative factors considered and the reasons the negative factors outweigh the positive and recommend that the case be denied in the exercise of discretion. An adjudicating officer will then issue a discretionary denial.

Example

- An Iraqi applicant testifies that he has been arrested on eight occasions in Anbar Province, Iraq between 2007 and 2015: three times by the Sahwa/Awakening Movement and five times by the Iraqi government. On each occasion, he was held for several weeks and accused of being a terrorist, being affiliated with particular terrorist organizations including al-Qaeda in Iraq and the Islamic Army in Iraq, and involvement in particular terrorist activities, such as the bombing of a police station and an attack on his neighbor's house. Three of the applicant's brothers have also been arrested and accused of similar activities. When you question the applicant in detail about each arrest, the applicant testifies that he and his brothers

[40] *See* RAD CARRP Lines of Inquiry for examples of factors that may be considered in the SVPI officer's discretionary analysis.

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were innocent of all of these accusations and has no idea why they were targeted for arrest and accused of specific activities so many times. Because the applicant has been accused of affiliation with an organization and activity described in INA § 212(a)(3)(B), you find that there is a national security concern in the case and place it on hold for CARRP, recommending discretionary denial. An SVPI officer will review the record (and may conduct further research or recommend additional interviews) to determine whether the national security concern is resolved.

As the applicant and several close family members were arrested multiple times over a period of several years and accused of affiliations with specific terrorist organizations and multiple specific terrorist activities in the context of the insurgency against American and multinational forces in Iraq, the negative discretionary factors relating to this concern would be significant absent testimony or other evidence that conclusively demonstrates that the applicant and his family members were falsely accused. Lacking such, the SVPI officer will find that the national security concern is unresolved and recommend a discretionary denial. An adjudicating officer will lift the CARRP hold and deny the case in the exercise of discretion.

As a matter of policy, cases which are cross-referenced in processing are reviewed through CARRP together. If a national security concern exists in a case, all cross-referenced cases must be placed on hold for CARRP. When any single national security concern is unresolved for any applicant (principal or derivative) on any case in a cross-referenced group of cases, the unresolved national security concern will be considered as a negative discretionary factor in the other cross-referenced principal applicants' cases as well and will generally result in a determination that a national security concern is unresolved in each case.

Cases Eligible for TRIG Exemption

As discussed in the RAIO Lesson Plan, *National Security, Part 2 (TRIG)*, some applicants who are inadmissible under the INA § 212(a)(3)(B) terrorism-related grounds of inadmissibility are eligible for discretionary exemptions of these grounds.[41] After you

[41] INA § 212(d)(3)(B)(i).

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have determined that an applicant is inadmissible under INA § 212(a)(3)(B), you must then determine whether the applicant meets the threshold requirements for all exemptions and whether the applicant meets the criteria articulated in the exercise of authority for any specific exemption. If the applicant is eligible for an exemption, you must exercise your discretion to determine whether the applicant merits the exemption in the totality of the circumstances. A non-exhaustive list of appropriate factors to consider includes:

- The nature of the TRIG activity, (e.g., if the applicant provided material support to a terrorist organization, the amount and type of support provided, and its frequency);
- The nature of activities committed by the terrorist organization;
- The applicant's awareness of those activities;
- The length of time that has passed since support was provided;
- The applicant's conduct since support was provided;
- Any other relevant factor.

Under IRAD policy, certain categories of exemptions may be adjudicated in the field, with one or two lines of supervisory review (depending on the specific exemption). Other exemptions, including second-line review of cases processed by the International Operations Division, require review at IRAD Headquarters. All denials based solely on TRIG, whether because the applicant does not meet the threshold requirements for any exemption or because you have determined that the exemption should not be granted in the exercise of discretion, require review at IRAD Headquarters.

All discretionary exemptions are adjudicated on the TRIG Exemption Worksheet, and your discretionary analysis should be documented both in Section IV of the Refugee Application Assessment and in Section IV of the Worksheet. If you have determined that the applicant qualifies for an exemption and merits the exemption in the totality of the circumstances, you should indicate in Section V of the Worksheet that your recommendation is to grant the exemption. If the exemption is granted after going through the requisite lines of review, the applicant is no longer inadmissible.

If you have determined that the applicant is eligible for the exemption but that, considering the totality of the circumstances, the exemption is not warranted in the exercise of discretion, you should indicate that your recommendation is to deny the exemption, checking the appropriate box in Section V of the worksheet.

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Example

- A Sri Lankan applicant testifies that she was forcibly recruited by the Liberation Tigers of Tamil Eelam (LTTE), a designated Tier I terrorist organization, in 2006. She was held by them for three years, until the end of the Sri Lankan Civil War in 2009. She cooked and served food, and she cared for injured LTTE soldiers on a regular basis. She also received military-type training from the LTTE and, on three occasions, carried a weapon to defend herself and the LTTE during battles against the Sri Lankan government, although she never actually used or threatened to use the weapon. She testified that she did not want to do these things, but that she would have been beaten if she refused; on two occasions, she tried to escape, but was captured and beaten by the LTTE both times. After her release, the applicant married a man whose brother and sister were both voluntary members of the LTTE. She and her husband are frequently, voluntarily, in contact with the brother and sister.

  This applicant is inadmissible under INA § 212(a)(3)(B)(i)(I) for having engaged in terrorist activity by providing material support to a terrorist organization and under INA § 212(a)(3)(B)(i)(VIII) for having received military-type training for a terrorist organization. Both activities were under duress, so the applicant meets the eligibility requirements for situational exemptions for these inadmissibility grounds. However, the length of time the applicant was involved in terrorist activities, the nature of her involvement (including the fact that she carried a weapon during three instances of LTTE combat against the Sri Lankan government) and her continuing associations with voluntary members of a terrorist organization, are significant adverse discretionary factors that must be considered. Although there are compelling positive discretionary factors in the case, it would be appropriate for you to find that the applicant has not met her burden to demonstrate that she merits the discretionary exemption in the totality of the circumstances and recommend that it be denied. You would then place the case on hold for HQ TRIG review as well as for CARRP, because the applicant's past involvement in the LTTE and continuing association with LTTE members are national security concerns that have not been resolved.

Cases Eligible for Waivers of Inadmissibility Grounds

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All refugees must be admissible to the United States in order for their applications to be approved; you do not have discretion to approve an applicant who is inadmissible. Under section 207(c)(3) of the INA, though, refugee applicants who are inadmissible under many of the non-TRIG grounds of inadmissibility are eligible for waivers of inadmissibility "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."[42] Waivers of inadmissibility for refugees are adjudicated on Form I-602, Application by Refugee for Waiver of Grounds of Excludability. The waiver adjudication is discretionary in nature.[43]

Officers may be called upon to adjudicate I-602 waivers in the course of their duties. In general, because an applicant cannot apply for a waiver until the applicant has been found inadmissible, you as the officer adjudicating the refugee case will not adjudicate the same applicant's waiver application. The officer adjudicating the I-602 waiver will generally not re-interview the applicant; he or she will make a decision based on your interview notes and the evidence of record. Accordingly, if you are the officer interviewing a refugee case in which the applicant is inadmissible but a waiver is statutorily available, you must be sure to elicit sufficient testimony regarding both positive and negative discretionary factors for the officer adjudicating the waiver to make a determination.

The positive and negative discretionary factors that should be considered for the purposes of the waiver adjudication are generally the same as those that are considered in the adjudication of the refugee application. Positive factors would include the humanitarian, family unity, or public interest considerations that led to a finding that the applicant is statutorily eligible, such as the severity of the past persecution and the well-founded fear of persecution and the applicant's family ties in the United States, as well as the applicant's credible acknowledgment of and remorse for wrongfulness of the act that led to a finding of inadmissibility and evidence of rehabilitation.

Negative factors will generally relate to the ground of inadmissibility, including the severity and consequences of the negative act(s) that led the applicant to be found inadmissible, the frequency of negative conduct, the likelihood of recidivism, and the applicant's circumvention of established procedures. Officers will also consider such

[42] Waivers are available to refugee applicants for all inadmissibility grounds that apply to refugees except those at INA §§ 212(a)(2)(C) (illicit trafficking in controlled substances), 212(a)(3)(A) (national-security related grounds), 212(a)(3)(B) (terrorism-related grounds), 212(a)(3)(C) (foreign policy), and 212(a)(3)(E) (Nazi persecution, genocide, torture, and extrajudicial killing).
[43] For additional guidance on I-602 adjudications, see International Operations SOP, *Form I-602: Application by Refugee for Waiver of Grounds of Excludability*.

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factors as the distance in time since the negative act(s), the applicant's explanation of the circumstances, whether the negative conduct was compelled or under duress, the age of the applicant, and any other unique characteristics specific to the applicant's case.

The Attorney General has held that in cases where the applicant is inadmissible for having committed a violent or dangerous crime, the applicant may not be granted a waiver in the exercise of discretion unless the applicant can demonstrate extraordinary circumstances, such as foreign policy or national security considerations, or exceptional and extremely unusual hardship to the applicant and/or family members if the waiver is not granted. Depending on the gravity of the criminal offense, even such a showing may not be sufficient.[44]

In assessing whether a crime is "violent or dangerous," you must consider whether the crime meets the definition of a "crime of violence" as defined in 18 U.S.C. § 16 and is an "aggravated felony" under INA § 101(a)(43). If so, the crime should be presumed to be "violent or dangerous." However, "violent or dangerous" crimes are not limited to those that meet the "crime of violence" definition, and you must also consider the common meanings of the terms "violent" and "dangerous" and assess whether the criminal statute or the circumstances of the crime entail violent or dangerous conduct.

In order for an applicant to show that he or she (or a relative) would suffer "exceptional and extremely unusual hardship" if the waiver is denied, the applicant must show that the level of hardship would be "substantially beyond that which would ordinarily result" from a denial.[45] Factors to be considered in assessing the level of hardship the applicant or a relative would suffer if his or her case were denied may include age, health, family ties in the United States and the country of residence, the applicant's individual circumstances in the country of residence, and the risk of *refoulement* to the country of citizenship.[46] In general, a lower standard of living, diminished educational opportunities, poor economic conditions, and other adverse country conditions commonly experienced by refugees in the applicant's country of residence will be insufficient, in themselves, to constitute "exceptional and extremely unusual hardship."[47]

[44] *Matter of Jean*, 23 I&N Dec. 373, 383 (AG 2002); see also 8 C.F.R. § 212.7(d) (applying this principle in the context of asylum applications, waivers of inadmissibility under INA § 209(c), and waivers under INA § 212(h)). The same principle is applied to waivers of inadmissibility under INA § 207(c)(3) and to refugee adjudications as a matter of program policy.
[45] *Matter of Monreal*, 23 I&N Dec. 56, 59 (BIA 1999).
[46] *Id.* at 63.
[47] *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323-324 (BIA 2002).

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As the interviewing officer, after you analyze the applicable grounds of inadmissibility and determine that a waiver is available, you should clearly indicate in Section IV of the Refugee Application Assessment whether you recommend that a waiver be granted. The adjudicating officer is not bound by your recommendation, but he or she will consider it when he or she adjudicates the waiver.

Example

- A Syrian applicant living in Lebanon testifies that he previously entered the United States on a student visa, was convicted of armed robbery in California in 1999, when he was 19 years old, and was removed as an aggravated felon after serving a two-year prison sentence. In your interview, he demonstrates a well-founded fear of persecution in Syria. He candidly acknowledges his wrongdoing and expresses remorse for the crime, and he demonstrates significant evidence of rehabilitation: he has had no criminal issues in Syria or Lebanon since, and he now has a family and is gainfully employed as a construction worker. He states that life is difficult for him in Lebanon because, like most Syrian refugees, he is unable to find a well-paying job, and the educational opportunities for his children are limited.

  You find that the applicant is inadmissible under INA § 212(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude and INA § 212(a)(9)(A)(ii)(II) for having been previously removed as an aggravated felon, and a waiver is available for both grounds. However, you would not recommend that the waiver be granted. Even considering the significant positive discretionary factors in the case (the applicant's demonstrated well-founded fear, the applicant's acknowledgment of wrongdoing, the evidence of rehabilitation, and the length of time since the crime was convicted), the fact that the applicant has been convicted of a violent aggravated felony is a significant adverse factor that would require the applicant to demonstrate extraordinary circumstances or exceptional and extremely unusual hardship to be overcome. The applicant has not made such a showing, so the waiver should be denied in the exercise of discretion.

Other Cases with Adverse Discretionary Factors

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In some circumstances, you may interview refugee applicants who are admissible, otherwise eligible for refugee status, and not subject to any security-related holds, but nevertheless have significant adverse discretionary factors that should be considered in the adjudication. In such cases, you must thoroughly explore both positive and negative discretionary factors in the interview. If you believe that the negative discretionary factors outweigh the positive discretionary factors and could result in a discretionary denial, in Section VI of your Assessment, you should place the case on HQ Review hold so that an officer at IRAD Headquarters can review your determination. If the officer concurs with your determination, IRAD Headquarters will issue a discretionary denial. You should clearly articulate in the Justification section of the Assessment the positive and negative factors you have considered and why you recommend that the case be denied in the exercise of discretion.

Such cases may include those in which there is evidence that the applicant has committed a serious crime, but the applicant cannot be found to be inadmissible, either because the applicant's conduct is not criminal in the country where the crime was committed, because the particular statute under which the applicant was convicted (or of which the applicant admits to the essential elements) does not meet the definition of a crime involving moral turpitude (CIMT), or because the applicant falls within a statutory exception to applicable inadmissibility grounds.

As noted above, the Attorney General has held that an applicant who has committed a "violent or dangerous" crime should not be granted discretionary benefits unless the applicant can demonstrate extraordinary circumstances, such as foreign policy or national security considerations, or that he or she will suffer exceptional and extremely unusual hardship if his or her application is not approved, and that if the criminal offense is sufficiently serious, even a showing of any may not be sufficient.[48] This principle should be applied to refugee adjudications even if the applicant's violent or dangerous conduct, which would be criminal in the United States, is not criminal in the country where it was committed and/or does not render the applicant inadmissible.

Examples

- An Iranian applicant testifies that her ex-husband, whom she divorced two years

[48] *Matter of Jean*, 23 I&N Dec. 373, 385 (AG 2002).

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ago and who is also a refugee applicant on a different case, regularly beat her with his fists during their marriage. She gives you permission to confront her ex-husband with the adverse information. Later in your circuit ride, you interview the ex-husband, and he establishes that he was persecuted in the past and has a well-founded fear of persecution. When you confront him with the information his ex-wife provided, the applicant admits that he beat his wife during their marriage but that he is sorry for his actions and does not intend to engage in any violent activities in the future. Domestic violence is a serious criminal issue that has generally been held to constitute a CIMT in the United States; however, Iran does not have a statute that criminalizes domestic violence, and no Iranian statute that applies to the applicant's conduct would constitute a CIMT.

In such a case, it would be appropriate for you to find that the applicant's admission that he engaged in domestic violence is a significant adverse discretionary factor, aggravated by the fact that his conduct was regular and relatively recent. Although the applicant's statutory eligibility for refugee status and his candor and remorse for his actions are positive discretionary factors, the applicant has admitted to violent activity that would be considered criminal if committed in the United States. If he has not established extraordinary circumstances or that he will suffer exceptional or extremely unusual hardship, you should place the case on HQ Review Hold and recommend discretionary denial.

- A Bhutanese applicant in Nepal testifies that fifteen years before your interview, when he was 16 years old, he was convicted of raping a four-year-old child under Chapter 14, No. 1, of the Nepali Criminal Code, Chapter on Rape. He was sentenced to 5 years in prison and released after serving 2.5 years. The applicant testifies that he is has not committed or been convicted of any other crimes, and he expresses remorse for his crime. The applicant establishes that he has a well-founded fear of persecution in Bhutan, and furthermore, medical documents in the record establish that the applicant has a serious medical condition for which treatment is not available in Nepal.

  The applicant is not inadmissible, because although he has been convicted of a CIMT, he falls within the juvenile offense exception: he was convicted of only one crime, it occurred when he was under 18, and more than five years have passed since the applicant was released from confinement. There are significant

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positive discretionary factors in the case (the applicant's statutory eligibility, his remorse for the crime, and the length of time that has passed), and the applicant's health and the unavailability of medical treatment in his country of residence may lead to the finding that the applicant has shown that he would suffer exceptional and extremely unusual hardship if his case is denied. However, the crime is a serious adverse discretionary factor, and you would find that the gravity of the crime of raping a child is so serious that even a showing of exceptional and extremely unusual hardship is insufficient for the applicant to demonstrate that he merits refugee status in the exercise of discretion. As such, you should place the case on hold for HQ Review and recommend discretionary denial.

Another situation in which a discretionary denial may be appropriate for non-national security-related reasons would be a case in which an applicant has an association or current, prior, or planned involvement with criminal activity or a criminal organization, but the applicant is not inadmissible on the basis of his or her own activities. For instance, an applicant's affiliation with a transnational criminal gang, or employment by a business that engages in organized criminal activities, is an indicator that the applicant is a potential danger to public safety and would be a significant adverse discretionary factor even in the absence of evidence that the applicant himself or herself has committed a crime.

An applicant's association or relationship with an individual or organization involved in criminal activities would also be an adverse discretionary factor. When evaluating the weight that the relationship or association would carry in the discretionary determination, you should consider such factors as the nature of the relationship, the closeness of the relationship, whether or not the association is continuing (and, if not, the length of time that has passed since it ended), the seriousness of the criminal activities, and the likelihood that the applicant would engage in criminal activities that pose a danger to public safety in the United States.

Examples

- A Salvadoran applicant testifies that her current boyfriend, the father of her son, is a member of the Mara Salvatrucha (MS-13) criminal gang. She states that her boyfriend was forcibly recruited and would like to leave the gang, but is unable to do so; she has encouraged him to try to leave MS-13 and has received threats from other MS-13 members because of her relationship with him. He has not told

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her anything about his activities with them. Although the applicant does not agree with the MS-13's activities and has never done anything to support her boyfriend or other MS-13 members in their criminal behavior, she testifies that she loves her boyfriend and would like for him to join her in the United States eventually so that he can leave MS-13.

The applicant's association with her boyfriend is a significant adverse discretionary factor. The nature of their relationship is close and continuing, and although the applicant is not aware of her boyfriend's specific activities, MS-13's violent criminal activities are very serious. The applicant's desire for her boyfriend to join her in the United States is also a negative factor, as she would be able to petition for him if they married and his entry would pose a public safety concern. It is unlikely that the positive discretionary factors in this case would be found to outweigh these negative factors, and it would be appropriate for you to place the case on hold for HQ Review and recommend discretionary denial.

- An applicant from the Central African Republic testifies that his uncle owned a business there and was involved in the illicit diamond trafficking industry. When the applicant was a young man, from 2001 to 2003, he worked for his uncle performing clerical tasks. The applicant was aware at the time that his uncle's company abused its workers and that his uncle paid millions of dollars to the regime of former President Ange-Félix Patassé in order to continue operating illegally, but he states that he never objected to these activities because it was simply how things worked under the Patassé regime. The applicant and his uncle both left the Central African Republic after the Patassé regime collapsed, but the applicant's uncle remains involved in the illicit diamond industry in Cameroon, and the applicant is still in contact with him and has a good relationship with him.

  The applicant's relationship with his uncle and his prior employment are adverse discretionary factors in this case. The applicant's relationship with his uncle is close and continuing, and his uncle is continuing to engage in very serious criminal activity involving both labor abuses and large-scale corruption. Although the applicant's prior involvement probably could not lead to a finding that the applicant is inadmissible, the applicant was involved in his uncle's business for a long period of time and was aware of the criminal nature of his activities. These are significant negative discretionary factors that would be unlikely to be outweighed by positive factors in the case, and it would be appropriate for you to

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place the case on hold for HQ Review and recommend discretionary denial.

If a case with a national security concern also has non-national security-related adverse discretionary factors such that you are recommending a discretionary denial, you should place the case on hold both for CARRP and for HQ Review. The CARRP reviewer at SVPI will review the national security concern and positive and negative discretionary factors material to the concern to determine whether the concern is resolved. If it can be resolved, the HQ reviewer will review all positive and negative discretionary factors in the record in its entirety and make the final determination as to whether the applicant merits discretionary approval of refugee status.

If you are placing a case on hold for HQ Review because of adverse discretionary factors, all cross-referenced cases should also be placed on HQ Review hold so that all cases that may potentially be affected by the adverse discretionary factor may be reviewed together. In cases where the adverse discretionary factor is an applicant's association with criminal gangs or organizations that may pose a risk to public safety, cross-referenced applicants may also have an association with such organizations that may be an adverse discretionary factor in their cases. In cases where the adverse discretionary factor relates to a single individual's criminal acts, the cross-referenced cases' relationship with this individual will likely be less significant as an adverse factor. You may recommend approval or denial pending HQ review, but if any case is recommended for denial, HQ must still review all cross-referenced cases for consistency and to ensure that discretion is being weighed appropriately.

DNA Pilot Program Cases

In 2008, the U.S. Refugee Admissions Program conducted a DNA pilot program for certain Priority 3 and Priority 1 cases. For cases that were conditionally approved but then refused or failed to appear for DNA testing after this was made a program requirement, and for DNA pilot cases in which at least one claimed family relationship was not supported by DNA results and the family then did not appear for a re-interview, USCIS denied the cases as a matter of discretion.

If you encounter a case with unique issues where you believe there are other adverse factors that weigh against approval in the exercise of discretion, it is appropriate to consult with your Team Lead and, through your chain of command, with appropriate points of contact at the IRAD Policy Branch.

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Other Adjudications

Officers will exercise discretion during the adjudication of a variety of immigration benefit requests. Some of the most common requests involving discretion include:

- Form I-601, Application for Grounds of Inadmissibility
- Form I-730, Refugee/Asylee Relative Petition
- Form I-602, Application by Refugee for Waiver of Grounds of Excludability

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SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

REQUIRED READING

None

ADDITIONAL RESOURCES

None

SUPPLEMENTS

Asylum Adjudications Supplement – Balancing Positive and Negative Factors

The most common situation in which you, as an Asylum Officer, will exercise discretion to deny an asylum claim, and a situation that does not require HQ review, involves those cases where eligibility is established by past persecution alone and it is determined that there is an absence of well-founded fear. The regulations provide clear guidance of how you should proceed.[49] This is an explanation of how you should apply that guidance:

1. The applicant has presented evidence that establishes that he meets the requirements of the refugee definition by virtue of having suffered past persecution. The applicant, having proven that he or she suffered persecution in the past has no further burden of proof in establishing eligibility and enjoys a presumption that their fear of persecution in the future is well-founded.

2. You must next consider whether there is evidence that rebuts the presumption of a well-founded fear of persecution in the future.[50]

[49] 8 C.F.R. § 208.13(b)(1).

[50] 8 C.F.R. § 208.13(b)(1)(i).

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3. First you consider any changed circumstances, having to do with the conditions in the country of persecution, or the applicant's personal situation, that would remove a reasonable possibility of future persecution.[51]

4. Next, you look to see if the applicant can reasonably relocate within his/her country of persecution and thereby avoid any future persecution.[52]

5. If you find that either of those conditions exists, the presumption that the applicant has a well-founded fear of persecution may be rebutted.

6. It is your burden of proof, in rebutting the presumption of well-founded fear that the applicant enjoys, to show by a preponderance of the evidence that the applicant would face no risk of persecution in the future. [53]

7. If you, the officer, are able to show, by a preponderance of the evidence, that the applicant no longer has a well-founded fear of persecution in the future, except in two very narrow circumstances detailed below, you are required to exercise your discretion to deny or refer the application. The basis of this regulation is the fact that the humanitarian concern that underlies the benefit no longer exists. The applicant is no longer in need of protection from persecution. In these cases the lack of risk of persecution is treated as a negative discretionary factor by the regulations.

8. The regulations also require that you consider two possible positive countervailing factors to the discretionary denial/referral of a claim based on past persecution with no well-founded fear. These two countervailing positive factors would allow for a grant of asylum in the absence of well-founded fear.

9. One countervailing factor is if the applicant presents evidence that indicates that there are compelling reasons for being unwilling or unable to return to the country of origin arising out of the severity of the past persecution, you may grant asylum.[54] While the humanitarian concerns that the benefit is meant to address no longer exist, there are other humanitarian concerns to consider as positive factors in weighing discretion.

[51] 8 C.F.R. § 208.13(b)(1)(i)(A).

[52] 8 C.F.R. § 208.13(b)(1)(i)(B).

[53] 8 C.F.R. § 208.13(b)(1)(ii).

[54] 8 C.F.R. § 208.13(b)(1)(iii)(A); *see also Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

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10. Another countervailing factor is if the applicant presents evidence that he or she would suffer some other serious harm if returned. While the other serious harm must rise to the level of persecution, no nexus to a protected ground is required.[55] If so, you may grant asylum in the absence of a well-founded fear of persecution.[56] Once again, risk to the applicant is the main positive factor to be considered in the exercise of discretion.

Officers should go through these steps in any case where the applicant is only able to establish eligibility through past persecution.

Remember, in order to rebut the presumption that the applicant has a well-founded fear of persecution after the applicant has established that he or she has suffered persecution in the past, the officer must be able to meet the preponderance of the evidence standard in showing that the applicant no longer has a well-founded fear of persecution. Before proceeding with a discretionary denial/referral based on a lack of well-founded fear in the future, the officer must also consider whether there are compelling reasons for the applicant being unwilling or unable to return to the country of origin arising out of the severity of the past persecution, or whether the applicant would suffer some other serious harm if returned.

[55] *Matter of L-S-*, 25 I&N Dec. 704, 714 (BIA 2012).

[56] 8 C.F.R. § 208.13(b)(1)(iii)(B); *see also Matter of H-*, 21 I&N Dec. 337 (BIA 1996).

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RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

EVIDENCE

TRAINING MODULE

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

EVIDENCE

Training Module

MODULE DESCRIPTION

This module discusses burden and standards of proof and describes the types of evidence presented in support of petitions and applications for benefits in the RAIO Directorate.

TERMINAL PERFORMANCE OBJECTIVE(S)

You, the officer, will be able to determine whether an applicant establishes eligibility (meets his or her burden of proof) for the requested benefit based on the evidence of record.

ENABLING PERFORMANCE OBJECTIVES

1. Determine the proper standard of proof to apply in determining an applicant's eligibility as a refugee under INA § 101(a)(42).
2. Distinguish the applicant's burden of proof from the standards of proof necessary to establish eligibility as a refugee under INA § 101(a)(42).
3. Evaluate evidence presented in an application for protection under INA § 101(a)(42) for reliability and relevance.
4. Evaluate evidence presented in an application for protection under INA § 101(a)(42) to determine if the applicant has met the appropriate standard of proof.

INSTRUCTIONAL METHODS

METHOD(S) OF EVALUATION

REQUIRED READING

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Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

Additional Resources – International and Refugee Adjudications

Additional Resources – Asylum Adjudications

CRITICAL TASKS

Task/ Skill #	Task Description
ILR16	Knowledge of the relevant laws and regulations for requesting and accepting evidence (4)
ILR17	Knowledge of who has the burden of proof (4)
ILR18	Knowledge of different standards of proof (4)
IRK4	Knowledge of policies, procedures and guidelines for requesting and accepting evidence (4)
RI1	Skill in identifying issues of a claim (4)
RI4	Skill in integrating information and materials from multiple sources (e.g., interviews/testimony, legal documents, case law) (4)
RI5	Skill in identifying the relevancy of collected information and materials (4)
RI7	Skill in identifying information gaps, deficiencies, and discrepancies in data or information (4)
IRK3	Knowledge of the procedures and guidelines for establishing an individual's identity (3)
DM7	Skill in making legally sufficient decisions (5)
DM9	Skill in making legally sufficient decisions with limited information (5)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
June 6, 2013	Throughout document	Corrected minor typos, formatting, cites identified by OCC-TKMD.	M. Morales, RAIO Training
August 3, 2015	Throughout document	Reorganization of module, some stylistic edits, updated links	RAIO Training
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training

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Throughout this training module, you will come across references to adjudication-specific supplemental information located at the end of the module, as well as links to documents that contain adjudication-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to the adjudications you will be performing.

For easy reference, supplements for international and refugee adjudications are in pink and supplements for asylum adjudications are in yellow.

You may also encounter references to the legacy Refugee Affairs Division (RAD) and the legacy International Operations Division (IO). RAD has been renamed the International and Refugee Affairs Division (IRAD) and has assumed much of the workload of IO, which is no longer operating as a separate RAIO division.

1 INTRODUCTION

Your job as an officer in the RAIO Directorate is to review applications and petitions to determine if the applicant or petitioner is eligible for a benefit under the Immigration and Nationality Act (INA), and to adjudicate his or her case in a neutral, unbiased manner. In every decision you make, you will gather and evaluate different types of evidence, including testimony, documents, and country of origin information (COI). Before you begin any adjudication, you must understand the legal requirements that the applicant or petitioner must meet.

This module provides guidance on evidence that you may see as you adjudicate cases. This module also discusses an applicant's burden of proof and the various standards of proof that apply in adjudicating different applications. Some benefits require specific types of documentary evidence to establish eligibility. For example, if a U.S. citizen (USC) wants to petition for his non-citizen mother so that she may apply for an immigrant visa, he must file a Form I-130, Petition for Alien Relative. In support of the petition, he must provide evidence of his citizenship and his relationship to his mother. To prove that he is a USC, he might submit a naturalization certificate or a passport. To prove his relationship to his mother, he would submit his birth certificate.

On the other hand, some benefits such as refugee and asylum status involve individuals who have fled their countries with little or no documentation.[1] In these cases, an interview is required because often testimony is the only evidence the applicant will have to establish large parts of his or her claim.

[1] *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); UNHCR Handbook, ¶ 74 (reissued, Geneva, Dec. 2011).

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In each of your adjudications, you will follow the methodological approach set forth in the RAIO Module, *Decision Making*. You will identify the relevant legal requirements of the adjudication, gather all necessary evidence, evaluate the quality of each piece of evidence, assign weight to each piece of evidence, and determine whether the applicant's burden of proof has been satisfied according to the appropriate standard of proof.

2 TYPES OF EVIDENCE

Generally, you must consider any statement, document, or object that an applicant offers as evidence. An applicant may also present witnesses at an interview. Witness testimony is evidence to be considered and weighed along with all the other evidence presented in the case.[2] *See* Asylum Adjudications Supplement – Types of Evidence. In addition, any COI materials that you discover in your research and information accessed in any computer databases are also evidence.

In the asylum and refugee context, applicants often face special difficulties presenting evidence. Generally, persecutors do not provide evidence of their persecution or intentions. Additionally, the applicant may have been forced to flee without an opportunity to gather documents, or it may have been dangerous for the applicant to carry certain documents, such as a written threat or identification documents.[3]

Human rights monitors and reporters may have difficulty documenting abuses in some refugee-producing countries that maintain firm control over the press and do not allow human rights monitors access to the country.

When applicants do provide documents, they may not be able to establish the genuineness of the documents.[4] If you believe that the documents are genuine, the evidentiary value should not be discounted merely because the documents are not certified or authenticated.

You must consider and evaluate any evidence submitted by the applicant. In order to create a fair and objective process for adjudicating claims, all evidence must be considered using the analytical framework explained in the RAIO Training Module, *Decision Making*. Although you must consider all evidence submitted by the applicant, you do not have to afford all evidence the same weight. You must determine the probative value of each piece of evidence. The circumstances surrounding the evidence and information about the evidence will determine what weight you assign to it.

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[2] 8 C.F.R. § 208.9(b).

[3] *See, e.g.*, *Aguilera-Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990) ("The last thing a victim may want to do is carry around a threatening note with him.")

[4] *See Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984).

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Circumstances that may affect the weight of the evidence include reliability, relevance, content, form, and the nature of the evidence.

Below is a non-exhaustive list of some of the common types of evidence that you might encounter along with some suggestions of ways in which the evidence may be used.

2.1 Testimonial Evidence from the Applicant

The Application Form

The application form supplies basic biographical information about the applicant and provides information about the basis for his or her claim. A review of the application should provide you with an indication of what biographical information may be relevant to the applicant's claim. The form may also contain some information about travel patterns that may be relevant to subsidiary issues such as access to the program in refugee resettlement cases and one-year filing deadline issues in asylum claims. You should read the form carefully to determine what information on the form, beyond the statements of the claim itself, may be relevant. With all applications where there is an interview, you should go over the biographical information with the applicant at the beginning of the interview, making certain that the applicant agrees that the information is correct. This sets a baseline of factual information that you may rely on if inconsistencies or contradictions arise later in the interview.

Oral Testimony

When conducting an interview, you should make certain that you elicit information on all material aspects of the claim. In many refugee and asylum cases, the oral testimony at the interview, along with the information contained in the application form, will be the most critical evidence you will gather and evaluate to make your decision. It is your duty to elicit as much detail as possible during the interview. In fulfilling your duty you will also be making your post-interview decision-making much easier.

Written Statements

In some types of cases, such as asylum or waiver cases, applicants will often submit statements with their application describing their claims. These statements will usually be much more detailed than the information provided on the application form, and you should review them very carefully.

All refugee cases will have a referral statement or form through which the applicant is granted access to the U.S. Refugee Admissions Program (USRAP). For refugee cases referred for resettlement consideration by the United Nations High Commissioner for Refugees (UNHCR), a U.S. Embassy or certain Non-Governmental Organizations (NGOs), the referring entity will provide a Resettlement Referral Form (RRF) outlining the applicant's claim. The Resettlement Support Center (RSC) will also interview all applicants and prepare a statement of the refugee claim which will accompany the Form

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I-590, Registration for Classification as Refugee. The RRF and RSC statement should be reviewed and considered in light of other information in the record and the applicant's testimony.

You should find those sections of the written statement that contain information that directly relates to the applicant's eligibility and compare them to statements in the application form. The statement is useful in helping to identify the material elements of the applicant's claim about which you will question the applicant during the interview.

The written statement might also contain contradictions or may raise inconsistencies when compared to the applicant's oral testimony. Apparent contradictions or inconsistencies that are material or relevant to the applicant's claim and eligibility should be explored in the interview. When evaluating their impact on credibility you should consider the circumstances under which the statements were prepared, whether they were taken under oath, and any other indicia of reliability.

2.2 Statements by Other Parties

Friends and Family (Oral Testimony)

Sometimes a family member or friend testifies under oath at the applicant's interview. Such oral testimony may be material to the applicant's claim and may be considered corroborative evidence.

Friends and Family (Written Statements)

An application may contain statements written by the applicant's friends or family. Some considerations that you should keep in mind when reviewing such evidence include:

- the type of written statement submitted (*e.g.*, a simple letter, an affidavit, or a sworn statement or declaration made under penalty of perjury);
- how the content of the statement relates to the claim; and
- whether the document was created to support the claim.

In evaluating the content of the statement, you should determine whether the statement was written before or after the applicant started the application process. In the protection context, if the statement was written before the applicant claims to have decided to apply for protection, and the statement contains very specific information about the applicant's claim, you should ask why this information was included in the statement.

Boilerplate statements should be evaluated based on the context in which applicants use them. In some cases boilerplate statements may be used as part of an adverse credibility

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determination.[5] *See* RAIO Training Module, *Credibility*, section on "Similar Claims." If the applicant submits written statements with nearly identical language, you should closely question the applicant about who prepared the statements and under what circumstances. For example, ask the applicant how the people who signed the statements had knowledge of their content. Point out to the applicant the extreme similarity in the documents, and provide the applicant an opportunity to explain why they are so similar. The applicant's answers may help you determine the statements' evidentiary weight and their impact on the overall credibility determination. Bear in mind, however, that the applicant may not necessarily know how or by whom the written statements were prepared or procured, as the applicant may not have personally obtained the documents.

See International and Refugee Adjudications Supplement – Testimony by Other Refugee Applicants .

Experts (Written Reports and Affidavits)

Applicants sometimes submit supportive documentation in the form of statements, reports, and affidavits written by outside parties such as subject matter experts, members of academia, and physicians. One common type of such evidence is medical reports, which are addressed below at section 2.7. You should always accept such documentation, but the weight you assign it should be based on a number of factors. Since the statement will usually be based on a claimed expertise of the declarant, the statement should give an adequate explanation of that expertise, which usually constitutes some background information about the declarant. The statement should give an indication of what knowledge the declarant has of the specific facts in the case at hand. It may make some connection between the factual information being provided and the applicant's claim. *See* Asylum Adjudications Supplement – Statements by Other Parties.

2.3 Travel Documents

Any documentation the applicant presents concerning his or her travel is useful. For example, to the extent that the documents give times and places where the applicant has been, you can establish a chronology that may provide evidence of the applicant's eligibility to apply for asylum or his or her access to the refugee program. The most common types of travel documents that an applicant might present are:

Passports

Possession of a valid national passport creates a *prima facie* presumption that the holder is a national of the country of issuance, unless the passport itself states otherwise. A person holding a passport showing him or her to be a national of the issuing country, but who claims that he or she does not possess that country's nationality, must substantiate

[5] *See* *Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006); *Nadeem v. Holder*, 599 F.3d 869, 873 (8th Cir. 2010).

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his or her claim, for example, by showing that the passport is a so-called 'passport of convenience' (an apparently regular national passport that is sometimes issued by a national authority to non-nationals). Generally, the mere assertion by the holder that the passport was issued as a matter of convenience for travel purposes only is not sufficient to rebut the presumption of nationality. It is sometimes possible to obtain information about the significance of a passport from the issuing authority, but only if confidentiality is not violated. If you are unable to obtain reliable, timely information about whether the passport conveys nationality, you must determine the credibility of the applicant's assertion regarding his or her passport in the context of the entirety of his or her testimony.[6]

In addition to proving nationality, passports may also provide information that helps you establish the applicant's travel patterns and places of residence. You should carefully examine a passport with stamps in it that indicate entries and exits from different countries. Sometimes you may find proof that the applicant was not where he or she claimed a specific event happened, when that event occurred. Passports may also provide some evidence of an applicant's profession, and this may be relevant to his or her claim. Finally, passports from third countries may provide evidence of dual nationality or firm resettlement.

Refugee Travel Documents

Possession of a refugee travel document by an applicant can be proof of identity and nationality and that another state party to the Refugee Convention has recognized that person as a refugee. It may also, however, raise the issue of firm resettlement. Like a passport, a refugee travel document may contain stamps for entry and exit from different countries to which the applicant has traveled and can be used to establish a chronology and determine travel patterns.

Tickets from Transportation Carriers

Tickets from airlines and other common carriers provide evidence that may help to map out travel patterns and timelines that could be relevant to part of the applicant's claim. In the asylum context, tickets may also provide evidence relevant to the applicant's eligibility to apply under the one-year filing deadline.

2.4 Identification Documents

National Identify (ID) Cards

An applicant may submit a national ID card as evidence of his or her identity and nationality. These documents can sometimes provide other useful information that you

[6] UNHCR Handbook, ¶ 93.

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can use in questioning the applicant. For example, national ID cards usually have an issue date. If an applicant submits a national ID card that has an issue date later than the date on which the applicant claims to have left his or her country, ask the applicant how he or she obtained the document.

Organizational ID Cards

(student, employment, union, refugee ID, etc.)

These types of documents generally should not be used as evidence of identity.; Rather, they are evidence that the holder has been a member of an organization or has held a particular status (student, refugee, etc.) that may be relevant to the claim. Again, such documents, when examined carefully, may also provide evidence beyond mere membership.

2.5 Civil Documents Issued by Government Agencies

(Police reports, household registrations, birth certificates, death certificates, marriage certificates, records from government hospitals, etc.)

When an applicant submits a document from another country, you should consider carefully what information is contained in the document and its relevance to the applicant's refugee claim or other eligibility criteria.

Example

> An applicant submits a police report she received after filing a complaint because she was beaten by an unknown assailant. While the police report is evidence that the applicant was harmed, it is likely that it relates to a number of different elements in the refugee definition, such as whether the applicant suffered past persecution, whether the assault was on account of a protected ground, and whether the government was unwilling or unable to protect her. The police report should prompt you to ask follow-up questions regarding the relevant issues.

2.6 U.S. Government Records

(CCD, DHS databases, previous applications for benefits, airport interviews, etc.)

If an applicant has had contact with the U.S. government prior to his or her application for protection, there may be additional information concerning the applicant in other Government records. The most common sources for information from other U.S. Government sources are the Office of Biometric Identity Management (OBIM) (formerly known as the U.S. Visitor and Immigration Status Indicator Technology (US-VISIT)) and the Consolidated Consular Database (CCD). The CCD records all contact that the

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applicant may have had with U.S. embassies overseas. An example of this is a record of previous attempts by the applicant to obtain a visa to come to the United States.[7]

As with all documentary evidence, records produced by the U.S. government should be evaluated for their probative value. Records produced by public officials in the regular course of their duties should generally be treated as presumptively reliable.[8] The purpose for which and circumstances under which government documents were produced, however, should always be considered and may limit their evidentiary value, particularly in relation to a claim for refugee or asylum status.

For example, interviews of applicants by agents of U.S. Customs and Border Patrol at the airport or port of entry or near the U.S. borders are intended to quickly gather basic information necessary for CBP's operations. They are not designed to elicit the often sensitive and complex facts involved in adjudicating a protection claim, and they often take place under circumstances the applicants may experience as rushed or confusing, and in which they may be reluctant to divulge information relevant to adjudication of a protection claim.

Several courts have indicated that adjudicators must carefully examine these statements and exercise caution before relying on them, particularly in order to impeach an applicant's credibility. The Second Circuit Court of Appeals, for example, has listed four factors officers should consider: (1) whether the record of the interview is verbatim or merely summarizes the person's statements; (2) whether the questions asked were designed to elicit details related to the claim and whether the officer asked follow-up questions that would aid in developing the account; (3) whether the applicant was reluctant to reveal information because of prior interrogation or other coercive experiences in his or her home country; and (4) whether answers to the questions suggested the applicant did not understand English or the translation was not reliable. While these factors are not exhaustive, you should consider them when determining how much weight to accord a record produced in such circumstances.[9]

2.7 Medical Evidence

The term "medical evidence" usually refers to a written opinion issued by a medical doctor, a psychiatrist, a psychologist, or other medical expert who produces statements concerning the physical and mental health of an individual. Medical evidence can also be obtained in the form of witness testimony or medical records.

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[7] *See* RAIO Training Module, *Fraud.*

[8] *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); s*ee, e.g.*, *Munoz-Avila v. Holder*, 718 F.3d 976, 979 (7th Cir. 2013); *Kim v. Holder*, 560 F.3d 833, 836 (8th Cir. 2009); *Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996).

[9] *Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004); *see also Nadmid v. Holder*, 784 F.3d 357, 360 (7th Cir. 2015); *Balogun v. Ashcroft*, 374 F.3d 492, 505 (7th Cir. 2004); *Balasubramanrim v. INS*, 143 F.3d 157, 162 (3d Cir. 1998).

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Medical evidence can be presented by the applicant at the time of his or her application. In the asylum context, you may request the applicant to provide it after the interview. It would be rare for such evidence to be available in an overseas refugee context. The most common scenario where such information is available is when applicants are processed in-country as they often have greater access not just to identity documentation but also to police or medical records which may corroborate claimed harm.

These reports can facilitate the work of decision-makers. To be given full weight, a medical evaluation must be written with objectivity and impartiality. Depending on the case, a medical report produced by the applicant may not necessarily resolve inconsistencies and statements that are found to be not credible. In fact, evidence presented in the medical documentation can sometimes undermine a claim or raise concerns about inconsistencies.

You may request medical evidence when you feel it is necessary to the adjudication. The applicant will either have to provide the evidence or give a reasonable explanation why the evidence is not available.[10] If such evidence is produced in the country where the applicant is applying, the applicant may have access to the evidence. Another consideration concerning the reasonableness of the applicant's ability to produce such evidence is the availability of physicians in the area who are qualified to make such an examination and their willingness to do them at no cost. In general, you should request medical evidence only if the applicant has failed to meet his or her burden of proof and additional corroboration is necessary to meet it.

The Istanbul Protocol[11] establishes internationally accepted guidelines that govern how best to handle medical investigations of allegations of torture. Although there is no specific requirement that medical evidence follow the Istanbul Protocol, it can serve as a guide for adjudicators as to what constitutes well-documented medical evidence. The more closely the medical evidence meets the standards in the Istanbul Protocol, the easier it is to determine the probative value of the evidence.

When medical evidence is submitted, it will most often be submitted to support a claim of past persecution. If an applicant indicates that he or she sought medical treatment in the United States or his country of first refuge because of torture, he or she should be asked to provide some medical documentation or explain why he or she is unable to provide it.

2.8 Country of Origin Information[12]

[10] *Matter of S-M-J-*, 21 I&N Dec. at 725-26.

[11] United Nations Commissioner for Human Rights, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, August 9, 1999.

[12] *See* RAIO Training Module, *Researching and Using Country of Origin Information in RAIO Adjudications.*

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Depending on the adjudication, COI is evidence you can use to help determine whether an individual may be eligible for the requested benefit. COI provides objective evidence against which documentation in the record and the testimony of an interviewee can be viewed and evaluated. In some cases, COI may be sufficient to establish a particular fact that is relevant to the adjudication. It is not necessary for an applicant to testify to every fact that the adjudicator finds. In refugee and asylum adjudications, you must evaluate the applicant's claim in light of COI. *See* Asylum Adjudications Supplement – Country of Origin Information.

2.9 Other Types of Physical Evidence

In some situations, an applicant may offer as evidence an object other than paper documentation, such as a videotape, compact disc (CD), flash drive, website link, book about the history of a conflict, or a bottle of medicine to substantiate a medical condition. In such instances, you should consult with your supervisor about how to best accept the information associated with this type of evidence.

Documentary Evidence—Authentication

In affirmative asylum and refugee processing, ***authentication is not necessary***. Documents should be accepted and considered as part of the evidence in the record whether authenticated or not. Bear in mind that under the Federal Rules of Evidence, a document may be authenticated by the "[t]estimony of witness with knowledge."[13] For asylum and refugee purposes, a "witness with knowledge" may be the applicant.[14] If the applicant provides a detailed, plausible, and consistent account of how he or she came into possession of the document, you should consider that document authenticated.

Although authentication is not necessary, you may give more weight to a document that is authenticated than a document that is not authenticated—and the method of authentication may affect the weight given the document.[15] When an applicant submits a document that does not appear to be what it purports to be, in order to completely discredit that documentary evidence you must provide sound, cogent reasons for doing so.[16] Otherwise, the document should be evaluated for its evidentiary value.

Courts have held that the means of authentication found in the immigration regulations are not the only means by which documents may be authenticated, and the trier of fact should give the applicant the opportunity to authenticate documents by alternative means,

[13] Federal Rules of Evidence Rule 901(b)(1), 28 U.S.C.A.

[14] *Zhanling Jiang v. Holder*, 658 F.3d 1118 (9th Cir. 2011)

[15] *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (The method of authentication that the party submitting the evidence utilizes may affect the weight of the evidence, and Immigration Judges "retain broad discretion to accept a document as authentic or not based on the particular factual showing presented), *citing Vatyan v. Mukasey*, 508 F.3d 1179, 1182-83 (9th Cir. 2007))

[16] *Tassi v. Holder*, 660 F.3d 710 (4th Cir. 2011).

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found in the Federal Rules of Evidence, if the applicant is unable to authenticate in one of the ways specified in the immigration regulations.[17]

3 BURDEN OF PROOF

In all applications for immigration benefits, the applicant bears the burden of proof to establish eligibility for the benefit he or she is seeking. [18] The burden of proof refers to the duty of one party to prove facts that meet the legal standard being applied. An applicant or petitioner for a benefit under the INA must establish (i.e., bears the burden of proof to establish) that he or she meets the requirements for the benefit being sought and is not subject to any bars or other disqualifying factors. This means that the applicant must produce evidence that establishes the facts of the case, and that those facts must meet the relevant legal standard.

Because of the non-adversarial nature of RAIO interviews, while the burden is always on the applicant to establish eligibility, there is a shared aspect of that burden in which you have an equal obligation to help fully develop the record.[19]

3.1 Burdens of "Persuasion" and "Production"

The phrase "burden of proof" might be thought of to encompass the concepts of the "burden of persuasion" and the "burden of production." The burden of persuasion refers to the burden to convince the adjudicator that the evidence supports the facts asserted.

The burden of production entails the obligation to come forward with the evidence at different points in the proceedings.

In overseas refugee adjudications, there is no time at which the burden of proof shifts away from the applicant. There are, however, situations in which it may be required for the officer to produce some evidence. For example, although it is the applicant's burden to establish that he or she is **not** firmly resettled, the BIA has held that the government bears the initial burden to produce some evidence indicating that an applicant is firmly resettled.[20]

In asylum adjudications, while the applicant always has the burden of proof to establish eligibility for asylum, there are specific instances when the burden shifts to the government to prove a certain point related to the exercise of discretion when eligibility

[17] *Tassi v. Holder*, 660 F.3d 710, 723 (4th Cir. 2011); *Zhanling Jiang v. Holder* 658 F.3d 1118, 1121 (9th Cir. 2011); *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 214 n.5(BIA 2010)

[18] INA § 291; *Matter of Acosta*, 19 I&N Dec. 211, 215 (BIA 1985); UNHCR Handbook, ¶ 196.

[19] 8 C.F.R. § 208.9(b); UNHCR Handbook, ¶ 196.

[20] *Matter of A-G-G-*, 25 I&N Dec. 486, 503 (BIA 2011).

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is based on past persecution. However, the burden of persuasion to establish eligibility for asylum never shifts and always remains on the applicant. For further information on burden shifting, *see* Asylum Adjudications Supplements –Applicant's Burden and Burden Shifting When Past Persecution Found.

3.2 Establishing Eligibility (the Applicant's Burden)

The applicant must establish that he or she meets all of the legal elements of the benefit being sought. It is your responsibility to read and understand the provisions in the statute, any corresponding regulations, and any binding case law applicable in each case you adjudicate. *See* International and Refugee Adjudications Supplement – Applicant's Burden and Asylum Adjudications Supplement – Applicant's Burden, below.

Example for Refugee Processing

To establish eligibility for admission as a refugee under INA § 207(c), the applicant must establish that he or she

- is of special humanitarian concern to the United States
- is a refugee, as defined at INA § 101(a)(42)
- is not firmly resettled
- is admissible as an immigrant
- merits a favorable exercise of discretion

Example for Asylum Adjudications

To establish eligibility for asylum under INA § 208, the applicant must establish that he or she

- is eligible to apply for asylum
- is a refugee within the meaning of § 101(a)(42)(A) of the Act
- is not subject to any mandatory bars to asylum
- merits a favorable exercise of discretion

Example for Adjudication of Orphan Petitions

To establish eligibility for an orphan petition, adoptive parent(s) must establish that

- at least one of the adoptive parent(s) is a U.S. citizen, and
- the adoptive parent(s) will provide proper parental care to the child, and
- the child is an "orphan" as defined in U.S. immigration law, and

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- either the child has been adopted abroad, and that each adoptive parent saw the child in person before or during the adoption or the adoptive parent(s) have legal custody of the child for emigration to the United States and adoption after the child arrives.

3.3 Special Consideration in the RAIO Context

The Board of Immigration Appeals (BIA) has recognized that a "cooperative approach" is required in adjudicating asylum requests.[21] This approach also applies to all RAIO adjudications. The BIA explained that this is because the BIA, immigration judges, and USCIS "all bear the responsibility of ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim."[22]

While the applicant must establish eligibility for the benefit, as part of the cooperative approach you have the duty to elicit sufficient information at the interview. You also have the duty to research COI to properly evaluate whether the applicant is eligible for the benefit he or she applied.[23] The burden is on the applicant to prove his or her claim, but you have a duty to develop the record completely.

3.4 Testimony Alone May Be Enough

A refugee or asylum applicant may establish eligibility with testimony alone.[24] If you, as the trier of fact, believe that other evidence is needed to corroborate the otherwise credible testimony of the applicant, you will request the evidence and the applicant must either: 1) provide the evidence or 2) provide a reasonable explanation as to why he or she cannot provide the evidence.[25]

> Burden of proof is different from credibility. For each case you adjudicate, you must make a credibility determination that follows the analytical framework in the RAIO Training Module, *Credibility* before deciding whether the applicant must

[21] *Matter of S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997).

[22] *Id.* at 723.

[23] 8 C.F.R. § 208.9(b); *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); and UNHCR Handbook, ¶ 196. *See also* RAIO Training Modules, *Interviewing – Eliciting Testimony* and *Researching and Using Country of Origin Information in RAIO Adjudications.*

[24] *See Matter of Mogharrabi,* 19 I&N Dec. 239, 245 (BIA 1987); *Shrestha v. Holder,* 590 F.3d 1034 (9th Cir. 2010). Note that in the asylum context, under INA § 208(b)(1)(B)(ii), the applicant's testimony is only sufficient to sustain the applicant's burden of proof if it is "credible, persuasive, and refers to specific facts sufficient to demonstrate that an applicant is a refugee." *See also* ASM Supplement – Testimony Can Meet Burden if "Credible, Persuasive, and Refers to Specific Facts" *and* RAIO Training Module, *Credibility.*

[25] *See Matter of S-M-J-*, 21 I&N Dec. at 725-26.

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provide additional evidence to meet his or her burden of proof. In other words, you cannot determine that an applicant has not met his or her burden of proof without first having done a complete credibility analysis.

In asylum cases, an applicant whose testimony you have found not to be credible (or whose testimony you have found to be unreliable for other reasons[26]) may, in some circumstances, meet his or her burden of proof by providing other reliable evidence. If you find that the applicant has not provided credible or reliable testimony, you must consider whether non-testimonial evidence in the record is nonetheless sufficient to meet the applicant's burden of proof.[27]

In both asylum and refugee cases, an applicant's testimony may only be credible in part, but may nonetheless establish his or her eligibility, leading to a "split credibility determination." For example, a refugee may establish eligibility through testimony that, while not credible in regards to past persecution, is credible in regards to the applicant's well-founded fear of persecution or vice versa.[28]

4 STANDARDS OF PROOF

The burden of proof is not the same as the standard of proof. The standard of proof refers to the amount of evidence, or level of proof, required to prove a given fact. There are several different standards of proof that apply during different stages of the adjudication process. *See* chart below.

[26] *See* Matter of J-R-R-A-, 26 I&N Dec. 609, 612 (BIA 2015) (noting, in the case of an applicant whose testimony indicated lack of competency, that an applicant's testimony may be found to be unreliable for reasons other than deliberate fabrication and that the adjudicator "should then focus on whether the applicant can meet his burden of proof based on the objective evidence of record and other relevant issues.")

[27] *Ilunga v. Holder*, 777 F.3d 199, 213 (4th Cir. 2015).

[28] *See* RAIO Training Module, *Credibility*, Sec. 6, "Split Credibility Finding." *See also* Refugee Affairs Division (RAD), *Refugee Application Assessment Standard Operating Procedure (SOP)* (Pilot Jun. 21, 2013) p.19.

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Standard of Proof		Refugee	Asylum	Other
Beyond any reasonable doubt	*Very high*			I-130 Adam Walsh Act- no risk to beneficiary
Clearly and beyond doubt	*Highly probably true*	Admissibility		Admissibility
AND Clear and convincing	*Firm belief or conviction*		Filed within one year	• Rebut prior fraudulent marriage • Citizenship of children born out of wedlock
Preponderance of the evidence	*More than 50% chance*	• Meets refugee definition • Special humanitarian concern • Not firmly resettled • Facts supporting eligibility	• Meets refugee definition • Not subject to any bars • Facts supporting eligibility	Eligibility for benefit sought
AND To the Satisfaction of the adjudicator	*Probably true*		Exceptions to 1-year rule	
AND More Likely Than Not				
Reasonable possibility	*One in ten chance*	Well-founded fear	Well-founded fear Reasonable fear	Well-founded fear
Significant possibility	*Substantial and realistic possibility*	Interdictions at sea	Credible fear	

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You must evaluate information according to several standards of proof for different types of applications and sometimes even in the course of the adjudication of a single application. These standards will be discussed in more detail during your division-specific courses.

Example

> In asylum and refugee processing, an applicant must prove by a preponderance of the evidence that he or she meets the definition of a refugee: that is, that he or she suffered persecution in the past or that there is a reasonable possibility that he or she will be persecuted in the future. When you decide whether an applicant is a refugee based on a fear of future persecution, you use the "reasonable possibility" standard to determine whether the applicant has a well-founded fear of persecution and the "preponderance of the evidence" standard to determine whether the applicant meets all other elements of the refugee definition and whether the facts supporting the applicant's eligibility are true. You are using two different standards within one adjudication: "preponderance of the evidence" and "reasonable possibility."

4.1 Beyond any Reasonable Doubt

In criminal cases, the government is required to prove a defendant's guilt ***beyond a reasonable doubt***. "A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs."[29] This standard is used in criminal law and in one situation encountered by RAIO officers: according to the February 8, 2007 policy memo implementing the Adam Walsh Act, where a U.S. citizen filing a petition for an alien relative has been convicted of a specified offense against a minor, he or she must establish that he or she poses "no risk" to the safety and well-being of the beneficiary "beyond any reasonable doubt."[30]

4.2 Clearly and Beyond Doubt

The ***clearly and beyond doubt*** standard is higher than the preponderance standard used in civil cases, but lower than the "beyond a reasonable doubt" standard required in criminal cases, and it is comparable to the "clear and convincing" standard explained below. While the evidence submitted to meet the "clearly and beyond doubt" standard must be "stronger and more persuasive" than the evidence necessary to satisfy the lower

[29] O'Malley, Grenig, and Lee, *Federal Jury Practice and Instructions* § 12.10 (5th ed. 2000).

[30] *See also Matter of Aceijas-Quiroz*, 26 I&N Dec. 294 (BIA 2014) (holding that the BIA lacks jurisdiction to review the standard of proof applied by USCIS in Adam Walsh Act determinations).

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preponderance of evidence standard of proof, the officer must give the applicant "the same fair and reasonable evaluation of his evidence" and must not presume that the applicant's evidence is "false or contrived."[31]

An individual approved for refugee status must prove that he or she is "clearly and beyond a doubt entitled to be admitted" at the time that he or she seeks to enter the U.S. as a refugee, as well as when he or she seeks to become a lawful permanent resident one year later.[32]

Refugee applicants abroad must establish that they are admissible to the United States as immigrants.[33] When you interview a refugee applicant outside of the United States and adjudicate the Form I-590, you are making an initial determination on that applicant's eligibility for admission into the United States as a refugee. An immigration officer at the Port of Entry (POE) will reference your determination when deciding whether to admit the individual into the United States as a refugee.[34] During their USCIS interview abroad and prior to the determination at the POE, all refugees are applicants for admission who must establish their admissibility "clearly and beyond a doubt."[35] Therefore, you will apply the clearly and beyond doubt standard of proof to the admissibility portion of the refugee status determination.

The "clearly and beyond doubt" standard of proof should not be confused with the "beyond a reasonable doubt" standard used in U.S. criminal courts where the government or prosecutor has the burden of establishing "beyond a reasonable doubt" that the defendant committed the essential elements of the crime of which he or she is accused. The U.S. Supreme Court has said that "we should hesitate to apply [the "beyond a reasonable doubt" standard] too broadly or casually to non-criminal cases."[36]

4.3 Clear and Convincing Evidence

[31] *Matter of Patel*, 19 I&N Dec. 774, 784-85 (BIA 1988) (quoting *Matter of Carrubba*, 11 I&N Dec. 914, 917 (BIA 1966)).

[32] *See* INA §§ 291; 235(b)(2)(A) ; 8 C.F.R. § 207.1(a); 207.2(b); INA § 209(a)(1); *Matter of Jean*, 23 I&N Dec. 373, 381 (AG 2002).

[33] INA § 207(c)(1).

[34] 8 C.F.R. §§ 207.2(b); 207.4.

[35] INA §§ 291; 235(b)(2)(A); 8 C.F.R. § 207.1(a). *See* U.S. Immigration and Naturalization Service Memo., *Representation of an Applicant for Admission to the United States as a Refugee During an Eligibility Hearing*, p.1 (Nov. 9, 1992) (confirming that at their interviews with U.S. immigration officers abroad, refugees are considered applicants for admission).

[36] *Addington v. Texas*, 441 U.S. 418, 425-26 (1979).

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The ***clear and convincing*** standard has been defined as a degree of proof that will produce "a firm belief or conviction as to allegations sought to be established."[37] It is higher than the preponderance standard used in civil cases, but lower than the "beyond a reasonable doubt" standard required in criminal cases.

An applicant for asylum must demonstrate by ***clear and convincing evidence*** that the application has been filed within one year after the date of the applicant's arrival in the United States, unless the applicant establishes to the satisfaction of the asylum officer that an exception applies.[38]

4.4 Preponderance of the Evidence

A fact is established by a ***preponderance of the evidence*** if the adjudicator finds, upon consideration of all the evidence, that it is more likely than not that the fact is true. In other words, there is more than a 50% chance that the fact is true. This is the standard of proof used in most RAIO adjudications.

Determination of whether a fact has been established "by a preponderance of the evidence" should be based on both the quality and quantity of the evidence presented.

In evaluating whether an applicant had met his or her burden of establishing the facts underlying his or her request for asylum, the BIA has explained, "When considering a quantum of proof, generalized information is insufficient. Specific, detailed, and credible testimony or a combination of detailed testimony and corroborative background evidence is necessary to prove a case for asylum."[39]

4.5 To the Satisfaction of the Adjudicator

The ***to the satisfaction of the adjudicator*** standard has been interpreted to require a showing similar to that of the "preponderance of evidence" standard, requiring an individual to prove an issue "by a preponderance of evidence which is reasonable, substantial and probative," or "in his favor, just more than an even balance of the evidence."[40]

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[37] *See Black's Law Dictionary* (5th Ed.).

[38] INA §§ 208(a)(2)(B)-(D); 8 C.F.R. § 208.4(a)(2)(i)

[39] *Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998).

[40] *See Matter of Barreiros*, 10 I&N Dec. 536, 538 (BIA 1964) (interpreting same standard for rescinding LPR status by establishing that applicant was not eligible for adjustment); *Matter of V-*, 7 I&N Dec. 460, 463 (BIA 1957) (interpreting standard for an alien to establish that a marriage was not contracted for the purpose of evading immigration laws).

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An asylum seeker cannot apply for asylum if he or she has previously applied for and been denied asylum by an immigration judge or the BIA, unless the asylum seeker demonstrates to the satisfaction of the Attorney General or the Secretary of Homeland Security changed circumstances that materially affect asylum eligibility. Similarly, an asylum seeker cannot apply for asylum more than one year after the date of arrival in the United States, unless the applicant demonstrates ***to the satisfaction of the Attorney General or the Secretary of Homeland Security*** changed circumstances that materially affect eligibility, or extraordinary circumstances relating to the delay in filing the application within the required time period.

The standard "to the satisfaction of the adjudicator" places the burden on the applicant to demonstrate that an exception applies. The applicant is not required to establish "beyond a reasonable doubt" or by "clear and convincing evidence" that the standard applies. Rather, this standard has been described in another immigration context as requiring the applicant to demonstrate that the exception applies through "credible evidence sufficiently persuasive to satisfy the Attorney General in the exercise of his reasonable judgment, considering the proof fairly and impartially."[41]

4.6 More Likely Than Not

The ***more likely than not*** standard is comparable to the "preponderance of the evidence" standard and the equivalent "to the satisfaction of the adjudicator" standard. While the "preponderance of the evidence" standard requires a greater than 50% likelihood that a fact is true, the "more likely than not" standard requires, in the context in which RAIO officers encounter it, a greater than 50% likelihood that a future event will occur.

To establish eligibility for withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the regulations that implement the Convention Against Torture (CAT), the applicant must establish a set of events and/or conditions, substantiated by a preponderance of evidence, showing that he or she *would be* persecuted or tortured in the country of removal. The Supreme Court has held that this means the applicant must establish that it is "more likely than not" (a greater than 50% chance) that he or she would be persecuted or tortured.[42]

RAIO officers do not adjudicate claims for withholding of removal under INA section 241(b)(3) or protection under the CAT. When conducting credible fear screenings or protection screenings for aliens interdicted at sea, though, refugee and asylum officers determine whether there is a significant possibility that each applicant could establish eligibility for these benefits. Thus, in these processes, officers must decide whether there

[41] *See* *Matter of Bufalino*, 12 I&N Dec. 277, 282 (BIA 1967) (interpreting the "satisfaction of the Attorney General" standard as applied when adjudicating an exception to deportability for failure to notify the Service of a change of address).

[42] 8 C.F.R. § 208.16(b)(1); *INS v. Stevic*, 467 U.S. 407, 104 S. Ct. 2489 (1984)

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is a significant possibility that the applicant will be able to demonstrate that it is more likely than not that he or she will be persecuted or tortured in his or her home country. To adjudicate these cases, therefore, officers must fully understand both the "significant possibility" standard and the "more likely than not" standard.

4.7 Reasonable Possibility

The ***reasonable possibility*** standard is lower than the "more likely than not" standard. In both asylum and refugee cases, a "well-founded fear of persecution" is established if there is a "reasonable possibility" that the applicant would be persecuted. While an applicant for refugee or asylum status must always establish his or her eligibility for the benefit (and the facts underlying the claim) by a preponderance of the evidence, one element of the refugee definition requires an applicant to show that the level of certainty that he or she would be persecuted in the future meets the "reasonable possibility" standard. In *Matter of Z-Z-O-*, the Board of Immigration Appeals clarified that an adjudicator's predictions of what events may occur in the future are findings of fact, whereas whether an applicant has established an objectively reasonable fear of persecution based on these facts is a legal determination.[43]

The U.S. Supreme Court decision in *Cardoza-Fonseca* emphasized that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place." The Court, in dicta, went on to cite favorably a leading authority:

> Let us ... presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp.... In such a case it would be *only too apparent* that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return. [44]

You should consider whether a preponderance of the evidence shows that a reasonable person in the applicant's circumstances would fear persecution.

4.8 Significant Possibility

Neither the statute nor the immigration regulations define a ***significant possibility***, and the standard is not discussed in immigration case law. RAIO officers apply this standard in the context of credible fear determinations done in expedited removal cases and interdictions at sea. A credible fear of persecution or torture is defined as a "significant

[43] *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590-591 (BIA 2015).

[44] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440, 107 S. Ct. 1207, 1213, 1217 (1987)(emphasis added); *citing* A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966).

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possibility" that the applicant could establish eligibility for asylum or for withholding of removal or deferral of removal under the Convention Against Torture.[45]

The legislative history behind the adoption of the "significant possibility" standard in these contexts indicates that the standard "is intended to be a low screening standard for admission into the usual full asylum [or overseas refugee] process."[46] On the other hand, a claim that has "no possibility of success," or only a "minimal or mere possibility of success," would not meet the "significant possibility" standard.

While a mere possibility of success is insufficient to meet the credible fear standard, the "significant possibility of success" standard does not require the applicant to demonstrate that the chances of success are more likely than not.[47] An applicant will be able to show a significant possibility that he or she could establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture if the evidence indicates that there is a substantial and realistic possibility of success on the merits. As such, the standard used in credible fear determinations is necessarily lower than that used in asylum or reasonable fear adjudications. For additional information about the requirements for credible fear determinations, see Asylum Training module: *Credible Fear.*

5 METHODOLOGICAL APPROACH

Gather the Evidence

You will need to gather relevant evidence having bearing on the adjudication. This requires that you conduct required background and security checks and carefully review the file, including the application, any written statement(s) by the applicant or witnesses, and any documents submitted by the applicant. Depending on the adjudication, COI may also be important evidence that you will need to gather.

Another way of gathering evidence is by interviewing the applicant and any witnesses; this is required in certain adjudications including refugee and asylum adjudications. At an interview, in addition to the testimonial evidence, the applicant may offer additional documentary or COI evidence. You must accept all evidence that is offered. How to gather testimonial evidence is discussed in the RAIO interviewing modules, in particular *Interviewing – Eliciting Testimony.*

Determine Materiality

[45] INA § 235(b)(1)(B)(v); 8 CFR § 208.30.

[46] *See* 142 Cong. Rec. S11491-02 (Sept. 27, 1996) (statement of Sen. Hatch).

[47] 142 Cong. Rec. H11071-02 (Sept. 25, 1996) (statement of Rep. Hyde) (noting that the credible fear standard was "redrafted in the conference document to address fully concerns that the 'more probable than not' language in the original House version was too restrictive").

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You must first determine whether the evidence is material, i.e., whether it would influence the outcome of the eligibility determination because it relates to a required legal element. The elements of eligibility are discussed in the legal modules for each benefit. For example, in refugee and asylum cases, each piece of evidence that you use in determining eligibility should relate in some way to the applicant's eligibility for the benefit sought. This could be evidence that is offered as proof of some element of the refugee definition such as well-founded fear or nexus. It could also be evidence that a bar does or does not apply to an applicant.

Evaluate the Quality of the Material Evidence

Once you have determined that evidence is material, you must then determine the quality of that evidence.

The quality of each type of evidence is measured in a different way.

- Testimonial evidence: You must decide whether the testimony is credible, and assess its persuasiveness and probative value. This topic is covered in the RAIO Training Module, *Credibility*.

- Documentary evidence: You must determine the probative value of each piece of evidence. In deciding how much weight to afford evidence, you must consider the reliability, relevance, content, form, and nature of each piece of evidence. This topic is covered in the RAIO Training Module, *Decision Making* as well as during discussions regarding fraud and fraudulent documents.

- COI evidence: You must decide whether the information comes from a reputable source that can be independently corroborated. This topic is covered in the RAIO Training Module, *Researching and Using Country of Origin Information in RAIO Adjudications*.

Once you have gathered and evaluated the evidence, you should be ready to apply the law to the facts and make a decision. This topic is covered in the RAIO Training Module, *Decision Making*.

6 CONCLUSION

Your role as a RAIO officer is to gather and evaluate the evidence of record, applying the appropriate burdens and standards of proof based on the claim before you.

In each of your adjudications, you will follow the methodological approach set forth in the RAIO Training Module, *Decision Making*. You will identify the relevant legal requirements of the adjudication, gather all necessary evidence, evaluate the quality of each piece of evidence, and assign weight to each piece of evidence.

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7 SUMMARY

Evidence

Generally, any statement, document, or object that an applicant offers you must be considered as evidence. In addition, any COI materials that you discover in your research and any information accessed in relevant computer databases are also evidence.

Common forms of evidence you may encounter in adjudicating claims include:

- Testimonial evidence, including the applicant's testimony during the interview and the testimony of any witnesses he or she may bring to the interview
- Statements by other parties, including affidavits and letters submitted by family, friends, associates, or outside experts
- Travel documents such as passports and refugee travel documents; these also include tickets and receipts from transportation carriers
- Identity documents, which can include government-issued documents such as a national ID card or driver's license, as well as ID cards issued by other entities, such as an employment or school ID, and membership cards for any type of organization (you must distinguish between those identity documents that may be used to prove identity and those that merely establish the applicant's association with the issuing entity)
- Civil documents issued by government agencies, such as birth certificates, marriage certificates, police records, and death certificates
- U.S. Government records, which include the applicant's A-file, among other documents, as well as records stored in any Government database
- Medical evidence, which may include a statement or an affidavit from a physician who has examined the applicant to corroborate a claim of torture, or may be a regularly kept record from a doctor or hospital indicating that the applicant was a patient or received treatment

Burden of Proof

While the applicant bears the burden of persuading you that he or she is eligible for the benefit that he or she seeks, you, as the trier of fact, have an affirmative duty to elicit information regarding the claim.

Standard of Proof

The standard of proof specifies how convincing or probative the evidence must be to meet the burden of proof. The preponderance of the evidence is the most common

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standard you will apply in adjudications. The applicant must always establish the facts of his or her case by a preponderance of the evidence; that is, that what he or she is asserting as fact is more likely than not true. The preponderance of the evidence standard will apply unless a different standard is specified in the statute.

Other standards that may apply are:

- "Clear and convincing" standard: used in determining whether an asylum application has been filed within the one-year filing deadline
- "Clearly and beyond doubt" standard: used when determining whether a refugee is admissible
- "To the satisfaction of the adjudicator" standard: used when an applicant is subject to the bar to applying for asylum because he or she has been previously denied by an Immigration Judge or because he or she did not file within the one-year filing deadline; used to establish exceptions to those prohibitions
- "Reasonable possibility" standard: used to determine whether an applicant has a well-founded fear of future persecution and in reasonable fear determinations
- "Significant possibility" standard: used in credible fear determinations and protection screenings for applicants interdicted at sea

Structured Approach to Evidence

First, you must carefully gather the relevant evidence having bearing on the adjudication. Once you have all the evidence, you must determine whether each piece of evidence is material to the applicant's claim and, if so, to which element of the applicant's claim it relates. A piece of evidence may be relevant to more than one element of the claim. Finally, you must evaluate the quality of each piece of evidence and assign weight to it before making your decision.

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PRACTICAL EXERCISES

Practical Exercise # 1

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

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OTHER MATERIALS

There are no Other Materials for this module.

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SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

International and Refugee Adjudications Supplement

Applicant's Burden

In the refugee context, the burden is on the applicant to establish eligibility by showing: that he or she (1) meets the definition of a refugee at INA § 101(a)(42); (2) has access to the U.S. Refugee Admissions Program by being a a member of a group designated to be of special humanitarian concern to the United States under INA § 207 ; (3) is not firmly resettled in another country; (4) is admissible as an immigrant under the INA, and (5) merits refugee status as a matter of discretion. The refugee definition excludes those who ordered, incited, assisted, or otherwise participated in the persecution of others.

Because refugee applicants seek admission to the United States, INA § 207(c)(1) requires that they establish their admissibility. INA § 207(c)(3) specifies certain grounds of inadmissibility which do not apply to refugees and other grounds that may be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

The regulations governing overseas refugee adjudications do not explicitly list "mandatory" grounds for denial as is the case in the asylum regulations. Rather, the statute and regulations specify grounds of eligibility, which, if not met will result in

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denial. In other words, cases will be denied where the applicants fail to establish that they have access to the USRAP (because they are not within a group designated to be of special humanitarian concern to the U.S.), have been firmly resettled, do not meet the refugee definition by, for example, having assisted or otherwise participated in the persecution of others, and/or are inadmissible.

In the overseas refugee processing context, applicants are generally not expected to provide evidence beyond testimony. Keep in mind that in many refugee interview settings, the refugees are in camps, set apart from the population of the host country and have limited access to resources. Even when they are integrated into the host population, their precarious status and lack of personal resources may make it very difficult for them to access documents from their home country. However, there may be refugee applicants from countries where corroborating documentation may be routinely available, and thus could be required by the adjudicator. In such cases, the evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence. Refugee Affairs Division HQ will advise its officers when corroborating documentation should be expected of particular refugee applicant populations, and will provide additional guidance about the consideration of documentary evidence during Pre-Departure Briefings prior to each circuit ride.

International and Refugee Adjudications Supplement

Testimony by Other Refugee Applicants

In some cases there will be family members who have applied for refugee resettlement separately from the applicant, or other individuals who have applied for refugee status based on circumstances that are the same as or significantly similar to those of the applicant. Depending on the circumstances of each case, sometimes the statements made in another claim may be used as evidence in the claim before you. For example, in cases where a child is the principal applicant, the testimony of guardians, family members or other individuals with a close relationship to the child may be considered in the adjudication of the child's claim when the child is too young to articulate, e.g., a nexus to a protected ground. *See generally* RAIO Training Module, *Children's Claims*. The record and testimony of other family members on the same or cross-referenced cases may also be considered when, for example, establishing family relationships material to an applicant's access to USRAP. However, a credibility confrontation based on inconsistencies between family members' testimony could violate confidentiality and place the family members at risk of harm. *See* RAIO Training Module,

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Credibility, section 3.1.2 Consistency.

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SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1. Cianciarulo, Marisa Silenzi. "Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise", 43 Harv. J. on Legis. 101, at 13 (Winter, 2006).

SUPPLEMENTS

Asylum Adjudications Supplement

Applicant's Burden

In the asylum context, the burden is on the applicant to establish the following affirmative grounds of eligibility: that he or she (1) is eligible to apply for asylum, (2) is a refugee within the meaning of INA § 101(a)(42)(A), and (3) merits asylum as a matter of discretion.[48]

After an applicant has established eligibility for protection based on the refugee definition, his or her burden of proof is satisfied unless there is evidence that a mandatory ground for denial applies. If the evidence indicates that a mandatory ground for denial of asylum applies, *only then does* the applicant have the burden of "proving by a preponderance of the evidence that he or she did not so act." [49]

[48] INA § 208(a)(2); (b)(1)(B)(i); (b)(2)(A)

[49] 8 C.F.R. § 208.13(c); *see* 8 C.F.R. § 1240.8(d).

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Asylum Adjudications Supplement

Must Weigh All Evidence

"In determining whether the applicant has met [his or her] burden, the trier of fact may weigh the credible testimony along with other evidence of record."[50]

Thus, an applicant's testimony may be credible, but nonetheless fail to satisfy his or her burden to establish the required elements of eligibility. "Other evidence of record" may demonstrate that the applicant, for example, does not have a well-founded fear of persecution because of improved country conditions or the existence of a reasonable internal relocation alternative.

These provisions, as well as the structure of INA § 208(b) as amended by the REAL ID Act, further clarify that credibility is but a component of burden of proof, and not the end of the analysis. Thus, testimony that is generally deemed credible may nonetheless fail to satisfy an applicant's burden of proof that he or she is eligible for protection and merits a favorable exercise of discretion.

If you "determine that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[51]

You have the authority to question any witnesses presented by the applicant.[52]

Asylum Adjudications Supplement

Must Meet the Refugee Definition[53]

The burden of proof is on the applicant to establish that he or she is a refugee within the meaning of INA § 101(a)(42)(A) and that discretion should be exercised favorably to grant asylum or refugee status.

In order to meet his or her burden, the applicant must present evidence that goes to each element of the refugee definition. The applicant must present evidence to

[50] INA § 208(b)(1)(B)(ii). *See also Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989).

[51] INA § 208(b)(1)(B)(ii).

[52] 8 C.F.R. § 208.9(b).

[53] For a more detailed discussion on this topic, see RAIO Training Module, *Refugee Definition.*

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establish that he or she is

- Outside his or her country of nationality or any country in which he or she last habitually resided
- Is unable or unwilling to return to that country
- 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

The applicant must also present evidence establishing that he or she is eligible to apply for asylum.

In order to establish that the persecutor's motivation for persecuting the applicant falls within the scope of the refugee definition, "the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."[54]

In evaluating nexus, asylum officers should take care to use the "at least one central reason" language in their assessments.

In addition to meeting the refugee definition, and eligibility to apply, the applicant must establish that he or she merits asylum as a matter of discretion and is not subject to any mandatory bars.

Asylum Adjudications Supplement

Past Persecution[55]

If the applicant establishes that he or she suffered past persecution on account of a protected ground, the applicant has met the burden of establishing that he or she is a refugee.

One of the differences between the refugee definition found in the INA and the

[54] INA §208(b)(1)(B)(i).

[55] For a more detailed discussion of this topic, *see* RAIO Module, *Definition of Persecution, and Eligibility Based on Past Persecution.*

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definition in the United Nations Convention and Protocol relating to the Status of Refugees is that the INA definition defines a refugee as someone who either has experienced past persecution on account of a protected ground, or fears persecution in the future.

Well-Founded Fear

If the applicant has not established past persecution on account of a protected characteristic, he or she must establish a well-founded fear of future persecution on account of a protected characteristic to meet his or her burden of establishing that he or she is a refugee. This burden includes establishing that it would not be reasonable to expect the applicant to relocate within the country of feared persecution to avoid future persecution.

Burden Shifting When Past Persecution Found

While the burden of proof resides with the applicant to establish eligibility for asylum or refugee status, the regulations provide for two circumstances in the exercise of discretion whether to grant asylum claims in which the burden shifts to USCIS. 8 CFR § 208.13(b) calls for a discretionary referral or denial when:

... an alien [is] found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

The burden of proof shifts to USCIS (you, the adjudicator) to show that either condition exists to rebut the presumption of a well-founded fear of future persecution that arises when the applicant establishes past persecution. The applicant has no further burden of proof unless you are able to prove at least one of the two conditions by a preponderance of the evidence.

If you have shown that the applicant has no risk of future persecution, the burden of proof then shifts back to the applicant to demonstrate that he or she should be granted asylum in the exercise of discretion:

- owing to compelling reasons for being unable or unwilling to return

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to the country arising out of the severity of the past persecution; or

- because there is a reasonable possibility that the applicant would suffer other serious harm upon removal to that country.[56]

For more information on the burden shift see RAIO Training Modules, *Discretion* and *Definition of Persecution, and Eligibility Based on Past Persecution*.

Mandatory Bars

If the evidence indicates that a ground for mandatory denial of asylum (or "mandatory bar to asylum") or refugee status may apply, then the applicant must establish by a preponderance of the evidence that the ground for mandatory denial does not apply.

Evidence indicative of a possible bar may be produced either by the applicant or by USCIS, but once such evidence is part of the record, the applicant bears the burden of proof to establish that the bar does not apply.

Example

After conducting an interview the officer found that Xavier was a refugee because he had suffered persecution during the Rwandan genocide. However, the A-file contains evidence that Xavier was subsequently accused by the Truth and Reconciliation Commission of participating in genocidal acts. Xavier would have to show, by a preponderance of the evidence[57], that he did not commit those acts.

Asylum Adjudications Supplement

Testimony Can Meet Burden if "Credible, Persuasive, and Refers to Specific Facts"

According to the INA, the applicant's testimony may be sufficient to sustain the applicant's burden of proof if it is "credible, persuasive, and refers to specific facts."[58] To give effect to the plain meaning of the statute and each of the terms therein, an applicant's testimony must satisfy all three prongs of the "credible, persuasive, and … specific" test in order to establish his or her burden of proof

[56] 8 C.F.R. § 208.13(b)(1)

[57] *See* section above, Standards of Proof.

[58] INA § 208(b)(1)(B)(ii).

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without corroboration.

Section 208(b)(1)(B)(iii) of the INA addresses the "credible" prong of this test. *See* RAIO Module, *Credibility* and the ASM Supplements to that Module.

The terms "persuasive" and "specific facts" must have independent meaning above and beyond the first term "credibility." "Specific facts" are distinct from statements of belief. When assessing the probative value of an applicant's testimony, the trier of fact must distinguish between fact and opinion testimony and determine how much weight to assign to each of the two forms of testimony.

"In determining whether the applicant has met [his or her] burden, the trier of fact may weigh the credible testimony along with other evidence of record."[59]

Thus, an applicant may be credible, but nonetheless fail to satisfy his or her burden to establish the required elements of eligibility. "Other evidence of record" may demonstrate that the applicant, for example, does not have a well-founded fear of persecution because of improved country conditions or the existence of a reasonable internal relocation alternative.

These provisions, as well as the structure of INA § 208(b) as amended by the REAL ID Act, further clarify that credibility is only a component of burden of proof, not the end of the analysis. Thus, testimony that is generally deemed credible may nonetheless fail to satisfy an applicant's burden of proof that he or she is eligible for protection (i.e., has established that he or she suffered past persecution or has a well-founded fear of persecution on account of a protected ground) and merits a favorable exercise of discretion.

If you "determine that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[60]

Asylum Adjudications Supplement

Statements by Other Parties - Testimony by other applicants for protection in their own cases

Testimony of Other Asylum Applicants: Because of the confidentiality regulation at 8 C.F.R. 208.6, the testimony given by one asylum applicant in support of his or her claim cannot readily be considered in evaluating the request for asylum of

[59] INA § 208(b)(1)(B)(ii). *See also Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989).

[60] INA § 208(b)(1)(B)(ii)

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another asylum applicant. This limitation extends to the testimony of family members, even if the testimony may be conflicting. However, the testimony of an asylum applicant appearing as a witness for another asylum applicant would be evidence to consider. There are certain exceptions in the confidentiality regulation that you may want to explore with a supervisory asylum officer. If questions arise in such cases, the supervisory asylum officer should contact Headquarters.

Asylum Adjudications Supplement

Country of Origin Information (COI)

You must conduct research and consider available COI. In addition to information submitted by the applicant, you may consider information obtained from: the Department of State, the RAIO Research Unit, international organizations, private voluntary agencies, academic institutions, and any other credible source, which may include reputable newspapers and magazines. 8 C.F.R. § 208.12. For considerations regarding the reliability of sources, see RAIO Training Module, *Researching and Using Country of Origin Information in RAIO Adjudications*.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

FRAUD IN THE CONTEXT OF RAIO ADJUDICATIONS AND OVERVIEW OF THE FRAUD DETECTION AND NATIONAL SECURITY (FDNS) DIRECTORATE

TRAINING MODULE

DATE (see schedule of revisions): 12/20/2019

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

FRAUD IN THE CONTEXT OF RAIO ADJUDICATIONS AND OVERVIEW OF THE FRAUD DETECTION AND NATIONAL SECURITY (FDNS) DIRECTORATE

Training Module

MODULE DESCRIPTION

This lesson is designed to acquaint you (RAIO officers) with the types of fraud that you are likely to encounter in your adjudications and how fraud can affect your adjudications. This lesson also introduces you to the Fraud Detection and National Security Directorate (FDNS), and how FDNS officers may assist you in identifying and verifying fraud indicators in your cases and advise you about patterns of fraud.

TERMINAL PERFORMANCE OBJECTIVE(S)

Given a request for benefits to adjudicate, you will be able to recognize fraud indicators and determine whether to request assistance from FDNS. Furthermore, when adjudicating a pending immigration benefit, you will be able to identify, verify, and evaluate fraud indicators.

ENABLING PERFORMANCE OBJECTIVES

1. Provide adjudicators with a general understanding of fraud and USCIS' approach to fraud deterrence
2. Familiarize adjudicators with the fraud referral process
3. Enable adjudicators to identify fraud indicators related to asylum, USRAP, identity, and relationships
4. Enable adjudicators to recognize and understand primary fraud detection resources
5. Familiarize adjudicators with FDNS and its role in the adjudication process
6. Familiarize adjudicators with the Overseas Verification Program

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INSTRUCTIONAL METHODS

Presentation, Discussion, Practical Exercises

METHOD(S) OF EVALUATION

Multiple Choice Exam

REQUIRED READING

1. Written Testimony of Alejandro M. Mayorkas, Director, U.S. Citizenship and Immigration Services, for a Hearing on SAFEGUARDING THE INTEGRITY OF THE IMMIGRATION ADJUDICATION PROCESS, before the House Committee on the Judiciary Subcommittee on Immigration Policy and Enforcement, dated February 15, 2012.

2. Written Testimony of Sarah M. Kendall, Associate Director, Fraud Detection and National Security Directorate, U.S. Citizenship and Immigration Services, for a Hearing on the AFTERMATH OF FRAUD BY IMMIGRATION ATTORNEYS, before the House Committee on the Judiciary Subcommittee on Immigration Policy and Enforcement, dated July 24, 2012.

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

1. GAO-02-66: Immigration Benefit Fraud: Focused Approach Is Needed to Address Problems, published January 31, 2002.

2. GAO-06-259: Immigration Benefits: Additional Controls and a Sanctions Strategy Could Enhance DHS's Ability to Control Benefit Fraud, published March 10, 2006.

3. GAO-16-50: Asylum: Additional Actions Needed to Assess and Address Fraud Risks, published December 2, 2015.

4. [redacted]

5. [redacted]

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Additional Resources – International and Refugee Adjudications

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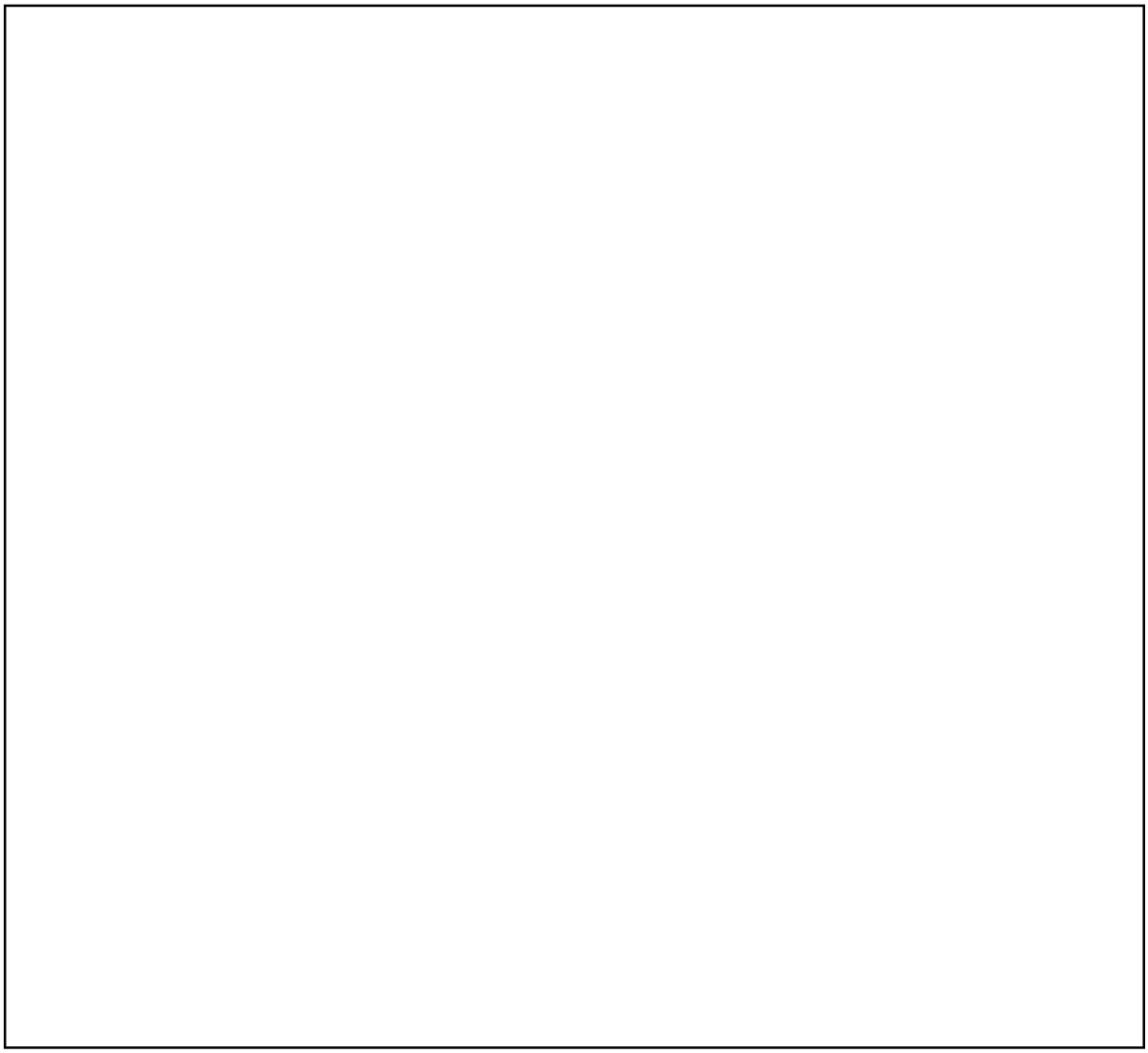
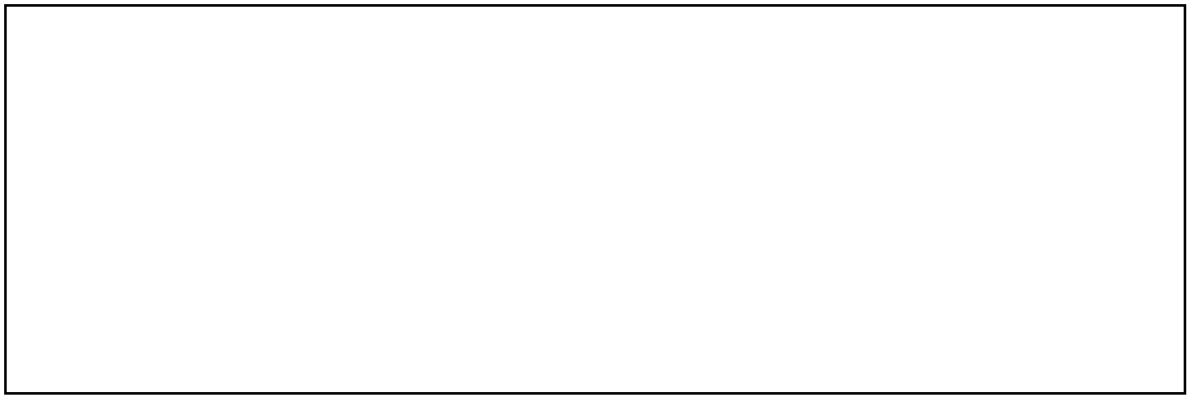


Additional Resources – Asylum Adjudications



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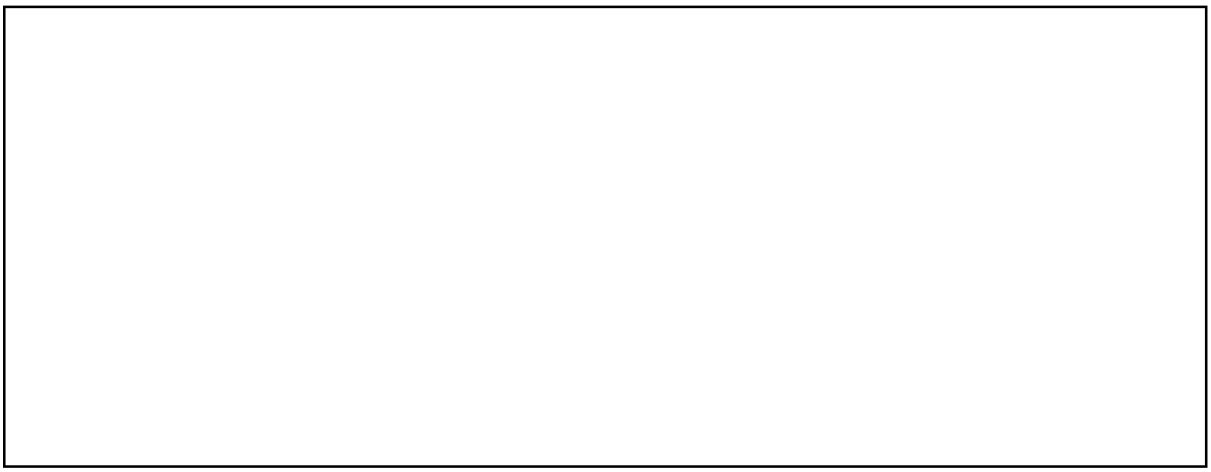

CRITICAL TASKS

SOURCE:

Task/ Skill #	Task Description
OK9	Knowledge of Fraud Detection and National Security (FDNS) functions and responsibilities
ILR16	Knowledge of the relevant laws and regulations for requesting and accepting evidence
ILR20	Knowledge of different standards of proof
ILR24	Knowledge of policies and procedures for FDNS Overseas Verification
ILR25	Knowledge of policies and procedures for FDNS Fraud Referral
IRK1	Knowledge of the appropriate points of contact to receive FDNS-assistance or guidance
IRK5	Knowledge of fraud detection resources
IRK6	Knowledge of strategies and techniques of identifying potential counterfeit and fraudulent documents or information
IRK7	Knowledge of CIS fraud prevention resources
IRK8	Knowledge of document security features
IRK9	Knowledge of the policies and procedures for reporting benefit fraud
RI6	Skill in identifying information trends and patterns
RI8	Skill in identifying fraud indicators
C5	Skill in recognizing and reacting to non-verbal cues
DM2	Skill in applying legal, policy, and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
3/8/2016	Entire Lesson Plan	Published	RAIO Training
7/17/2018	FDNS Overview – FDNS structure	Updates to HQFDNS structure and USCIS Mission Statement	[redacted] RAIO FDNS; RAIO Training
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training

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Throughout this training module, you will come across references to adjudication-specific supplemental information located at the end of the module, as well as links to documents that contain adjudication-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to the adjudications you will be performing.

For easy reference, supplements for international and refugee adjudications are in pink and supplements for asylum adjudications are in yellow.

You may also encounter references to the legacy Refugee Affairs Division (RAD) and the legacy International Operations Division (IO). RAD has been renamed the International and Refugee Affairs Division (IRAD) and has assumed much of the workload of IO, which is no longer operating as a separate RAIO division.

1. INTRODUCTION

Fraud poses a significant challenge to the integrity of U.S. Citizenship and Immigration Services (USCIS) programs. Because you will encounter fraud in the course of your adjudications and because commission of fraud in an application or petition can render an applicant or beneficiary ineligible for the benefit sought, you must understand what is meant by the term "fraud" and how to address fraud when you suspect and/or discover it.

This lesson is designed to acquaint you with the types of fraud that you are likely to encounter and to assist you in understanding how fraud can affect the adjudication of an application for a benefit. However, this lesson is not designed to make you an expert on fraud and its detection. You must consult with your local FDNS Immigration Officers (FDNS IOs) for more specific information on local trends and guidance on how to handle specific instances of fraud you may encounter.

The lesson is divided into two components. The first section discusses the definition and relevance of fraud in RAIO adjudications, examples of fraud commonly encountered by RAIO officers, and how to recognize fraud indicators. The second section gives a brief overview of the Fraud Detection and National Security Directorate (FDNS) of USCIS, including working effectively with FDNS officers integrated into each RAIO division to collectively strengthen the integrity of the program by deterring fraud and preventing national security risks.

1.1 Fraud and the RAIO Directorate

While benefit fraud can occur in all USCIS adjudications, applicants for benefits such as refugee status, asylum, or parole represent unique populations. In many cases, applicants have little or no corroborating documentation, and may rely solely on testimony in support of their claims, which presents unique challenges in identifying fraud. Furthermore, refugees, asylees, and their beneficiaries are eligible to apply for legal permanent resident status and, ultimately, citizenship.

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Consequently, identifying indicators of fraud during the asylum and refugee process is essential to prevent an otherwise ineligible individual from becoming a legal permanent resident or U.S. citizen.

While individuals granted humanitarian parole are not eligible for permanent resident status or citizenship, they are permitted to enter the United States temporarily under certain conditions for urgent humanitarian reasons or significant public benefit on a case-by-case basis. Parole applications are generally adjudicated within a short period of time and do not require an in-person interview. Applicants seeking parole must therefore be carefully vetted through criminal and national security background checks and document reviews.

RAIO's international presence at multiple field offices abroad puts the directorate in an advantageous position to detect fraud and national security concerns at the most critical stage– prior to an individual's arrival in the U.S. The directorate's presence abroad also facilitates local verification of documents on behalf of USCIS domestic offices, furthering RAIO's fraud detection and national security capabilities.

Acknowledging and seeking to address these challenges, RAIO has instituted the most extensive set of mandatory identity and background checks in USCIS. Each of the RAIO divisions has dedicated HQ staff to develop and expand program policies and procedures to deter fraud and enhance RAIO's ability to identify national security concerns.

2. FRAUD OVERVIEW

It is important to understand your role as an officer in the fraud detection and prevention process and how to work most effectively with FDNS IOs in your local offices. In addition to identifying fraud in your adjudications, and determining the impact on eligibility, you play a critical role in the larger fraud prevention efforts of USCIS by referring fraud to FDNS.

2.1 Source of Authority

The Secretary of DHS maintains broad authority to administer and enforce the Immigration and Nationality Act (INA) and all other laws relating to naturalization and immigration. The Secretary has delegated to USCIS the authority to conduct interviews and investigate alleged civil violations of the immigration laws.[1] Through this delegated authority, USCIS and U.S. Immigration and Customs Enforcement (ICE) further entered into a written agreement in which ICE agreed to take the lead on criminal investigations while USCIS agreed to focus on detecting and combating fraud associated with applications and petitions.[2]

[1] Department of Homeland Security Delegation Number: 0150.1, dated June 5, 2003.

[2] Memorandum of Agreement between USCIS and ICE on the Investigation of Immigration Benefit Fraud, entered on September 25, 2008.

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Petitions and applications submitted to USCIS are signed under penalty of perjury and also authorize USCIS to verify information provided on the form to ensure compliance with applicable laws, regulations, and authorities.[3] USCIS has the legal right to verify information provided on applications and petitions and may verify the information before and after a decision is made.

2.2 Definition of Fraud

In the USCIS context, fraud is defined as a willful misrepresentation of the truth or concealment of a material fact in order to obtain a benefit for which one would otherwise not be qualified.[4] Fraud in RAIO adjudications commonly takes the form of oral or written testimony but may be committed through the concealment or nondisclosure of material[5] facts, through the material falsification or alteration of documentary evidence, or through conduct that amounts to an assertion not in accordance with the truth.[6]

To constitute fraud, the false representation regarding a material fact must have been made:

- knowingly, intentionally and deliberately[7] and
- in order to procure an immigration-related benefit for which the beneficiary is or was not otherwise qualified.[8]

---

[3] 8 C.F.R. § 103.1.

[4] *See* Fraud SOP, p.6. Note that "fraud" as defined in the SOP covers all activities that would render an alien inadmissible under INA § 212 (a)(6)(C)(i), which provides that aliens who seek to procure, have sought to procure, or have procured an immigration benefit by "fraud or willful misrepresentation of a material fact" are inadmissible. As used in this section of the statute, "fraud" also requires that the applicant have had the intent to deceive the official and that the official to whom the misrepresentation is made have believed and acted upon the misrepresentation. *See Matter of Kai Hing Hui,* 15 I&N Dec. 288, 290 (BIA 1975)*; Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

[5] A material fact is one that is significant or essential to the adjudication of the merits of the claim. In other words, a fact is material if it is of such a nature that knowledge of the fact would affect a reasonable officer's decision-making process in adjudicating the merits of the claim. *See* Black's Law Dictionary (10th ed. 2014); *see also Kungys v. United States*, 485 U.S. 759, 770 (1988) (concluding that a misrepresentation is material if it has a natural tendency to influence or was capable of influencing the decisions of the decision-making body).

[6] *See, e.g.*, INA § 274(c); *Cervantes-Gonzales v. INS*, 244 F.3d 1001, 1004 (9th Cir. 2001); *Garcia v. INS*, 31 F.3d 441, 443 (7th Cir. 1994); *Witter v. INS*, 113 F.3d 549, 553 (5th Cir. 1997); *Matter of Y-G-*, 20 I&N Dec. 794, 797 (BIA 1994).

[7] *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956); *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975) (holding that aliens must be fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented facts, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true, to be found inadmissible).

[8] This definition is provided to clarify that not all misrepresentations are considered "fraud" in the USCIS context. When determining whether an applicant's testimony is credible, it is not necessary for a RAIO officer to decide whether a misrepresentation or concealment of a material fact meets all the elements of the definition of fraud.

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In the course of an interview or case review, you may discover that the individual is or was involved in committing other fraud not directly associated with fraud in the RAIO adjudication context. In such cases, consult with an FDNS officer to determine if the fraudulent information should be passed on to another agency for investigation.

2.3 Perpetrators of Fraud

Perpetrators of fraud can be found in and outside of the immigration process. Typical perpetrators of fraud within the immigration process include:

- Direct Recipients of a Benefit
  - A refugee or asylum applicant; Immigrant Visa petitioner
  - Dependents of an applicant; Immigrant Visa beneficiary

- Immigration Service Provider (ISP)
  - Attorney
  - Translator/Interpreter
  - Preparer/Notary

Other perpetrators of fraud outside of the immigration process typically include:

- A document vendor
- A visa facilitator
- A smuggler or middleman
- Other facilitating organizations or officials

2.4 Fraud Indicators

Fraud indicators vary from case to case. The presence of fraud indicators alone is not confirmation of fraud. All indicators need to be examined as a whole to see how they impact the substance of the claim in the totality of the circumstances. Some examples include:

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2.5 Where Fraud Indicators Are Found

Through careful file review and preparation before, during, and after an interview, fraud indicators may be found within a variety of sources, including but not limited to:

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Examples

2.6 Types of Fraud found in RAIO Adjudications

RAIO divisions and USCIS as a whole encounter various fraudulent activities. The common types of fraud include:

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2.6.1 Document Fraud

Types of documents commonly encountered in USCIS adjudications:

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Example

2.6.2 Evaluating Documents for Authenticity

[13] USCIS Academy Basic Training Manual, Identifying Fraudulent Documents.

[14] USCIS Academy Basic Training Manual, Identifying Fraudulent Documents.

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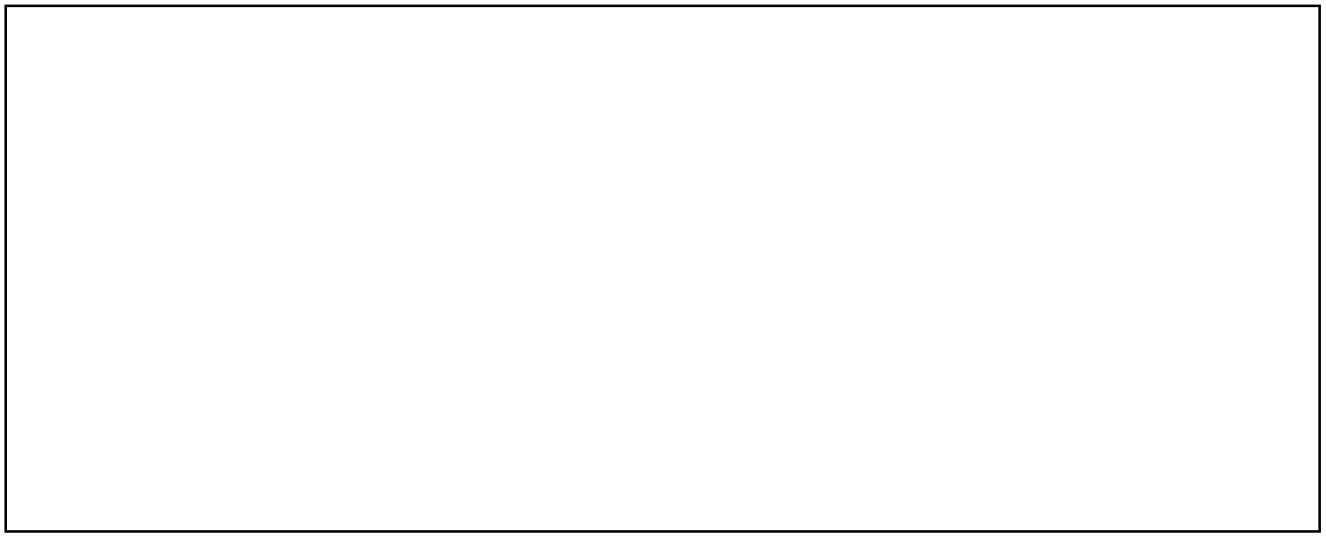
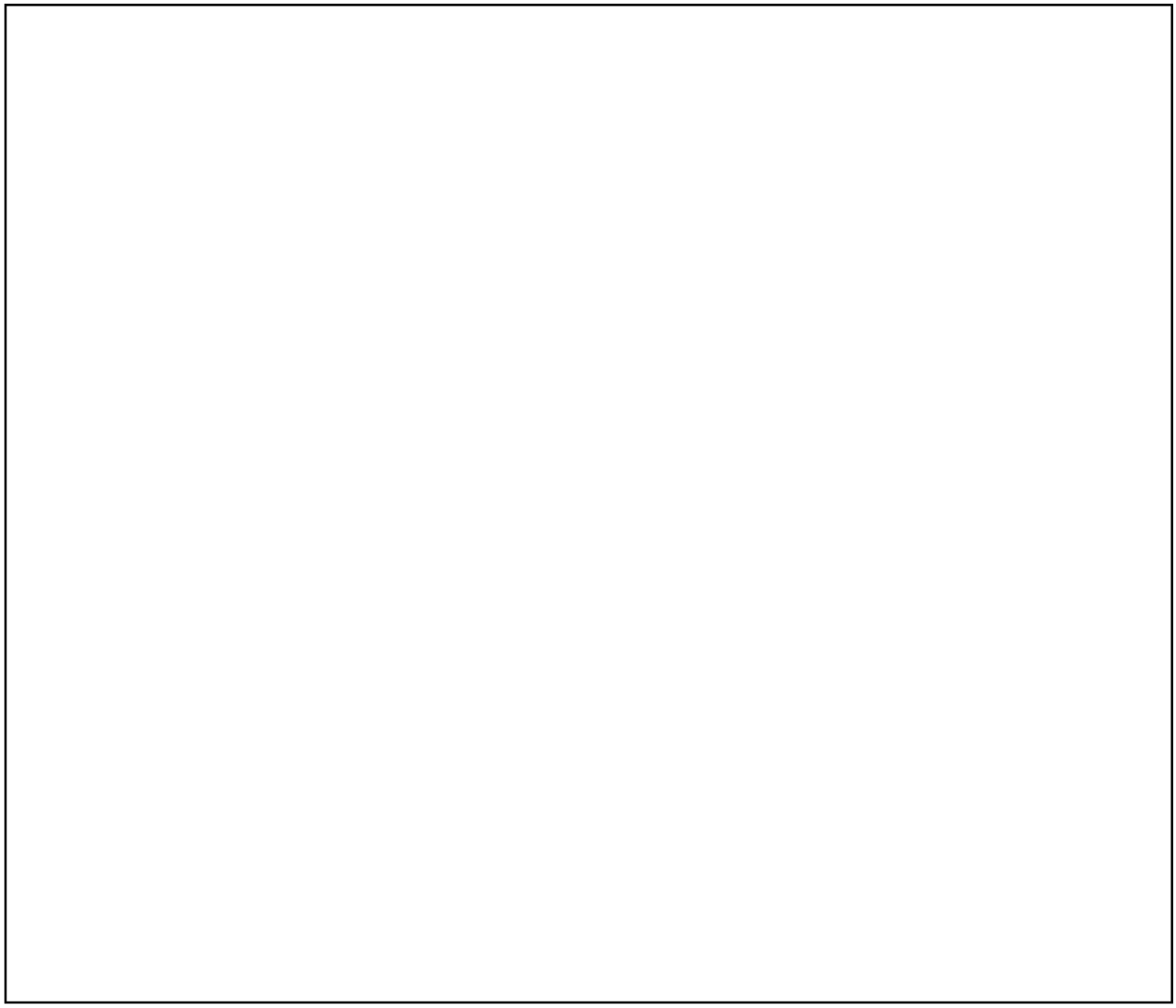


- **Questions about documentary evidence**



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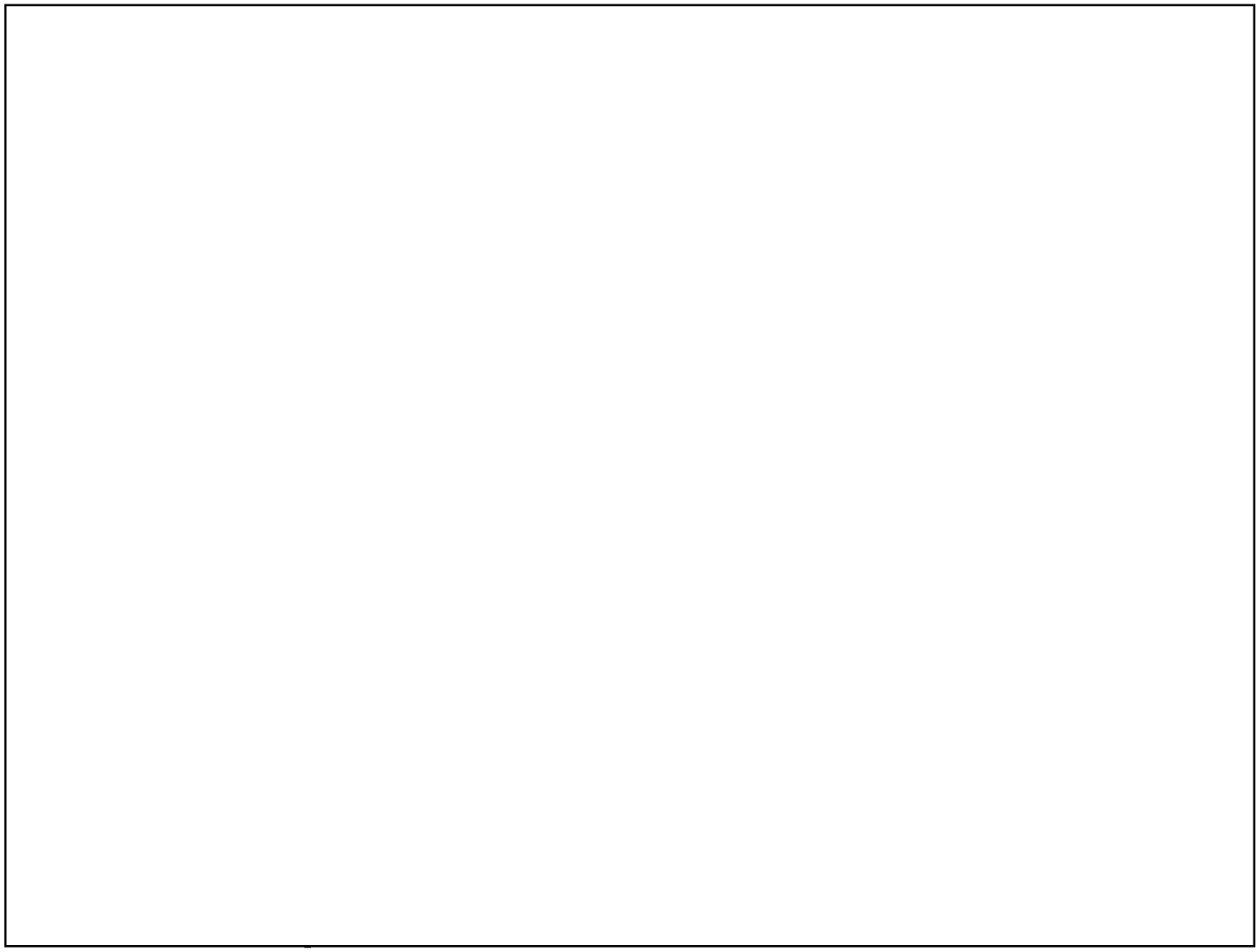
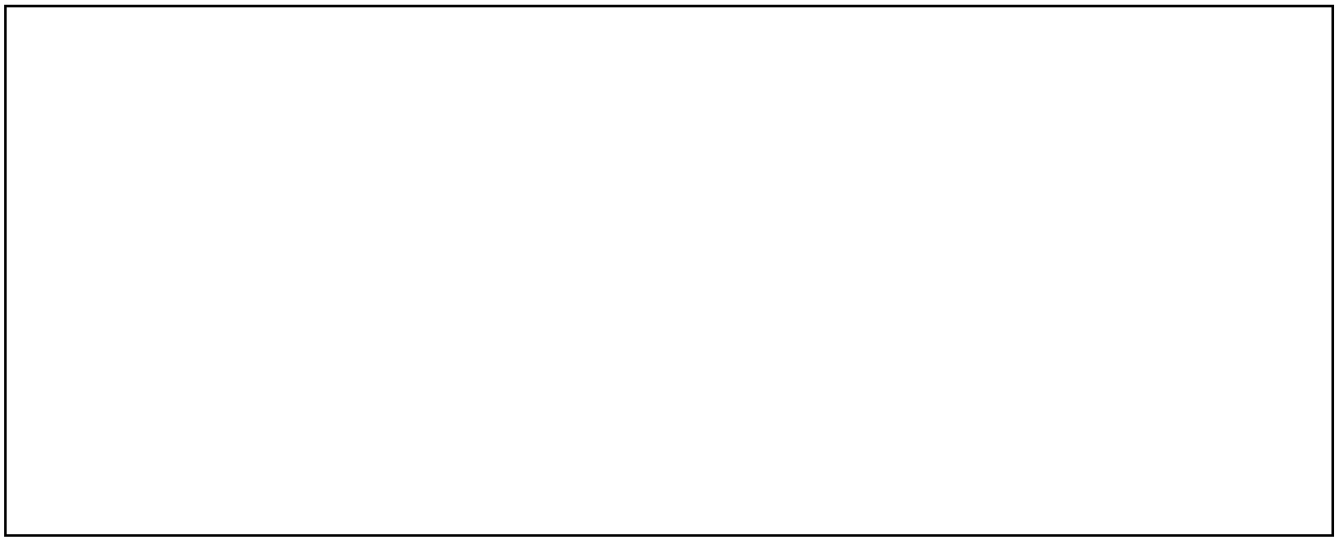


2.6.3 Multiple Claims & Identities



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Ask Questions

2.6.4 Relationship Fraud

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Example

2.6.5 Boilerplate Claims

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2.6.6 Immigration Service Provider Fraud

The issue of attorney, preparer, and interpreter fraud is more prevalent in the asylum context.[21]

[21] Applicants for refugee status cannot be represented by attorneys during their interviews abroad. *See* U.S. Immigration and Naturalization Service Memo, *Representation of an Applicant for Admission to the United States as a Refugee During an Eligibility Hearing* (Nov. 9, 1992). However, a provision in the National Defense Authorization Act (NDAA) for FY 2014 allows an exception: representation for applicants in the Iraqi P-2 refugee program (i.e., individuals with ties to the U.S.) and during Special Immigrant Visa (SIV) interviews for Iraqis and Afghans. Specifically, the NDAA for FY2014 amended the Refugee Crisis in Iraq Act of 2007, Pul.L.110-181, div. A, title XII, Subtitle C (Sec. 1241).

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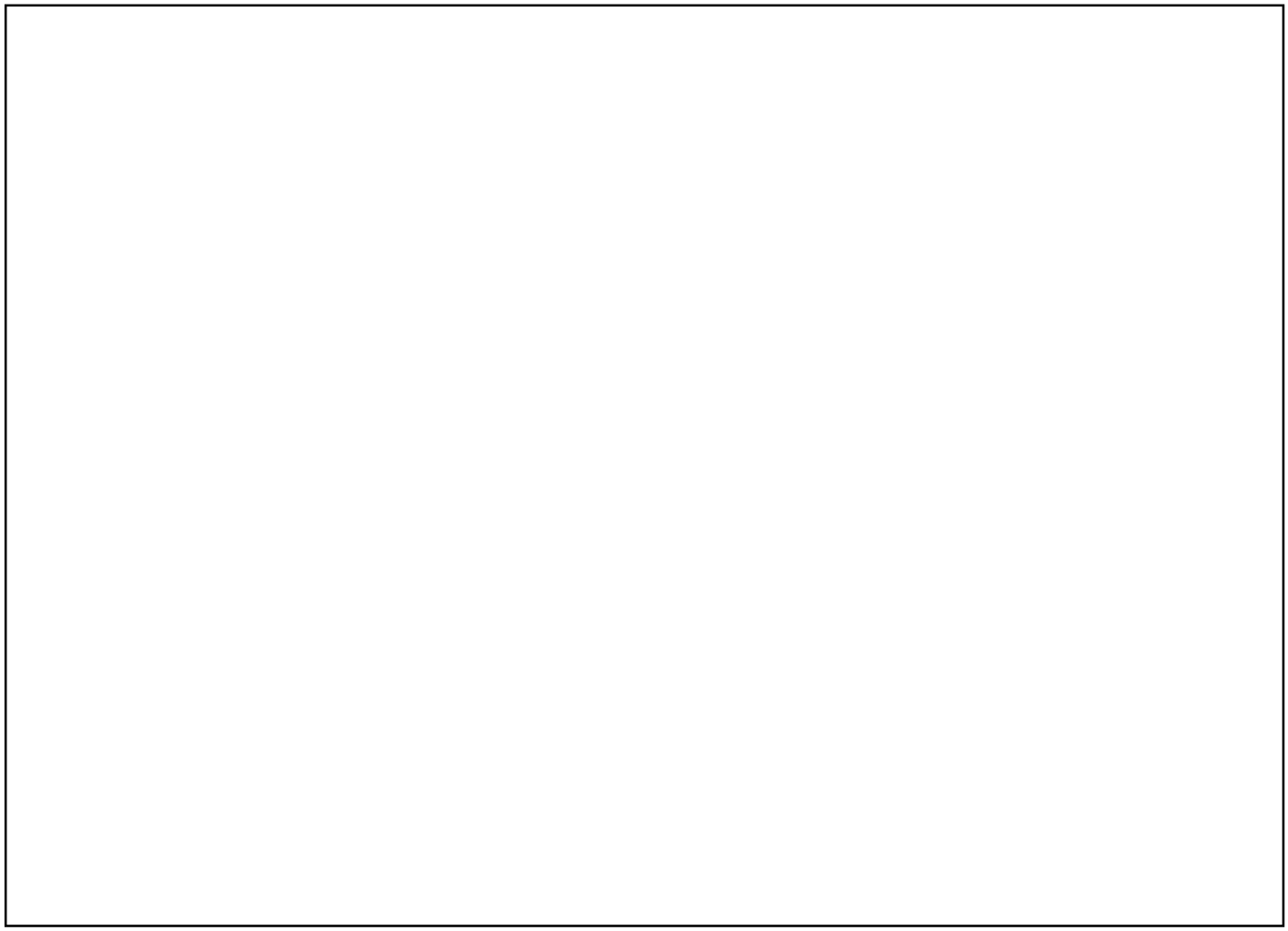
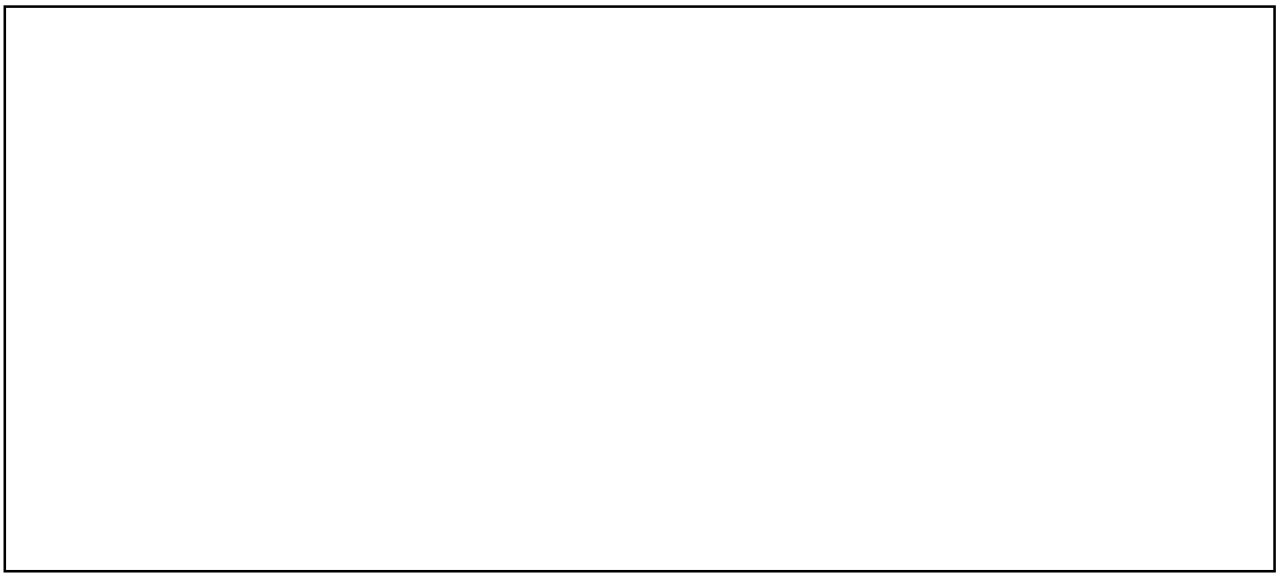


2.6.7 Visa Fraud



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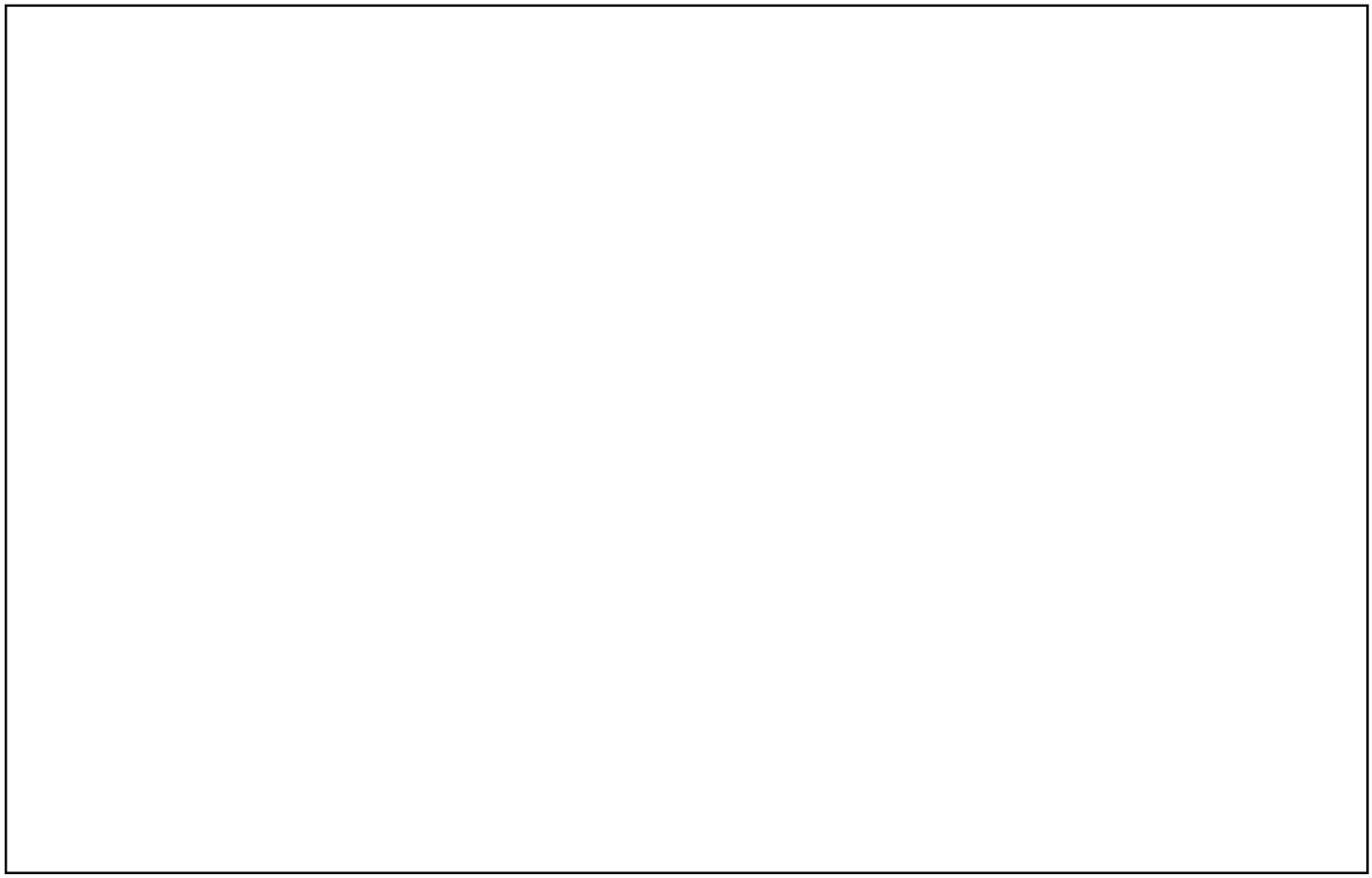
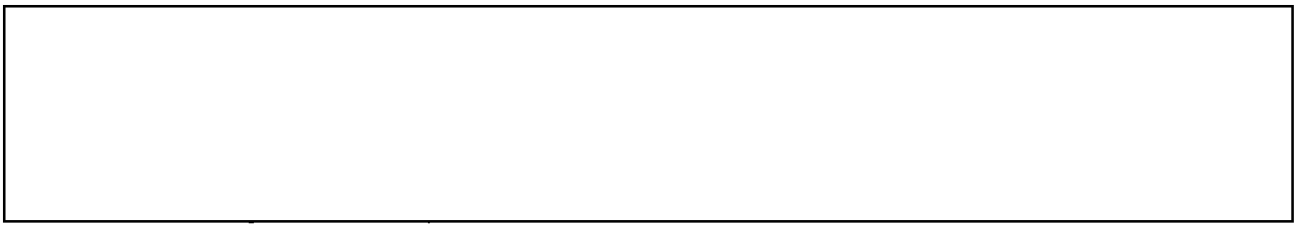


2.6.8 Access to the U.S. Refugee Admissions Program (USRAP) Fraud

To gain admission to the United States as a refugee, an applicant must first be designated as of special humanitarian concern to the United States.[27] Each year, the President makes this designation by consulting with Congress and determining the number of refugees that may be admitted through one of three USRAP processing priorities.[28] In order to obtain an interview with USCIS, an applicant must first gain access to the USRAP through one of these processing priorities. Access is obtained through referral by the United Nations High Commissioner for Refugees (UNHCR), a U.S. Embassy, a designated non-governmental agency or by establishing



[27] INA § 207(a)(3), (c)(1).

[28] *Id. See also* Proposed Refugee Admissions for Fiscal Year 2015, Report to Congress, pp. 6-14, available at: http://www.state.gov/documents/organization/232029.pdf (last accessed Aug. 17, 2015)

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membership in specific groups identified and designated by the U.S. Department of State in consultation with USCIS and other USRAP partners.

Examples

2.7 Overseas Fraud

You may encounter indicators of fraud that cannot be resolved domestically, whether through the

Examples

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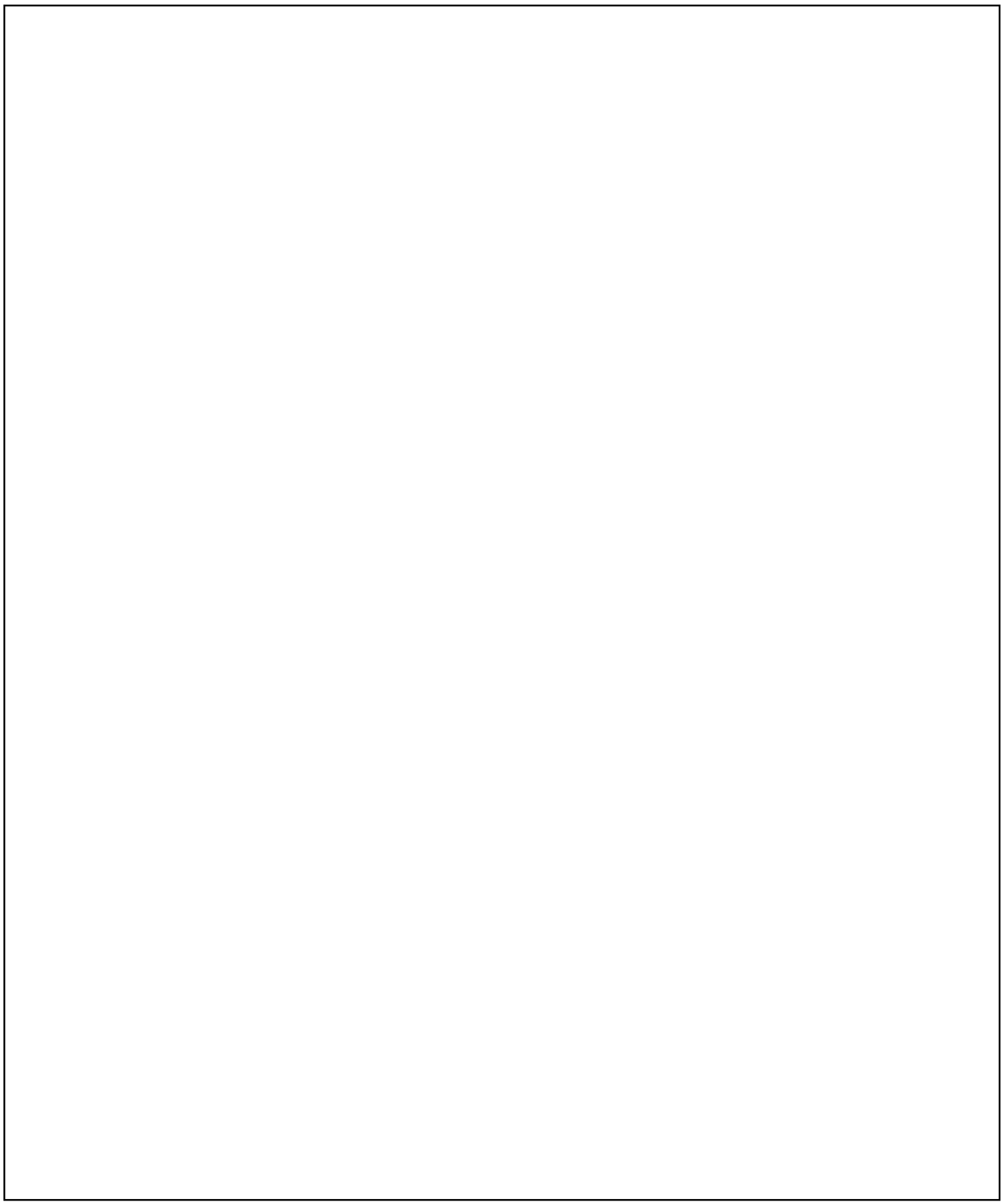

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2.8 Partnering in Fraud Detection and Deterrence

Central to RAIO's mission is providing protection, humanitarian relief, and other immigrant benefits and services throughout the world, while combating fraud and protecting national security. RAIO's efforts to detect and deter fraud require a fully engaged staff, which includes you—the officer, as well as mission support staff, supervisors, training officers, directors and deputy directors, headquarters staff, and FDNS officers.

Now that you are aware of the types of fraud you may encounter in your adjudications work and the different ways you can address fraud indicators, it is important for you to understand the role of FDNS and the resources it offers to you. The following section will provide you with an overview of FDNS' structure and mission, the role of the FDNS officer and how FDNS can support you, and the steps you can take to refer a case FDNS for further investigation.

3. FDNS OVERVIEW

USCIS was created by statute on March 1, 2003, as a part of the formation of the Department of Homeland Security (DHS). The immigration benefit services functions of the legacy Immigration and Naturalization Service (INS) were assigned to USCIS, while INS's investigations and enforcement functions were assigned to U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP). This reorganization partially addressed General Accounting Office (now the Government Accountability Office – referred hereafter as GAO) concerns[31] regarding INS' dual and seemingly conflicting service and enforcement missions. However, with this division, USCIS was not delegated any of the investigative, enforcement, and intelligence capabilities necessary to independently prosecute cases of immigration benefit fraud.

In 2004, USCIS created FDNS in accordance with a Congressional recommendation to establish an organization "responsible for developing, implementing, directing, and overseeing the joint USCIS-ICE anti-fraud initiative and conducting law enforcement/background checks on every applicant, beneficiary, and petitioner prior to granting immigration benefits."[32] FDNS fulfills the USCIS mission of enhancing both national security and the integrity of the legal immigration

[31] GAO-02-66: Immigration Benefit Fraud: Focused Approach Is Needed to Address Problems (issued January 31, 2002).

[32] Conference Report, Fiscal Year 2005 Appropriations Act.

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system by: (1) Identifying threats to national security and public safety posed by those seeking immigration benefits; (2) detecting, pursuing, and deterring immigration benefit fraud; (3) identifying and removing systemic vulnerabilities in the process of the legal immigration system; and (4) acting as USCIS's primary conduit for information sharing and collaboration with other governmental agencies. FDNS also oversees a strategy to promote a balanced operation that distinguishes USCIS's administrative authority, responsibility, and jurisdiction from ICE's criminal investigative authority.

Fraud threatens the integrity of the nation's immigration benefits system and may facilitate the entry and continued presence of terrorists, criminals, and others who seek to do us harm. While not every act of fraud is a threat to national security, exploitation of the immigration system poses significant national security concerns. FDNS integrates the efforts of law enforcement, intelligence, and overseas assets in support of USCIS operations and mission-critical functions. By integrating its mission, goals, and objectives throughout USCIS, FDNS promotes process integrity, security, and public safety without compromising operational efficiency.

3.1 FDNS Vision and Mission

As a major component of the Department of Homeland Security, USCIS has the mission of "administering the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values."[33] The abilities to detect and deter fraud and to perform screening that identifies threats to national security and public safety are essential components in upholding the integrity of the immigration process. The FDNS Directorate develops and maintains the anti-fraud, screening and background checks, and information-sharing programs needed to accomplish the overall goal of providing the right benefit to the right person at the right time, and no benefit to the wrong person.

FDNS Vision: A legal immigration system providing qualitative and responsive service to its customers, while detecting, deterring, and combating fraud, and screening applicants to ensure benefits are not granted to persons who pose a threat to national security and/or public safety.

FDNS Mission: FDNS will enhance the integrity of the legal immigration system by leading agency efforts to identify threats to national security and public safety, detect and combat immigration benefit fraud, and remove systematic and other vulnerabilities.

3.2 Headquarters FDNS Organizational Structure and Core Functions

Within USCIS, Headquarters FDNS (HQFDNS) develops and maintains policies and procedures that govern the detection of fraud and threats to national security or public safety in requests for immigration benefits. HQFDNS also works with other components of USCIS to carry out the mission. Field Operations (FOD), Service Center Operations (SCOPS), and Refugee, Asylum, and International Operations (RAIO) Directorates supervise field FDNS officers. HQFDNS

[33] USCIS Mission Statement.

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develops and implements operational policies and procedures that address fraud and national security concerns in coordination with these directorates. FDNS also works with the Immigration Records and Identity Services Directorate (IRIS) on policies and procedures related to biometric and other security checks. In addition, the USCIS Privacy Office and Office of the Chief Counsel advise FDNS on the privacy and legal considerations of policies and initiatives.

HQFDNS consists of multiple divisions responsible for setting policies related to USCIS' anti-fraud, national security, and public safety activities.[34] Among other functions HQFDNS provides guidance, procedures, and advice to the USCIS operational directorates by:

- Establishing the agency's Fraud Detection Standard Operating Procedures to assist with detecting, deterring, and preventing benefit fraud;
- Maintaining the agency's National Background and Identities Checks Operating Procedures (NaBISCOP) to identify and resolve background checks issues indicating national security or public safety concerns;
- Managing the agency's Controlled Application Review and Resolution Program (CARRP) to handle cases with national security concerns; and
- Representing USCIS within the Intelligence community and assisting USCIS with information sharing regarding fraud and national security concerns.

3.2.1 Fraud

The FDNS Fraud Division (FD) is charged with implementing and overseeing USCIS anti-fraud programs for Service Centers, Regional, District and Field Offices, Asylum Offices, and other HQ components. This division develops fraud detection related policies, procedures, priorities, and objectives and coordinates with other HQ entities to implement the anti-fraud mission. FD also identifies systematic vulnerabilities in the legal immigration system and proposes requisite solutions. FD priorities and mission goals are divided between the Fraud Programs and Verification Branch (FPVB) and the Research and Analysis Branch (RAB). FPVB manages site visits to verify information provided for immigration benefits, including the Overseas Verification Program (OVP) to verify events, statements and documents originating overseas and the Administrative Site Visit and Verification Program (ASVVP) and the External Site Visit and Verification Program (ESVVP) to verify visa information. FPVB also manages programs that proactively identify potential fraud trends, including the UPIL (Unauthorized Practice of Immigration Law) and Fraud Scams program which collaborates with internal and external partners to identify immigration scams against vulnerable groups, the Post-Conviction Clean-Up Initiative and the Fraud Tip-line programs. In addition, FD oversees liaison activities and FDNS details to the DOS National Visa Center (NVC), DOS Kentucky Consular Center (KCC), ICE Homeland Security Investigations Forensic Laboratory (HSI-FL), ICE Document and Benefit Fraud Task Force (DBFTF), and ICE Identify and Benefit Fraud Unit (IBFU).

[34] *See* USCIS Connect Page for information about the FDNS Directorate; *see also* the HQFDNS Organization Chart.

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3.2.2 National Security and Public Safety

The FDNS National Security and Public Safety Division (NSPSD) supports Law Enforcement Agencies (LEA), the Intelligence Community (IC) and USCIS customers as a knowledge hub for the creation and implementation of screening policy, the performance of background vetting, and the integration of national security and immigration expertise. For national security in particular, NSPSD provides national security expertise and guidance to the USCIS field offices and service centers; develops and maintains national security-related policies, programs and projects; facilitates interagency screening coordination; and initiates, develops and implements screening projects to enhance the security process.

(b)(7)(E)

The FDNS Immigration Vetting Division (IVD) also supports HQFDNS' national security work by ensuring an agency-wide approach for reviewing national security concern cases in the field and assisting with requests for analysis and synopsis of underlying intelligence information. IVD priorities and mission goals are divided between the National Security and Vetting Branch and the Intelligence Watch Branch.

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3.2.3 Intelligence

The FDNS Intelligence Division (ID) informs USCIS senior leadership and other USCIS Directorates of intelligence and information on significant national security issues and threats; manages the processing, analysis, production, and dissemination of USCIS immigration data-based information and intelligence products focused on enhancing national security efforts and identifying trend and patterns in immigration fraud; is the USCIS lead for coordinating information sharing and collaboration efforts between USCIS, DHS, and the Law Enforcement and Intelligence Community; and facilitates the completion of Requests for Information received from outside of USCIS. ID priorities and mission goals are divided between the Intelligence Integration Branch, which has an Information Sharing & Collaboration (IS&C) Section and a Refugee Analysis Section, and the Reports & Field Coordination Branch, which is USCIS' primary intelligence production team. The Intelligence Division oversees liaison activities and details to: The Border Fusion Intelligence Section (BIFS) at the El Paso Intelligence Center (EPIC), DHS I&A/DHS Threat Task Force (DTTF) and the National Counterterrorism Center (NCTC). The Intelligence Division through its Case Prioritization and Intelligence Assessment (CPIA) Branch also conducts classified database checks and identifies and recommend possible nomination for terrorist-related watchlisting or dewatchlisting.

3.2.4 Social Media

4. RAIO'S FDNS PROGRAM

RAIO and FDNS have taken important steps to strengthen RAIO's ability to detect and address fraud, national security and public safety concerns, and facilitate information sharing in our globally dispersed operating environment. In 2015, FDNS and RAIO executed a governance agreement to strengthen the partnership between the directorates and enhance fraud detection and national security operations throughout RAIO.[35]

RAIO has developed the most extensive set of mandatory identity and background checks in USCIS and the RAIO divisions have developed and expanded program policies and procedures to deter fraud and further identify national security concerns. RAIO's international presence also facilitates the local verification of documents on behalf of adjudicators and FDNS teams throughout the operational directorates, benefiting the whole of USCIS. Currently there are FDNS Officers working to support RAIO within the:

- RAIO HQ FDNS Branch;

[35] Internal Memorandum of Agreement Between FDNS Directorate and RAIO Directorate Regarding the Governance Structure for Fraud Detection and National Security Operations, signed by Matthew Emrich and Joseph Langlois (June 17, 2015).

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- International and Refugee Affairs Division's Security Vetting and Program Integrity (SVPI) branch and international field offices; and
- Asylum HQ and the domestic Asylum Offices.

4.1.1 HQ RAIO FDNS Branch

RAIO supports strong FDNS programs in each of its divisions. Because many of our fraud, national security, and information sharing needs require a coordinated approach that is consistent with FDNS mission and guidance, RAIO created an FDNS branch at the directorate level to enhance effectiveness, promote directorate-wide objectives, and help coordinate the work of RAIO's operational divisions. These efforts include:

- Communicating annual goals and priorities established by HQFDNS to RAIO FDNS operations;
- Communicating directly with FDNS Supervisory Immigration Officers (SIOs) and Immigration Officers (IOs) within RAIO divisions on routine operational and other day-to-day activities, issues, and items, while ensuring RAIO program leadership has visibility;
- Establishing standard operating and quality assurance procedures to guide FDNS-funded positions and projects;
- Coordinating with RAIO division leadership to ensure RAIO participation in FDNS-related internal and external working groups;
- Managing FDNS resource allocations, such as personnel and funding for travel and supplies;
- Coordinating the formal clearance process for RAIO-specific FDNS-related policy, operational guidance, and training materials;
- Coordinating with the RAIO Divisions and HQFDNS on classified and unclassified interagency taskings and Requests for Information (RFI); and
- Providing support to HQFDNS in exigent circumstances or national security incidents with RAIO equities.

4.1.2 International and Refugee Affairs Division Security Vetting and Program Integrity Branch (SVPI)

IRAD has established some of the most advanced and comprehensive security vetting processes within USCIS. In order to support these processes, IRAD has a Security Vetting and Program Integrity (SVPI) unit of FDNS officers. These officers assist with day-to-day security vetting operations as well as development of policies and procedures related to fraud and national security concerns. SVPI officers manage and oversee the following processes and programs integral to refugee admissions: adjudication of hits in the Department of State's Consular Lookout and Support System (CLASS), collection of biometrics and reporting of results, fraud detection and policies, review of military service for certain populations, and the Inter-Agency Checks (IACs).

IRAD also provides operational support and oversight related to fraud detection and national security issues to RAIO's overseas offices, including overseas verification of evidence, security

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vetting and fraud trend analysis. FDNS officers assigned internationally perform a variety of duties, including document verification, an activity that supports adjudications across all USCIS directorates, including RAIO.

Currently, requests for overseas verification (OV) are vetted through IRAD.[36] The process of routing overseas verification requests is done through the FDNS-Data System (FDNS-DS). This process has streamlined the communication between domestic and international offices and has allowed HQFDNS and RAIO to gain greater insight into the need for and the content of overseas verification requests. The former International Operations Division (IO) (now part of IRAD) in partnership with FDNS developed the USCIS Overseas Verification SOP[37] so that the agency has a consistent and coordinated approach to fraud verification activities conducted internationally.

IRAD also provides anti-fraud efforts through DNA sample collection abroad and in fraud referrals for I-730 adjudication internationally.

4.1.3 Asylum FDNS

The Asylum Division was the first division within the RAIO Directorate to employ FDNS officers to assist with anti-fraud efforts. In August of 2004, each asylum office received one anti-fraud officer initially to handle the fraud workload. As FDNS expanded its role and assumed the lead role in vetting fraud cases and overseeing national security related programs, asylum offices received additional officers and FDNS support staff to assist with this added workload. FDNS officers in the asylum field offices work closely with the local Asylum Fraud Prevention Coordinator and local management in addition to Supervisory Asylum Officers and Asylum Officers. In 2015, the Asylum Division established an FDNS Branch within Asylum Headquarters to develop operational guidance and provide technical support to Asylum FDNS personnel and Asylum Division managers.

4.2 FDNS Officer Roles and Responsibilities

While the RAIO divisions face different fraud and national security challenges in administering their respective programs, there are common themes that run through the fraud and national security work performed by FDNS officers in all RAIO division offices.

4.2.1 Strengthen National Security

FDNS officers assist in resolving background check hits involving national security and public safety concerns.[38] If the positive hits relate to national security, adjudicators cease adjudication of these cases and transfer them to FDNS officers. FDNS officers resolve the concerns and deconflict with appropriate law enforcement agencies through the CARRP process. Additionally, FDNS officers may perform checks on applicants and beneficiaries by searching in classified databases.

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[36] *See* FDNS, Fraud Division, Overseas Verification SOP (September 26, 2014).

[37] FDNS, Fraud Division, Overseas Verification SOP (September 26, 2014).

[38] *See* RAIO Training Module, *National Security, Part 1* for more information.

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4.2.2 Improve Anti-Fraud Capabilities

FDNS officers routinely research fraud leads from RAIO officers. As part of their case research, FDNS officers have access to commercial data brokers and perform thorough searches in these systems in addition to DHS and USCIS systems. FDNS officers investigate perpetrators of fraudulent applications and, if feasible, request that ICE investigate the lead. Under limited circumstances, FDNS officers can assist adjudicators with suspected fraud by submitting overseas verification requests to verify document authenticity. FDNS officers provide recurring fraud trainings to RAIO officers and inform adjudicators of emerging fraud trends. FDNS officers also coordinate/assist law enforcement agencies in immigration fraud investigations by collecting relevant information and submission of data queries in USCIS systems.

4.2.3 Address Public Safety Concerns

FDNS officers also help coordinate with the appropriate division of ICE or other law enforcement agencies when there are matters implicating public safety. An Egregious Public Safety (EPS) case is defined as any case where information indicates the alien is under investigation for, has been arrested for (without disposition), or has been convicted of any of the following:

- Murder, rape, or sexual abuse of a minor as defined in INA § 101(a)(43)(A);
- Illicit trafficking in firearms or destructive devices as defined in INA § 101(a)(43)(C);
- Offenses relating to explosive materials or firearms as defined in INA § 101(a)(43)(E);
- Crimes of violence for which the term of imprisonment imposed or where the penalty for a pending case is at least one year as defined in INA § 101(a)(43)(F);
- An offense relating to the demand for or receipt of ransom as defined in INA § 101(a)(43)(H);
- An offense relating to child pornography as defined in INA § 101(a)(43)(I);
- An offense relating to peonage, slavery, involuntary servitude, or trafficking in persons as defined in INA § 101(a)(43)(K)(iii);
- An offense relating to alien smuggling as described in INA § 101(a)(43)(N);
- Human Rights Violators, known or suspected street gang members, or Interpol hits; or
- Re-entry after an order of exclusion, deportation, or removal subsequent to conviction for a felony where a Form I-212, Application for Permission to Reapply for Admission into the U.S. after Deportation or Removal, has not been approved.

4.3 How Can Your Local FDNS Officer Support You?

In addition to the functions and duties performed by FDNS officers described in the previous section, there are also functions that are specific to each RAIO Division:

- IRAD-SVPI officers coordinate with other government agencies and resolve issues related to background checks.
- FDNS officers abroad may perform investigations overseas, including site visits on behalf of RAIO and domestic offices.

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- Asylum FDNS officers may pre-screen applications, identifying fraud, national security, and public safety issues prior to an asylum interview.

Consult with your supervisor and your respective office's FDNS officers to familiarize yourself with local office procedures on FDNS pre-screening measures and/or ongoing investigations that may aid in the adjudication of your case(s).

4.4 Fraud Referral Process

USCIS' anti-fraud strategy involves strategic partnership with ICE where ICE is the lead agency tasked with criminal investigation of immigration fraud.[39] Under this strategy, FDNS is designated as the primary USCIS component responsible for anti-fraud activities. USCIS refers suspected single-scope and major conspiracy multi-scheme fraud [40] cases to ICE, provided that such suspicion is sufficiently articulated in writing.[41] This means that conflicting and/or otherwise derogatory information that would lead a reasonable officer to question the veracity of the information provided must exist.

4.5 Fraud Referral

To refer a case for suspected fraud to your local FDNS, you must complete an electronic Fraud Referral (FR) in which you document relevant information necessary to refer the case of suspected fraud to your local FDNS team. In the FR, you must:

1. Provide a brief, but detailed summary of the fraud concern,
2. List the specific information that merits further FDNS research,
3. Identify WHO is involved in the suspected fraud,
4. Address WHY the issue is material to eligibility for the benefit, and
5. Explain WHAT triggered your suspicion(s) of fraud.

You can submit an FR at any stage of the adjudicative process. For cases referred to FDNS with suspected fraud **BEFORE** an adjudicative decision, the case will be placed on HOLD pending administrative investigation results documented on a Statement of Findings. If fraud is discovered **AFTER** you made a final determination, you can still submit a FR to an FDNS

[39] *See* signed memo, "Memorandum of Agreement between USCIS and ICE on The Investigation of Immigration Benefit Fraud," dated September 25, 2008.

[40] In the case of an asylum application that is to be referred to Immigration Court, a copy of the application and related material may be forwarded to the BFU so that the case may progress to Immigration Court in accordance with the asylum reform time frames.

[41] Since 2008, ICE no longer accepts single-scheme fraud referrals unless "(i) the alien is from a country designated in writing by ICE, (ii) the alien is the subject of a TECS II record, (iii) USCIS suspects misconduct on the part of the attorney, notary, interpreter or preparer, or (iv) evidence of a criminal conviction for an offense that is not grounds for inadmissibility or removability is present." *See* "Memorandum of Agreement between USCIS and ICE on The Investigation of Immigration Benefit Fraud," dated September 25, 2008.

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officer.[42] Based on the FR, a local FDNS officer will conduct in-depth systems checks, data collection, and other inquiries necessary to meet the minimum threshold of articulated fraud. After doing so, FDNS officers will refer the case to ICE with a Request to Investigate (RTI).

4.6 Investigative Process-Verification Resources

During the administrative investigation, the FDNS officer conducts additional research to obtain sufficient evidence that the suspected fraud meets the individual elements of the charge of inadmissibility or removability (misrepresentation, willful, and material). If the research identifies fraud, the FDNS officer analyzes the size and scope of the fraud.

The FDNS officer performs the following activities to obtain the evidence that is necessary to further articulate the suspicion of fraud and serve as the basis for you to make a determination on the pending application or petition:

- Identify documentary evidence by thoroughly reviewing the receipt file, case file, and/or A-file and other associated documentary evidence.

- Query government data sources (as appropriate)[43]:

    - Arrival and Departure Information System (ADIS)

      The ADIS system is a DHS-wide repository for the storage and use of biographic, biometric indicator, and encounter data on aliens who have applied for entry, entered, or departed the United States. ADIS consolidates information from various systems to provide a repository of data held by DHS for pre-entry, entry, status management, and

[42] This usually involves a denied or referred asylum claim, and the purpose is to collect evidence related to large-scale fraud schemes. In the refugee context, single-scheme refugee fraud is often discovered after a refugee has been approved and admitted into the United States.

[43] This list is not all-inclusive as new systems are introduced and become available to USCIS. *See also* DHS Privacy Impact Assessment for Immigration Benefits Background Check Systems, November 5, 2010.

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exit tracking of immigrants and non-immigrants. Its primary use is to facilitate the investigation of subjects of interest who may have violated their immigration status by remaining in the United States beyond their authorized stay. Other uses include assisting in determining visa or immigration benefits eligibility and providing information in support of law enforcement, intelligence, and national security investigations.

- Automated Biometric Identification System (IDENT)

  The IDENT system is the central DHS-wide system for storage and processing of biometric and associated biographic information for DHS mission-related processes, including: national security; law enforcement; immigration and border management; intelligence; background investigations for national security positions and certain positions of public trust; and associated testing, training, management reporting, planning and analysis, or other administrative uses.

- Case Access System for the Executive Office for Immigration Review (CASE)

  The CASE system contains the biographic and demographic data of individuals in immigration proceedings before EOIR's courts or the BIA. The information within CASE may be used to determine eligibility for relief from removal or for some other government benefit. It also may be used to alert an individual of the status of a case before EOIR. It also may be used by DHS to coordinate the trial attorneys' calendars. There are a variety of sources of the information in the database, including the following: Department of Homeland Security (DHS) charging document; applications submitted by the alien, or a representative appearing on the alien's behalf; documents submitted by the alien or his representative; documents submitted by DHS; testimony provided by the alien or his representative when appearing in Court.

- Case Activity and Management for International Operations (CAMINO)

  The CAMINO system supports RAIO's international offices within the International and Refugee Affairs Division (IRAD). IRAD staff adjudicate a wide variety of petitions and applications and issue travel documents to overseas customers. CAMINO is a person-centric case management system used to administer, track, and adjudicate applications filed with or processed by USCIS international offices under IRAD jurisdiction with an international nexus. IRAD staff use CAMINO to manage the following application adjudication process: (1) Receipting and Acceptance Processing; (2) General Adjudication Procedures; (3) Security Screening Checks; (4) Interview; (5) Decision Case Action; and (6) Post-Adjudication.

- Central Index System (CIS)

  CIS contains information on the status of 57 million applicants/petitioners seeking immigration benefits to include: lawful permanent residents, naturalized citizens, U.S. border crossers, aliens who illegally entered the U.S., aliens who have been issued employment authorization documents, individuals who petitioned for benefits on behalf

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of family members, and other individuals subject to the provisions of the Immigration and Nationality Act (INA). In the current USCIS environment, there are multiple benefits processing systems (C3, C4, RAPS) and support systems (NPS card production). CIS receives and sends updates from these systems to keep the most up-to-date record of an individual's immigration status and A-File location.

- Change of Address Form (AR11 System and Form)

  The AR-11, Alien's Change of Address, and AR-11SR, Alien's Change of Address (Special Registration), are available for customers to report their change of address in the United States.

- Computer Linked Adjudication Information Management System (CLAIMS 3)

  CLAIMS 3 is a case management application used by USCIS to track the adjudication of applications and petitions for immigration benefits and services except those related to asylum and naturalization. CLAIMS 3 maintains information from numerous different types of USCIS applications and is the primary source of applicants' or petitioners' information that is used to display background checks information and adjudications decisions (process by which decisions are made to grant or deny an application).

- Consolidated Consular Database (CCD)

  The CCD system is a data warehouse that holds current and archived data from the U.S. Department of State's Bureau of Consular Affairs (CA) domestic and post databases. CCD provides for a set of centralized visa and American citizen services supporting consular posts and back office functions. USCIS personnel use CCD to obtain information about the individual's identity, previous travel history, and method of entry into the United States.

- Customer Profile Management System (CPMS)

  CPMS is a USCIS system allows users to access applicant biometric information as well as Federal Bureau of Investigation (FBI) and Department of Defense (DOD) biometric background check responses collectively. CPMS serves as a conduit from USCIS to the FBI for conducting fingerprint biometric background checks and storing the results. CPMS enhances the user experience and identity integrity by linking more information together in a single site, alerting a user when a query returns more than a single identity, and separating unique identities to avoid confusion during the review process.

- Electronic Document Management System (EDMS)

  EDMS is a USCIS system that manages the digitization of files to provide electronic access to case files, including A-Files and Receipt Files and enables the file to be shared more efficiently within DHS components and with external agencies. EDMS is a web-based system that allows authorized users to view and search electronic copies of the

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paper-based case files: A-Files and Receipt Files. The tri-components require access to the information contained in these case files to learn the status of individuals, including permanent residents, naturalized citizens, border crossers, apprehended aliens, legalized aliens, aliens issued employment authorization, and other individuals of interest in order to successfully complete their job functions. EDMS permits quick and simultaneous access to case files 24 hours a day, 7 days a week.

- Enforcement Integrated Database (EID) and ENFORCE Alien Removal Module (EARM)

  The EID system is a shared database repository for several DHS law enforcement and homeland security applications. EID captures and maintains information related to the investigation, arrest, booking, detention, and removal of persons encountered during immigration and criminal law enforcement investigations and operations conducted by the ICE, U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS) components within DHS. DHS personnel access the data in EID using the ENFORCE applications, referred to generally as ENFORCE. HSI and ERO personnel use ENFORCE's Alien Removal Module (EARM) to support ICE's arrest, detention, processing and removal of individuals for criminal and administrative violations.

- Executive Office of Immigration Review Data Inquiry Screen (EOIR)

  The EOIR screen displays data relating to referral of an asylum or NACARA § 203 application to EOIR for proceedings, and includes the hearing location, when proceedings were instituted, type of proceedings, asylum processing information, dates and types of decisions, appeal history, EAD clock information, and charges contained in the Notice to Appear (NTA) filed with EOIR.

- Federal Bureau of Investigations National Name Check Program (FBI Name Checks)

  The National Name Check Program (NNCP) is a program to disseminate information from the FBI's Central Records System (CRS), centralized records of FBI Headquarters, field offices, and legal attaché offices, as well as all investigative, administrative, personnel, and general files in response to name check requests received from Federal agencies. The NNCP reviews and analyzes potential identifiable documents to determine whether a specific individual has been the subject of or mentioned in any FBI investigation(s), and if so, what information may be disseminated to the requesting agency. The FBI does not adjudicate the final outcome but rather merely reports the results to the requesting agency.

- Fraud Detection and National Security Data System (FDNS-DS)

  The FDNS-DS system records, tracks, and manages the background check process related to immigration applications and petitions, as well as information related to beneficiary applications with suspected or confirmed fraud, criminal activity, public safety and/or national security concerns, and cases randomly selected for benefit fraud

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assessments. FDNS-DS maintains information on all individuals who have been reviewed for these concerns. In instances where no fraud, criminal activity, public safety and/or national security concerns were found, the information maintained will only be used to demonstrate that an assessment was conducted so additional resources do not have to be used for a second review.

- Integrated Automated Fingerprint Identification System (IAFIS)/Next Generation Identification (NGI)

  The IAFIS system is a national, computerized system for storing, comparing, and exchanging fingerprint data operated by the Criminal Justice Information Services (CJIS) Division of the FBI. IAFIS is a repository of criminal history information, fingerprints, criminal subject photographs, as well as information regarding military and civilian federal employees and other individuals as authorized by Congress. IAFIS also provides tentative identification of individuals based on descriptive information such as a name, date of birth, distinctive body markings, and identification numbers. IAFIS's primary function is to provide the FBI a fully automated fingerprint identification and criminal history reporting system. NGI was designed to provide technological advancements to better promote the FBI's overall mission of reducing terrorist and criminal activities by improving and expanding biometric identification and criminal history information sharing services.

- National File Tracking System (NFTS)

  The NFTS system is an automated file-tracking system used to maintain an accurate file inventory and track the physical location of files. This system facilitates USCIS's ability to efficiently manage and streamline access to the millions of immigration files under its control. NFTS tracks the location of A-Files, T-Files, Sub-Files, W-Files, and Receipt Files within a local office.

- Person Centric Query System (PCQS)

  The PCQS system is an information technology service that provides USCIS status verifiers with the ability to submit a single query for all transactions involving an immigrant across a number of connected systems. PCQS returns a consolidated response of the immigrant's past interactions with the federal government as he/she passed through the U.S. immigration system, listing the name of the underlying system and the relevant information reported from that system. PCQS removes the complexity of accessing individual systems separately by presenting a single access point for the status verifier.

- Global Case Management System

  The Global Case Management System tracks case status and facilitates the scheduling of appointments and interviews and the issuance of notices (including receipt notices, appointment notices, and decision letters) at several stages of the adjudication process for affirmative asylum and expedited removal cases. USCIS Asylum Offices use Global to

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record decisions and to generate decision documents such as approval, dismissal, or rescission of an asylum or NACARA § 203 application, denial of an asylum application, administrative closure of an asylum application, or referral of an asylum or NACARA § 203 application to the Executive Office of Immigration Review (EOIR). The system also initiates, receives, and records responses for national security and background check screening and prevents the approval of any benefit prior to the review and completion of all security checks. Finally, the system provides fully-developed and flexible means for analyzing and managing program workflows and provides the Asylum Program with statistical reports to assist with oversight of production and processing goals.

- Student and Exchange Visitor Information System (SEVIS)

  The SEVIS system collects and maintains pertinent information on nonimmigrant F-1 students and J-1 exchange visitors, and the school and exchange visitor sponsors that host these individuals in the United States. DHS, in partnership with the Department of State and Department of Education, collects information electronically from approved educational institutions and designated Exchange Visitor (EV) programs in the United States certain information about aliens who have or are applying for F, M, or J non-immigrant status and their dependents, including identifying information about the alien; field of study, status and compliance information from educational institutions and exchange visitor programs; and the alien's date and port of entry.

- TECS System (TECS)

  The TECS system (not an acronym) is the updated and modified version of the former Treasury Enforcement Communications System. TECS is established as an overarching law enforcement information collection, analysis, and sharing environment that securely links telecommunications devices and personal computers to a central system and database. TECS is both an information-sharing platform, which allows users to access different databases that may be maintained on the platform or accessed through the platform, and the name of a system of records that include temporary and permanent enforcement, inspection, and operational records relevant to the antiterrorism and law enforcement mission of CBP and numerous other federal agencies that it supports. TECS also allows direct access to other major law enforcement systems, including the Department of Justice's National Crime Information Center (NCIC), the National Law Enforcement Telecommunications Systems (NLETS), and the Canadian Police Information Centre (CPIC).

- Worldwide Refugee Admissions Processing System (WRAPS)

  The WRAPS system is an electronic refugee resettlement case management system that links the Department of State Bureau of Population, Refugees and Migration (PRM) and its worldwide partners to facilitate the refugee resettlement process. WRAPS contains case information and tracks the processing of refugee applicants as they move through the required administrative steps up to arrival in the U.S.

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- Research additional data systems:
  - Commercially available databases
  - Public open source systems
  - Available state, local, and federal databases
  - Other available DHS databases

4.7 Investigative Process – Overseas Verification (OV)

International offices' resources are limited. Therefore, an overseas verification request (OVR) is generally used as a last resort.[44] If you are able to adjudicate the petition/application without an OVR, you should do so. You should make sure that all relevant systems checks have been run, all administrative avenues have been exhausted, and other fraud detection avenues have been completely pursued prior to submitting an OVR. Time spent on unnecessary OVRs diverts resources and ultimately increases turnaround times for other cases.

4.7.1 How are Overseas Verifications useful?

When a justifiable overseas verification is performed, it can produce evidence that is otherwise unavailable to an adjudicator and that assists in determining the bona fides of an application or petition for immigration benefits. Overseas verifications can also produce evidence that is otherwise unavailable to an FDNS officer and helps develop a lead or case.

4.7.2 Who initiates Overseas Verifications requests?

The FDNS officer initiates an OVR when you identify possible fraud indicators related to documents or testimony presented by an applicant that cannot be resolved domestically. You would submit an FR articulating the fraud concerns. Upon review of the FR, the FDNS officer determines that the OVR could potentially yield the information needed to confirm the fraud. During this review process, the FDNS officer will assess whether there are any alternatives to an OVR that could provide sufficient information to complete the adjudication. These assessments include taking steps, when appropriate, to gather additional information (such as sending a Request for Evidence (RFE), researching document-issuing policies, consulting exemplars, or checking the Verification Resources by Country Document,[45] etc.). If no other alternative in resolving fraud is found, the FDNS officer then submits an OVR. FDNS Officers will not request an OVR based on mere suspicion. The FDNS Officers will not submit an OVR if grounds for adjudicating the case already exist where fraud indicators can be resolved domestically, or if an administrative investigation leads to a finding of Fraud Found or Fraud Not Found. Exceptions will be made at the discretion of local management. Due to the cost, confidentiality

[44] See Overseas Verification SOP.

[45] RAIO International Operations Division, Verification Resources by Country.

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considerations and logistics involved with conducting inquiries abroad, an OV should only be utilized as a **last resort** when all other investigative remedies have been exhausted.

If the fraud indicators relate to presented documents, you should be diligent in ensuring that the chain of custody of a questionable document is adequately established. You should document a proper foundation establishing chain of custody by asking the applicant probing questions related to how the document was obtained, who obtained the document, whether the applicant was present during the issuance of such document, and resolve any inconsistencies in the response prior to OVR submission. By properly establishing chain of custody, you strengthen the OVR's finding, and thus its usefulness to the adjudication.

4.7.3 Who conducts Overseas Verifications?

Overseas verifications performed by USCIS international offices are typically conducted by U.S. government employees with assistance from locally employed staff (LES). LES investigators located in many of our international offices have the necessary knowledge and often have established relationships with host government agencies. For OVRs submitted for countries where there is no USCIS presence, the DOS Fraud Prevention Unit at post performs this service on USCIS's behalf. USCIS reimburses DOS for these services under the Economy Act.

OVs may be conducted by:

1. FDNS Immigration Officers posted internationally
2. USCIS Overseas Adjudications Officers (OAO) or Field Office Directors (FOD)
3. USCIS LES
4. Department of State Consular Officers
5. Department of State Foreign Service National

The OVR will be reviewed by the designated OAO, FOD or LES at the USCIS international office or, if destined for a DOS post, reviewed by FDNS officers. The designated reviewers will determine practicability with the OVR. Circumstances may exist at a post that will render the OVR not practicable, such as current country conditions (e.g. armed conflict, road conditions, record unavailability, personnel safety, or record unreliability), the likelihood of definitive results, cost, and availability of resources.

The reviewers will also consider confidentiality concerns. Federal laws, regulations, and agency policy protect information relating to asylees and refugees, those seeking benefits under the Violence against Women Act (VAWA), under Temporary Protected Status (TPS), applicants for temporary resident status under INA sections 210 (SAW) and 245A and applicants for adjustment of status under the Legal Immigration Family Equity (LIFE) Act. The disclosure restrictions in these laws and regulations must be applied and are in addition to any disclosure restrictions in the Privacy Act. As with the Privacy Act, the assumption in these circumstances is that information owned by USCIS cannot be shared outside of USCIS or DHS. There are

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exceptions to the information sharing restrictions that allow sharing of information in certain circumstances which may be found in the OVR SOP.

Information sharing restrictions are based on:

1. Source of the request (with whom USCIS will be sharing the information);
2. Nature and purpose of the request (how USCIS or requestor will use the information); and
3. Immigration status of the subject of the overseas verification request.

For asylum, refugee, credible fear, and reasonable fear information, the confidentiality requirements of 8 C.F.R.§ 208.6 generally prohibit the sharing of personally identifiable information (PII) with foreign governments and other third parties, significantly limiting the possibility of carrying out overseas verifications of this information (whether it is to be verified for a refugee or asylum application, or in relation to another benefit sought by the applicant, such as adjustment of status). However, there are certain circumstances in which it may be possible to carry out an overseas verification relating to asylum or refugee information. Refer to Appendix N – Privacy and Confidentiality Requirements for additional information.[46]

OVRs concerning asylum and refugee cases will be sent from International and Refugee Affairs Division Headquarters (IRAD-HQ) to the Asylum Division for review and redaction instructions. The Asylum Division may communicate any required changes or redaction directly to the requester. Once redactions or changes are made and the request has been approved, the Asylum Division will notify IRAD-HQ that the OVR is ready to be sent to the USCIS international office or submit the OVR to DOS for further processing at the international post.

4.7.4 How is an Overseas Verification performed?

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4.7.5 When an Overseas Verification is completed

When the Overseas Verification is completed by an international USCIS Office, the office will compile a Report of Verification (ROV). The ROV details the nature of the OVR, who conducted the OV, how the OV was conducted, and the findings of the OV. The USCIS OAO, FOD or LES will not need to complete an ROV when the OV is not practicable. The ROV will be uploaded to FDNS-DS and the requesting FDNS IO will be notified of OV completion. If the Overseas Verification was processed by DOS, they will notify IRAD-HQ's SVPI unit when it has been completed and provide a report documenting the findings. IRAD-HQ's SVPI unit will upload the report to FDNS-DS and notify the requesting FDNS IO. The FDNS IO will inform you of the OV results.

4.7.6 Other Overseas Verification anti-fraud efforts

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5. SUMMARY

Our mission is to administer benefits to those who are eligible for protection while also ensuring the integrity of RAIO's programs. You play a key role in the adjudications process and in the successful implementation of RAIO's anti-fraud initiatives. The support available to you not only includes your supervisor and FDNS staff at your office and division, but also the numerous resources RAIO's FDNS program can access to conduct investigations and verify whether your case involves fraud.

You can also take immediate steps to address suspected fraud in your cases, such as carefully reviewing applications/petitions and supporting documentation, and asking detailed questions at the time of the interview about potentially derogatory information. RAIO officers may submit a fraud referral for any petition or application during any phase of adjudication. Consult with your supervisor and FDNS before, during (if possible), and after your interview to help you address suspected fraud indicators. Complete a fraud referral sheet and continue communicating with FDNS as they conduct system checks and additional research on your case.

Remember that not all inconsistencies in the record indicate the presence of fraud. Always provide the applicant an opportunity to explain any inconsistencies and carefully document the applicant's responses in the record.

When you are able to reasonably articulate the basis for your suspicion, you should make a fraud referral. Even if the suspected and/or identified fraud does not ultimately affect the decision in your adjudication (e.g., the applicant was able to reasonably explain and resolve the fraud concerns with regard to his/her claim) contact FDNS, as the information you obtain may be a basis for a new fraud pattern or trend.

You are in a good position to discover individuals who may be engaging in visa fraud or other benefit fraud. This information may be important to the affected agencies' potential investigation and may result in the successful prosecution of individuals engaging in immigration fraud. You are not alone in fraud prevention and have an extensive network of resources available to you.

[50] Aytes, Michael, INS Policy Memorandum, *Genetic Relationship Testing; Suggesting DNA Tests, Revisions to the Officers Field Manual (AFM) Chapter 21 (AFM Update AD07-25)*, March 19, 2008; Adjudicator's Field Manual (AFM), Chapter 21.2(d)(1): Factors Common to the Adjudication of All Relative Visa Petitions.

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PRACTICAL EXERCISES

There are no practical exercises for this module.

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OTHER MATERIALS

There are no other materials for this module.

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SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

The following information is specific to international and refugee adjudications. Information in each text box contains adjudication-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. Kendall, Sarah M, Associate Director, Fraud Detection and National Security Directorate; Langlois, Joseph E., Associate Director, Refugee, Asylum and International Operations Directorate; Monica, Donald J., Associate Director, Field Operations Directorate; Neufeld, Donald W., Associate Director, Service Center Operations Directorate, *Overseas Verification SOP and Operation Guidance,* September 26, 2014.

2. USCIS Fraud Detection and National Security Directorate Fraud Division, *Overseas Verification Standard Operating Procedures,* September 5, 2014.

ADDITIONAL RESOURCES

1. International DNA Processing: Suggesting, Collecting, and Interpreting DNA Evidence, September 4, 2014. Version 1.1.

2. Ruppel, Joanna, Chief, USCIS International Operations Division, *Implementation of updated interim DNA Field Guidance, International DNA Processing, Suggesting, Collecting and Interpreting DNA Evidence,* September 4, 2014.

3. Aytes, Michael, USCIS Policy Memorandum, *Genetic Relationship Testing; Suggesting DNA Tests, Revisions to the Officers Field Manual (AFM) Chapter 21 (AFM Update AD07-25)*, March 19, 2008.

4. *Overseas Verification Program: Verification Resources by Country Where USCIS is Present*, Version 2.0, October 2, 2015.

5. USCIS International Operations Division, *Asylee/Refugee Following-to-Join Travel Eligibility Standard Operation Procedures ("I-730 Travel Eligibility SOP")*, Version 3.1, March 2, 2015.

6. USCIS Management Directive No. 140-001, *Handling Sensitive and Non-Sensitive Personally Identifiable Information*, September 7, 2010.

7. U.S. Department of Homeland Security Privacy Office, *Handbook for Safeguarding Sensitive Personally Identifiable Information*, March 2012.

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SUPPLEMENTS

There are no International and Refugee Adjudications supplements.

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SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

REQUIRED READING

1. Lynden Melmed, Chief Counsel, USCIS. *Authority of Asylum Officers to Retain Fraudulent Documents or Documents Fraudulently Obtained*. Memorandum to Lori Scialabba, Associate Director, RAIO and Greg Smith, Acting Associate Director, National Security and Records Verification. (Washington, DC: November 30, 2007). 4 p.

2. Ted H. Kim, Acting Chief, Asylum Division, US Citizenship and Immigration Service. *Fact Sheet on Confidentiality and Fact Sheet Attachment*. Memorandum to Asylum Office Directors and Deputy Directors. (Washington, DC: October 18, 2012). 8 p.

ADDITIONAL RESOURCES

1. Cooper, Bo. INS Office of the General Counsel. *Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information,* Memorandum to Jeffrey Weiss, Director, Office of International Affairs. (Washington, DC: June 21, 2001), 7p.

2. INS Immigration Officer Academy (IOA). *Fraudulent Documents: Counterfeiting (Instructor Guide).* (Glynco, GA: March 1999).

3. Langlois, Joseph E. Asylum Division, INS Office of International Affairs. *Discovery of fraudulent documents* ***after*** *the asylum interview*, Memorandum to Asylum Directors, Supervisory Asylum Officers, and Asylum Officers. (Washington, DC: May 27, 1998), 2p. (Included in lesson, *Credibility*)

4. Langlois, Joseph E. Asylum Division, INS Office of International Affairs. *Fingerprint and Identity Checklist,* Memorandum for Asylum Office Directors. (Washington, DC: September 3, 1998), 4p.

5. Langlois, Joseph E. Asylum Division, INS Office of International Affairs. *Known or Suspected Human Rights Abusers,* Memorandum to Asylum Office Directors,

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Supervisory Asylum Officers, QA/Trainers, Asylum Officers, (Washington, DC: September 11, 2000), 5p.

6. Langlois, Joseph E. Asylum Division, INS Office of International Affairs. *Matter of O-D, Int. Dec. 3334 (BIA 1998)*, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 29 April 1998), 3 p.

7. Langlois, Joseph E. Asylum Division, Office of International Affairs. *Procedures for Contacting HQASM on Terrorist Cases*, Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 3, 2002), 2p.

8. Pearson, Michael A. INS Office of Field Operations. *Forensic Document Laboratory Case Backlogs,* Memorandum to Regional Directors, et al. (Washington, DC: July 13, 1999), 2p.

9. Pearson, Michael A. Office of Field Operations. *Human Rights Abuse Memorandum of Understanding*, Memorandum to Regional Directors, et al. (Washington, DC: Sept. 29, 2000), 2p. plus attachments.

10. Pearson, Michael A. INS Office of Field Operations. *Revised Procedures for Submitting Evidence to the Forensic Document Laboratory,* Memorandum to Regional Directors, et al. (Washington, DC: July 13, 1999), 2 p.

11. Reno, Janet. Office of the Attorney General. *FBI Access to INS Asylum Files for Foreign Counterintelligence Purposes,* Memorandum to Director, FBI, and Commissioner, INS (Washington, DC: Nov. 4, 1994), 1 p.

12. Williams, Johnny N. Office of Field Operations. *Interagency Border Inspection System Records Check*, Memorandum to Regional Directors, et al. (Washington, DC: 2 July 2002), 4 p. plus attachment.

13. Weiss, Jeffrey. INS Office of International Affairs. *Processing Claims Filed by Terrorists or Possible Terrorists,* Memorandum to Asylum Office Directors and HQASM Staff, (Washington, DC: October 1997), 2p.

14. *Annex Regarding Sharing of Information on Asylum and Refugee Status Claims to the Statement of Mutual Understanding on Information Sharing between the Department of Citizenship and Immigration Canada (CIC) and the Bureau of Citizenship and Immigration Services (BCIS), of the U.S. Department of Homeland Security (DHS)* (22 August 2003), 10 pp.

15. *Statement of Mutual Understanding on Information Sharing among the Department of Citizenship and Immigration Canada (CIC) and the U.S. Immigration and Naturalization Service (INS) and the U.S. Department of State (DOS)* (February 27, 2003), 12 pp.

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16. Joseph E. Langlois. Director, Asylum Division. *Choicepoint Guidance*, Memorandum to Asylum Office Directors and Deputy Directors (Washington, DC: 29 September 2003), 1 p., plus attachments.

17. Joseph E. Langlois, Director, Asylum Division, US Citizenship and Immigration Service. *US-VISIT SIT Deployment and Issuance of Draft Procedures, including 7 attachments: Draft Procedures, Asylum and Nacara sec. 203 Background Identity and Security Checklist, Federal Registar Notice, 50 Busiest Land Ports of Entry, Deployment Dates for Immigrant Visas Issued Overseas, Deployment Dates for Nonimmigrant Visas Issues Overseas, and Visa Refusal Codes*, Memorandum to All Asylum Office Personnel (Washington, DC: May 26, 2006) 21 pp. including attachments

18. Joseph E. Langlois, Director, Asylum Division, US Citizenship and Immigration Service. *APSS SAFE Screen Guidance*, Memorandum to All Asylum Officer Personnel (Washington, DC: June 5, 2006) 9 pp.

19. Joseph E. Langlois, Director, Asylum Division, US Citizenship and Immigration Service. *Image Storage and Retrieval System Access for Asylum Office Staff,* Memorandum to All Asylum Office Personnel (Washington, DC: June 6, 2006) 2 p.

20. Joseph E. Langlois, Director, Asylum Division, US Citizenship and Immigration Service. *Minimum Staffing Requirement forAsylum Office Forensic Document Laboratory Certified Document Instructors*, Memorandum to Asylum Office Directors and Deputy Directors. (Washington, DC: October 2, 2006). 2 p.

21. Joseph E. Langlois, Chief, Asylum Division, US Citizenship and Immigration Service. *Disclosure of Consular Affairs Visa Data in Asylum Adjudications*. Memorandum to Asylum Office Directors and Deputy Directors. (Washington, DC: January 24, 2008). 5 p.

22. Alejandro Mayorkas, Director, USCIS. *Disclosure of Asylum-Related Information to the Foreign Government Participants in the Five Country Conference.* Decision Memorandum to Janet Napolitano, Secretary, DHS. (Washington, DC: March 5, 2010). 4 p.

23. Ted Kim, Acting Chief, Asylum Division, US Citizenship and Immigration Service. *Issuance of a New Section of the ISCPM Regarding Information Sharing on Asylum Seekers Pursuant to International Agreements*. Memorandum to All Asylum Office Staff. (Washington, DC: July 22, 2011). 2 p.

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SUPPLEMENTS

Asylum Adjudications Supplement – Fraud in Asylum Adjudications

Effects of Fraud on an Asylum Claim

- Providing fraudulent evidence such as false testimony or fraudulent documents to support an asylum claim has implications for evaluating the applicant's credibility and whether the applicant has met his/her burden of proof.[51]
- An applicant who submits fraudulent evidence should be given the opportunity to explain the submission.
- The failure to provide a reasonable explanation may be grounds for an adverse credibility finding.
  - For an adverse credibility finding, the fraudulent evidence must be considered under the "totality of the circumstances" standard as required by the REAL ID Act.[52]
  - If the fraudulent evidence is discounted, the officer may find that the applicant has failed to meet his or her burden of proof, depending on the evidentiary weight accorded to the testimony.[53]
  - Please see the RAIO Training Module, *Credibility* for a discussion of the REAL ID Act and its use of the "totality of the circumstances" standard rather than "materiality" in establishing credibility and burden of proof issues. The totality of the circumstances standard applies to issues of fraud as well as other credibility issues present in an applicant's claim, when making a credibility determination.

[51] For further discussion of burden and standards of proof, see RAIO Training Module, *Evidence*.

[52] *See* INA § 208(b)(1)(B)(iii).

[53] *See* INA § 208(b)(1)(B)(ii) ("In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record.").

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Asylum Adjudications Supplement – Consequences of Fraud in the Asylum Program

Termination of Asylum

Source of Authority: 8 C.F.R. § 208.24

- When fraud is discovered after asylum has been granted, asylum can generally be terminated if the alien has not yet adjusted to legal permanent resident (LPR) status.

- The Prima Facie standard is required to issue a Notice of Intent to Terminate (NOIT).

- The burden shifts to USCIS to establish one or more of the termination grounds by a Preponderance of the evidence.

  Please note: As of 8/7/2012, Asylum Offices operating in the Ninth Circuit (ZLA, ZSF, and ZCH (Idaho Only)) have suspended direct terminations processing until further notice, based on the court decision in *Nijjar v. Holder*, 689 F. 3d 1077 (9th Cir. 2012). Affected offices may still issue a Notice of Intent to Terminate (NOIT) for termination by the Executive Office for Immigration Review (EOIR), in coordination with ICE OPLA.

  For more information on Termination procedures please see the AAPM III.V Termination of an Asylum Approval.

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Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	History of the Affirmative Asylum Program
Rev. Date	May 9, 2013
Lesson Description	This lesson provides an historical overview of the refugee definition and asylum process in the United States, leading up to the creation of the Asylum Program. Information is provided on each major piece of legislation or regulation that contributed to the development of the Asylum Program.
Terminal Performance Objective	An Asylum Officer will be familiar with the history, mission, values, and goals of the U.S. Asylum Program within the context of DHS, USCIS, and RAIO, and utilize awareness of the U.S. Asylum Program's history to underscore the importance of conducting high quality adjudications in a timely manner.
Enabling Performance Objectives	1. Identify the key historical points in the development of the Asylum Program. (OK1)(OK2)(AIL1) 2. Explain the shortcomings of the 1990 Final Rule and the remedies provided in the 1995 Final Rule. (OK1)(OK2)(OK3)
Instructional Methods	Lecture, class discussion, visual aids.
Student Materials/ References	Participant Workbook; David A. Martin. "Making Asylum Policy: The 1994 Reforms," Washington Law Review (Vol. 70, No. 3, July 1995), pp. 725-755.
Method of Evaluation	Written test
Background Reading	1. Beck, Susan. "Cast Away," The American Lawyer (October 1992), pp. 54-59. 2. Beyer, Gregg A. "Affirmative Asylum Adjudication in the United States," Georgetown Immigration Law Journal (Vol. 6, No. 2, June 1992), pp. 253-284. 3. Beyer, Gregg A. "Establishing the United States Asylum Officer Corps: A First Report," International Journal of Refugee Law (Vol. 4, No. 4, July, 1992), 39 pp. 4. Beyer, Gregg A. "Reforming Affirmative Asylum Processing in

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the United States: Challenges and Opportunity" The American University Journal of International Law and Policy (Vol. 9, No. 4, November 1994), pp. 43-78.

5. Conover, Ted. "The United States of Asylum," New York Times Magazine (September 20, 1993), pp. 56.

6. Langlois, Joseph E. Director, Asylum Division, US Citizenship and Immigration Services. *The Effect of the "Real ID" Act on* the Processing of Coercive Population Control (CPC) Cases, Memorandum for all Asylum Office Personnel (Washington, DC: 16 June 2005), 3pp.

7. Langlois, Joseph E., Acting Director, Asylum Division, Office of International Affairs. Final Rule amending the asylum regulations in 8 C.F.R. 208, Memorandum to Asylum Office Directors, et al. (Washington, DC: 6 December 2000), 8 pp., plus attachment.

8. Martin, David A. "Making Asylum Policy: The 1994 Reforms," Washington Law Review (Vol. 70, No. 3, July 1995), pp. 725-755.

New Critical Tasks

1. Knowledge of the Asylum Division History (OK1)
2. Knowledge of Asylum Division mission, values and goals. (OK2)
3. Knowledge of U.S. case law that impacts Asylum Division policies and procedures (AIL1)
4. Knowledge of how the Asylum Division contributes to the mission and goals of RAIO, USCIS, and DHS (OK3)

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I. INTRODUCTION

Those who cannot remember the past are condemned to repeat it.

George Santayana, 1863–1953, The Life of Reason, Volume 1, 1905

The purpose of this lesson is to provide the context out of which the U.S. asylum program arose. After a brief discussion of the development of refugee protection on the international level, the lesson describes the critical events in the creation of a U.S. statutory and regulatory scheme for the protection of refugees. Through the lens of the past, this lesson strives to convey some of the challenges that will always confront the management and officers of the U.S. asylum program.

See generally, RAIO module International Human Rights Law and UNHCR module Overview of UNHCR and Concepts of International Protection for more information on the development of international refugee law.

II. DEVELOPMENT OF REFUGEE PROTECTION UNDER INTERNATIONAL LAW

In the 20th century, individuals fleeing their countries of nationality and seeking protection elsewhere became the subject of international legal protection. The Universal Declaration on Human Rights, adopted by the United Nations General Assembly in 1948, includes the right of individuals to seek and to enjoy in other countries asylum from persecution.

Gregg A. Beyer, Affirmative Asylum Adjudication in the United States, 6 Geo. Immigr. L.J. 253, 255-256 (1992).

Universal Declaration of Human Rights. Art. 14, G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948

Because the Universal Declaration is not a treaty, the right to seek asylum was not immediately binding on UN member states. Yet within a few years of the Universal Declaration's proclamation, the 1951 United Nations Convention relating to the Status of Refugees (1951 Convention) was crafted establishing the concept of protection of asylum seekers as an obligation of states.

Many scholars have asserted that many, if not all, of the rights enumerated in the Universal Declaration have become customary international law.

The 1951 Convention was innovative for two important reasons. First, it established a universal definition of a refugee, as opposed to a definition based on the nationality of the individual seeking protection.

1951 Convention Relating to the Status of Refugees, Art. 1, 189 U.N.T.S. 137, July 28, 1951.

In the post-World War I period, the League of Nations created programs to protect specific national or ethnic groups that would have been at risk were they to return to their countries of citizenship. Such groups included Russians, Assyrians, Turks, Greeks, Armenians, and German Jews. UNHCR. *State of the World's*

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Refugees: The Challenge of International Protection (New York: 1993), pp. 11-12.

Second, the 1951 Convention prohibits contracting parties from expelling or returning an individual to a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

1951 Convention, Art. 33.

Despite these innovations, the Convention's universal definition of a refugee was initially limited in scope. The definition applied only to those individuals in refugee-like situations "as a result of events occurring before 1 January 1951." In addition, the 1951 Convention allowed signatories to limit that definition further to "events occurring in Europe before 1 January 1951."

1951 Convention, Art. 1(A)(2)

1951 Convention, Art. 1(B), emphasis added

In 1967 a Protocol to the 1951 Convention was established. In addition to binding its signatories to apply the substantive provisions (Articles 2-34) of the 1951 Convention, the Protocol amended the definition of a refugee. First, the Protocol removed the date restriction, allowing the refugee definition to be used to address refugee situations that developed in the post-war period. Further, the 1967 Protocol required signatories to apply the definition without geographic limitation, unless the signature country had made an appropriate declaration and had renewed the declaration upon signature of the Protocol. Thus taken together, the 1951 Convention and its 1967 Protocol establish a truly universal definition of a refugee to be applied by party states. More importantly, for the first time, the protection of refugees who would be persecuted if returned to their countries of nationality was no longer optional, but became an international legal obligation.

1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, January 31, 1967.

1967 Protocol, Art. I.

III. 1952-1980: DEVELOPMENT OF REFUGEE PROTECTION IN US LAW, A PERIOD OF CONFLICTING DEFINITIONS

> World War II and the holocaust shamed the world into formalizing a basic international legal framework for *protecting refugees. "Disregard and contempt for human rights…[and] barbarous acts which outraged the conscience of mankind," cause the United Nations to* include the right to seek and enjoy asylum from persecution in the 1948 Universal Declaration of Human Rights, The 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol further elaborated this right and the corresponding obligations for both applicants and States Party. The United States signed the 1967 Protocol in 1968, thus committing itself to the international regime of refugee protection.

Gregg A. Beyer, Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities, 9 AM. U. J. INT'L L. & POL'Y 43, 55 (1994).

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Despite the international recognition of the need for refugee protection in the 1951 Convention, the US did not adopt a definition of a refugee until several years later. The United States did not accede to the 1951 Convention, and in 1952 the Immigration and Nationality Act (INA) was passed without any express provisions for the resettlement of refugees or admission of arriving asylum-seekers.

David A. Martin, The Refugee Act of 1980: Its Past and Future, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 91, 109 (1992).

The 1952 Act did allow for a discretionary form of withholding of deportation for aliens who, in the opinion of the Attorney General, "would be subjected to physical persecution." See INA § 243(h) (1952); 66 Stat. 214, which was amended in 1965 to allow withholding of deportation for those who would be "persecuted on account of race, religion, or political opinion." INA § 243(h) (1965), 79 Stat. 918.

Beginning in 1956 the U.S. government adopted an ad hoc approach to refugee protection, with the Attorney General using his parole authority under the INA to allow refugees to enter the U.S. But because the INA did not provide a means for parolees to adjust their status to that of legal permanent residents (LPRs), Congress had to pass a series of special legislative acts, such as the Hungarian Refugee Act of 1958, the Cuban Refugee Act of 1966, and the Indochinese Refugee Act of 1977, to allow specific populations paroled into the U.S. in response to refugee situations to adjust their status.

Martin, The Refugee Act of 1980, at 92-95.

The first attempt by the U.S. to regularize the identification of refugees came with the passage of the September 1957 "Refugee-Escapee Act." That statute defined the term "refugee-escapee" in geographical and political terms, as persons fleeing communist or communist-dominated countries, or the Middle East. In 1965, Congress further regularized U.S. refugee protection programs by amending the INA to incorporate the "refugee-escapee" definition and provide for the resettlement of refugees as a category of immigrants – "conditional entrants." Three years after incorporating this politically oriented definition into the INA, the United States acceded to the 1967 Protocol and therefore accepted the obligation to apply the substantive provisions of the 1951 Convention and the universal definition of a refugee as amended by the Protocol.

Though the United States had acceded to the 1967 Protocol, and its refugee definition unencumbered by political or geographic

Section 15(c)(1) of the Act of Sept. 11, 1957, 71 Stat. 643; Joyce Vialet, CRS, CRS Report for Congress: "A Brief History of U.S. Immigration Policy," 1991.

INA § 203(a)(7) (1965); Section 3 of the Act of October 3, 1965, 79 Stat. 911, 913

1967 Protocol, 19 U.S.T. 6223, (entered into force for the United States on Nov. 1, 1968).

Refugee Act of 1980, PL 96-

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constraints, the definition of a refugee in U.S. immigration law was not amended until 1980. At the time of accession to the 1967 Protocol there was an assumption that U.S. practices already conformed to the requirements of the 1951 Convention and its 1967 Protocol. In the eyes of the Administration, accession to the 1967 Protocol was less about changing our practices with respect to refugees, and more about signaling the global leadership of the U.S. in the area of refugee protection.

212, 94 Stat. 102.

David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. PA. L. REV. 1247, 1259 (1990); see INS v. Stevic, 467 US 407, 428 n.22 (1982) (arguing that the geographical limitations in INA § 203(a)(7) on those eligible for refugee resettlement as conditional entrants served as limits on admission, which was not required by the 1951 Convention, and thus was consistent with the Convention definition of a refugee).

But because the 1967 Protocol is not a self-executing treaty, implementing legislation was required to make the treaty operative. During the gap between accession to the 1967 Protocol and the passage of the Refugee Act of 1980, U.S. officials continued to look to the INA for authority to address the admission of refugees. As a result of this failure to promptly enact implementing legislation, the United States continued, until 1980, to apply its politically and geographically limited definition to refugee determinations despite accepting the universal definition of a refugee of the 1967 Protocol.

See INS v. Stevic, 467 US 407, 428 n.22 (1982) (noting that Article 34 of the 1951 Convention encouraged nations to facilitate the admission and naturalization of refugees, but did not require such a program to begin upon ratification).

Analysts of immigration policy have suggested that there were advantages to retaining the ideologically based definition. The adjudication of the former refugee definition was easier to adjudicate, requiring only a determination that the applicant was a citizen of communist or Middle Eastern country. The definition required little examination into the individual circumstances of the alien seeking protection, which would be required to determine whether there existed an objective possibility that the individual would be persecuted in the future (the universal definition standard). In addition, political support from Congress and the public was more easily generated for a program closely aligned with the country's primary foreign policy objective at that time – fighting Communism. The non-ideological definition of a refugee embodied in the 1951 Convention, and its implication that foreign policy concerns would not be a factor in asylum decisions, requires the U.S. to recognize as refugees those aliens who have been persecuted by government regimes that U.S. foreign policy supported. Acceptance of an approach that seemed to run counter to other U.S. policies was hard to win.

See Beyer, Reforming Affirmative Asylum Processing in the United State: Challenges and Opportunities, at 58-60.

IV. REFUGEE ACT OF 1980: US ACCEPTS UNIVERSAL DEFINITION

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The Refugee Act of 1980 was passed with the primary purpose of bringing U.S. refugee law into conformance with the obligations it assumed when it signed the Protocol on November 1, 1968. The statutory definition of refugee was derived from the 1951 Convention definition: "…any person who is outside any country of such person's nationality…, 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." In fact, the U.S. definition of a refugee codified in the INA is broader than the Convention definition in that under United States law an individual can meet the refugee definition based on past persecution on account of one of the protected characteristics, even if he or she does not have a well-founded fear of future persecution.

See INS v. Cardoza-Fonseca, 480 US 421, 436 (1987).

Refugee Act of 1980. PL 96-212, 94 Stat. 102 (1980); INA § 101(a)(42).

Even more important to the fulfillment of U.S. obligations under the 1967 Protocol, the Refugee Act made mandatory the withholding of deportation to a country where an individual's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, consistent with Article 33 of the 1951 Convention (non-refoulement).

Refugee Act of 1980. PL 96-212, 94 Stat. 102. Prior to 1980 the INA allowed the Attorney General to withhold deportation in some situations, but did not require it. In INS v. Stevic, the Supreme Court asserted that the Attorney General could accommodate the requirements of Article 33 by always exercising his discretion to withhold deportation where the alien would be persecuted on account of a protected ground if returned. 467 US 407, 428, n.22 (1984).

The Refugee Act of 1980 also mandated that the Attorney General establish procedures to exercise discretion to grant asylum to refugees physically present in the United States, but provided little guidance as to the mechanisms to be created or standards to be applied. Under interim regulations published in June 1980, Immigration and Naturalization Service (INS) District Directors were given the authority to adjudicate asylum requests of those aliens not in exclusion or deportation proceedings. The decision to vest in INS District Directors the authority to grant asylum to aliens not in deportation or exclusion proceedings (affirmative applications) was consistent with the practice at that time to give District Directors authority over most immigration adjudications.

Beyer, Affirmative Asylum Adjudication in the United States, at 262; T. David Parish, Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee, 92 COLUM. L. REV. 923, 925 (1992).

8 CFR § 208.1 (1980), 45 FR 37392

Gregg A. Beyer, Establishing the United States Asylum Officer Corps: A First Report, 4 INT'L J. REFUGEE L.

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455, 459 (1992).

V. 1980-1990: DEBATE OVER A FINAL ASYLUM RULE

A. Intervening Events

At the time that the interim rules were published, many believed that a final rule would follow shortly. However, intervening immigration events and the ensuing debate over the proper role of asylum in U.S. immigration policy hampered consensus-building among interested parties.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 459.

The landscape of immigration policy changed in the early 1980s when large influxes of Haitian and Cuban migrants arrived on U.S. shores exposing the new reality of the United States as a country of first asylum. Almost immediately, the situation demonstrated that not only did the U.S. not anticipate so many individuals reaching its shores to request asylum, but also did not appear ready to deal with the situation. Both the administration and Congress were legitimately concerned that the U.S. had lost control over its borders. Even a UN Deputy High Commissioner for Refugees urged that the U.S. regain its control over its borders, on the rationale that the general public does not support generous refugee programs if it believes that the programs have lost control. In addition, the situation demonstrated the administrative difficulty of determining more than that someone is from a country where life is "demonstrably unfree," but that the individual in question will be targeted if returned.

See Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 459.

Beyer, Affirmative Asylum Adjudication in the United States, at 265.

Martin, The Refugee Act of 1980: Its Past and Future, at 114. Others cite the experience of the Cuban-Haitian migration situations as demonstrative of the instinct of US officials to view immigration policy through the lens of foreign policy and the challenges that it faced in applying a neutral definition of a refugee. Advocates pointed out differences in the way that the situations of these two groups were being addressed by INS, especially in detention policies and policies regarding adjustment of status to that of a permanent resident. See US Committee for Refugees (USCR), Despite a Generous Spirit: Denying Asylum in the United States, at 14-18 (1986).

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B. Failure to Achieve Ideals

The debates that ensued after the arrival of the Haitians and Cubans in the early 1980s illuminated a perceived conflict between two ideals: 1) offering protection to those who have been persecuted or fear persecution, regardless of foreign policy implications, and 2) successful control over the entry of aliens. However, within the first few years after the Refugee Act was passed, it became apparent that the limited asylum system established by the Refugee Act failed to reach either of the two ideals. Both government officials and outside organizations identified specific problems that frustrated the government's ability to achieve the ideals of the asylum system.

See Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, at 1270.

First, the prospect of obtaining permanent residence in the U.S. was attractive to many who had fled their countries of nationality, especially because an alien did not have to be legally present in the United States, or have a sponsoring relative with legal status, as required with most other means of immigration, in order to apply for asylum. In large part because of the Cuban-Haitian migration situation, within six months of the passage of the Refugee Act, more than 100,000 claims for asylum had been filed. By October 1982 there were more than 140,000 asylum cases before INS. Applying for asylum was made even more appealing by the regulations allowing asylum applicants to receive work authorization in the discretion of the district director, absent a finding that the asylum claim is frivolous. These factors resulted in a growing backlog, but, despite this, very few officers were assigned to interview and adjudicate these cases.

Martin, The Refugee Act of 1980: Its Past and Future, at 112.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 459.

Arthur Helton, INS is the One *that's Abusing Political* Asylum, HOUSTON CHRONICLE, February 22, 1989, at 3 (claiming that in 1989 only 30 officers nationwide were involved in adjudicating asylum claims at that time).

Martin, The Refugee Act of 1980: Its Past and Future, at 110.

Second, there was concern that adjudicators did not have requisite expertise in asylum law or access to relevant resources to fairly adjudicate the claims before them. In part, INS Examiners assigned to adjudicate asylum cases were viewed as "low level functionaries" with little or no instruction in asylum matters. Because the Examiners adjudicating asylum requests reported to INS District Directors, many believed that an enforcement mentality pervaded the administration of the asylum system. Compounding the concern about the training and management of the INS Examiners was the recognition of the complexity of the adjudication. Bona fide asylum applicants are likely to have left their countries of nationality without identity or other forms of documentation, and typical claims for asylum involve facts that are not easily verifiable, such as low-level membership in a political party or instances of past harm by

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 458.

Helton, *INS is the One that's* Abusing Political Asylum.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 466.

Martin, The Refugee Act of 1980: Its Past and Future, at 115.

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authorities. Credibility determinations are critical and a degree of prognostication is required.

Finally, the lack of real consequences for those who apply for asylum but are not eligible reduced the effectiveness of the entire system. Not only was there the possibility of receiving work authorization, but there was also little likelihood that a denial of asylum would result in the initiation of deportation proceedings and removal from the country. That reality both undermined any disincentive that an alien would have against filing a mala fide application for asylum and eroded public support for a generous asylum system.

Martin, The Refugee Act of 1980: Its Past and Future, at 115-116.

C. Identification of Goals

Through the examination of these failures, government officials and those in the advocacy committee identified two goals paramount to creating an effective asylum system: to produce high quality adjudications and to lessen systemic incentives for filing spurious claims in order to obtain work authorization or remain longer in the United States. Alternatives debated during the ten-year period between the promulgation of the interim rule in 1980 and the final rule in 1990 were measured against their ability to achieve these two goals.

See Beyer, Affirmative Asylum Adjudication in the United States, at 258.

D. Alternatives to the Status Quo

Four questions dominated the deliberations regarding the best design to achieve the goals of a prompt and fair adjudication and a system that did not create incentives for filing spurious claims:

1) Who should conduct the primary adjudication?

2) What role should Immigration Judges play in the process?

3) What organizational entity should control the administration of the affirmative asylum process?

4) How, and from what source, should country conditions be considered in the adjudication?

A final rule promulgated in 1990 answered each of these four questions, but an understanding as to why the questions were answered as they were requires a discussion of the debates surrounding the asylum program.

1. Who should conduct the primary adjudication?

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Many refugee advocates, and some government officials, involved in the process of developing a new asylum system did not want to leave the primary adjudication of affirmative asylum claims to INS district adjudicators. Those familiar with refugee protection issues believed that the complex nature of the refugee definition, coupled with the reality that few refugees have access to corroborating documentary evidence, called for a more involved interview and in-depth legal analysis than most adjudications handled by the district offices. In addition, some outside the INS perceived district directors, and transitively those supervised by them, to be enforcement-oriented and less likely to look compassionately on the claims of those seeking refuge. Finally, many recognized that other adjudicative responsibilities in district offices would pull resources away from the adjudication of asylum claims.

See Martin, The Refugee Act of 1980: Its Past and Future, at 101.

See Beyer, Affirmative Asylum Adjudication in the United States, at 274; 1988 Revised Proposed Final Rule, 53 FR 11300, 11301.

Prior to the proposal and passage of the Refugee Act of 1980, the Select Commission on Immigration and Refugee Policy (1979-1981) was formed to study the laws and policies regarding refugees and make recommendations to the President and Congress. The president of the University of Notre Dame, Rev. Theodore Hesburgh, CSC, served as Chairman. In a Final Report submitted on March 1, 1981 (and echoed in a supplemental Staff Report issued in April 1981), the Select Commission recommended that a new position be created, "asylum admissions officer," to be filled by individuals trained in making eligibility determinations and with access to area experts familiar with conditions in the countries of origin. In response to the Select Commission's report, President Reagan created a Task Force on Immigration and Refugee Policy, which, after three months of work, reached a similar conclusion that applications for asylum be adjudicated by a new, dedicated corps of asylum officers within the INS. Anticipating a legislative response to these recommendations, the Department of Justice chose not to address asylum procedures when a final rule on refugee admission procedures was issued in September 1981. Indeed, in October 1981, the President put forward a legislative package to Congress that would have created the position of asylum officer within INS.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 460.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 460-461.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 461.

1981 Final Rule, 46 FR 45116; Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 461.

Omnibus Immigration Control Act, S. 1765, H.R. 4832; Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 461.

Other legislative proposals focused on administrative judges as the appropriate individuals to adjudicate asylum requests.

Immigration Reform and

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The Immigration Reform and Control Act (IRCA) of 1983 contained provisions that would have created a system in which specially trained judges would hear asylum cases. In June 1989, the Administrative Conference of the United States recommended that a new Asylum Board be created within EOIR, with asylum hearings being conducted by asylum adjudicators recruited from attorneys with "adjudicative skills … familiar with international relations and refugee affairs." It was recommended that the adjudicators under the Asylum Board receive "salary, benefits, and guarantees of adjudicative independence equivalent to those of immigration judges."

Control Act, S. 529, H.R. 1510; Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 462.

Administrative Conference of the United States. Recommendation 89-4 Asylum Adjudication Procedures, June 16, 1989. The Administrative Conference of the United States, an independent agency and advisory committee created in 1968 and terminated in 1995, studied U.S. administrative processes with an eye to recommending improvements to Congress and executive agencies.

INS management supported the creation of a new corps of officers dedicated to asylum. In response to internal recommendations regarding the asylum program, INS Commissioner Alan C. Nelson declared that asylum processing issues would be an INS priority for fiscal year 1983 and that training would be organized for "specialized training for asylum officers" in that time period. Little progress was made on this proposal, until August 28, 1987 when a proposed final rule was issued which would have created the position of asylum officer under the management of the Assistant Commissioner for Refugee, Asylum, and Parole.

Alan C. Nelson, INS Commissioner, Memorandum Asylum Study – Attached, March 29, 1983, quoted in Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 462.

1987 Proposed Rule, 52 FR 32552, 32553. However, no change to the administration of the asylum program was implemented until after the publication of the 1990 Final Rule.

2. What role should the Immigration Judges play in the process?

As various organizations and committees recommended a specialty position for the adjudication of asylum cases, some indicated that the decisions of these new officers should be able to be appealed to a higher adjudicative body.

See Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 461. (The President's Task Force recommended hearings before INS asylum officers whose decisions could be appealed to the Attorney General).

Other plans called for administrative judges to take on the primary role of the adjudication of asylum cases, as was one of the proposed measures to be included in IRCA, as discussed above.

See discussion on IRCA in Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 462.

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The 1987 proposed final rule adopted what proved to be the most controversial approach to the role of immigration judges. The 1987 rule proposed that INS asylum officers be the primary adjudicator of asylum and withholding of deportation claims and that their decisions be binding on immigration judges should the alien be placed into exclusion or deportation proceedings. Even defensive applications filed before an immigration judge (or for the first time on appeal to the BIA) would have to be referred to an asylum officer for a hearing before exclusion or deportation proceedings (or the appeal) could continue. In his testimony before a Subcommittee of the Senate Committee on the Judiciary in 1981, David Martin provided twin rationales for a similar proposal. First, a non-adversarial interview is the best setting for eliciting information from an applicant unfamiliar with the United States courtroom, especially where the primary evidence in the case is the applicant's testimony. Second, a limited review confined to the record would more expeditiously resolve cases.

52 FR at 32554.

52 FR at 32554.

David A. Martin, Asylum Adjudication, Hearings Before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 1981.

Backlash over this proposal from the refugee advocacy community prompted a reversal of position. Advocates did not trust that this new corps of asylum officers would be sufficiently independent of the enforcement mentality or foreign policy concerns. Furthermore, the removal of the possibility of a de novo hearing by an immigration judge represented the loss of a last safety net that advocates believed would provide some protection to individuals facing return to a country where they may be persecuted. In response to the controversy, the proposed final rule issued on April 6, 1988 provided for a de novo hearing by an immigration judge where an applicant has been denied asylum by the asylum officer and been placed in exclusion or deportation proceedings. However, the supplemental information to the proposed rule suggested that DOJ could later revive the idea of removing the authority of immigration judges to adjudicate asylum requests in exclusion or deportation proceedings, as the decisions of the asylum corps achieved greater quality and consistency.

See Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 464-465.

53 FR 11300.

53 FR at 11301; See Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 465.

3. What organizational entity should control the administration of the affirmative asylum process?

The 1987 proposed final rule placed the authority over the management of the program in the INS Assistant Commissioner for Refugees, Asylum, and Parole (CORAP). This organizational assignment was retained by the 1988

52 FR at 32554.

53 FR at11303.

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proposed final rule. The 1988 rule recognized that INS district directors were required to devote significant amounts of time to non-asylum matters. Even where individual districts had established a corps of examiners devoted to asylum cases, those examiners rarely received specialized training and little opportunity to strive for uniformity in decision-making with examiners in other districts.

53 FR at11301.

However, there were some, especially within INS, who were doubtful that the administration of the program would be best placed in the Central Office. After the publication of the 1988 proposed final rule, INS Commissioner Nelson recommended to Attorney General Thornburgh that INS District Directors supervise asylum officers. The INS at that time felt that because the role of Immigration Judges had been reinstated with the proposed rule of 1988, there was less of a need to keep the management of asylum adjudications separate from the more enforcement-oriented districts.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 465.

INS Pushes Major Changes to Proposed Asylum Rule, INTERPRETER RELEASES, Vol. 66, No. 1, Jan. 2, 1989, at 3.

In addition to the debate over Central Office or local district supervision, some raised concerns over the role of the Asylum Policy and Review Unit (APRU) within the Department of Justice. APRU was set up in 1987 as a component within the DOJ's Office of Legal Policy and was tasked with the review of certain asylum decisions (including final denials) forwarded by District Directors. APRU also provided both general analyses of asylum issues as well as case specific comments to the Deputy Attorney General. Some saw the creation of APRU as a reflection of DOJ's lack of confidence in the ability of INS to handle sensitive cases; others saw it as a way for DOJ to achieve a higher grant rate for applicants fleeing the communist governments of Eastern European countries (see section on foreign policy implications, below).

Martin, Reforming Asylum Adjudications: On Navigating the Coast of Bohemia, at 1313-1314.

Under the 1987 proposed final rule, APRU was to be involved in several steps of the asylum adjudication. APRU was given joint (with CORAP) responsibility for the compilation and dissemination of country conditions information; was to be provided copies of all applications for asylum and decisions on applications; and had the authority to review affirmative decisions or decisions as to termination prior to becoming effective. The INS objected to the review of asylum denials by APRU, claiming that the process was duplicative and expensive. Outside observers not only viewed APRU's review role as duplicative, but

52 FR at 32554.

52 FR at 32558.

52 FR at 32557, 32560.

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also believed that to some extent it undercut the authority of the Board of Immigration Appeals in attempts to reverse the Board's finding after a deportation order was administratively final.

66, No. 1, Jan. 2, 1989, at 3.

Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, at 1338.

4. How, and from what source, should country conditions be considered in the adjudication?

Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, at 1262.

Through the codification of a definition of a refugee based on the Convention definition, Congress demonstrated its intent that refugee standards be applied neutrally, without an ideological basis for the decision. However, early applications of the definition were not immune from foreign policy concerns. Under the 1980 interim asylum regulations, the district director requested an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State (DOS). This opinion could provide the basis of the adjudicator's decision, in whole or in part.

8 CFR § 208.7 (1980).

See 8 CFR § 20.8(d) (1980).

Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, at 1303.

Though DOS advisory opinions were not binding on the adjudicating officer, a General Accounting Office study found that in 1984 the INS agreed with the State Department opinion in 96 percent of cases. Outside observers supported their claim that decisions on individual cases were heavily influenced by foreign policy concerns by citing approval rates for asylum seekers in the 1980s. Statistics covering the years 1983-1986 indicate that the highest approval rates were for applicants from countries considered to be unfriendly to the United States (Iran – 60.4%; Romania – 51.0%; Czechoslovakia – 45.4%) and that the lowest approval rates were for applicants from countries with anti-communist or friendly governments (El Salvador – 2.6%; Haiti – 1.8%; and Guatemala – 0.9%).

USCR. Despite a Generous Spirit: Denying Asylum in the United States, at. 8. The USCR report also notes that the foreign policy paradigm did not always apply; there was a lower approval rate (14.0%) of Nicaraguans seeking asylum from the Sandinista government over the same period.

A politically influenced asylum system was not without support within the government. Edwin Meese, the Attorney General from 1985 to 1988, saw the validity of arguments made by representatives of Nicaraguan and Polish asylum-seekers that it was peculiar that the US government would deny asylum to people fleeing countries that the US opposed in foreign policy. To address this concern, the administration had considered issuing rules that would create a presumption that those individuals fleeing "totalitarian regimes" had a well-founded fear of persecution.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 463-464.

USCR, Despite a Generous Spirit: Denying Asylum in the United States, at 8, 10.

With the proposed final rule issued in 1987, DOJ and INS

52 FR at 32553.

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recognized that consideration of country conditions from diverse sources would increase the accuracy and consistency of asylum decisions. Therefore, the proposed rule required CORAP to compile and disseminate information concerning the persecution of persons in other countries. In addition, regulations allowed asylum officers to rely on the country conditions information from sources beyond the Department of State that had been compiled and disseminated by CORAP and APRU. BHRHA was no longer required to provide opinions on each case, but retained the option to comment. However, despite these moves toward a more politically neutral decision, the 1987 proposed rule required that asylum officers consider the DOS Country Reports on Human Rights Practices to be the principal source of country conditions information.

52 FR at 32554.

52 FR at 32556.

52 FR at 32554.

The concern regarding the influence of foreign policy over asylum decisions was personified in the plaintiffs in the class action lawsuit American Baptist Churches v. Thornburgh (initially, American Baptist Churches in the U.S.A. v. Meese). In 1985 over 80 religious and refugee service organizations and two individual undocumented aliens brought suit in federal district court against the INS, the Executive Office for Immigration Review (EOIR) and the United States Department of State.

The religious and refugee service organizations were later dismissed from the lawsuit. American Baptist Churches in the USA v. Meese, 712 F. Supp. 756 (N.D. Cal. 1989).

The plaintiffs challenged the actions by the U.S. government on several grounds, including that the government applied immigration laws in a discriminatory manner in violation of their Constitutional right to equal protection of the law. In support of the discriminatory treatment claim, the plaintiffs cited statistics similar to those quoted above that reflected a lower asylum approval rate of asylum requests filed by Salvadorans and Guatemalans. Though an additional claim that international law conferred the right to temporary refuge was dismissed, the court allowed the individual plaintiffs to pursue the claims based on discriminatory denial of asylum and withholding of deportation and unlawful denial of extended voluntary departure and certified a nationwide class of Guatemalan and Salvadoran plaintiffs – the "ABC class."

See American Baptist Churches in the USA v. Meese, 712 F.Supp. 756, 765 (N.D. Cal. 1989).

American Baptist Churches in the U.S.A. v. Meese, 712 F. Supp. 756 (N.D. Cal. 1989) (removing religious and refugee service organizations from the suit for lack of standing and dismissing claim to right to temporary refuge); Order (N.D. Cal. Sept. 12, 1989).

Settlement negotiations, which began in 1990, culminated in a court-approved settlement on January 31, 1991. The stipulated settlement agreement (Settlement Agreement) represents an agreement by both parties regarding the proper procedures for adjudicating the asylum claims of the

Specifically, the Settlement Agreement provides that eligible class members are entitled to de novo adjudication of asylum requests pursuant to the 1990

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class members and is binding on both parties. Reflecting concerns of the plaintiff class, the preamble of the Settlement Agreement states that the following are not relevant to the determination of whether an individual is eligible for asylum:

asylum regulations, irrespective of any decisions rendered on previously filed asylum applications. American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991).

1) foreign policy and border enforcement considerations;

760 F. Supp. 796, 799 (N.D. Cal. 1991).

2) the fact that an individual is from a country whose government the United States supports or with which it has favorable relations; and

3) whether or not the United States government agrees with the political or ideological beliefs of the individual.

Additionally, the preamble provides that the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities.

VI. THE 1990 FINAL RULE: QUALITY AT A COST

A. Basic Elements

A final rule on the asylum system was published on July 27, 1990 and became effective on October 1, 1990. The final rule provided an answer to each of the four questions that had been debated over the course of the previous ten years.

1990 Final Rule. 55 FR 30674-88.

1. A corps of professional asylum officers, trained in international relations and international law, was created solely to adjudicate affirmative asylum claims.

   8 CFR § 208.1(b) (1990).

   Under the new system, asylum officers interviewed applicants for asylum and wrote individualized analyses of the eligibility of the applicant for asylum given the application of the law to the facts at hand. To better ensure quality decisions, as a matter of policy it was decided that all applicants whose claims were not recommended for approval were issued Notices of Intent to Deny (NOIDs), which laid out the legal grounds for a denial, and provided an opportunity to rebut the proposed decision prior to the final adjudication.

   Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 469.

2. The final rule retained the process whereby those applicants not eligible for asylum who were not in legal immigration status were allowed to renew their applications for asylum when in deportation proceedings before an Immigration

   8 CFR § 208.18(c) (1990).

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Judge.

Applicants denied by the Immigration Judge could appeal the decision to the Board of Immigration Appeals and then to federal appellate courts.

3. The new Asylum Corps would operate under the direction of an INS Assistant Commissioner for Refugees, Asylum, and Parole based out of the Central Office. — 8 CFR § 100.2(d)(3)(1990).

The Assistant Commissioner was responsible for "general supervision and direction in the conduct of the asylum program, including evaluation of the performance of the employees." The administration believed that placing authority for the direction of the asylum program in a headquarters office independent of the district offices would separate the program from the enforcement functions, and perceived enforcement mentality, of the rest of INS. The final rule retained a role for DOJ APRU, such as participation in training, passing on country conditions information material to asylum claims, and review of asylum decisions. On June 11, 1992 the functions of APRU were assumed by the Quality Assurance Branch of the INS Asylum Division and the Resource Information Center (RIC) and soon after APRU was abolished. — 8 CFR § 208.1(b) (1990).

55 FR at 30676.

8 CFR § 208.1, 208.17, 208.18 (1990).

In 1993 the functions of CORAP were separated into three branches (Asylum, Refugees, and Parole) within the INS Office of International Affairs (IAO) and later regulations placed the authority for the administration of the affirmative asylum program with the director of IAO. 59 FR 60065, 60068.

4. Country conditions information would be compiled from multiple sources.

The final rule required CORAP "to compile and disseminate to Asylum Officers information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social group, or political opinion, as well as other information relevant to asylum determinations." The regulation mandated the creation of a documentation center, an element not included in either of the proposed rules, to provide officers with information on human rights conditions as had been the practice in asylum systems of other countries. — 8 CFR § 208.1(c) (1990).

8 CFR § 208.1(c) (1990); 55 FR at 30676.

Seven asylum offices opened in April 1991, and an eighth, New York, opened in December 1994. The offices are currently — Asylum applicants who lived far from one of the asylum

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located in Los Angeles (Anaheim), San Francisco, Newark (Lyndhurst), Houston, Miami, Chicago, Arlington, and Rosedale, New York. The program began with eighty-two asylum officers and had a total of 150 by March 1992.

offices would be interviewed at a nearer INS district office by an asylum officer on circuit ride.

Though the final rule answered the four questions debated in the previous years, it remained to be seen whether the new system, and its 82 dedicated asylum officers, was adequate to meet the two goals set before it: to produce high quality adjudications and to lessen systemic incentives for filing spurious claims in order to obtain work authorization or remain longer in the United States.

B. Achievements of the 1990 Final Rule: Improved Quality

In the years of debate prior to the promulgation of the 1990 final rule, refugee advocates and policy analysts questioned the ability of the INS and its adjudicators to produce quality asylum decisions. The administration responded by creating a new profession whose training and dedication would help achieve the desired quality. Many observers found that the newly-founded asylum corps conducted more thorough and informed interviews than those of the past, and demonstrated a thorough understanding of the relevant legal standards.

Lawyers Committee for Human Rights, Uncertain Haven: Refugee Protection on the Fortieth Anniversary of the 1951 United Nations Refugee Convention: A Report (1991).

1. Personnel

Part of the unique character of the new asylum corps could be found in the experience of its staff. Great efforts were made to hire individuals from diverse backgrounds; overseas experience, foreign language abilities, and cross-cultural skills were viewed as assets. 45 percent of new officers were hired from outside the ranks of INS, while 55 percent had some INS or other government experience. New members of the corps had previous experience in overseas refugee processing, domestic refugee resettlement, human rights report, the law, and international relations.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 468 & 471, n. 101.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 471.

2. Training

Focusing on improving the quality and consistency of asylum adjudications, plans for the asylum corps included comprehensive training for the new officers in international relations and international law. To develop this new training program, INS top management encouraged interested NGOs to join INS and asylum program officials in the task. Together, the working group developed the INS

8 CFR § 208.1(b) (1990). 1990 Final Rule, 55 FR at 30680.

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Basic Law Manual, which served as the agency's interpretation of asylum law and provided the basis of much of the new officers' training.

The Asylum Program no longer uses the Basic Law Manual. Asylum Program guidance on adjudications is reflected in the Refugee, Asylum and International Operations (RAIO) Training Modules, the Asylum Division Officer Training Course materials, Asylum Division Procedural Manuals, and other materials. For historical reference, see Joseph E. Langlois, Asylum Division, Office of International Affairs. Use of the Basic Law Manual, Memorandum to Asylum Office Directors, et al. (Washington, DC: 27 August 1999), 1 p.

In late February 1991, a four-week training program for the new asylum officers and supervisors began. The training program included discussions of the political and legal challenges that prompted the creation of the asylum corps; study of asylum law and policies; role-playing exercises to practice interviewing techniques and cross-cultural sensitivity; and assignments in asylum case analysis and decision-writing.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 471-472.

3. Resource Information Center (RIC)

The RIC began operations simultaneously with the new asylum corps on April 2, 1991. The mission of the RIC was to collate and disseminate information on conditions in countries of origin required by asylum officers to accurately assess applicants' eligibility for asylum. In the process of designing the RIC, INS officials worked closely with the Canadian government and its Immigration and Refugee Board Documentation Center and borrowed from its resources it developing the RIC's library of holdings. The RIC collected documentation from many non-governmental sources, such as Amnesty International, Human Rights Watch, and the Lawyers Committee for Human Rights, as well as began plans for producing its own pieces to summarize and analyze the reports of other organizations. This function is now performed by the RAIO Research Unit.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 472-474.

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C. Failing of the 1990 Final Rule: Backlogs are the Cost of Quality

While the ability of the asylum corps to adjudicate cases fairly was regarded as a significant improvement over that of the previous INS Examiners, its ability to provide timely adjudications was not yet proven. The issue remained whether the new asylum system could achieve the goal of a fair adjudication that does not create an incentive for filing spurious claims.

See Sarah Ignatius, National Asylum Study Project, An Assessment of the Asylum Process of the Immigration and Naturalization Service (Harvard Law School, 1993), at 1; Beyer, Affirmative Asylum Adjudication in the United States, at 276 (citing assessment by Arthur Helton).

The task of establishing a new corps of professional, specially-trained adjudicators posed a logistical challenge for the INS. New officers had to be selected, cleared and trained; office locations had to be identified, leased and reconstructed; a management staff, including local office directors, had to be established; and adjudication procedures developed. Until the program was ready to become operational under the 1990 regulations, an interim corps of officers was pulled together from the ranks of district adjudicators, known as the Designated Asylum Officer Corps (DAOC). Owing to practical concerns, the INS district directors retained supervisory authority over the DAOC, supplemented by CORAP quality assurance visits, until the asylum program was ready to open its doors on April 2, 1991.

Beyer, Establishing the United States Asylum Officer Corps: A First Report, at 467.

And when the asylum offices opened those doors, they were greeted by a backlog of approximately 140,000 cases that had developed before the work even began. Staffing projections developed in July 1991 anticipated that the new corps would be able to complete 80,000 cases annually, based on a three-hour average adjudication (including interview, research, and written analysis). In early 1992 the annual caseload was estimated at 180,000 per year, taking into consideration the slower adjudication in 1992, backlogs developing in the early days of the program, and the 150,000 cases expected to be filed as a resulted of the ABC Settlement Agreement. Initial hopes were that the 150 officers adjudicating cases by mid-1992 would be able to keep current with new receipts. In fact, by 1992 there was a recognition that the changes to the program would need to be made in order to allow the asylum corps to keep current with receipts and issue decisions within a short period of time (INS Commissioner Gene McNary indicated a goal of 90-days from date of filing as an adequate adjudication period).

See James Rowley, New Immigration Unit Starts One Step Behind, THE WASHINGTON TIMES, March 27, 1991.

Beyer, Affirmative Asylum Adjudication in the United States, at 275-276.

See Beyer, Affirmative Asylum Adjudication in the United States, at 279-281.

In 1991, the new Asylum Program had received 56,000 new filings, but had completed only 16,550 cases. The next fiscal

Beyer, Reforming Affirmative Asylum Processing in the United States: Challenges

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year, the number of asylum applications filed rose to almost 104,000 while the number completed barely reached 22,000. In early fiscal year 1994, only one in three new asylum cases were being scheduled for interview. Each month, more than 10,000 cases were going directly into a backlog. The situation was exacerbated by the diversion of asylum resources to Guantanamo Bay, Cuba to screen Haitian asylum-seekers. By 1995, more than 425,000 applications would be in the asylum backlog. Many of those in the backlog had no real claim to asylum, but still enjoyed the benefit of a work permit. Others with real claims for asylum also were in the backlog. But without the grant of asylum, they remained in legal limbo, unable to begin a new life or legally bring their families out of harm's way at home. But as this backlog grew, the system became more vulnerable to fraud and abuse by those seeking work authorization without a real possibility of being scheduled for an interview.

and Opportunities, at 51.

By the Spring of 1993 Senator Edward Kennedy, Chairman of the Senate Subcommittee on Immigration and Refugee Policy declared during a hearing on asylum policy, "The asylum system has broken down, and it's up to Congress and the Administration to fix it." The DOJ Justice Management Division concluded in a September 1993 report that the asylum program had been underfunded and understaffed from its inception, requiring the program to play "catch-up from the very beginning."

Quoted in Beyer, Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities, at 53.

Justice Management Division, U.S. Department of Justice, Management of the INS Affirmative Asylum System, September 1993, cited in Beyer, Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities, at 49, n. 44.

Compounding the concern within administrative and congressional circles over the lack of timely asylum adjudications, public support for the asylum program was strained by publicized stories of immigrant smuggling and terrorist attacks by foreign nationals. The grounding of the Golden Venture at Rockaway Beach, New York with its load of Chinese nationals seeking refuge reignited public concern that floods of asylum seekers threatened U.S. control over its borders. In addition, the involvement of aliens with pending asylum applications in both the 1993 World Trade Center bombing and the attack on CIA employees in Langley, VA demonstrated how the failure to adjudicate asylum applications in a timely manner could impact national security. In late July 1993, President Clinton directed the Department of Justice to develop within three months an administrative, but not legislative, plan to reform asylum.

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VII. 1995 ASYLUM REFORMS: QUALITY AND TIMELINESS

The 1995 asylum reforms, published after having been revised in response to public comments on December 5, 1994, became effective on January 4, 1995. The comprehensive package of reforms was the product of collaboration between government representatives and members of the non-governmental organization (NGO) community. Through dialogue and compromise, a plan emerged that retained the quality adjudication instituted by the 1990 reforms while adopting procedures that could keep up with demand and deter abuse. The new program would have to approve quickly those who needed asylum, while keeping those who did not qualify from benefiting just by filing an asylum application.

1994 Final Rule, 59 FR 62284.

The 1995 asylum reforms brought change at many levels. This package kept the best of the previous system, reformed procedures that had not been successful, and provided additional new funding. Most notably, the reform program retained the non-adversarial interview by INS asylum officers and an opportunity for a de novo hearing before an Immigration Judge in cases not approved by an asylum officer.

A. Decoupled Asylum Request from Automatic Employment Authorization

First, in the combined and streamlined process created by the reforms, applicants who applied on or after January 4, 1995, are not automatically eligible for a work permit. Prior to reforms, asylum applicants could apply for work authorization at the same time they applied for asylum. So long as the asylum request was not "frivolous," employment authorization was granted. Under the reforms, work permits are granted only if applicants are approved for asylum or if the government takes longer than 180 days to reach a final decision, whichever comes first.

1990 Final Rule. 55 FR 30674-88.

8 CFR § 208.7 (1990)

8 CFR § 208.7 (1990)

Note: The applicant can apply for work authorization 150 days after USCIS receives a complete application. USCIS then has 30 days to either grant or deny the request.

In order to achieve the goal of final adjudication, not including any administrative appeal to the BIA, INS negotiated with the Executive Office for Immigration Review, the body with authority over the Immigration Courts, and agreed that the asylum program would strive to adjudicate affirmative asylum cases within 60 days of filing. A case referred to the Immigration Court within the first 60 days of filing would be placed on a fast track for hearings before an Immigration Judge to provide the best opportunity for completing the adjudication

See also section VII.B., "Created the Referral Process," below.

Pub. L. 104-208, 110 Stat. 3009.

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before the 180-day mark. The success of this aspect of the reforms was reflected in the amendments to the INA passed by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). By statute, in the absence of exceptional circumstances, the asylum program is required to conduct an affirmative asylum interview within 45 days of filing, and the Immigration Court is required to complete its adjudication within 180 days of filing.

INA § 208(d)(5)(A). The changes to asylum processing enacted with IIRIRA apply only to those applications filed on or after April 1, 1997.

B. Created the Referral Process

Second, the 1995 reforms streamlined the review process for cases not granted by the asylum corps. Prior to the reforms, asylum officers issued final decisions on all applications for asylum and withholding of deportation. An applicant who was found ineligible was denied, and the applicant had the right to file an asylum application de novo with the Office of the Immigration Judge, if exclusion or deportation proceedings were initiated.

8 CFR §§ 208.14(a); 208.18(b)(1990)

Pursuant to the 1995 revised regulations, and current regulations, requests filed by applicants who are deportable or removable and who are found ineligible for asylum must be referred directly to EOIR for adjudication in immigration proceedings. Asylum offices are able to issue documents placing individuals in proceedings before the Immigration Court based on the information provided in the asylum application, and asylum offices schedule hearings in Immigration Court directly through access to the Immigration Court's computer system.

8 CFR § 208.14(c)

The immigration judge adjudicates the same asylum application that was filed with the Asylum Office. As a matter or discretion, the immigration judge may allow the applicant to supplement or amend the application.

C. Removed the Right to Rebut in Most Cases

Prior to the reforms, asylum applicants who were found ineligible for asylum were sent written explanations of the decision and provided an opportunity to rebut the preliminary decision before a final decision was made. Under the reform regulations only applicants who are in the United States legally may be denied asylum by an asylum officer, and only after the applicant is first given a Notice of Intent to Deny (NOID) explaining the adverse determination and an opportunity to rebut the decision.

Note that the reform and current regulations do not apply to eligible class members of the ABC Settlement Agreement, who receive a NOID if found ineligible for asylum. American Baptist Churches v. Thornburgh, 760 F. Supp. 796(N.D. Cal. 1991).

D. Decisions No Longer Mailed in Most Cases

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Prior to the reforms, asylum decisions and any documents initiating deportation or exclusion proceedings were mailed to the applicant's last known address. This process made it more difficult for trial attorneys to prove that an alien who did not appear for a deportation or exclusion hearing before an Immigration Judge had been properly served with charging documents.

Since the reforms, all applicants are required to pick up decisions in person, insuring that, if they are placed in removal proceedings, they are served with the charging documents, informing them of the date and place of hearing. An exception is made for asylum applicants who are interviewed at a circuit ride location.

8 CFR § 208.9(d)

E. Removed Authority to Adjudicate Requests for Withholding of Deportation in Most Cases

Prior to the reforms, asylum officers adjudicated requests for withholding of deportation (now withholding of removal) with each asylum request. Currently asylum officers adjudicate only requests for asylum despite the fact that the application for asylum is at the same time an application for withholding of removal. Applicants may present to an immigration judge a request for withholding of removal based on the original I-589 if referred by the asylum office.

8 CFR § 208.16(1990).

8 CFR § 208.16(a).

8 CFR § 208.3(b).

Further equipping the asylum program to deal with its increasing backlogs, the 1994 Violent Crime Control and Law Enforcement Act provided for sufficient additional resources to be made available to the reformed asylum process to double the U.S. Asylum Corps from 150 to over 300 Asylum Officers and permit an increase in the number of Immigration Judges from 112 to 179.

Through asylum reform and additional resources provided by Congress, the Asylum Program committed itself to processing asylum applications in a timely manner; therefore, the majority of decisions made by Asylum Officers were completed within 60 days of receipt of the application at the INS Service Center.

VIII. 1995-PRESENT: SUCCESS IN MAINTAINING QUALITY AND TIMELINESS

At the beginning of the reforms, the new asylum program faced a continuing onslaught of applications being filed at the rate of more than 127,000 per year (excluding applications filed under the ABC settlement agreement), coupled with a backlog of almost 425,000

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cases. However, with the reform procedures in place, the Asylum Corps was prepared to tackle this once insurmountable task.

As a result of these reforms, the number of non-meritorious filings has significantly decreased, productivity within the streamlined asylum system has increased nearly fourfold, and the great majority of applicants are receiving decisions from the Asylum Program within 60 days of filing for asylum, and from Immigration Judges within 180 days of filing.

Since Fiscal Year (FY) 1993, asylum applications made to the Asylum Program have decreased by 75 percent, from 127,000 to approximately 41,883 in FY 2012. The reduction in new receipts demonstrates that the restriction on the availability of employment authorization and the prompt completion of removal proceedings for those not granted asylum removed the incentive to file false claims. Furthermore, the increase in approval rates by INS Asylum Officers from approximately 22% in FY 1993 and FY 1996 to 41% in FY 2012 indicates that genuine asylum-seekers are being identified, rather than languishing in the backlog.

Affirmative Asylum receipts generally fell from 1995 to 2005. In 2005 receipts hit a record low of 24,260. Since 2005, receipts have been slowly climbing to the 2012 level of 41,883. In the years of 2010 through 2012, the backlog slowly began to grow again on account of increased receipts. This increase in Affirmative Asylum receipts, combined with large increases in both the Credible Fear and Reasonable Fear programs, has increased the workload of the Asylum Division, significantly in the recent years.

By the end of 1999, claims were being granted asylum within six months of filing, often sooner, while those found ineligible were decided quickly and, if not in valid status, were placed in removal proceedings. Since FY 2000 the asylum program has consistently adjudicated more than 75% of its cases interviewed at one of the eight asylum offices within 60 days of filing. As a result of the success of the 1995 reforms, the asylum program regained the confidence of the government and public, finally achieving the balance between the two goals of an effective asylum program – quality adjudications and without creating incentives for filing spurious claims – that had previously been so elusive.

IX. OTHER DEVELOPMENTS IN THE HISTORY OF THE US ASYLUM PROGRAM

The status of the asylum program has not remained static since the promulgation of the regulations that ushered in asylum reform in 1995. Subsequent legislation and regulations have confronted the

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asylum program with new challenges and opportunities. As evident from the discussion below, many of those changes came with the enactment of IIRIRA in 1996.

A. Expansion of the Refugee Definition

IIRIRA expanded the refugee definition to include resistance to a coercive population control program as a political opinion. The definition of a refugee now specifically includes language stating that:

INA § 101(a)(42).

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

This amendment was viewed as superceding previous administrative opinions finding that forced abortions and sterilizations did not constitute persecution on account of a protected characteristic.

See Matter of X-P-T-, 21 I&N Dec. 634 (BIA 1996).

B. Credible Fear Screening Interviews

IIRIRA also created the process called expedited removal, which authorized INS to remove from the United States without a hearing those aliens who arrive at ports of entry and illegally attempt to gain admission without entry documents or with improper documents, unless the alien expresses an intention to apply for asylum or a fear of return. Aliens who express a fear of return are referred to an asylum pre-screening officer (APSO), who conducts an interview to determine whether the alien has a credible fear of persecution or torture. The credible fear standard is a low threshold test designed to identify all persons who could qualify for asylum and refer those aliens to the Immigration Court for a full hearing on the claim to asylum or other protection from return.

INA § 235(b)(1)(A)(i).

See Asylum lesson, Credible Fear

C. Reasonable Fear Determinations

Under the INA, DHS has the authority to issue or reinstate final orders of removal, without hearing, to certain aliens who have

INA §§ 238(b), 241(a)(5); 8 CFR § 241.8.

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been convicted of an aggravated felony after admission or who illegally reentered the United States after having been removed, or after having left the United States voluntarily while under an order of exclusion, deportation, or removal. In order to ensure compliance with U.S. treaty obligations not to return a person to a country where the person would be tortured or the person's life or freedom would be threatened on account of a protected characteristic, interim regulations require asylum officers to conduct reasonable fear determinations in certain situations where final orders have been issued or reinstated.

8 CFR § 208.31.

The reasonable fear standard operates as a screening mechanism, much in the same way as the credible fear standard, but requires aliens in the reasonable fear process to meet a higher standard than do aliens in the credible fear process. Those aliens who demonstrate a reasonable fear of persecution or torture are referred to an Immigration Judge for a hearing on the claim to protection under Article 33 of the 1951 Convention or Article 3 of the Convention Against Torture.

Article 3 of the Convention against Torture prohibits the return of any individual to a country where there are substantial grounds for believing that the person would be in danger of being subject to torture. For more information, see, Asylum lesson, Reasonable Fear of Persecution and Torture Determinations.

D. NACARA

On November 19, 1997 President Clinton signed the Nicaraguan Adjustment and Central American Relief Act (NACARA). Section 203 of NACARA allowed certain nationals of Guatemala, El Salvador and former Soviet bloc countries who entered the U.S. and applied for asylum by certain dates, or registered for benefits under the ABC settlement agreement, to apply for suspension of deportation or special rule cancellation of removal under standards similar to those in place prior to the enactment of IIRIRA. The Attorney General gave asylum officers the authority to grant relief under section 203 of NACARA in certain cases, in large part based on a judgment as to the efficient management of resources. Most NACARA section 203 beneficiaries had asylum applications pending with the Asylum Program, including most of the approximately 240,000 registered ABC class members. Allowing these individuals and their qualified family members to apply for relief under section 203 while their asylum applications are pending with the Asylum Program provides an efficient method for resolving most of the claims at an earlier stage in the administrative process. Granting this authority to asylum officers was also viewed as an acknowledgment of the ability of the asylum program to produce quality adjudications in a timely manner, the key success of asylum reform.

See Asylum lesson, Suspension of Deportation and Special Rule Cancellation of Removal under NACARA

IIRIRA restricted the availability of cancellation of removal by heightening the eligibility requirements and limiting the number of aliens who could be granted cancellation.

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E. The Homeland Security Act of 2002

On March 1, 2003, U.S. Citizenship and Immigration Services (USCIS) assumed responsibility for the immigration service functions of the federal government. The Homeland Security Act of 2002 (Pub. L. No. 107–296, 116 Stat. 2135) dismantled the Immigration and Naturalization Service (INS) and separated the agency into three components within the Department of Homeland Security (DHS).

The Homeland Security Act created USCIS to enhance the security and efficiency of national immigration services by focusing exclusively on the administration of benefit applications. The law also formed Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to oversee immigration enforcement and border security.

As a part of this restructuring the Asylum Program became one division in the Refugee, Asylum and International Operations Directorate (RAIO). Asylum remains the largest division in RAIO, even after the creation of the Refugee corps in 2006. Under RAIO, the Asylum Division continues to evolve. In 2012, RAIO piloted a combined training course for all three RAIO divisions—the Asylum Division, the Refugee Affairs Division, and the International Operations Division. Building upon what was previously taught in Asylum Officer Basic Training Course and Refugee Officer Basic Training Course, Officer training now consists of the RAIO combined basic training course in conjunction with the division specific courses. New asylum officers now attend both the RAIO Combined Training Course and the Asylum Division Officer Training Course. Like the original AOBTC, these courses are designed to ensure that all officers in RAIO receive specialized training in asylum and refugee law as well as country conditions research, cross cultural communication and other issues important to asylum adjudications.

Another recent change to the Asylum Program has been the implementation of post adjudication, quality reviews. These reviews are conducted by all three divisions and the results are reported to RAIO management. The purpose of these reviews is to ensure consistency between the divisions in our adjudications of refugee and asylum claims and to identify training needs in the field offices.

X. CONCLUSION

Taken together, the final rule of 1990 creating the asylum corps and

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the 1995 reforms produced an asylum system that addressed the goals identified in the wake of the challenges to the system identified the 1980s – to produce high quality adjudications and to lessen systemic incentives for filing spurious claims in order to obtain work authorization or remain longer in the United States. But even after the successes of the reforms and the awarding of increased responsibilities as described above, the examination of the program's performance does not end. One of the lessons learned from the period of 1980 to 1990 was that even a well-intentioned program will fail where it cannot stand up under scrutiny from Congress, NGOs, or the general public.

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Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	Mandatory Bars to Asylum
Rev. Date	May 9, 2013
Lesson Description	This lesson describes prohibitions on applying for asylum, exceptions to those prohibitions, and the circumstances that require denial or referral of an asylum application, even when an applicant establishes that he or she is otherwise eligible for asylum.
Terminal Performance Objective	Given a request for asylum to adjudicate, the asylum officer will be able to determine when an applicant is ineligible to apply for asylum and when a refugee is ineligible for a grant of asylum.
Enabling Performance Objectives	1. Locate the sections of the INA and regulations that apply to grounds for mandatory denials of asylum. (ACRR3) (AAS6) (ACCR4) 2. Identify the grounds of ineligibility to apply for asylum, and the exceptions to those grounds. (AIL4) 3. Indicate who is subject to a mandatory denial or referral of asylum. (ACRR3) 4. Describe the factors to consider in determining whether an individual is firmly resettled. (ACRR3) 5. Identify policies and procedures for handling criminal issues. (ACRR3) (CD38)
Instructional Methods	Lecture; discussion; practical exercises
Student Materials/ References	Lesson Plans; INA; 8 C.F.R. §208; INS v. Aguirre-Aguirre, 526 U.S. 415 (1999)
Methods of Evaluation	Practical exercise; Written test
Background Reading	1. Agreement Between the Government of the United States of America and the Government of Canada for the Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (Dec. 5, 2002), 5 pp.; Final Rule on the Implementation of the Agreement, 69 FR 69480, November 29, 2004, 12 pp. 2. Walter D. Cadman. Investigations Branch, Office of Field Operations. Investigative Referral of Suspected Human Rights Abusers, Memorandum to District Directors, et al. (Washington, DC: Sept. 28, 2000), 2p.

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3. Joseph E. Langlois. Asylum Division, Office of International Affairs. Known or Suspected Human Rights Abusers, Memorandum to Asylum Office Directors, et al. (Washington, DC: Sept. 11, 2000), 5p.

4. Joseph E. Langlois. Asylum Division, Office of International Affairs. Procedures for Contacting HQASM on Terrorist Cases, Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 3, 2002), 2p.

5. Joseph E. Langlois. Asylum Division, Office of International Affairs. Procedures for Implementing the One-Year Filing Deadline and Processing Cases Previously Denied by EOIR, Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 4, 2002), 11 p.

6. Michael A. Pearson. Office of Field Operations. Human Rights Abuse Memorandum of Understanding, Memorandum to Regional Directors, et al. (Washington, DC: Sept. 29, 2000), 19p.

7. Chris Sale. Office of the Deputy Commissioner. AEDPA Implementation Instruction #3: The Effects of AEDPA on Various Forms of Immigration Relief, Memorandum to Management Team (Washington, DC: 6 August 1996), 9 p. plus attachments

8. Jeffrey Weiss. Office of International Affairs. Processing Claims Filed By Terrorists Or Possible Terrorists, Memorandum to Asylum Office Directors, HQASM Staff (Washington, DC: 1 October 1997), 2 p.

9. Johnny N. Williams. Office of Field Operations. Interagency Border Inspection System Records Check, Memorandum to Regional Directors, et al. (Washington, DC: 2 July 2002), 4 p. plus attachment.

10. James W. Ziglar. Office of the Commissioner. New Anti-Terrorism Legislation, Memorandum for Regional Directors and Regional Counsel (Washington, DC: 31 October 2001), 8p.

11. United Nations High Commissioner for Refugees, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees. HCR/GIP/03/05, 4 September 2003, 9 pp.

12. Joseph E. Langlois. USCIS Asylum Division. Updates to Asylum Officer Basic Training Course Lessons as a Result of Amendments to the INA Enacted by the REAL ID Act of May 11, 2005, Memorandum to Asylum Office Directors, et al. (Washington, DC: 11 May 2006), 8 pp.

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

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CRITICAL TASKS

1. Knowledge of mandatory bars and inadmissibilities to asylum eligibility (ACRR3)
2. Knowledge of policies and procedures for one year filing deadline (ACRR4)
3. Knowledge of criteria for refugee classification. (CD20)
4. Knowledge of policies and procedures for handling criminal issues (CD38)
5. Skill in analyzing complex issues to identify appropriate responses or decisions (CD127)

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I. INTRODUCTION

This lesson describes prohibitions on applying for asylum, exceptions to those prohibitions, and the circumstances that require denial or referral of an asylum application, even when an applicant establishes that he or she is otherwise eligible for asylum. Prohibitions on applying for asylum and circumstances that require denial or referral of otherwise eligible applicants are known collectively as "bars." There are bars to applying for asylum and bars to eligibility for asylum.
This lesson only introduces the bar to applying for asylum more than one year after the date of last arrival (the one-year filing deadline), and the bar to applying based on availability of a safe third country. Both of these subjects are covered in greater detail in the asylum lessons, One-Year Filing Deadline and Safe Third Country Threshold Screening. This lesson will provide more detailed information on the bar to applying for asylum based on a Previous Denial of an Asylum Claim.

This lesson will also provide a brief review of the bars to eligibility that are covered in RAIO training modules Analyzing The Persecutor Bar, National Security, and Firm Resettlement.

This lesson will provide a more detailed discussion of bars to eligibility based on criminal activity.

You are not required to memorize all of the specific crimes listed as bars to asylum. Rather, you should become familiar with the broad category of crimes that preclude a grant of asylum, and the issues that must be considered when adjudicating the claim of an applicant who may have been involved in criminal activity.

In general, the process for interview of an asylum-seeker does not change when examining the possibility that a mandatory bar applies. However, there are certain instances when the asylum officer must switch to Question-and-Answer, Sworn Statement style interview notes. This is discussed in greater detail in the RAIO training module Interviewing - Note-Taking.

II. OVERVIEW OF BARS

1951 Convention relating to the Status of Refugees, Art. 1.F; UNHCR Handbook, paras. 140, 147-63

The 1951 Convention relating to the Status of Refugees gives State signatories the authority to deny protection to certain refugees who are determined to be "persons who are not considered to be deserving of international protection," and persons deemed "not in need of

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international protection." Specifically, the Convention does not apply to any person with respect to whom there are serious reasons for considering that he or she committed certain crimes (crime against peace, war crime, crime against humanity, or serious nonpolitical crime outside the country of refuge), or has been guilty of acts contrary to the purposes and principles of the United Nations.

In accordance with these provisions, United States law contains provisions that prohibit the granting of asylum (and/or withholding of removal) to certain individuals based on criminal activities and national security reasons. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) on September 30, 1996, Congress significantly revised the law relating to eligibility to apply for and to be granted asylum. Prior to the IIRIRA, the only bar to applying for asylum was conviction of an aggravated felony. A change occurred with enactment of IIRIRA so that a conviction of an aggravated felony is a bar to being granted asylum. Other circumstances discussed below are bars to applying for asylum. Consequently, an asylum applicant who applies for asylum on or after April 1, 1997 must first demonstrate eligibility to apply for asylum before the merits of the claim will be adjudicated.

INA § 208(b)(2)(B)(i). This is discussed in section IV.B below.

In addition, Congress identified new mandatory bars to eligibility for asylum and codified in statute grounds for ineligibility that previously were found only in regulation.

Because the IIRIRA amendments to section 208 of the INA apply only to asylum applications filed on or after April 1, 1997, three new prohibitions on applying for asylum and the new substantive ineligibility grounds apply only to applications filed on or after April 1, 1997.

A. Overview of Bars to Applying for Asylum

Pursuant to regulation, only the BIA, an immigration judge or asylum officer may make the determination as to whether an applicant is prohibited from applying for asylum. Therefore, the Service Centers will continue to accept asylum applications in affirmative cases, regardless of whether it appears that an applicant is barred from applying. The applicant will be scheduled for an asylum interview, and an asylum officer will interview the applicant to determine whether a prohibition on filing is applicable, and if so, whether an exception exists.

8 C.F.R. § 208.4(a)(1)

Generally, an asylum seeker cannot apply for asylum on or after April 1, 1997, if any of the following three circumstances apply:

INA § 208(a)(2); 8 C.F.R. § 208.4(a)

- The asylum seeker could be returned to a "safe" third country, pursuant to a bilateral or multilateral agreement.

As will be discussed below, the first bar only

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applies to certain applicants arriving from Canada, who are seeking credible or reasonable fear interview, and there are exceptions for all three bars.

- The asylum seeker submitted an application more than one year after arrival in the United States or after April 1, 1998, whichever is most recent in time.

- The asylum seeker previously has been denied asylum by an immigration judge or the BIA.

Conviction of an aggravated felony is a prohibition on filing for asylum applications submitted between November 20, 1990 and April 1, 1997.

B. Overview of Mandatory Bars to a Grant of Asylum

INA §§ 208(b)(2)(A); Note that the statute provides that the Attorney General may establish by regulation additional limitations on a grant of asylum. INA § 208(b)(2)(C).

There are six statutory grounds (mandatory bars) that render an applicant ineligible for asylum, even if the applicant may be a "refugee" within the meaning of section 101(a)(42)(A) of the Act.

Each bar is outlined below, and will be discussed in more detail in the rest of the lesson plan.

By definition, a persecutor cannot be a "refugee." The second sentence of INA § 101(a)(42) specifically excludes persecutors from the refugee definition.

- Persecution of others on account of one of the protected characteristics in the refugee definition

- Conviction of a particularly serious crime, including an aggravated felony

- Commission of a serious nonpolitical crime outside the United States prior to arrival in the U.S.

- Reasonable grounds exist for regarding the applicant a danger to the security of the United States

- Participation in terrorist activities or status as a representative of certain terrorist organizations

- Firm resettlement

III. BARS TO APPLYING FOR ASYLUM

Only applicants who submit applications for asylum on or after April 1, 1997, are subject to the following bars to applying for asylum.

A. Safe Third Country

INA § 208(a)(2)(A).

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If it is determined that the asylum seeker can be removed to a "safe third country," he or she cannot apply for asylum, unless the Attorney General finds it in the public interest for the applicant to remain in the United States.

Each of the following requirements must be met before this bar can be applied:

1. There must be a bilateral or multilateral agreement for removal with the third country;

2. The applicant's life or freedom would not be threatened on account of a protected ground in the third country; and

3. The applicant must have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection in the third country.

Please refer to Asylum Lesson Plan, Safe Third Country Threshold Screening, for a detailed discussion of the applicability and exceptions related to this bar to filing for asylum.

B. One-Year Filing Deadline

INA § 208(a)(2)(B); 8 C.F.R. § 208.4(a)(2)(ii). The Asylum Division provided a 2-week grace period when this provision was implemented and thus does not refer as untimely any I-589 applications filed before April 16, 1998.

An asylum seeker cannot apply for asylum more than one year after the date of arrival in the United States. The one-year period is calculated from the date of the applicant's last arrival in the United States or April 1, 1997, whichever is most recent in time. Please refer to Asylum Lesson Plan, One-Year Filing Deadline, for a detailed discussion of the applicability and exceptions related to this bar to filing for asylum.

C. Previous Denial of Asylum

INA §§ 208(a)(2)(C) and (D); 8 C.F.R. § 208.4(a)(3).

See Joseph E. Langlois, Asylum Division, Office of International Affairs. Procedures for Implementing the One-Year Filing Deadline and Processing Cases Previously Denied by EOIR, Memorandum to Asylum Office Directors, et al. (Washington, DC:

An asylum seeker cannot apply for asylum if he or she has previously applied for and been denied asylum by an immigration judge (IJ), or the Board of Immigration Appeals (BIA) (collectively EOIR), unless the asylum seeker demonstrates to the satisfaction of the adjudicator changed circumstances that materially affect asylum eligibility. A previous denial of asylum by an asylum officer is not a bar to applying for asylum.

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Jan. 4, 2002).

1. Jurisdiction

In most cases in which an applicant has been denied asylum by an IJ or the BIA, the Asylum Division does not have jurisdiction over a subsequently filed Form I-589, Application for Asylum and for Withholding of Removal, because a charging document has been served on the applicant and filed with EOIR. Therefore, unless the applicant left the United States after the denial, the application would fall under EOIR's exclusive jurisdiction under 8 C.F.R. § 208.2(b) and 8 C.F.R. § 208.2(b).

Note: The "Previous Denial of Asylum" procedures do not apply to an individual who entered the US illegally after having been removed, deported, or excluded, or after having left the US under an order of removal, deportation, or exclusion, and is therefore subject to reinstatement of the prior order. For procedures involving reinstatements of prior orders, see Affirmative Asylum Procedures Manual, section III.S, Reinstatement of Prior Order.

There are five circumstances in which the Asylum Program has jurisdiction over an I-589 filed after an IJ or BIA has denied the applicant asylum. In the first three circumstances, the applicant must have left the United States after having been denied asylum by an IJ or the BIA, returned to the United States, and then submitted the I-589 with USCIS. The last two circumstances relate only to Unaccompanied Alien Children (UACs) and are a result of the Trafficking Victims Protection Reauthorization Act.

Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Staff, Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (HQRAIO 120/12a) (25 March 2009).

a. The applicant was removed from or departed the United States under an order of removal, deportation, or exclusion, and subsequently made a legal entry.

Because the final order was executed, EOIR no longer has jurisdiction and, because the subsequent entry was legal, the applicant is not subject to reinstatement of the final order under INA § 241(a)(5).

b. The applicant departed the United States after the expiration of a voluntary departure period, thus becoming subject to a removal order and subsequently

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made a legal entry; or

c. The applicant departed the United States before the expiration of a voluntary departure period, and subsequently made a legal or illegal entry.

USCIS has jurisdiction because no final order was entered (therefore reinstatement is not an issue), and there has been a departure and re-entry since the applicant was placed in proceedings (therefore, EOIR no longer has exclusive jurisdiction under 8 C.F.R § 208.2).

d. A UAC in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has never submitted a Form I-589, may file for asylum with USCIS.

e. For an individual in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has previously submitted a Form I-589 while a UAC, USCIS may have initial jurisdiction.

Please see the RAIO Module *Children's* Claims and the Asylum lesson One-Year Filing Deadline for a more detailed explanation of cases involving Unaccompanied Alien Children.

2. Determination of changed circumstances

a. Definition

The definition of "changed circumstances" applied in the one-year filing deadline analysis is the same as the definition of "changed circumstances" as applied when analyzing whether the applicant may be permitted to apply for asylum after being denied asylum by an IJ or the BIA. The changed circumstances must materially affect the applicant's eligibility for asylum and may include changes in the country of persecution or changes relating to the applicant in the United States, including changes in U.S. law.

INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a)(4); and see Asylum lesson, One-Year Filing Deadline, section Changed Circumstances

The difference in the analysis is that to overcome the previous denial bar the changed circumstance must have occurred since the applicant was denied asylum by the IJ or BIA.

Note: The one-year filing deadline analysis requires that the changed circumstance have occurred after April 1, 1997.

Example: In 1995, an applicant claimed that he feared that he would be forcibly sterilized should he return to China. In January 1996 he was denied asylum by an IJ. He was granted voluntary departure by the IJ, left before the expiration period, and re-entered the country without inspection in August 1998. He files a second application for asylum. He establishes that there are changed

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circumstances since his prior denial that materially affect his eligibility for asylum (i.e. the codification of persecution based on resistance to a coercive population control program as persecution on account of political opinion by IIRIRA in 1996) and has, therefore, overcome the bar to applying after a previous denial.

Example: An applicant claiming that she would be persecuted on account of her political opinion should she be returned to Panama was denied asylum by an IJ in 2010. After departing the US under voluntary departure, she returned in 2012. She claims that since the time that she was denied asylum by the judge, she has had increased health problems relating to diabetes and can receive proper care only in the United States. Her illness does not amount to a changed circumstance materially affecting her eligibility for asylum and does not overcome the previous denial bar to applying.

b. Standard of proof

See RAIO module, Evidence.

The standard of proof for demonstrating this exception is "to the satisfaction of" the adjudicator.

3. Review of previous decision

The entire file, including the prior application, supporting documentation, and the previous assessment or decision, must be reviewed prior to making a determination on whether the applicant is eligible to apply for and be granted asylum. Whenever possible, the case should be assigned to the officer who made the original decision.

a. Prior denial by asylum officer

As indicated above, a prior denial by an asylum officer is not a bar to applying for asylum. Changed circumstances need not be established for the asylum claim to be considered on its merits. Nevertheless, in such cases, substantial deference should be accorded to prior determinations as to previously established facts, including credibility findings, unless a clear error is present.

b. Prior denial by EOIR

Findings of fact made by EOIR, including credibility determinations, must be upheld and cannot be

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reconsidered. The application of law to the applicant's original case also must be upheld, unless the applicant establishes changed law materially affecting his or her eligibility for asylum. The applicant has already had an opportunity to appeal the IJ's decision, and the asylum officer is not in a position to give a new hearing on issues that were or should have been raised on appeal.

4. Interview

In order to determine whether there are changed circumstances that materially affect the applicant's eligibility for asylum, the asylum officer interviews the applicant and reviews the record regarding the previous application for a thorough understanding of the basis for the applicant's claim. The asylum officer need not re-visit the details of the original asylum claim, unless it is necessary to the determination of asylum eligibility once the applicant has established changed circumstances. Therefore, the asylum interview focuses on whether any changed circumstances have occurred after the applicant was denied asylum by EOIR that may materially affect the applicant's eligibility for asylum, and any information needed to make an asylum eligibility determination if changed circumstances are established.

5. Written analysis

Where a changed circumstance exception is found, the analysis, whether in a NOID or an assessment to refer or grant, must include a statement as to why the applicant was previously denied asylum, an explanation of the changed circumstances and their materiality to the applicant's eligibility for asylum, and an analysis of the merits of the claim to asylum in light of the changed circumstances.

If a changed circumstance exception is not found, the analysis in the assessment to refer or NOID requires a description of any changed circumstances that might have been claimed by the applicant, a description of and citation to country conditions (if applicable), and an explanation of why those circumstances are not changed circumstances or why they do not materially affect the applicant's asylum eligibility. In this case, the analysis does not require a full account of all material facts or an analysis of the applicant's claim.

6. One-Year Filing Deadline

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Applicants who file an application for asylum on or after April 1, 1997, are subject to the one-year filing deadline rule, including those who were previously denied asylum by an IJ or the BIA. However, please note that the one year filing deadline does not apply to UACs.

INA § 208(a)(2)(B); 8 C.F.R. § 208.4(a).

See RAIO Module: *Children's* Claims, Asylum Supplement.

The analysis of the one-year filing deadline for those who were previously denied asylum will be identical to that for all other applicants.

See generally Asylum lesson, One-Year Filing Deadline.

a. Filing timely

As explained above, for the Asylum Division to have jurisdiction over an asylum application filed by an individual who was previously denied asylum by an IJ or the BIA, the individual must have left the United States and made a re-entry subsequent to the denial of asylum.

Section III.C.1., Jurisdiction, above, lists the situations when the Asylum Division has jurisdiction over an applicant previously denied asylum.

To determine whether the applicant timely filed, the officer compares the date of the applicant's entry subsequent to the denial of asylum to the date the second asylum application was filed to determine whether the individual filed the application within one year after the date of last arrival.

See Asylum Lesson, One-Year Filing Deadline, section IV.

Example: Consider the same applicant from China in the example above. Recall that he was denied asylum by an IJ in January 1996, and after departing voluntarily, he re-entered the country illegally in August 1998. He filed an application for asylum in December 1999. Recall that he established that there are changed circumstances since his prior denial that materially affect his asylum eligibility (i.e., the codification of persecution based on resistance to a coercive population control program as persecution on account of political opinion by IIRIRA in 1996), overcoming the previous denial bar to applying. However, his application was not timely filed (16 months after last arrival). The officer must then determine whether the applicant has established a changed or extraordinary circumstance exception to the one-year filing deadline.

b. Exceptions to the one-year filing deadline

An applicant previously denied asylum who files an application for asylum more than one year after his or her last arrival may still be eligible for asylum if he or

See Asylum lesson, One-Year Filing Deadline, section Exceptions to the One-

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she can establish eligibility for an exception to the one-year filing deadline.

Year Rule

(i) Changed circumstances

If an applicant establishes a changed circumstance that excuses a prior denial of asylum, that same circumstance may qualify as an exception to the one-year filing deadline as well, provided that the changed circumstance occurred on or after April 1, 1997 and the application was filed within a reasonable period of time given the circumstances.

See Asylum lesson, One-Year Filing Deadline, section Changed Circumstances.

Example: An ethnic Albanian from Kosovo who feared persecution on account of his nationality was denied asylum by an IJ in March 1997. The applicant timely departed under voluntary departure and re-entered the US illegally in December 1997. The applicant filed for asylum in July 1999 (an untimely filing). The applicant established an exception to the previous denial bar on the basis of a substantial increase in hostilities against ethnic Albanians in Kosovo that began in mid-1998, developed into ethnic cleansing in early 1999, and culminated in an attack on his town by Serbian police in April 1999. Because the worsening of conditions is material to the applicant's asylum eligibility, this also serves as a changed circumstance exception to the one-year filing deadline, provided that the applicant files within a reasonable period given the circumstances.

Example: Consider the same Chinese applicant above. He established a changed circumstance exception to the previous denial bar to applying (statutory change in the definition of refugee based on resistance to a coercive population control program). However, this changed circumstance does not provide an exception to the one-year filing deadline because it did not occur after April 1, 1997.

See Asylum lesson, One-Year Filing Deadline, section Changed Circumstances, General Considerations.

(ii) extraordinary circumstances

Extraordinary circumstances do not provide an exception to the bar to applying for asylum after a

See Asylum lesson, One-Year Filing

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prior denial. However, if the changed circumstance that overcomes the previous denial bar does not apply as a changed circumstance exception to the one-year filing deadline, the asylum officer must consider whether there are extraordinary circumstances that are material to the filing deadline.

Deadline, section Extraordinary Circumstances

Example: Again consider the Chinese applicant above. In May 1999 he was seriously injured in a factory accident that required him to be hospitalized until September 1999. The timing and degree of injury constitute an extraordinary circumstance directly related to the delay in filing and, therefore, would serve as an extraordinary circumstance exception to the one-year filing deadline, so long as the applicant files for asylum within a reasonable period of time after he recovers from the accident.

c. Filing within a reasonable period of time

Once an applicant who applied untimely has established the requisite changed or extraordinary circumstances, a determination must be made as to whether the application was filed within a reasonable period of time given those circumstances. This requirement applies equally to applicants previously denied asylum who file more than one year after the date of last entry.

8 C.F.R. §§ 208.4(a)(4)(ii) and (5); See Asylum lesson, One-Year Filing Deadline, section Filing within a Reasonable Period of Time, Overview.

Example: Consider the applicant from Kosovo. He established a changed circumstance that materially affects his claim to asylum. This changed circumstance may provide an exception to both the prior denial bar and the one-year filing deadline bar, if the applicant filed his application within a reasonable period of time, given the circumstances. Though hostilities began about one year before he filed his application, it was the police attack on his town in April 1999 that crystallized his fear and brought him to file an application for asylum. Filing within three months of the occurrence of the changed circumstance generally would be considered a reasonable period of time.

7. Dependents

A denial of the principal applicant's asylum application does not prohibit an included dependent from filing a subsequent, separate asylum application.

8 C.F.R. § 208.14(f).

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IV. BARS TO ELIGIBILITY FOR ASYLUM

A. Persecution of Others

"The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." In addition, the statute specifically prohibits the Attorney General from granting asylum to such a person.

INA § 101(a)(42); § 208(b)(2)(A)(i).

The statutory exclusion of persecutors from the refugee definition means that even if an applicant has been persecuted in the past, or has a well-founded fear of future persecution on account of one of the protected grounds, he or she cannot be said to have "met the definition of a refugee" if he or she is also found to be a persecutor.

It had long been held that the persecutor bar applies even if the alien's assistance in persecution was coerced or otherwise the product of duress. However, the Supreme Court in Negusie v. Holder requested that such an understanding be revisited. Specifically, the Supreme Court held that the BIA misapplied the Supreme Court's prior decision in Fedorenko (based on a reading of similar language in the Displaced Persons Act) as mandating that whether an alien is compelled to assist in persecution is immaterial for persecutor-bar purposes and remanded the case for agency interpretation of the statute in the first instance. The BIA has yet to issue a decision in the Negusie remand. However, DHS and DOJ are jointly developing regulations addressing possible exceptions to the persecutor bar based on duress and other factors. Until the BIA publishes a decision on the issue, or relevant regulatory guidance is issued, cases involving the persecution of others under coercion or duress should be held.

Matter of Rodriguez-Majano, 19 I. & N. Dec. 811 (1988) citing, Fedorenko v. United States, 449 U. S. 490 (1981).

Negusie v. Holder, 555 U.S. 511 (2009).

See the RAIO Module, Analyzing The Persecutor Bar for an in-depth discussion on the definition and application of the persecutor bar.

B. Conviction of Particularly Serious Crime

Asylum may not be granted to an applicant who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community.

INA § 208(b)(2)(A)(ii).

1. Filing date

This bar applies regardless of the filing date of the asylum application; however, the filing date determines the type of crimes included in this category.

8 C.F.R. §§ 208.13(c)(1) and (2)(A).

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If the application was filed before November 29, 1990, then an aggravated felony is not automatically considered a particularly serious crime.

See Section IV.B.6.a., Aggravated Felonies, below.

If the application was filed before April 1, 1997, then the conviction must have occurred in the United States. If the application was filed on or after April 1, 1997, then the conviction may have occurred either inside or outside of the United States.

2. Basic elements

   a. convicted by a final judgment

   b. crime is "particularly serious"

   c. the applicant constitutes a danger to the community

3. Definition of "conviction"

For immigration purposes, a conviction exists if each of the following requirements are met:

INA § 101(a)(48)(A).

   a. a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and

   b. the court has ordered some form of punishment, penalty, or restraint on a person's liberty; and

   c. the conviction must be final. A conviction is final, for immigration purposes, if direct appellate review has either been waived or exhausted

Matter of Polanco, 20 I&N Dec. 894 (BIA 1994).

If in doubt about the finality of a conviction, a Supervisory Asylum Officer should contact the USCIS Office of Chief Counsel or ICE OPLA, as appropriate.

4. Juvenile convictions

Conviction as a juvenile will not constitute a conviction for a particularly serious crime under the INA, if the applicant is

Matter of Ramirez-Rivero, 18 I&N Dec.

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under 16 years of age or was tried as a juvenile (while 16 to18 years of age). However, commission of the crime may be a basis to exercise discretion to deny or refer the asylum request.

135, 137-39 (BIA 1981); see RAIO Module, Discretion.

5. What constitutes a particularly serious crime

a. aggravated felonies

By statute, all aggravated felonies are considered particularly serious crimes for purposes of evaluating asylum eligibility.

INA § 208(b)(2)(B)(i). See Section b, "Other Crimes – general" below. Note: The particularly serious crime discussion contained herein is applicable only to asylum decision-making and is inapplicable to withholding of removal, a topic outside the scope of this lesson.

Given that the bar to asylum is for a conviction of a "particularly serious crime," the key inquiry for asylum officers is not whether the offense meets the definition of an aggravated felony, but whether the offense can be considered "particularly serious." As a practical matter, most particularly serious crimes encountered in asylum interviews will be aggravated felonies.

In order to determine if the particularly serious crime bar is applicable, the asylum officer should first consider whether the conviction is of a crime specifically identified by statute or precedent case law as an aggravated felony or otherwise as a particularly serious crime. If no such identification is available, officers must consider whether the conviction meets the defining characteristics of a "particularly serious crime." In general, when cases where the issue of a possible bar arises, guidance should be sought from supervisors, headquarters quality assurance and the USCIS Office of the Chief Counsel or ICE Office of the Principal Legal Advisor, as appropriate.

Prior to IIRIRA, the commission and conviction dates of the crime determined which definition of aggravated felony applied. As a result of IIRIRA, the current definition of aggravated felony at INA § 101(a)(43) applies regardless of commission or conviction date.

The list of crimes statutorily designated to be aggravated felonies is contained in section 101(a)(43) of the INA. Some are specific crimes, while others are more general (e.g., murder vs. crime of violence). Some crimes are not aggravated felonies unless a sentence of particular length or a certain amount of money is involved. Therefore, it is necessary to consider the sentence in such cases.

Note that it is not important to memorize statutory provisions defining and describing aggravated felonies. Instead, given information that the applicant was arrested, it is critical to acquire as much information as possible about whether there was a conviction, upon what charge or charges that conviction rested and what the sentence was. You should also gather information concerning the

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circumstances underlying the facts of the crime, but be aware that the aggravated felony determination may, depending on the circumstances, rest solely on the record of conviction (regardless of the underlying facts).

A term of imprisonment for purposes of the INA is defined as including "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." Therefore, someone who has been sentenced to a term of imprisonment for a certain term, but whose sentence is deferred if a period of probation is successfully completed, is still considered "sentenced" to that term of imprisonment.

INA § 101(a)(48)(B).

The aggravated felony definition applies to convictions for violations of either state or federal law. It also applies to convictions in violation of a foreign law, so long as the term of imprisonment was completed within the previous 15 years.

INA § 101(a)(43).

(i) Drug related offenses

In assessing whether a state drug related conviction constitutes an aggravated felony under 18 USC § 924(c)(2) the U.S. Supreme Court held that conduct made a felony under state law but a misdemeanor under the Controlled Substances Act (CSA) is not a "felony punishable under the Controlled Substances Act" for INA purposes. A state offense comes within the quoted phrase only if it prohibits conduct punishable as a felony under the CSA.

Lopez v. Gonzales, 549 U.S. 47 (2006). Finding that a South Dakota misdemeanor conviction for aiding and abetting another person's possession of cocaine is not a felony punishable under the CSA and is therefore not a drug trafficking crime within the meaning of 18 U.S.C. § 924(c)(2).

But, the reverse is not true. A state misdemeanor conviction cannot be elevated to an aggravated felony conviction just because the same facts would support felony charges under the CSA. The Supreme Court rejected an attempt to extend Lopez where the government argued that "conduct punishable as a felony should be treated as the equivalent of a felony conviction when the underlying conduct could have been a felony under federal law." The court ruled that even though federal law provides for enhanced sentencing for a simple possession drug offense where there is a prior conviction, a simple possession misdemeanor conviction under state law, where there was no mention of any prior conviction included in the charges, could not be considered an aggravated felony just because the alien

Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010).

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could have been charged as a felon in federal court. The court reasoned that the statute "limits the Attorney General's cancellation authority only when the noncitizen has actually been convicted of a[n] aggravated felony - not when he merely could have been convicted of a felony but was not." (internal quotation marks omitted).

(ii) "Crime of violence"

Leocal v. Ashcroft, 543 U.S. 1 (2004) holding that a Florida conviction for DUI causing serious bodily injury does not have a mens rea requirement, and *therefore is not a "crime of violence" under the* Act.

In determining whether an offense is a "crime of violence" under 18 USC §16, the Supreme Court held that a statute which punishes negligent or accidental conduct cannot be said to involve the "use" of physical force against the person or property of another, and therefore is not an aggravated felony.

In order to determine whether the conviction of a particular offense amounts to a "crime of violence" the officer must look to the requirements of the criminal statute and evaluate whether it includes a mens rea requirement. Mens Rea is the legal term used for the mental state required for culpability under a statute.

EXCEPTION: If an application was filed prior to November 29, 1990, the conviction of an aggravated felony does not constitute a mandatory bar to asylum. Consequently, the asylum officer must analyze the circumstances of the conviction in such cases to determine whether it constitutes a particularly serious crime.

Matter of A-A-, 20 I&N Dec. 492 (BIA 1992).

b. other crimes – general

INA § 208(b)(2)(B)(i). Delgado v. Mukasey, 546 F.3d 1017 (9th Cir. 2008); Matter of N-A-M-, 24 I&N Dec. 336 (BIA 2007).

The INA designates that all aggravated felonies are, per se, particularly serious crimes, but does not limit the consideration of what is a particularly serious crime to aggravated felonies. It is important to remember that even after a determination is made that a conviction is for a crime that is not an aggravated felony, the officer must still determine whether the conviction is for a particularly serious crime.

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The determination as to whether a crime (other than an aggravated felony) is "particularly serious" is most often made on a case-by-case basis. The factors to consider are the following:

Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982); Matter of B-, 20 I&N Dec. 427, 430 (BIA 1991); Matter of L-S-J-, 21 I&N Dec. 973, 974-75 (BIA 1997); Mahini v. INS, 779 F.2d 1419, 1421 (9th Cir. 1986); Yousefi v. INS, 260 F.3d 318 (4th Cir. 2001)(criteria valid but not properly applied).

(i) the nature of the conviction;

(ii) the sentence imposed;

(iii) the circumstances and underlying facts of the conviction; and

(iv) whether the type and circumstances of the crime indicate that the alien will be a danger to the community.

See Section IV.B.7., Danger to the Community, below, and note that this element involves somewhat circular reasoning, since conviction of a PSC necessarily leads to a finding that the alien is a danger to the community.

A single conviction of a misdemeanor normally is not a particularly serious crime.

Matter of Juarez, 19 I&N Dec. 664 (BIA 1988).

Crimes of violence are normally particularly serious crimes. The term "crime of violence" means--
(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (definition).

Note that a crime does not have to be a crime of violence to constitute a particularly serious crime. In Matter of R-A-M-, 25I&N Dec. 657 (BIA 2012), the BIA found that possession of child pornography constituted a particularly serious crime.

6. Danger to the community

As a matter of law, an individual who has been convicted in the United States of a particularly serious crime constitutes a danger to the community.

Matter of U-M-, 20 I&N Dec. 327 (BIA 1991) (affirmed, Urbina-Mauricio v. INS, 989 F.2d 1085 (9th Cir. 1993)); Choeum v. INS, 129 F.3d 29 (1st Cir. 1997).

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7. Examples

Note: Many of these examples are taken from cases decided before IRIIRA broadened the list of crimes considered aggravated felonies. They remain valid examples of particularly serious crimes but for the most part are also aggravated felonies under IRIIRA.

a. assault with a dangerous weapon

Matter of D-, 20 I&N Dec. 827 (BIA 1994); Matter of Juarez, 19 I&N Dec. 664 (BIA 1988).

Note, however, that assault with a deadly weapon was found not to be a particularly serious crime in a case involving a single, misdemeanor offense.

b. drug trafficking

INA § 101(a)(43)(B); see Matter of Y-L-, A-G- & R-S-R-, 23 I&N 270 (AG 2002) drug trafficking is also presumptively a particularly serious crime for purposes of withholding of removal. The Attorney General ruled that the presumption would only be overcome in "the most extenuating circumstances" that were "both extraordinary and compelling."

Generally a drug trafficking conviction constitutes an aggravated felony and therefore a particularly serious crime as a matter of law for asylum purposes. Even if there is some question as to whether a particular drug offense constitutes an aggravated felony, it is likely to meet the criteria for a particularly serious crime described above and thus bar the applicant from asylum eligibility.

c. battery with a dangerous weapon, or aggravated battery

Matter of D-, 20 I&N Dec. 827 (BIA 1994); Matter of B-, 20 I&N Dec. 427 (BIA 1991).

d. rape

INA § 101(a)(43)(A); see Matter of B-, 20 I&N Dec. 427 (BIA 1991).

e. sexual abuse of a minor

INA § 101(a)(43)(A); U.S. v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993); Matter of Small, 23 I&N Dec. 448 (BIA 2002).

Sexual abuse or attempted sexual abuse of a minor constitutes an aggravated felony and therefore a particularly serious crime for asylum purposes. Misdemeanor sexual abuse of a minor also has been found to constitute an aggravated felony (and a particularly serious crime for asylum purposes).

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f. armed robbery

Matter of D-, 20 I&N Dec. 827 (BIA 1994); Matter of L-S-J-, 21 I&N Dec. 973 (BIA 1997).

g. theft offenses (including receipt of stolen property) or burglary offenses

INA § 101(a)(43)(G); Matter of Garcia-Garrocho, 19 I&N Dec. 423 (BIA 1986); Matter of Frentescu, 18 I&N Dec. 244; Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990).

Theft offenses (including receipt of stolen property) or burglary offenses for which the term of imprisonment is at least one year constitute aggravated felonies and therefore particularly serious crimes for asylum purposes. A theft offense, for which alien may be removed, includes the crime of "aiding and abetting" a theft offense. Note that burglary may also constitute a particularly serious crime if it involves a threat to an individual.

Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007) (holding that a conviction under a California statute prohibiting taking a vehicle without consent was a "theft offense," for which alien could be removed)

h. kidnapping (aggravated)

Groza v. INS, 30 F.3d 814 (7th Cir. 1994).

i. murder and manslaughter

Dor v. Dist. Dir., INS, 697 F.Supp. 694 (S.D.N.Y. 1988); Matter of C-, 20 I&N Dec. 529 (BIA 1992); Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994); Ahmetovic v. INS, 62 F.3d 48 (2d Cir. 1995).

Murder constitutes an aggravated felony and therefore a particularly serious crime for asylum purposes. Manslaughter (including involuntary) has also been found to be a particularly serious crime.

8. Dependents

8 C.F.R. § 208.21(a).

This bar also applies independently to a spouse or child who is included in an asylum applicant's request for asylum and who was convicted of a particularly serious crime. In some cases, a principal applicant may be granted asylum, and a dependent referred or denied because he or she was convicted of a particularly serious crime.

C. Commission of Serious Nonpolitical Crime

INA § 208(b)(2)(A)(iii).

Asylum may not be granted if there are serious reasons to believe that the applicant committed a serious nonpolitical crime outside the United States before arriving in the United States.

1. Filing Date

Previously, this was a mandatory bar to

This mandatory bar to asylum was added by the IIRIRA and therefore applies only to applications filed on or after April 1,

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1997. However, when adjudicating a request for asylum filed before April 1, 1997, the commission of a serious nonpolitical crime may be considered as a serious adverse factor in the exercise of discretion.

withholding of deportation, but not asylum.

See RAIO Module, Discretion.

2. Definition

a. A "serious nonpolitical crime" has been defined as a crime that:

McMullen v. INS, 788 F.2d 591, 595 (9th Cir. 1986), citing Guy Goodwin-Gill, The Refugee in International Law, 60-61 (1983).

(i) was not committed out of genuine political motives,

(ii) was not directed toward the modification of the political organization or structure of the state, and

(iii) in which there is no direct, causal link between the crime committed and its alleged political purposes and object.

b. A "serious nonpolitical crime" need not be as serious as a "particularly serious crime."

Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982)

c. Even if the crime was committed out of genuine political motives, it should be considered a serious nonpolitical crime if the act is grossly out of proportion to the political objective or if it is of an atrocious or barbarous nature.

Matter of E-A-, 26 I&N Dec. 1, 3, 5 (BIA 2012) (although the applicant and his group never caused any physical injury to anyone, they placed innocent people at substantial risk); McMullen v. INS, 788 F.2d 591, 595 (9th Cir. 1986); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999); Chay-Velasquez v. Ashcroft, 367 F.3d 751 (8th Cir. 2004).

3. Requirements

McMullen v. INS, 788 F.2d 591, 599 (9th Cir. 1986); Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980).

a. There is no requirement that the serious nonpolitical crime resulted in a conviction. The lack of conviction means that this bar can really only be discovered through the interview process, as there will probably not be any documentation. However, the adjudicator needs to find probable cause to believe that the crime was committed.

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Probable cause means that there is a reasonable basis to believe that the crime was committed.

Example: While a Coptic Christian from Egypt was on a flight en route from Egypt to United States, the Egyptian authorities notified the Department of State that the individual was wanted in Egypt allegedly for having committed a murder there just hours before his departure. The Second Circuit upheld the immigration judge's determination that there were serious reasons to believe that the applicant had committed a serious non-political crime. The immigration judge supported his finding with documentation of the charges against the applicant, including: a warrant for the applicant's arrest; a police report indicating that the applicant's fingerprints were found at the murder scene and that the applicant was seen soon after the murder with an injured hand and a bloody shirt; and a report that the blood on the recovered shirt was found to match that of the victim. Evidence presented by the applicant that there were some irregularities in the Egyptian police reports and that Coptic Christians have been wrongfully accused of crimes was insufficient to compel a finding that he was framed by the Egyptian authorities, and thus the Second Circuit found that the immigration judge supported the determination that the applicant was barred from asylum.

Khouzam v. Ashcroft, 361 F.3d 161, 164 (2d Cir. 2004).

b. The crime must have been committed outside the United States.

c. The applicant need not have personally carried out the act of harm ("pulled the trigger"). For example, providing logistical and physical support that enables others to carry out terrorist acts against ordinary citizens suffices.

McMullen v. INS, 788 F.2d 591, 599 (9th Cir. 1986); Matter of E-A-, 26 I&N Dec. 1, 7 (BIA 2012) (noting that the applicant was not a "mere bystander" and that his involvement and participation "materially contributed" to the groups destructive behavior).

4. Recruitment of Child Soldiers

The Child Soldiers Accountability Act of 2008 (CSAA), effective as of October 3, 2008, creates both criminal and immigration prohibitions on the recruitment or use of child soldiers. Specifically, the CSAA establishes a ground of inadmissibility at section 212(a)(3)(G) of the INA and a ground of removability at section 237(a)(4)(F) of the INA.

Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). See also Lori Scialabba and Donald Neufeld, USCIS, Initial Information Concerning

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These parallel grounds set forth that "[a]ny alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code" is inadmissible and is removable.

the Child Soldiers Accountability Act, Public Law No. 110-340, Memorandum to Field Leadership (Washington, DC: 31 December 2008). CSAA, sec. 2(b)-(c).

The statute also requires that DHS and DOJ promulgate regulations establishing that an alien who is subject to these grounds of inadmissibility or removability "shall be considered an alien with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime," and is therefore ineligible for asylum pursuant to INA section 208(b)(2)(A)(iii). The regulations remain in the process of being developed and promulgated. In the interim, the Congressional intent in enacting the CSAA, as well as the nature of the serious crime of the use of child soldiers, should be considered in determining whether an applicant is subject to the serious nonpolitical crime bar. Note that the statute does not exempt children from the applicability of this ground, even where they were recruited as children themselves.

CSAA, sec. 2(d)(1). See Asylum lesson, Guidelines *for Children's Asylum* Claims, VI.E.4. Note: this is accurate at this time of posting; however, this lesson will be superseded by the RAIO training module Guidelines for *Children's Claims.*

5. Dependents

This bar also applies independently to a spouse or child who is included in an asylum applicant's request for asylum and who has committed a serious nonpolitical crime outside the United States before arriving in the United States. In some cases, a principal applicant may be granted asylum, while his or her dependent (who committed a serious nonpolitical crime) is denied or referred because he or she is subject to a mandatory bar.

8 C.F.R. § 208.21(a).

D. Security Risk

Asylum may not be granted if there are reasonable grounds to believe that the applicant is a danger to the security of the United States.

INA § 208(b)(2)(A)(iv).

See the RAIO module National Security for an in-depth discussion on the definition and application of the security risk bar.

E. Terrorists

1. Background on terrorist legislation, as applied to asylum adjudication

See Jeffery Weiss, Asylum Division. Processing Claims Filed by Terrorists or Possible Terrorists, Memorandum to Asylum Office Directors (Washington, DC: 1 October 1997), 2 p.

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The Anti-terrorist and Effective Death Penalty Act of 1996 (AEDPA), which came into effect on April 24, 1996, provided that any individual who falls within certain terrorist provisions in the INA is ineligible for asylum, unless it is determined that there are not reasonable grounds to believe that the individual is a danger to the security of the United States.

See Chris Sale. Office of the Deputy Commissioner. AEDPA Implementation Instruction #3: The Effects of AEDPA on Various Forms of Immigration Relief, Memorandum to Management Team (Washington, DC: 6 August 1996), 13 p.

The IIRIRA re-designated the sub-clauses of INA § 212(a)(3)(B) and expanded the terrorist grounds for ineligibility for asylum.

The PATRIOT Act of 2001 expanded grounds of inadmissibility based on terrorism, broadened the definition of "terrorist activity," added two definitions of "terrorist organization," and added a separate ground of inadmissibility for those who have associated with a terrorist organization. The Act retained the exception to the ineligibility for those individuals who fall under sub-clause (IV) of 212(a)(3)(B)(i).

See Ziglar, James W. Office of the Commissioner. New Anti-Terrorism Legislation, Memorandum for Regional Directors and Regional Counsel (Washington, DC: 31 October 2001), pp. 2-3.

The Intelligence Reform and Terrorism Prevention Act of 2004 amended the provisions in INA § 219 for the designation of foreign terrorist organizations by the Department of State.

Intelligence Reform and Terrorism Prevention Act of 2004 § 7119, PL 108-458, 118 Stat. 3638.

The REAL ID Act of 2005 further broadened the categories of individuals who are inadmissible for terrorist activities by including those who have received military-type training from or on behalf of a terrorist organization and broadening the inadmissibility ground regarding espousing terrorist activity to no longer require that the individual hold a "position of prominence." The statute also limited the affirmative defense to the inadmissibility for "engaging in terrorist activity" through soliciting things of value, soliciting individuals for membership in, or for providing material support for an undesignated terrorist organization to require the alien to "demonstrate by clear and convincing evidence that he did not know, and reasonably could not have known, that the organization was a terrorist organization."

REAL ID Act of 2005 §103(a); see RAIO module National Security

The statute also revised the Patriot Act's inadmissibility provision for material support to a terrorist organization and added INA § 212(d) to create an inapplicability provision for the material support ground, as well as for individuals or

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representatives of terrorist organizations who endorse or espouse terrorist activity.

2. Grounds of ineligibility

INA § 208(b), as amended by the REAL ID Act, prohibits the granting of asylum to anyone who: — INA § 208(b)(2)(A)(v).

a. has engaged in terrorist activity; — INA § 212(a)(3)(B)(i)(I).

b. a consular officer or the Attorney General knows, or has reasonable grounds to believe, is engaged in or is likely to engage after entry in any terrorist activity; — INA § 212(a)(3)(B)(i)(II).

Note: An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered to be engaged in a terrorist activity. INA § 212(a)(3)(B)(i)(V).

c. has, under any circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity; — INA § 212(a)(3)(B)(i)(III).

d. is a representative of — INA § 212(a)(3)(B)(i)(IV).

(i) a foreign terrorist organization, as defined in section 212(a)(3)(B)(vi) or — INA § 212(a)(3)(B)(i)(IV)(aa).

(ii) a political, social, or other group that endorses or espouses terrorist activity; — INA § 212(a)(3)(B)(i)(IV)(bb).

e. is a member of a terrorist organization designated under Section 219 of the INA or otherwise designated through publication in the Federal Register under INA Section 212(a)(3)(B)(vi)(II); — INA § 212(a)(3)(B)(i)(V).

e. is a member of a terrorist organization described in INA section 212(a)(3)(B)(vi)(III) (undesignated terrorist organization), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

g. endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization; — INA § 212(a)(3)(B)(i)(VII); INA §237(a)(4)(B). Note that this ground does not require that the

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statements be made under circumstances indicating an intention to cause death or serious bodily harm.

h. has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization

INA § 212(a)(3)(B)(i)(VIII); INA § 237(a)(4)(B); "military-type training is defined in 18 U.S.C. § 2339D(c)(1). Note that an exemption to the terrorist bar exists for those who received military type training under duress.

i. is the spouse or child of an alien who is inadmissible under INA § 212(a)(3)(B), if the activity causing the alien to be found inadmissible occurred within the past five years unless the spouse or child:

INA § 212(a)(3)(B)(ii).

(i) did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(ii) the consular officer or the Attorney General has reasonable grounds to believe the spouse or child has renounced the activity causing the alien to be found inadmissible under this section; or

j. who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States.

INA § 212(a)(3)(F); INA § 237(a)(4)(B).

See the RAIO lesson National Security for an in-depth discussion on the definitions of the terms relating to terrorism and the application of the terrorist bar.

F. Firm Resettlement

An applicant who was firmly resettled in another country prior to arriving in the United States may not be granted asylum.

INA § 208(b)(2)(A)(vi)

Note: This bar does not

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apply to derivatives. See 8 C.F.R. § 208.21(a).

1. History

The firm resettlement bar is founded on two of the cessation clauses of the United Nations Convention Relating to the Status of Refugees. The Refugee Convention states that the convention ceases to apply to an individual who "has acquired a new nationality, and enjoys the protection of the country of his new nationality", or to an individual "who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

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

The firm resettlement bar has been part of United States refugee law from its inception, as a mandatory bar in The Displaced Persons Act of 1948. In a 1957 revision of the INA, the firm resettlement bar was dropped from the Act, but US courts continued to apply it as a discretionary factor. After passage of the Refugee Act of 1980, interim regulations were enacted that made firm resettlement a regulatory bar in affirmative asylum cases. When the final asylum regulations were adopted in 1990, firm resettlement was made a regulatory bar for all adjudicators. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress codified firm resettlement as a statutory bar.

A very detailed history of the firm resettlement bar can be found in Matter of A-G-G-, 25 I&N Dec. 486 (BIA 2011).

2. Definition

An applicant "is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." Note that, in order for the bar to apply, the entry into another nation must be after the events that caused the applicant to be a refugee.

8 C.F.R. § 208.15.

Please refer to RAIO Module, Firm Resettlement, for a detailed discussion of the applicability and exceptions related to this bar to eligibility for asylum.

a. Finally, if the applicant is found to have received an offer of permanent resettlement, the burden shifts to the

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applicant to establish, by a preponderance of the evidence, that an exception to firm resettlement applies, pursuant to 8 C.F.R. §§ 208.15(a) and (b). If the applicant is able to meet his or her burden of proof that an exception applies, the applicant may be granted asylum.

3. Special Issues

There are a number of issues concerning the application of the firm resettlement bar that have arisen over the years. Some issues that may arise are:

a. Length of time spent in the third country

The length of time an applicant spends in a third country does not by itself establish firm resettlement. Firm resettlement occurs only after the applicant has been offered some form of enduring lawful status in that country. However, length of time is a factor to consider, particularly in determining whether the applicant cannot be considered firmly resettled because entry into the third country was a necessary consequence of flight. Refer to section 2.a above.

b. Offer of firm resettlement

The Ninth Circuit has held that to meet its burden of proving that an offer of firm resettlement exists the USCIS must present either direct evidence of an offer of permanent resettlement or, if such evidence cannot be obtained, indirect evidence of such an offer. Indirect factors may include the applicant's length of stay in the third country, intent to remain in the country and the social and economic ties developed during such stay. Relying on Abdille v. Ashcroft, 242 477 (3d Cir. 2001), the Court indicated that the indirect evidence used to establish firm resettlement must "rise to a sufficient level of clarity and force."

The Third Circuit, in Abdille v. Ashcroft, indicated in dicta that non-offer based factors, such as the length of the applicant's residence in a third country or the extent of the applicant's social and economic ties to the country, provide circumstantial evidence of a formal offer of some type of permanent resettlement and can serve as a surrogate for direct evidence of an offer.

The BIA further addressed evidence of firm resettlement in the holding of Matter of D-X- & Y-Z-, 25 I&N Dec. 664 (BIA

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2012). In this decision, the BIA provides a straightforward approach with a strong presumption of firm resettlement when the applicant provides facially valid documentation of permission to reside and work indefinitely in a country. The decision makes clear that the mere fact that the document was obtained fraudulently does not invalidate the presumption. A number of circuit court cases support that "facially valid" documentation of residence status is enough to establish a presumption of firm resettlement, where there is no evidence that such status would be invalidated by the country of firm resettlement. In D-X- & Y-Z-, the female applicant had left and reentered the country where she had fraudulently obtained residence status, using the fraudulently obtained documents. While the Board does not in this decision explicitly discuss the importance of any evidence about whether the irregularities in the document render it vulnerable to invalidation, this case in fact involved evidence that the fraudulently obtained document was not invalidated, as the applicant was able to reenter the country using the documents.

4. Entry into the third country

While the focus of the analysis is on the existence of an offer of permanent residence, the plain language of the regulation makes clear that, in order for the offer to be effective, the applicant must have entered into the country at some point while the offer was available. The offer will be considered effective if, for example, the applicant entered into the country after the offer was made, and while it was still active, or, for example, the offer was made after the applicant initially entered the country, but while the applicant was still there, unless the applicant's entry into that country was a necessary consequence of his or her flight from persecution and he or she remained in that country only as long as necessary to arrange onward travel without establishing significant ties in that country.

Again, please refer to RAIO Module, Firm Resettlement, for a detailed discussion of such special issues as they relate to the firm resettlement bar.

V. BURDEN AND STANDARD OF PROOF

A. Mandatory Bars to Applying for Asylum

INA §§ 208(a)(2)(B) and (D); 8 C.F.R. § 208.4(a)(2)(i).

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1. One-year filing deadline

The applicant must demonstrate by clear and convincing evidence that the application has been filed within 1 year after the date the applicant arrived in the United States,

or

demonstrate to the satisfaction of the Attorney General (the asylum officer or immigration judge) the existence of changed circumstances that materially affect eligibility for asylum or extraordinary circumstances that resulted in the delay.

Reminder: The one-year filing period is calculated from 4/1/97 or arrival in U.S., whichever is more recent in time. See Asylum Lesson, One-Year Filing Deadline, section Calculating the One-Year Period.

2. Previous denials

If an applicant has previously been denied asylum by an IJ or the BIA, the applicant must demonstrate to the satisfaction of the Attorney General (asylum officer or immigration judge) the existence of changed circumstances that materially affect eligibility for asylum.

INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a).

3. Explanation

The "clear and convincing" standard has been defined as a degree of proof that will produce "a firm belief or conviction as to allegations sought to be established." It is higher than the preponderance standard used in civil cases, but lower than the "beyond a reasonable doubt" standard in criminal cases.

To demonstrate "to the satisfaction of the Attorney General" that an exception applies, means that it must be reasonable for the asylum officer to conclude that the exception applies.

See *Black's Law* Dictionary, 5th Ed.; see RAIO Module, Evidence.

B. Mandatory Bars to Asylum

If the evidence indicates that a ground for mandatory denial or referral exists, then the applicant has the burden of proving by a preponderance of the evidence that the ground does not apply.

8 C.F.R. § 208.13(c); See also Cheo v. INS, 162 F.3d 1227 (9th Cir. 1998) (where evidence indicates applicant was firmly resettled, burden is on applicant to establish the contrary); Maharaj v. Gonzales, 450 F. 3d 961 (9th Cir. 2006) (the burden shifts to the applicant only when USCIS has presented sufficient evidence that the statutory bar applies).

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A fact is established by a preponderance of the evidence, if the adjudicator finds, upon consideration of all the evidence, that it is more likely than not that the fact is true (in other words, there is more than a 50% chance that the fact is true).

See RAIO Module, Evidence.

VI. MANDATORY NATURE OF BARS

If it is determined that a mandatory bar applies, the asylum officer has no discretion to grant asylum to the applicant, even though the applicant may otherwise be eligible. As the term itself indicates, denial in such cases is mandatory. Therefore, the asylum request must be referred or denied, as appropriate.

When a mandatory bar to asylum applies, the asylum officer does NOT weigh that adverse factor against the risk of future persecution as with the exercise of discretion.

VII. DEPENDENTS

When a principal alien is granted asylum, his or her spouse and/or children, as defined in the Act, also may be granted asylum if accompanying, or following to join, unless it is determined that the spouse or child is ineligible for asylum under section 208(b)(2)(A)(i), (ii), (iii), (iv) or (v) of the Act for applications filed on or after April 1, 1997, or under 8 C.F.R. § 208.13(c)(2)(i)(A), (C), (D), (E), or (F) for applications filed before April 1, 1997.

8 C.F.R. § 208.21(a).

In other words, with the exception of firm resettlement, all the bars to granting asylum that apply to principal applicants apply equally to dependents. For example, if a dependent was convicted of an aggravated felony, the dependent is barred from a grant of asylum, even if the principal is granted. However, if the dependent was firmly resettled in a third country, the dependent is not barred from receiving a derivative grant of asylum if the principal is granted.

VIII. SUMMARY

A. Bars to Applying for Asylum

The following bars to applying for asylum are applicable only to applications filed on or after April 1, 1997. Only asylum officers, immigration judges, and the Board of Immigration Appeals can determine whether a prohibition on filing applies.

1. The asylum seeker could be returned to a "safe" third country.

There is an agreement between the United States and Canada,

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but the agreement only applies to aliens at land border ports of entry and those transiting through one country when being removed by the other country. It does not apply to affirmative asylum adjudications.

2. The asylum seeker waited more than one year after arrival in the United States to apply.

   The filing date is calculated from April 1, 1997 or the date of last arrival, whichever is most recent in time. This bar does not apply to UACs nor does it apply if the applicant establishes changed circumstances that materially affect eligibility, or extraordinary circumstances relating to the delay.

3. The asylum seeker previously has been denied asylum by an immigration judge or the BIA.

   This bar does not apply if the applicant demonstrates changed circumstances that materially affect asylum eligibility.

B. Mandatory Bars to Eligibility for Asylum

The following are mandatory bars to a grant of asylum:

1. Persecution of others on account of one of the protected characteristics in the refugee definition

2. Conviction of a particularly serious crime, including an aggravated felony

   If the application was filed on or after April 1, 1997, the conviction may have occurred either inside or outside the United States.

3. Commission of a serious nonpolitical crime outside the United States prior to arrival in the United States

   This bar does not apply to asylum applications filed prior to April 1, 1997, but may be a basis for a discretionary denial or referral.

4. Risk to the security of the United States

   Any case in which the asylum officer believes the applicant may present a risk to the security of the United States must be sent to Asylum Headquarters for review.

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5. Engaging in terrorist activities or status as a representative of certain terrorist organizations

An applicant cannot be granted asylum if he or she has engaged, is engaging, or is likely to engage in terrorist activity; has incited terrorist activity indicating an intention to cause death or serious bodily harm; is a representative of either a designated terrorist organization or a group whose endorsement of acts of terrorist activity undermines the efforts of the United States to reduce or eliminate terrorist activities; or has used his or her position of prominence in an country to endorse or espouse terrorist activity.

6. Firm resettlement

An applicant is considered firmly resettled if the applicant, after becoming a refugee, entered into another country with, or while there received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement when in that country.

An applicant was not firmly resettled if entry was necessary to flight, the applicant remained only to arrange onward travel, and the applicant developed no significant ties; or the conditions of residence were substantially restricted.

C. Burden of Proof

1. Prohibition on Filing

The applicant must establish by clear and convincing evidence that he or she applied for asylum within one year after arrival in the U.S., unless an exception applies.

If a bar to filing applies, the applicant must demonstrate to the satisfaction of the adjudicator that an exception applies.

2. Bars to asylum

If the evidence indicates that a ground for mandatory denial of asylum applies, the applicant must prove by a preponderance of the evidence that a mandatory bar does not apply.

D. Mandatory Nature of Bars

If it is determined that a mandatory bar applies, the asylum officer has no discretion to grant asylum to the applicant, even though the applicant may otherwise be eligible.

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E. Dependents

The spouse or child of an asylum applicant cannot be granted derivative asylum status if a mandatory bar, other than firm resettlement, applies to the spouse or child.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

NATIONAL SECURITY, PART 2: TERRORISM-RELATED INADMISSBILITY GROUNDS (TRIG)

TRAINING MODULE

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

NATIONAL SECURITY, PART 2: TERRORISM-RELATED INADMISSBILITY GROUNDS (TRIG)

TRAINING MODULE

MODULE DESCRIPTION:

This module provides an overview of the terrorism-related inadmissibility grounds (TRIG) and their impact on RAIO adjudications.

TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing and adjudicating cases, you (the officer) will identify terrorism-related inadmissibility grounds (TRIG) indicators, elicit all relevant information from an applicant to correctly determine if the applicant is subject to a TRIG or mandatory bars, where appropriate determine whether an exemption is available, document your findings in the file appropriately, and make a legally sufficient final decision.

ENABLING PERFORMANCE OBJECTIVE(S)

1. Properly identify designated terrorist organizations ("Tier I" and "Tier II"), and analyze whether a group meets the definition of an undesignated terrorist organization ("Tier III").
2. Apply the INA § 212(a)(3)(B) TRIG inadmissibility grounds/bars.
3. Apply statutory exceptions to TRIG.
4. Explain the exemptions available for TRIG.
5. Analyze the facts and relevant law to make a legally sufficient decision in a case involving TRIG.

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INSTRUCTIONAL METHODS

- Interactive presentation
- Discussion
- Practical exercises

METHOD(S) OF EVALUATION

- Multiple-choice exam
- Observed practical exercises

REQUIRED READING

1. INA § 212(a)(3)(B).

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

1. See USCIS TRIG ECN site for memos, legal guidance, legislation and other adjudicative resources.
2. Memorandum, Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds, Michael L. Aytes, Acting Deputy Director (July 28, 2008).
3. See USCIS TRIG ECN Home Page for TRIG Exemption Worksheet.
4. Memorandum, Collecting Funds from Others to Pay Ransom to a Terrorist Organization, Dea Carpenter, Deputy Chief Counsel (February 6, 2008).
5. *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006).
6. Nicholas J. Perry, *The Breadth and Impact of the Terrorism-Related Grounds of Inadmissibility of the INA*, 06-10 Immigr. Briefings 1, Oct. 2006.

Additional Resources – International and Refugee Adjudications

Additional Resources – Asylum Adjudications

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR13	Knowledge of inadmissibilities (4)
ILR23	Knowledge of bars to immigration benefits (4)
ILR27	Knowledge of policies and procedures for terrorism-related grounds of inadmissibility (TRIG) (4)
IRK2	Knowledge of the sources of relevant country conditions information (4)
IRK13	Knowledge of internal and external resources for conducting research (4)
TIS2	Knowledge of the USCIS TRIG ECN (4)
RI3	Skill in conducting research (e.g., legal, background, country conditions) (4)
RI9	Skill in identifying inadmissibilities and bars (4)
RI10	Skill in identifying national security issues (4)
DM2	Skill in applying legal, policy, and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
RI6	Skill in identifying information trends and patterns (4)
RI11 OK9	Skill in handling, protecting, and disseminating information (e.g., sensitive and confidential information)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
10/26/2015	Throughout document	Updated broken links and citations; added new TRIG exemptions; minor formatting changes; added new case law	RAIO Training, RAIO TRIG Program
10/22/2018	Throughout document	Separated TRIG and National Security Lesson Plans; streamlined TRIG sections; added updated case law and policy guidance; fixed links.	RAIO Training; RAIO TRIG Branch
7/22/2019	Throughout document	Corrected minor typos and formatting issues.	RAIO Training
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training

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Throughout this training module, you will come across references to adjudication-specific supplemental information located at the end of the module, as well as links to documents that contain adjudication-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to the adjudications you will be performing.

For easy reference, supplements for international and refugee adjudications are in pink and supplements for asylum adjudications are in yellow.

You may also encounter references to the legacy Refugee Affairs Division (RAD) and the legacy International Operations Division (IO). RAD has been renamed the International and Refugee Affairs Division (IRAD) and has assumed much of the workload of IO, which is no longer operating as a separate RAIO division.

1 INTRODUCTION

This lesson plan covers the relevant law regarding the terrorism-related inadmissibility grounds (TRIG) as they pertain to RAIO adjudications. In doing so, this lesson plan provides the information you need to understand TRIG, identify cases with TRIG issues, and properly adjudicate and process them.

2 TRIG OVERVIEW

The INA prohibits granting most immigration benefits to individuals with certain associations with terrorist organizations or who have engaged in certain types of activities. Officers overseas encounter these prohibitions directly through the terrorism-related inadmissibility grounds codified at section 212(a)(3)(B) of the Immigration and Nationality Act (INA). Depending upon how an asylum applicant entered the United States, an asylum applicant may be subject to either the section 212 inadmissibility provisions or the section 237 deportability provisions, which incorporate the TRIG provisions by reference. Although an asylum applicant is generally not required to be found admissible to establish eligibility for a grant of asylee status, the mandatory bar to asylum found at INA § 208(b)(2)(A)(v) also incorporates the TRIG provisions by reference, making all of the section 212(a)(3)(B) terrorism-related inadmissibility grounds mandatory bars to asylum. Therefore, this lesson plan focuses on the TRIG provisions codified at INA § 212(a)(3)(B).

USCIS's mission includes protecting the integrity of the U.S. immigration system, which requires careful consideration of TRIG matters. As part of the determination of statutory

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eligibility for an immigration benefit, you must examine each case for TRIG issues and determine whether a TRIG bar or inadmissibility applies.

3 IDENTIFYING TRIG ISSUES

As noted above, the terrorism-related inadmissibility grounds are found at INA § 212(a)(3)(B). These grounds include statutory definitions for terrorist activity, engaging in terrorist activity, and terrorist organizations.

- "Terrorist activity" is defined in INA § 212(a)(3)(B)(iii)[1];
- Conduct that constitutes "engag[ing] in terrorist activity" is defined under INA § 212(a)(3)(B)(iv);[2] and
- "Terrorist organization[s]" are defined in INA § 212(a)(3)(B)(vi).[3]

3.1 Where You May Encounter TRIG Indicators

TRIG indicators may be encountered at any stage of the adjudication process. The following is a non-exhaustive list of places where TRIG indicators are often encountered:

(b)(7)(E)

[1] For definition, see also Section 7.2, below: "Terrorist Activity" Defined.

[2] For definition, see also Section 7.3, below: "Engage in Terrorist Activity" Defined.

[3] For expanded definition, see also Section 6, below: TRIG – "Terrorist Organization" Defined.

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4 INTERVIEWING CONSIDERATIONS AND PREPARATION

Relevant Questions

4.1 Association with People/Organizations of Described in INA § 212(a)(3)(B).

- Connection to an unknown political or social organization[5]
- Associated with, or accused of involvement in, a terrorist organization

Relevant Questions

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Relevant Questions

Relevant Questions

(b)(7)(E)

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4.2 Engaged in, or Suspected of Engaging in, Terrorist Activities

Relevant Questions

(b)(7)(E)

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4.3 Connection to Areas Known to Have Terrorist Activity

Relevant Questions

Relevant Questions (b)(7)(E)

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5 THE TERRORISM-RELATED INADMISSIBILITY GROUNDS (TRIG)

As previously noted, the terrorism-related inadmissibility grounds are found at INA § 212(a)(3)(B). This section has a long and complex history, and is the subject of various policy memoranda and determinations by executive branch agencies, as well as decisions by the courts. Because of this complexity, and because TRIG touches upon issues of national security, foreign relations, and interagency cooperation, it is vital for you to properly identify and adjudicate TRIG issues. The purpose of this section is to familiarize you with TRIG generally, so that you can identify TRIG issues in the context of RAIO adjudications. After having done so, you will know how to fully develop the factual record and to properly analyze and adjudicate any applicable TRIG issues.

This lesson plan will first explore the INA definition of a "terrorist organization."

6 TRIG – "TERRORIST ORGANIZATION" DEFINED

Many of the general terrorism-related inadmissibility grounds refer to "terrorist organizations." There are three categories, or "tiers," of terrorist organizations defined in the INA.[6] These three tiers are explained below.

[6] INA § 212(a)(3)(B)(vi).

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6.1 Categories or "Tiers" of Terrorist Organizations

- **Tier I (Foreign Terrorist Organizations (FTO)):**[7] a foreign organization designated by the Secretary of State under INA § 219 after a finding that the organization engages in terrorist activities or terrorism. In addition, pursuant to legislation, the Taliban is considered to be a Tier I organization for purposes of INA § 212(a)(3)(B);[8]

- **Tier II (Terrorist Exclusion List (TEL)):**[9] an organization otherwise designated by the Secretary of State as a terrorist organization, after finding that the organization engages in terrorist activities; or

- **Tier III ("Undesignated" Terrorist Organizations):**[10] a group of two or more individuals, whether organized or not, that engages in, or has a subgroup[11] that engages in terrorist activities. (The definition of "engage in terrorist activity" is found at INA § 212(a)(3)(B)(iv) and is discussed below.) (b)(7)(E)

6.2 Foreign Terrorist Organization Designation under INA § 219 (Tier I)

6.2.1 Authority

Under INA § 219, the Secretary of State is authorized to designate an organization as a foreign terrorist organization. The Secretary of State is required to notify congressional leaders in advance of making such a designation.[12]

The designation does not become effective until its publication in the *Federal Register*, and the designation will remain effective until revoked by an act of Congress or by the Secretary of State.

[7] INA § 212(a)(3)(B)(vi)(I). For more information, see Section 6.2, below: Foreign Terrorist Organization Designation under INA § 219 (Tier I).

[8] Consolidated Appropriations Act, 2008 (CAA), Pub. L. 110-161, 121 Stat. 1844, Division J, Title VI, § 691(d) (Dec. 26, 2007).

[9] INA § 212(a)(3)(B)(vi)(II). For more information, see Section 6.3, below: Terrorist Exclusion List (Tier II).

[10] INA § 212(a)(3)(B)(vi)(III). For more information, see Section 6.4, below: Undesignated Terrorist Organizations.

[11] *See* Department of State guidance on what constitutes a subgroup, 9 FAM 302.6-2(B)(3)(h).

[12] INA § 219(a)(2)(A)(i).

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6.2.2 Definition

The Secretary of State is authorized to designate an organization as a terrorist organization if the Secretary finds that:

- The organization is a foreign organization;
- The organization engages in terrorist activity (as defined in INA § 212(a)(3)(B)) or terrorism (as defined in 22 U.S.C. § 2656f(d)(2)), or retains the capability and intent to engage in terrorist activity or terrorism[13]; and
- The terrorist activity or terrorism of the organization threatens the security of U.S. nationals or the national security of the United States.[14]

6.2.3 Organizations Currently Designated as Foreign Terrorist Organizations (FTOs)[15]

On October 8, 1997, the Secretary of State published the first list of Tier I terrorist organizations in the *Federal Register*. Most of the organizations were re-designated in October 1999 and October 2001. The Secretary of State has also designated groups as terrorist organizations in separate *Federal Register* Notices each year since 1999.

Foreign terrorist organizations designated by the Secretary of State include, among others, al-Qa'ida, Boko Haram, Communist Party of the Philippines/New People's Army (CPP/NPA), Basque Homeland and Freedom (ETA), Hamas, Hizballah, the Islamic State of Iraq and the Levant (ISIL, ISIS, or IS), Liberation Tigers of Tamil Eelam (LTTE), Revolutionary Armed Forces of Colombia (FARC), and Shining Path.

The current FTO list can be found on the Department of State Bureau of Counterterrorism's homepage at https://www.state.gov/j/ct/list/index.htm. You should check this site on a regular basis for the most current version of the list as additional organizations may be designated at any time.

The Taliban is not listed as an FTO on the State Department's website because it was not designated by the State Department under INA § 219. Rather, under § 691(b) of the

[13] *See* *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1243-1244 (D.C. Cir. 2003) (finding that an organization's admission to participation in attacks on government buildings and assassinations was sufficient to support a finding that the group was engaged in "terrorist activity.")

[14] INA § 219(a)(1).

[15] *See* U.S. Department of State, Office of Counterterrorism, Fact Sheet: Foreign Terrorist Organization Designation (Washington, DC, September 1, 2010).

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Consolidated Appropriations Act, 2008, Congress provided that the Taliban shall be considered to be a Tier I terrorist organization.[16]

6.3 Terrorist Exclusion List (Tier II)

6.3.1 Authority

The USA PATRIOT Act added, and the REAL ID Act amended, two additional categories of "terrorist organizations" to INA § 212.[17] The Secretary of State, in consultation with or upon the request of the Secretary of Homeland Security or the Attorney General, may designate as a terrorist organization an organization that "engages in terrorist activity" as described in INA § 212(a)(3)(B)(iv)(I-VI). Unlike Tier I organizations, there is no requirement that the organization endanger U.S. nationals or U.S. national security.

The Terrorist Exclusion List (TEL) designation is effective upon publication in the *Federal Register*. The organizations that have been designated through this process are referred to collectively as the "Terrorist Exclusion List."

6.3.2 Organizations Currently Designated on the Terrorist Exclusion List (Tier II)

There are 58 organizations currently designated as terrorist organizations under INA § 212(a)(3)(B)(vi)(II).

The Department of State maintains the Terrorist Exclusion List at: https://www.state.gov/j/ct/rls/other/des/123086.htm. However, while organizations may be removed from the list, the Department of State is no longer adding organizations to this list.

6.4 Undesignated Terrorist Organizations (Tier III)

Any group of two or more individuals may constitute a "terrorist organization" under the INA even if not designated as such under INA § 219 or listed on the TEL, if they meet the requirements below.

6.4.1 Definition

Under INA § 212(a)(3)(B)(vi)(III), a group of two or more individuals, whether organized or not, meets the definition of a "terrorist organization" if the group engages in terrorist activity, or has a subgroup that engages in terrorist activity.

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[16] Consolidated Appropriations Act, 2008, *supra*, note 8. The Taliban is the only group to date that Congress has stated shall be considered as a Tier I terrorist organization and the only one that does not appear on the FTO list.

[17] INA § 212(a)(3)(B)(vi)(II) (created by § 411(a)(1)(G) of the USA PATRIOT Act of 2001, and amended by § 103(c) of the REAL ID Act).

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For example, looking to the definitions contained in the INA of "engaging in terrorist activity" and "terrorist activity," an organization meets the definition of a terrorist organization if it illegally uses explosives, firearms, or other weapons (other than for mere personal monetary gain), with intent to endanger the safety of individuals or to cause substantial damage to property. This broad definition covers most armed resistance groups and makes no exceptions for groups aligned with U.S. interests.[18] Note that there is no exception for groups using "justifiable" force. In *Matter of S-K-*, the BIA rejected the applicant's argument that there is an exception to the "terrorist organization" definition for groups that use justifiable force to repel attacks by forces of an illegitimate regime. The BIA's review of the statutory language led it to conclude "that Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters,' and it did not intend to give [the BIA] discretion to create exceptions for members of organizations to which our Government might be sympathetic."[19] Similarly, in *Khan v. Holder*, the U.S. Court of Appeals for the Ninth Circuit considered and rejected the applicant's argument that the statute contains an exception for organizations that use force against military targets that is permitted under the international law of armed conflict.[20]

On the other hand, organizations whose violent activities include the use of weapons or dangerous devices solely for mere personal monetary gain fall within the statutory exception at INA § 212(a)(3)(B)(iii)(V)(b).

According to guidance from the Department of State, a group is a "subgroup" of another organization if there are reasonable grounds to believe that either the group as a whole or its members are affiliated with the larger group, and the group relies upon the larger group, in whole or in part, for support or to maintain its operations. If there is such a relationship, and the subgroup engages in terrorist activity, then both groups are terrorist organizations.[21]

However, the U.S. Court of Appeals for the Third Circuit has held that an entity may not be deemed a Tier III terrorist organization unless its leaders authorized terrorist activity commited by its members.[22] Evidence of authorization may be direct or circumstantial,

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[18] INA §§ 212(a)(3)(B)(iii) and (iv); *see Matter of S-K-*, 23 I&N Dec. 936, 940 (BIA 2006) (declining to adopt a "totality of circumstances" test to the question of whether a group is engaged in "terrorist activity."); *see also* Sections 7.2 and 7.3, below: "Terrorist Activity" Defined and "Engaging in Terrorist Activity" Defined.

[19] *Matter of S-K-*, 23 I&N Dec. at 941 (upholding the IJ's determination that the Chin National Front, an armed organization that uses land mines in fighting against the Burmese government, met the INA definition of an undesignated terrorist organization).

[20] *Khan v. Holder*, 584 F.3d 774, 784-785 (9th Cir. 2009).

[21] *See* 9 FAM 302.6-2(B)(3)(h).

[22] *Uddin v. Attorney General*, 870 F.3d 282, 289-90 (3rd Cir. 2017). The ruling in *Uddin* involved a group which is a major political party in the country at issue, and which does not have an armed wing. However, significant political violence in the country at issue is common, and multiple political parties in that country are implicated in violent

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and authorization may be reasonably inferred from, among other things, the fact that most of an organization's members commit terrorist activity or from a failure of a group's leadership to condemn or curtail its members' terrorist acts.[23] Similarly, the U.S. Court of Appeals for the Seventh Circuit has noted that an organization is not a terrorist organization simply because some of its members have engaged in terrorist activity "without direct or indirect authorization."[24] The activity must be "authorized, ratified, or otherwise approved or condoned by the organization" in order for the organization to be considered to have engaged in terrorist activity.[25]

6.5 Groups Excluded from the Tier III Definition by Statute

As a result of the broad reach of the statute and its application to groups that are sympathetic to the United States or that have previously assisted the United States, Congress enacted section 691(b) of the Consolidated Appropriations Act, 2008 (CAA). The CAA stated that the following groups *shall not be considered to be terrorist organizations* on the basis of any act or event occurring *before* December 26, 2007:[26]

- Karen National Union/Karen National Liberation Army (KNU/KNLA)
- Chin National Front/Chin National Army (CNF/CNA)
- Chin National League for Democracy (CNLD)
- Kayan New Land Party (KNLP)
- Arakan Liberation Party (ALP)
- Tibetan Mustangs
- Cuban Alzados (groups opposed to the Communist government of Cuba)
- Karenni National Progressive Party (KNPP)

activity carried out by members. The nature of the group at issue in *Uddin* likely influenced the court's ruling. The issue of authorization will be less problematic with a group whose aims clearly included the use of violence, such as a group which was largely made up of individuals who engaged in combat, or a group which had an armed wing.

[23] *Uddin*, 870 F.3d at 292. The court noted that conclusive proof that the leaders of a group explicitly sign off on each individual terrorist act at issue is not required.

[24] *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008).

[25] *Id.*

[26] Consolidated Appropriations Act, 2008, *supra*, note 8, § 691(b).

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- appropriate groups affiliated with the Hmong[27]
- appropriate groups affiliated with the Montagnards (includes the Front Unifié de Lutte des Races Opprimées (FULRO))[28]
- African National Congress (ANC)[29]

(Hereinafter, this list will be referred to as the "CAA groups" in this lesson plan.)

In December 2014, Congress enacted section 1264 of the National Defense Authorization Act (NDAA) for Fiscal Year 2015, which provides that two major Kurdish political parties in Iraq are excluded from the definition of "terrorist organization":[30]

- Kurdish Democratic Party (KDP)
- Patriotic Union of Kurdistan (PUK)

The NDAA provision is not time-limited. As a result, unlike the CAA groups, the KDP and the PUK are not considered to be terrorist organizations for activities occurring *at any time*.

In August 2018, Congress enacted the John S. McCain National Defense Authorization Act for Fiscal Year 2019.[31] Pursuant to the 2019 NDAA, the Rwandan Patriotic Front (RPF)/Rwandan Patriotic Army (RPA) are excluded from the definition of an undesignated (Tier III) terrorist organization for any period before August 1, 1994, and INA § 212(a)(3)(B) shall not apply to an alien with respect to any activity by the alien in association with the RPF/RPA before August 1, 1994. Thus, there is no time period during which RPF/RPA is considered a Tier III organization.

6.5.1 Discretionary Exemption Provision for Terrorist Organizations

The INA provides the Secretaries of State and Homeland Security, in consultation with the Attorney General and each other, the authority to conclude, in their sole and unreviewable discretion, that an organization will not be considered a terrorist organization under INA § 212(d)(3)(B)(i). However, the Secretary of Homeland Security

[27] Appropriate groups may be established through country condition reports to show that a subgroup is affiliated with the Hmong or Montagnards. *See also* Exercises of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, October 5, 2007 (FULRO and Hmong).

[28] Consolidated Appropriations Act, 2008, *supra*, note 8, § 691(b).

[29] On July 1, 2008, Congress amended the CAA to add the African National Congress. Pub. L. no. 110-257.

[30] National Defense Authorization Act for Fiscal Year 2015, Pub. L. no. 113-291, 128 Stat. 3292, § 1264(a)(1) (2014).

[31] John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. no. 115-232, 132 Stat. 1636 (Aug. 13, 2018).

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may not exempt a group from the definition of an undesignated terrorist organization if the group:

- engaged in terrorist activity against the United States;
- engaged in terrorist activity against another democratic country; or
- has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians.

To date, this authority *has not* been exercised. However, as explained in Section 9 below, TRIG Exemption Authority, the Secretary of Homeland Security *has* exercised the authority not to apply certain *provisions* of INA § 212(a)(3)(B) to individual aliens based on specific activities or associations with certain groups.

6.5.2 Recognized Foreign Governments Not Considered Tier III Organizations

As a general matter, INA § 212(a)(3)(B) does not apply to activity of a recognized and duly constituted foreign government within the definition of "terrorist activity" or "engaging in terrorist activity." Political parties that participate in or have representation in a government are not considered synonymous with the government of a country for purposes of this determination.

Also, entities in *de facto* control of an area are not recognized as the government of that area for the purposes of TRIG.

If you have questions as to whether an entity should be considered the government for purposes of this determination or other questions related to this issue, please contact your supervisor for referral of the issue to the TRIG point of contact (POC) for your Division.

7 TERRORISM-RELATED INADMISSIBILITY GROUNDS

7.1 Statute – INA §212(a)(3)(B)(i) – The Inadmissibility Grounds

The terrorism-related inadmissibility grounds (TRIG) are found at INA § 212(a)(3)(B)(i) and are described in detail below. The terrorism related deportability ground at INA § 237(a)(4)(B), as amended by the REAL ID Act of 2005, incorporates all of the terrorism-related inadmissibility grounds at INA § 212(a)(3)(B) and INA § 212(a)(3)(F) (related to association with terrorist organizations and an intent while in the United States to engage

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in activities that could endanger the welfare, safety or security of the United States).[32] Therefore, these grounds of inadmissibility are also grounds of deportability.[33]

The terrorism-related grounds of inadmissibility under INA § 212(a)(3)(B) apply to an alien who:

I. Has engaged in terrorist activity – INA § 212(a)(3)(B)(i)(I);[34]

II. A consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity – INA § 212(a)(3)(B)(i)(II);

III. Has, under any circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity – INA § 212(a)(3)(B)(i)(III);[35]

IV. Is a [current] representative[36] of – INA § 212(a)(3)(B)(i)(IV):

(aa) A terrorist organization (as defined in INA §212(a)(3)(B)(vi)) – INA § 212(a)(3)(B)(i)(IV)(aa);[37] or

(bb) A political, social, or other group that endorses or espouses terrorist activity – INA § 212(a)(3)(B)(i)(IV)(bb);[38]

V. Is a [current] member of a Tier I or II terrorist organization – INA § 212(a)(3)(B)(i)(V);[39]

VI. Is a [current] member of a Tier III terrorist organization, unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and

[32] INA § 212(a)(3)(F) requires consultation between DHS (given this authority under the Homeland Security Act of 2002) and the Department of State. Therefore USCIS rarely applies this ground of inadmissibility.

[33] INA § 237(a)(4)(B) ("Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.") (codified at 8 U.S.C. § 1227(a)(4)(B)).

[34] *See* Sections 7.2 and 7.3, below: "Terrorist Activity" Defined and "Engaging in Terrorist Activity" Defined.

[35] *See* 9 FAM 302.6-2(B)(3)(f).

[36] For purposes of the terrorist provisions in the INA, "representative" is defined as "an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity." INA § 212(a)(3)(B)(v).

[37] *See* Section 6, above: "Terrorist Organization" Defined.

[38] Note that this ground of inadmissibility is written in the present tense but that prior representation raises the possibility that this ground, or other grounds of inadmissibility, may apply.

[39] INA § 237(a)(4)(B); *see* Section 6, above: "Terrorist Organization" Defined. Note: The Taliban should be considered a Tier I terrorist organization pursuant to Section 691(d) of the Consolidated Appropriations Act, 2008.

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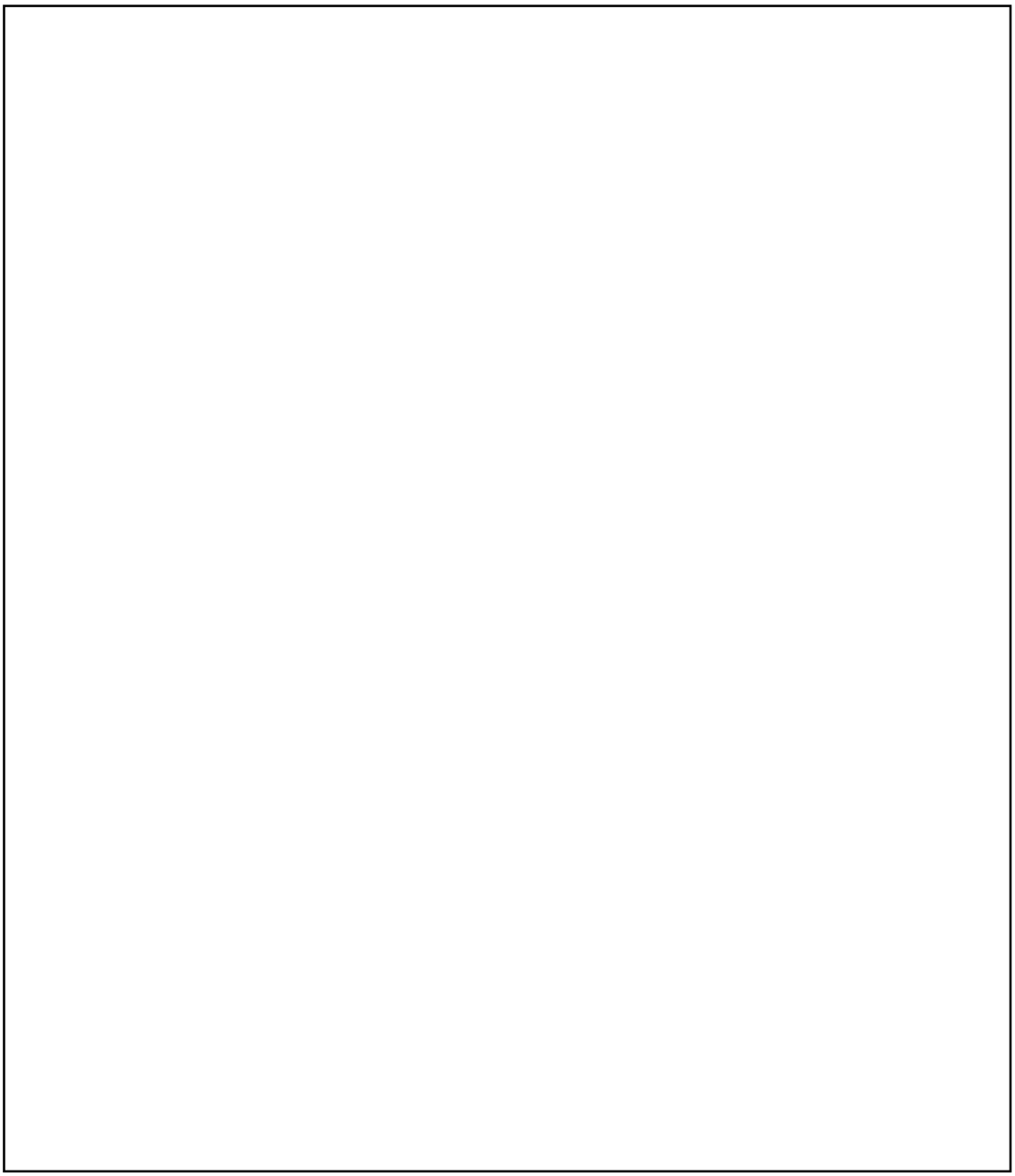
should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(i)(VI).[40]

(b)(7)(E)



[40] *See* Section 6, above: "Terrorist Organization" Defined.

[41] 9 FAM 302.6-2(B)(3)(e).

[42] *Id.*; *see also* *Viegas v. Holder*, 699 F.3d 798, 804 (4th Cir. 2012).

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(b)(7)(E)

VII. Endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization – INA § 212(a)(3)(B)(i)(VII);[44]

VIII. Has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization – INA § 212(a)(3)(B)(i)(VIII);

- "Military-type training" is defined at 18 U.S.C. § 2339D(c)(1) to include: "training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction . . . "[45]

- **NOTE**: On January 7, 2011, the Secretary exercised her discretionary authority under INA § 212(d)(3)(B)(i) to exempt individuals who have received military-type training ***under duress*** from the application of this ground of inadmissibility.[46]

IX. Is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years – INA § 212(a)(3)(B)(i)(IX)[47];

To qualify as a "child," the individual must be unmarried and under 21 years of age.

NOTE: This ground only applies to current spouses and does not apply if the applicant is divorced from the TRIG actor or if the TRIG actor is deceased.

[44] See Section 7.3, below: "Engage in Terrorist Activity" Defined.

[44] Note that this ground, unlike INA § 212(a)(3)(B)(i)(III), *does not* require that the statements be made under circumstances indicating an intention to cause death or serious bodily harm.

[45] 18 U.S.C. § 2339D(c)(1).

[46] *See* 76 Fed. Reg. 14418-01 (March 16, 2011) and Section 9.4.1, below: Situational Exemptions – Duress-Based.

[47] In addition, under this provision, an alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization (PLO) is considered to be *engaged in terrorist activity*.

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EXCEPTION: The provision above does not apply to a spouse or child – INA § 212(a)(3)(B)(ii):

- who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

- whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

7.2 "Terrorist Activity" Defined

Many of the terrorism-related inadmissibility grounds under INA § 212(a)(3)(B)(i) refer to "terrorist activity" or "engaging in terrorist activity." Terrorist activity and engaging in terrorist activity are separately defined at INA §§ 212(a)(3)(B)(iii) and (iv), respectively.

"Terrorist activity" is defined as any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

- The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle) – INA § 212(a)(3)(B)(iii)(I);

- The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained – INA § 212(a)(3)(B)(iii)(II);

- A violent attack on an internationally protected person or upon the liberty of such person– INA § 212(a)(3)(B)(iii)(III);

  An "internationally protected person" is defined by statute as:

  - a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or

  - any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization, who at the time and place concerned is entitled pursuant to international law to special protection against attack on his person, freedom, or dignity, and any member of his family then forming part of his household;[48]

[48] 18 U.S.C. § 1116(b)(4).

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- An assassination – INA § 212(a)(3)(B)(iii)(IV);

- The use of any – INA § 212(a)(3)(B)(iii)(V):

  - Biological, chemical, or nuclear weapon – INA § 212(a)(3)(B)(iii)(V)(a); or

  - Explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain) – INA § 212(a)(3)(B)(iii)(V)(b);

  With intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property;

- A threat, attempt, or conspiracy to do any of the above – INA § 212(a)(3)(B)(iii)(VI).

7.3 "Engage in Terrorist Activity" Defined

"Engaging in terrorist activity" means, in an individual capacity or as a member of an organization:

- To commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity – INA § 212(a)(3)(B)(iv)(I);

- To prepare or plan a terrorist activity – INA § 212(a)(3)(B)(iv)(II);

- To gather information on potential targets for terrorist activity – INA § 212(a)(3)(B)(iv)(III);

- To solicit funds or other things of value for – INA § 212(a)(3)(B)(iv)(IV):

  - a terrorist activity – INA § 212(a)(3)(B)(iv)(IV)(aa);

  - a Tier I or Tier II terrorist organization – INA § 212(a)(3)(B)(iv)(IV)(bb);[49] or

  - a Tier III (undesignated) terrorist organization, unless the solicitor can demonstrate by clear and convincing evidence that he or she did not know, and should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(iv)(IV)(cc);[50]

    NOTE: *Collecting* funds or other items of value from others in order to pay ransom to a terrorist or a terrorist organization, in order to obtain the release of a third person, does not constitute solicitation of funds for a terrorist activity or for

[49] Referring to terrorist organizations described in INA § 212(a)(3)(B)(vi)(I) and (II).

[50] Referring to terrorist organizations described in INA § 212(a)(3)(B)(vi)(III).

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an organization. However, payment of ransom to a terrorist organization generally has been considered to fall under the material support ground of inadmissibility (discussed below).[51]

- To solicit any individual:
  - To engage in conduct otherwise described as engaging in terrorist activity – INA § 212(a)(3)(B)(iv)(V)(aa);
  - for membership in a Tier I or Tier II terrorist organization – INA § 212(a)(3)(B)(iv)(V)(bb); or
  - for membership in a Tier III (undesignated) terrorist organization, unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(iv)(V)(cc); or
- To commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds, or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training – INA § 212(a)(3)(B)(iv)(VI):
  - For the commission of a terrorist activity – INA § 212(a)(3)(B)(iv)(VI)(aa);
  - To any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity – INA § 212(a)(3)(B)(iv)(VI)(bb);
  - To a Tier I or Tier II terrorist organization – INA § 212(a)(3)(B)(iv)(VI)(cc);
  - To a Tier III (undesignated) terrorist organization (a group of two or more individuals which engages in or has a subgroup that engages in terrorist activity), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(iv)(VI)(dd).

Guidance on Self-Defense: USCIS interprets INA § 212(a)(3)(B) not to include **lawful** actions taken in self-defense under threat of imminent harm, provided the action was considered lawful under the law of the country where it occurred, **and** under U.S. federal and state laws. The analysis is complicated and requires research of foreign laws. If you

[51] Memorandum, Collecting Funds from Others to Pay Ransom to a Terrorist Organization, Dea Carpenter, USCIS Deputy Chief Counsel, to Lori Scialabba, RAIO Associate Director (Feb. 6, 2008).

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have a case in which the self-defense exception may apply, please contact your Division POC for TRIG-related issues. If this issue arises during your interview, you should elicit as much detail as possible about the incident in question, including what kind of force the applicant used, why he or she believed such force was necessary, and other relevant circumstances of the incident. You should include this information in your query to your Division POC, who will provide further guidance.

8 TRIG - MATERIAL SUPPORT

Providing material support is not in and of itself a ground of inadmissibility – it is one of the ways in which an individual may "engage in terrorist activity" under INA § 212(a)(3)(B)(iv) (specifically, INA § 212 (a)(3)(B)(iv)(VI)). That is, an individual who has provided material support to a terrorist organization is inadmissible under INA § 212(a)(3)(B)(i)(I) as an alien who "has engaged in a terrorist activity," as described in INA § 212(a)(3)(B)(iv)(VI).

8.1 Statutory Examples of Material Support

The INA provides the following non-exhaustive list of examples which would constitute "material support":[52]

- Safe house
- Transportation
- Communications
- Funds
- Transfer of funds or other material financial benefit
- False documentation or identification
- Weapons (including chemical, biological, or radiological weapons)
- Explosives
- Training

Beyond these examples, the INA does not define the meaning of "affords material support."

The statutory list is not an exhaustive list of what constitutes material support.[53]

[52] INA § 212(a)(3)(B)(iv)(VI).

[53] *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298 (3d Cir. 2004) ("Use of the term 'including' suggests that Congress intended to illustrate a broad concept rather than narrowly circumscribe a term with exclusive categories.").

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8.2 Factors Relating to "Material Support"

8.2.1 Amount of Support

The amount of support provided need not be large or significant. For example, in *Singh-Kaur v. Ashcroft,* the U.S. Court of Appeals for the Third Circuit upheld the BIA's determination that a Sikh applicant who gave food to and helped to set up tents for a Tier III terrorist organization had provided "material support" under INA § 212(a)(3)(B)(iv)(VI).[54]

The court looked to the plain meaning of the terms "material" ("[h]aving some logical connection with the consequential facts" or "significant" or "essential") and "support" ("[s]ustenance or maintenance; esp., articles such as food and clothing that allow one to live in the degree of comfort to which one is accustomed") when evaluating the BIA's interpretation of the statute. Based on the plain language of the terms and the non-exhaustive nature of the list of examples provided in the statute, the court found that the BIA's interpretation that the definition of "material support" included the provision of food and setting up tents was not manifestly contrary to the statute.[55]

The U.S. Court of Appeals for the Fourth Circuit in *Viegas v. Holder* found that "there is no question that the type of activity in which Viegas engaged comes within the statutory definition of material support. The issue was whether Viegas's activities qualified as "material."[56] The court went on to hold that the petitioner's support (paying dues monthly for four years and hanging posters) was sufficiently substantial standing alone to have some effect on the ability of the Front for the Liberation of the Enclave of Cabinda, an undesignated terrorist organization, to accomplish its goals.[57]

In *Alturo v. U.S. Att'y Gen.*, the U.S. Court of Appeals for the Eleventh Circuit upheld the BIA's determination that an applicant who had given annual payments of $300 to the United Self-Defense Forces of Colombia (AUC), a Tier I terrorist organization at the time of the payments, had provided material support. The Court explained, "The BIA's legal determination[] that the funds provided by Alturo constitute 'material support' [is a] permissible construction[] of the INA to which we must defer. The INA broadly defines 'material support' to include the provision of 'a safe house, transportation, communications, *funds*, transfer of funds, or other material financial benefit, false documentation or identification, weapons…explosives, or training,' and the BIA

[54] Singh-Kaur, 385 F.3d at 300-301.

[55] *Id*. at 298 (quoting *Black's Law Dictionary* (7th ed. 1999)). In reaching this conclusion, the court noted that the BIA reasonably interpreted the terrorist grounds of inadmissibility to cover a wider range of actions than do the criminal provisions regarding material support to a terrorist organization codified at 18 U.S.C. § 2339A. *See id.*

[56] Viegas, 699 F.3d at 803.

[57] *Id.*

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reasonably concluded that annual payments of $300 over a period of six years was not so insignificant as to fall outside that definition."[58]

Although the courts that have considered the issue have generally agreed with the government's position that there is no exception for minor or "de minimis" material support implicit in the statute, certain applicants who have provided "limited" or "insignificant" material support to a Tier III organization may be eligible for an exemption. *See* Section 9.4.5, below: Situational Exemptions – Certain Limited Material Support and Insignificant Material Support.

8.2.2 To Whom/For What the Material Support was Provided

The material support provision applies when the individual afforded material support for the commission of a "terrorist activity" to someone who has committed or plans to commit a terrorist activity or to a terrorist organization.[59]

8.2.3 Use of Support

How the terrorist organization uses the support provided by the applicant is irrelevant to the determination of whether the support is material. For example, in *Matter of S-K-*, the BIA found that Congress did not give adjudicators discretion to consider whether an applicant's donation or support to a terrorist or terrorist organization was used to further terrorist activities.[60] It may, however, be relevant to the application of an exemption.

8.2.4 Applicant's Intent

The applicant's intent in providing the material support to an individual or terrorist organization is also irrelevant to the determination of whether the support is material.[61] It may, however, be relevant to the application of an exemption.

8.2.5 Relationship of Material Support Provision to Membership in a Terrorist Organization

Current membership in a terrorist organization is a distinct ground of inadmissibility, and is not, in and of itself, equivalent to the provision of material support.[62] While a member of a terrorist organization may have committed an act that amounts to material support to that group (such as paying dues), membership and support are two distinct grounds that should be analyzed separately.

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[58] *Alturo v. U.S. Att'y Gen.*, 716 F.3d 1310, 1314 (11th Cir. 2013).

[59] *See Singh-Kaur*, 385 F.3d at 298; INA §§ 212(a)(3)(B)(iv)(VI)(aa)-(dd)).

[60] *Matter of S-K-*, 23 I&N Dec. at 944.

[61] *Id.* at 943 (pointing out that the statute requires only that the applicant provide material support to a terrorist organization, without requiring an intent on the part of the provider).

[62] INA §§ 212(a)(3)(B)(i)(V)-(VI).

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8.2.6 Household Chores

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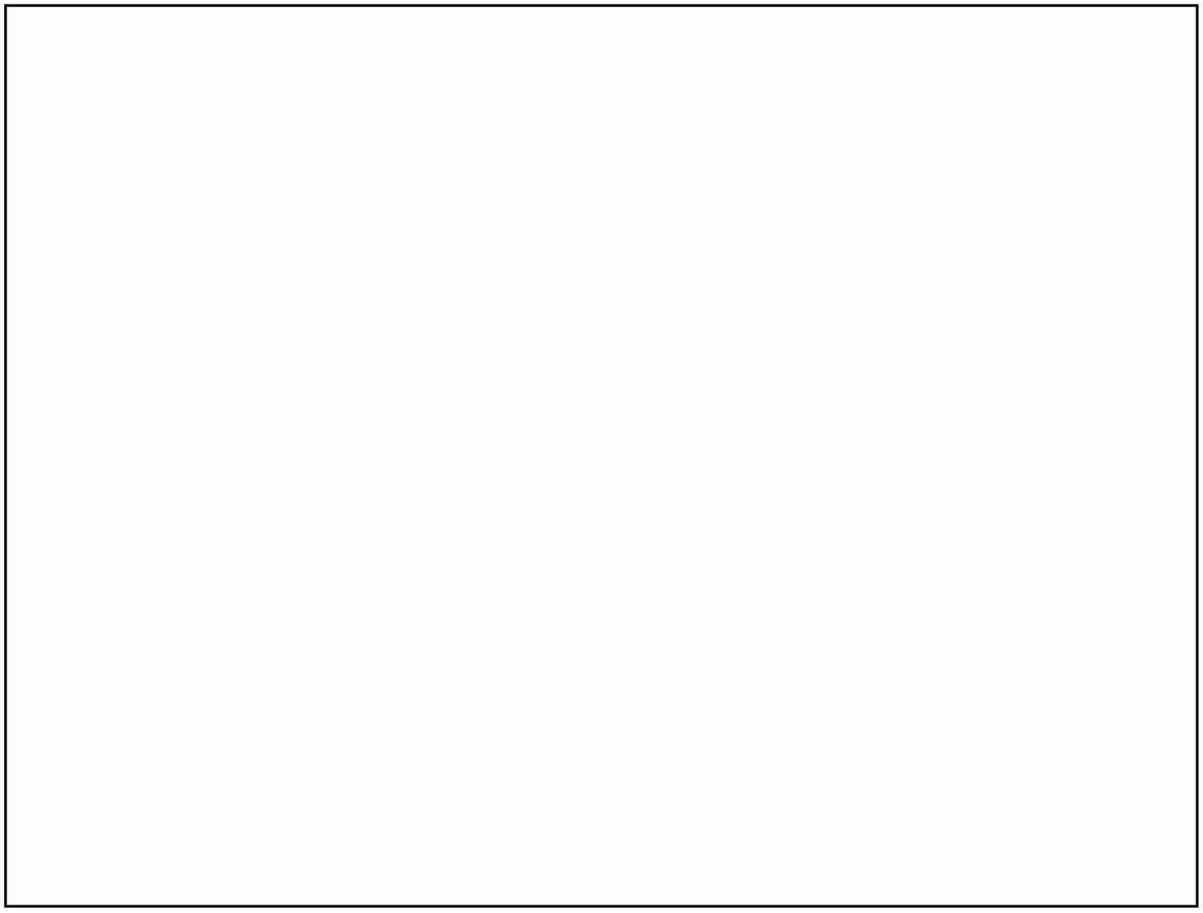

8.2.7 Ransom

Payment of ransom to a terrorist organization is considered material support, and any applicant who directly contributed to the ransom will be inadmissible. However, some of the acts or activities that often occur in response to a terrorist organization's demand for a ransom payment are not considered material support. The following are some examples that make this distinction:

Activity that is considered material support:

- Payment or contributing items of value toward the ransom payment (e.g., giving money or selling jewelry), either directly or through an intermediary
- Delivering the ransom payment

Activity that, in and of itself, is not considered material support:

[63] *See Matter of A-C-M-*, 27 I&N Dec. 303 (BIA 2018).

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- While being held captive, calling others to ask them to pay the terrorist organization in exchange for release
- While being held captive, giving phone numbers of friends or relatives to the captors, so that the captors could call and make demands for ransom payment
- Negotiating the ransom amount
- Collecting contributions toward the ransom payment from others

As noted previously in Section 7.3, the act of collecting contributions toward the ransom is also not considered solicitation under INA § 212(a)(3)(B)(iv)(IV). To be inadmissible for solicitation, the activities must be *for* a terrorist activity or *for* a terrorist organization, which is distinct from requesting or collecting ransom money to secure the release of the individual held captive.

8.2.8 Duress

Some advocates have argued that there is an implicit exception in the statute for individuals who provided material support to a terrorist organization under duress—that is, that individuals who were forced to give material support to a terrorist organization are not inadmissible. DHS has taken the position, based on the plain language of the statute and the exemption authority given to the Secretary of State and the Secretary of Homeland Security, that there is no statutory duress exception. However, since early 2007, a secretarial exemption has been available for certain applicants who have provided material support under duress. While these applicants are inadmissible, DHS may decide not to apply the ground of inadmissibility that pertains to them as a matter of discretion.[64]

Four circuit courts of appeals have upheld unpublished BIA decisions holding that the statute does not contain an implied duress exception. In *Annachamy v. Holder*, the U.S. Court of Appeals for the Ninth Circuit held that "the statutory framework makes clear that no exception was intended." The Court noted that the text of the statute does contain an explicit exception for those applicants who did not know or should not reasonably have known that the organization to which they provided material support was a Tier III terrorist organization and that the inadmissibility ground for membership in the Communist party contains an explicit exception; thus, the Court reasoned, if Congress had intended the statute to contain a duress exception to the material support provision, it would have explicitly included one.[65] Likewise, the U.S. Courts of Appeals for the Third, Fourth, and Eleventh Circuits have found that the BIA's construction of the statute to

[64] Exemptions are also available for military-type training under duress and solicitation under duress. *See* Section 9.4.1, below: Situational Exemptions – Duress-Based.

[65] *Annachamy v. Holder*, 733 F.3d 254, 260-261 (9th Cir. 2013), *amending and superseding Annachamy v. Holder*, 686 F.3d 729 (9th Cir. 2012), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014).

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include material support provided under duress was permissible and deferred to its interpretation.[66]

In *Matter of M-H-Z-*, the BIA clarified that, under its interpretation of the statute, both *voluntary and involuntary* conduct fall under the definition of "material support," and held that there is no implied duress exception.[67] The BIA's decision is controlling on this issue. In its review of *Matter of M-H-Z*, the U.S. Court of Appeals for the Second Circuit held that the BIA's interpretation of the material support bar was permissible and deferred to the Board's interpretation that the material support bar does not contain an explicit or an implied duress exemption.[68]

In cases where you find that an applicant has provided material support to a terrorist organization under duress, you must find that this ground of inadmissibility does apply, but consider whether the applicant has established his or her eligibility for the situational duress exemption. For more information, *see* Section 9.4.1, below, Situational Exemptions – Duress-Based.

8.2.9 Material Support Lines of Inquiry

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[redacted]

[66] *Barahona v. Holder*, 691 F.3d 349, 353 (4th Cir. 2012); *Alturo v. U.S. Att'y Gen*, 716 F.3d 1310, 1314 (11th Cir. 2013); *Sesay v. Att'y Gen. of U.S.*, 787 F.3d 215, 222 (3d Cir. 2015).

[67] *Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016).

[68] *Hernandez v. Sessions*, 884 F.3d 107, 109 (2d Cir. 2018).

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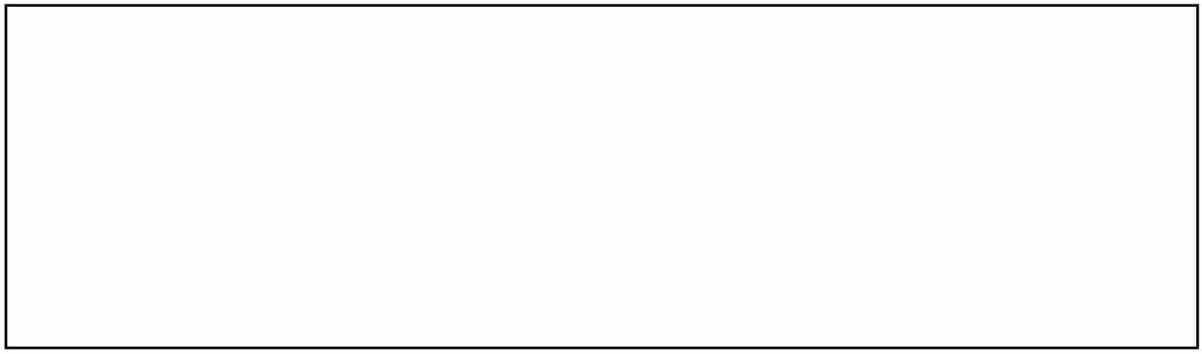

8.3 Lack of Knowledge Exceptions

8.3.1 Exception for Tier IIIs Only (Membership, Solicitation and Material Support)

There is an exception for some of the TRIG provisions related to Tier III organizations if the applicant can "demonstrate by clear and convincing evidence that he did not know, and reasonably should not have known, that the organization was a terrorist organization."[69] This lack of knowledge exception refers to knowledge of the group's activities, and in particular, knowledge that the group engages in activities of the type that qualify as "engaging in terrorist activity" under INA § 212(a)(3)(B)(iv). The applicant does not, however, need to know that the group meets the definition of an undesignated terrorist organization under INA § 212(a)(3)(B)(vi)(III) to be found inadmissible.[70]

This exception applies to:

- members of;
- those who solicit funds, things of value, or members for; and
- those who provide material support to;

Tier III terrorist organizations only.

If the applicant can show by "clear and convincing" evidence that he or she did not know, and should not reasonably have known, that the organization was a terrorist organization,[71] these grounds of inadmissibility do not apply. Note that there is both a

[69] INA §§ 212(a)(3)(B)(i)(VI), (B)(iv)(IV)(cc), (B)(iv)(V)(cc), (B)(iv)(VI)(dd).

[70] *American Academy of Religion v. Napolitano*, 573 F.3d 115, 132 (2d. Cir. 2009).

[71] INA § 212(a)(3)(B)(iv)(VI)(dd); *see* Section 7.4, below: Undesignated Terrorist Organization (Tier III); *see also Matter of S-K-*, 23 I&N Dec. at 941-942; *Viegas*, 699 F.3d at 802-803 (upholding the BIA's finding that the applicant "reasonably should have known" his organization was engaged in violent activities despite his lack of specific information about his own faction); *Khan*, 584 F.3d at 785 (holding that the applicant's admission that he knew a wing of his organization was dedicated to armed struggle and evidence of media reports of violent attacks committed by his organization were sufficient to support a finding that he knew or reasonably should have known it was a terrorist organization).

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subjective (did not know) and an objective (should not reasonably have known) component to this exception.

"Clear and convincing" evidence is that degree of proof, that, though not necessarily conclusive, will produce a "firm belief or conviction" in the mind of the adjudicator.[72] It is higher than the "preponderance of the evidence" standard, and lower than "beyond a reasonable doubt."[73]

This exception does not apply to Tier I or Tier II organizations. This exception also does not apply to "representatives" of undesignated terrorist organizations.[74]

In order to determine whether a lack of knowledge is reasonable, you must consider:

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[redacted]

[72] *Matter of Carrubba*, 11 I&N Dec. 914, 917-18 (BIA 1966); *see also Matter of Patel*, 19 I&N Dec. 774, 783 (BIA 1988).

[73] For more information about standards and burdens of proof, see RAIO Training module, *Evidence*.

[74] INA § 212(a)(3)(B)(v) ("Representative" defined).

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8.3.2 Exception for All Tiers (Material Support Only)

Additionally, under the material support provision, INA § 212(a)(3)(B)(iv)(VI), there is an exception that if the applicant did not know or reasonably should not have known that he or she *afforded material support*, the applicant would not be inadmissible.

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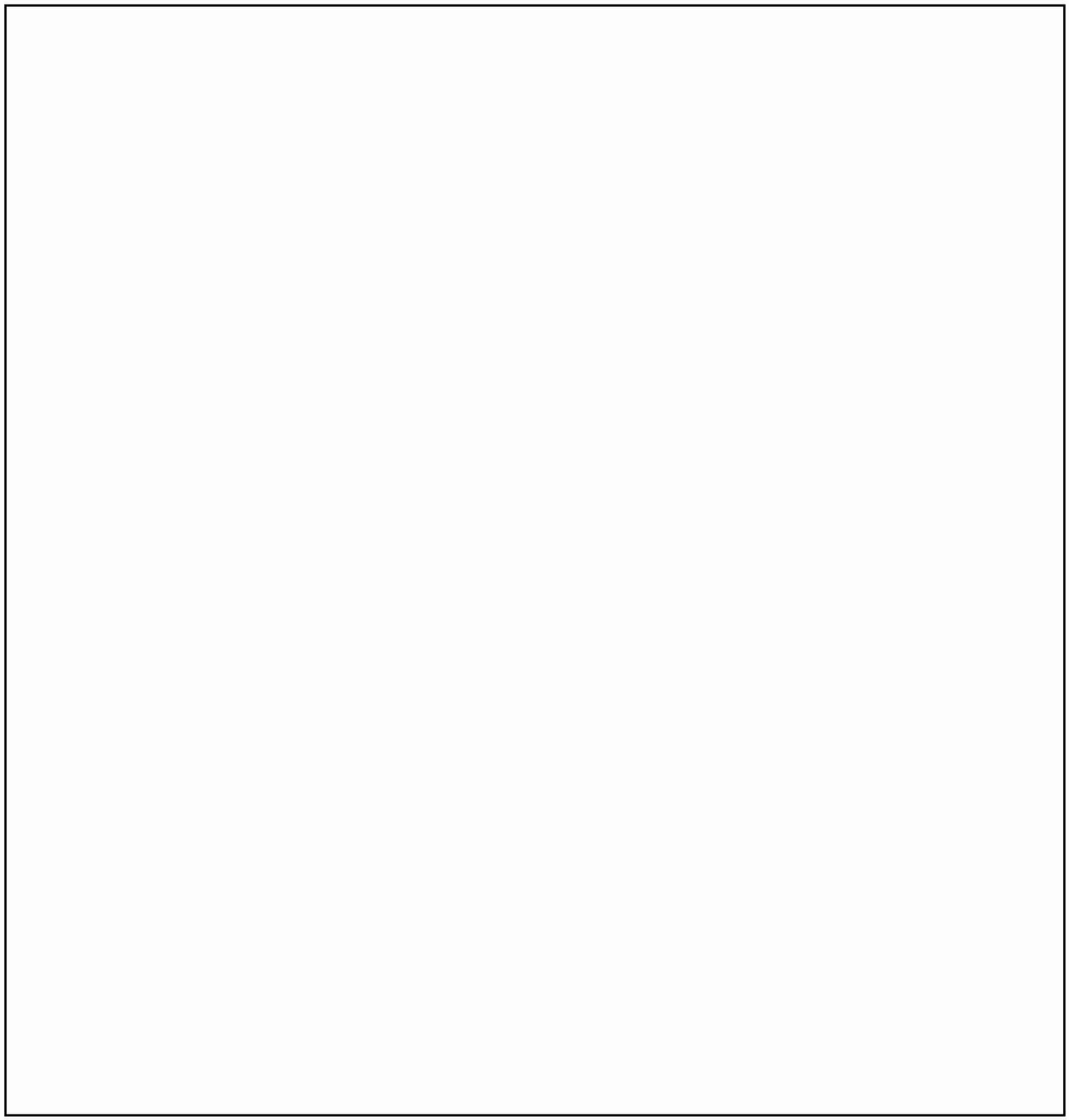

[75] This exception may only be applicable when the applicant provided something that has no apparent value. However, there is no exception for material support that is of minimal value.

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9 TRIG EXEMPTION AUTHORITY

9.1 General

INA § 212(d)(3)(B)(i), as created by the 2005 REAL ID Act and revised by the Consolidated Appropriations Act, 2008, includes a discretionary exemption provision for certain INA § 212(a)(3)(B) grounds of inadmissibility. This exemption authority can be exercised by the Secretary of Homeland Security or the Secretary of State after consultation with each other and the Attorney General.[76]

Exemptions issued to date fall into one of three categories: "group-based" exemptions, which pertain to associations or activities with a particular group or groups; "situational" exemptions, which pertain to a certain activity, such as providing material support or medical care; and "individual" exemptions, which pertain to a specific applicant.

Once the Secretary of Homeland Security signs a new exemption authority, USCIS releases the exemption document along with a corresponding policy memorandum, which provide further guidance to adjudicators on implementing the new discretionary exemption.

In each of the exercises of exemption authority to date that are either group-based or situational, the Secretary of Homeland Security delegated to USCIS the authority to determine whether a particular alien meets the criteria required for the exercise of the exemption.

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[76] INA § 212(d)(3)(B)(i). For some specific examples of the Secretary's exercise of discretion under this provision, see USCIS Fact Sheets.

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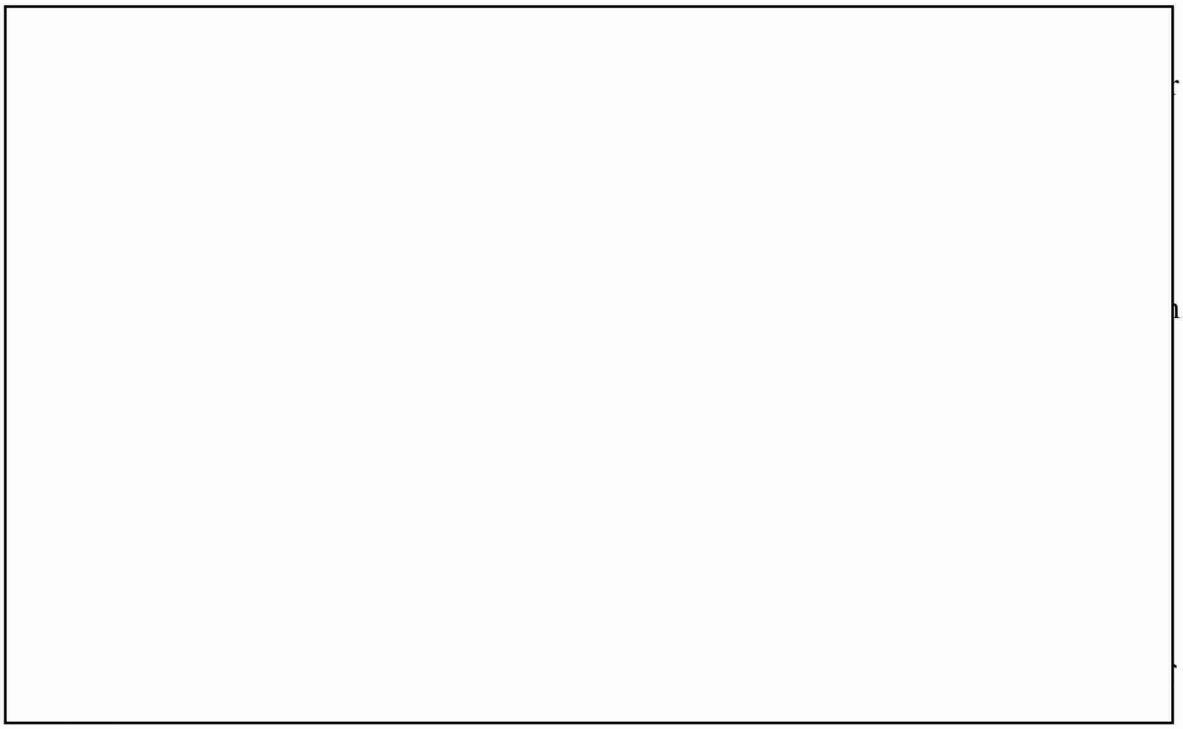

9.2 Criteria

9.2.1 Threshold Requirements

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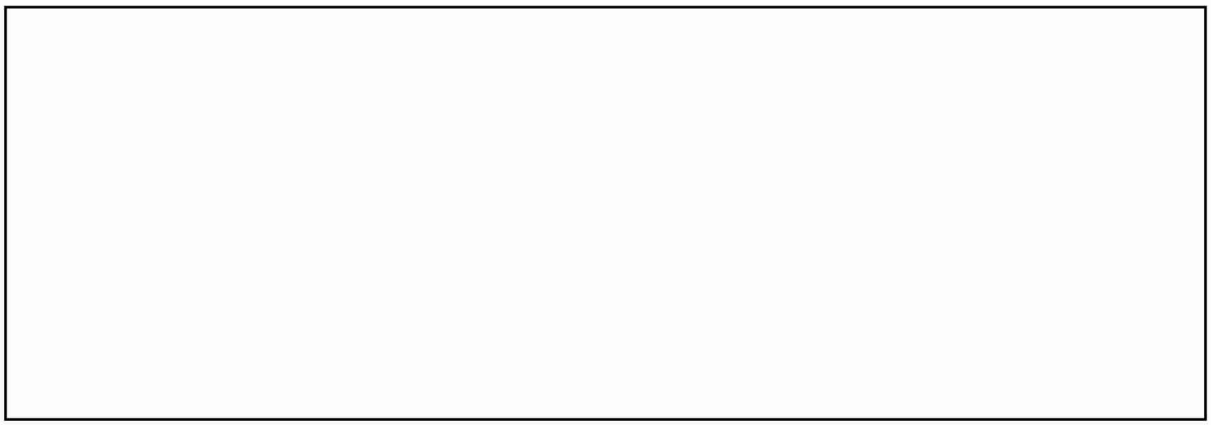

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9.2.2 Specific Additional Exemption Requirements

9.2.3 Totality of the Circumstances

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9.3 Group-Based Exemptions

9.3.1 Named Groups in the Consolidated Appropriations Act, 2008 (CAA)

As explained in Section 6.5 above, the Consolidated Appropriations Act, 2008 (CAA) named ten groups that are excluded from the definition of a "terrorist organization." The ten groups are comprised of six ethnic rebel groups in Burma, two U.S.-backed anti-Viet

[77] If you have questions about whether an applicant poses a danger to the safety and security of the United States, consult with a local Fraud Detection and National Security (FDNS) IO and/or your supervisor in accordance with local operating procedures.

[78] The existing exercises of authority and policy memoranda for TRIG exemptions can be found on the TRIG Exemptions page of the USCIS TRIG ECN.

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Cong groups, the CIA-backed Tibetan resistance group based in Mustang, and the anti-Castro Alzados in Cuba. The African National Congress (ANC), an anti-apartheid South African party, was added to the CAA groups through a subsequent amendment. The language of the CAA's exclusion provides that the named groups "shall not be considered" terrorist organizations on the basis of any act or event that occurred prior to December 26, 2007.[79]

The CAA's statutory exclusion only partially mitigated the immigration consequences for applicants who have activities and/or associations with the CAA groups. Applicants who would otherwise have been inadmissible for their activities and/or associations with a CAA group will receive "automatic relief" from any TRIG provision in which the term "terrorist organization" is an element. However, automatic relief does not cover the TRIG provisions in which the term "terrorist organization" is not an element. As a consequence, group exemptions were authorized for certain "covered activities" in connection with the ten groups named in the CAA.[80]

Automatic relief: The CAA groups are not considered "terrorist organizations" per the CAA. As such, the TRIG provisions that include the term "terrorist organization" will not apply to applicants with activities and/or associations with the CAA groups. This is referred to as "automatic relief." A TRIG exemption worksheet is not required.

Time limitation to automatic relief: As a result of the statutory construction of the CAA's exclusion, any of the named groups that have re-engaged in "terrorist activity" on or after December 26, 2007 will no longer be covered by the CAA exclusion as of that date. In other words, if any of the CAA groups commits a terrorist activity on or after December 26, 2007, it will be considered a Tier III undesignated terrorist organization as of that date. According to reporting, the KNU/KNLA, KNPP, and ALP have re-engaged in terrorist activity.

CAA group-based exemptions: The following group-based exemption authorities were authorized in addition to the "automatic relief" provisions of the CAA.

Date authorized: June 18, 2008 (separate exemptions authorized for each of the ten CAA groups)

Groups included:
- Karen National Union/Karen National Liberation Army (KNU/KNLA)
- Chin National Front/Chin National Army (CNF/CNA)
- Chin National League for Democracy (CNLD)

[79] Consolidated Appropriations Act, 2008, *supra*, note 8, § 691(b).

[80] *See* 73 Fed. Reg. 34770-34777 (June 18, 2008); *see also* Memorandum to Associate Directors, et al., Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds, Michael L. Aytes, Acting Deputy Director, USCIS (July 28, 2008).

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- Kayan New Land Party (KNLP)
- Arakan Liberation Party (ALP)
- Tibetan Mustangs
- Cuban Alzados (groups opposed to the Communist government of Cuba)
- Karenni National Progressive Party (KNPP)
- appropriate groups affiliated with the Hmong
- appropriate groups affiliated with the Montagnards (includes the Front Unifié de Lutte des Races Opprimées (FULRO))

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[redacted]

9.3.2 Iraqi Group Exemptions and the National Defense Authorization Act of 2014 (NDAA)

As explained in Section 6.5 above, two Iraqi groups were excluded from the definition of a "terrorist organization" by the National Defense Authorization Act for Fiscal Year 2015 (NDAA): the Kurdish Democratic Party (KDP), led by Masoud Barzani, and the Patriotic Union of Kurdistan (PUK), led by Jalal Talabani.

Unlike the CAA, the NDAA excluded the KDP and PUK from the definition of a terrorist organization without any conditions or restrictions, meaning that the exclusion applies at all times – past, present, and future. Applicants who would otherwise have been inadmissible for their activities and/or associations with the KDP or PUK will receive "automatic relief" from any TRIG provision in which the term "terrorist organization" is an element. However, automatic relief does not cover the TRIG provisions in which "terrorist organization" is not an element.

Automatic relief: The KDP and PUK are not considered "terrorist organizations" as per the NDAA. As such, the TRIG provisions that include the term "terrorist organization" will not apply to applicants with activities and/or associations with the KDP or PUK. This is referred to as "automatic relief." A TRIG exemption worksheet is not required. For any TRIG activity related to the KDP or PUK that is not covered by automatic relief, a group exemption is available. (Note that automatic relief is not applicable to the Iraqi National Congress, although it has a group exemption, as explained below.)

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Iraqi group-based exemptions: The following group-based exemption authorities were authorized in addition to the "automatic relief" provisions for the KDP and PUK.

Date authorized: September 21, 2009[81] (separate exemptions authorized for the three groups)

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Additional requirements: The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons.

The INC meets the definition of a Tier III terrorist organization due to its activities in opposition to Saddam Hussein and Baath Party rule, as did the KDP and PUK prior to their statutory exclusion from the definition by the NDAA.

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[81] *See* Memorandum to USCIS Field Leadership, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities Related to the INC, KDP, and PUK, Lauren Kielsmeier, Acting Deputy Director, USCIS (January 2010).

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9.3.3 All Burma Students' Democratic Front (ABSDF)

Date authorized: December 16, 2010[83]

Covered activity: All activities and/or associations with ABSDF (except for current engagement or future intent to engage in terrorist activity)

Additional requirements: The applicant must not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.

The ABSDF has operated for many years in defiance of Burma's military government through political activism and armed rebellion. Due to activities carried out by the organization, the ABSDF meets the definition of a Tier III terrorist organization.

9.3.4 Kosovo Liberation Army (KLA)

Date authorized: June 4, 2012[84]

Covered activity: Solicitation, material support, and receipt of military-type training.

Additional requirements: (1) The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests; and (2) The applicant must not have been subject to an indictment by an international tribunal.

The KLA was an Albanian insurgent organization which sought the separation of Kosovo from Yugoslavia in the 1990s. Due to its activities, the KLA meets the definition of a Tier III terrorist organization.

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[83] Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 76 Fed. Reg. 2131-01 (January 12, 2011); *see also* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities and Associations Relating to the All Burma Students' Democratic Front (ABSDF), USCIS Office of the Director (PM-602-0025) (Dec. 29, 2010).

[84] Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 77 Fed. Reg. 41895-01 (July 16, 2012), *see also* Policy Memorandum, Implementation of New Discretionary Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Kosovo Liberation Army (KLA), USCIS Office of the Director (PM-602-0068) (July 5, 2012).

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9.3.5 AlSSF-Bittu Faction

Date authorized: October 18, 2010[85]

Covered activity: Material support

Additional requirements: The applicant must not have not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.

The AISSF was initially formed in the early 1940s to help promote the Sikh religion and to establish an independent Sikh nation. The AISSF-Bittu Faction transformed itself from a militant outfit during the Sikh insurgency of the 1980s and early 1990s into something akin to an interest or lobbying group. Due to the violent activities carried out by the organization, the AISSF-Bittu Faction meets the definition of a Tier III terrorist organization.

9.3.6 Farabundo Marti National Liberation Front (FMLN) and Nationalist Republican Alliance (ARENA)

Date authorized: April 3, 2013[86] (separate exemptions authorized for each group)

Covered groups:
- Farabundo Martí para la Liberación Nacional, or Farabundo National Liberation Front (FMLN)
- Alianza Republicana Nacionalista, or Nationalist Republican Alliance (ARENA)

Covered activity: All activities and/or associations with FMLN or ARENA (except for current engagement or future intent to engage in terrorist activity)

Additional requirements: (1) The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests; and (2) The applicant must not have engaged in terrorist

[85] *See* Exercise of Authority Under INA § 212(d)(3)(B)(i), 76 Fed. Reg. 2130-02 (January 12, 2011); *see also* Policy Memorandum, Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) for Material Support to the All India Sikh Students Federation-Butti Faction (AISSF-Bittu), USCIS Office of the Director (PM-602-0024) (December 29, 2010).

[86] *See* Exercise of Authority Under INA § 212(d)(3)(B)(i), 78 Fed Reg. 24225-01 and 24225-02 (April 24, 2013); *see also* Policy Memorandum, Implementation of New Discretionary Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Farabundo Marti National Liberation Front (FMLN) or to the Nationalist Republican Alliance (*Alianza Republicana Nacionalista*, or ARENA), USCIS Office of the Director (PM-602-0082) (May 22, 2013).

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activity outside the context of civil war activities directed against military, intelligence, or related forces of the Salvadoran government.

The FMLN was formed in 1980 as a left-wing armed guerrilla movement, while the ARENA was formed in 1981 as a right-wing political party that used death squads to support its agenda. The two movements fought on opposite sides of the Salvadoran Civil War, and due to their violent activities, they met the definition of a Tier III organization during that time.

9.3.7 Oromo Liberation Front (OLF)

Date authorized: October 2, 2013[87]

Covered activity: Voluntary solicitation, material support, and military-type training.

Additional requirements: (1) The applicant must **either**:

- have been admitted as a refugee, granted asylum, or had a pending asylum or refugee application on or before October 2, 2013;

or

- be the beneficiary of an I-730 Refugee/Asylee Relative Petition filed at any time by a petitioner who was admitted as a refugee or granted asylum on or before October 2, 2013;

(2) The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests; and
(3) The applicant must not have engaged in terrorist activity outside the context of civil war activities directed against military, intelligence, or related forces of the Ethiopian government.

The OLF is an opposition group founded in 1973 which engaged in violent conflict with the Ethiopian government. It falls within the definition of a Tier III organization because of its violent activities.

[87] *See* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Oromo Liberation Front (OLF), USCIS Office of the Director (PM-602-0096) (December 31, 2013).

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9.3.8 Tigray People's Liberation Front (TPLF)

Date authorized: October 17, 2013[88]

Covered activity: Voluntary solicitation, material support, and military-type training.

Additional requirements: The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.

The TPLF is a political party founded in 1975 in Ethiopia, as an opposition group. It was engaged in violent conflict with the Ethiopian government from then until 1991. It qualified as a Tier III organization during that period because of its violent activities. On May 27, 1991, the TPLF, with other parties, succeeded in overthrowing the Ethiopian government and became part of the ruling coalition in the new government. Since that time, its activities would likely not fall within the Tier III definition. Therefore, after that date, an exemption is likely not required.

9.3.9 Ethiopian People's Revolutionary Party (EPRP)

Date authorized: October 17, 2013[89]

Covered activity: Voluntary solicitation, material support, and military-type training.

Additional requirements: The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.

The EPRP is a leftist political party founded in 1972 in Ethiopia. It was engaged in violent conflict with successive Ethiopian governments and other parties from then until 1993. It qualified as a Tier III organization during that period because of its violent activities.

Although the EPRP continues to oppose the Ethiopian government, it has not engaged in any documented acts of violence since approximately January 1, 1993, and does not

[88] *See* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Tigrayan People's Liberation Front (TPLF), USCIS Office of the Director (PM-602-0101) (June 15, 2014).

[89] *See* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Ethiopian People's Revolutionary Party (EPRP), USCIS Office of the Director (PM-602-0100) (June 15, 2014).

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appear to fall within the definition of a Tier III terrorist organization after that date. Thus, an exemption is likely not required for later associations or activities.

9.3.10 Eritrean Liberation Front (ELF)

Date authorized: October 17, 2013[90]

Covered activity: Voluntary solicitation, material support, and military-type training.

Additional requirements: (1) The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests; and (2) *If the applicant's activity or association with the ELF occurred prior to January 1, 1980*, then the applicant must **either**:

- have been admitted as a refugee, granted asylum, or had an asylum or refugee application pending on or before October 2, 2013;

or

- be the beneficiary of an I-730 Refugee/Asylee Relative Petition filed at any time by a petitioner who was admitted as a refugee or granted asylum on or before October 2, 2013.

The ELF is a leftist political party founded in 1960 in Ethiopia with the goal of achieving Eritrean independence. It was engaged in violent conflict with successive Ethiopian governments and other parties from then through 1991. It met the defintion of a Tier III organization during that period because of its violent activities.[91]

The ELF no longer operates, and it has not engaged in any documented acts of violence since approximately January 1, 1992. Therefore, it generally is not considered a Tier III organization after that date. Thus, the exemption is likely not required for later associations or activities.

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[90] *See* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Eritrean Liberation Front (ELF), USCIS Office of the Director (PM-602-0099) (June 15, 2014); *see also* Exercise of Authority Under INA § 212(d)(3)(B)(i), 78 Fed. Reg. 66037-01 (November 4, 2013).

[91] *See Haile v. Holder*, 658 F.3d 1122, 1127 (9th Cir. 2011) (upholding an Immigration Judge's finding that the ELF constituted a terrorist organization). Note that the applicant in this case testified that the ELF continued to engage in violent activities at least up to 2002.

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9.3.11 Democratic Movement for the Liberation of Eritrean Kunama (DMLEK)

Date authorized: October 17, 2013[92]

Covered activity: Voluntary solicitation, material support, and military-type training.

Additional requirements: The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.

The DMLEK is an armed group in Eritrea founded in 1995 in opposition to the Eritrean government. It has been engaged in violent conflict with that government since its founding. It qualifies as a Tier III organization because of its violent activities.

9.3.12 Certain Burmese Groups

Date authorized: March 11, 2016[93]

Groups included:

- All Burma Muslim Union
- Arakan Army
- Hongsawatoi Restoration Army / Party
- Kachin Independence Army
- Kachin Independence Organization
- Karen National Defense Organization
- Karenni Nationalities People's Liberation Front
- Kawthoolei Muslim Liberation Front
- Kuki National Army
- Mon National Liberation Army
- Mon National Warrior Army
- Myeik-Dawei United Front
- National Democratic Front
- National United Party of Arakan
- New Democratic Army Kachin
- New Mon State Party

[92] *See* Exercise of Authority Under INA § 212(d)(3)(B)(i), 78 Fed. Reg. 66037-02 (November 4, 2013); *see also* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for the Democratic Movement for the Liberation of Eritrean Kunama (DMLEK), USCIS Office of the Director (PM-602-0098) (June 15, 2014).

[93] *See* Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 81 Fed. Reg. 21891-01 (Apr. 13, 2016); *see also* Policy Memorandum, Implementation of the Discretionary Exemption Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for Certain Burmese Groups, USCIS Office of the Director (PM-602-0135) (June 2, 2016).

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- Parliamentary Democracy Party
- Ramanya Restoration Army
- Shan State Army
- Zomi Reunification Organization/Zomi Revolutionary Army

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Each of the above groups has engaged in violent activities that bring it within the definition of a Tier III organization.

9.3.13 Afghan Civil Servants

NOTE: This exemption was signed by the Secretary of Homeland Security and Secretary of State, but has not yet been implemented by USCIS. Therefore, you should not apply this exemption until further notice.

On January 18, 2017, the Secretary of Homeland Security, in consultation with the Attorney General and Secretary of State, authorized an exemption for Afghan nationals who were employed in civil service positions while the Taliban was in power from September 27, 1996 through December 22, 2001. Due to the limitation on the exemption authority at INA § 212(d)(3)(B)(i), which prohibits exemptions from being granted for certain voluntary associations and activities with Tier I and Tier II organizations,[94] the adjudicator must assess the nature and context of the applicant's employment.

In addition to the threshold requirements listed in Section 9.2.1, the applicant must not have voluntarily and knowingly engaged in terrorist activity on behalf of the Taliban. The applicant's employment must not have directly advanced the Taliban's political or ideological agenda, and the applicant must have reasonably believed that to decline or depart from employment would prevent the applicant from being able to sustain important activities of daily life, subject the applicant or his or her family to physical or other harm, or would subject the applicant to comparably compelling circumstances such that the applicant reasonably believed that he or she could not decline or leave the employment.

[94] INA § 212(d)(3)(B)(i) prohibits exemptions for voluntary service as a member or representative of a Tier I/II organization, voluntarily and knowingly engaging, endorsing, espousing, or persuading others to endorse/espouse/support terrorist activity for a Tier I/II organization, and voluntarily receiving military-type training from or on behalf of a Tier I/II organization.

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9.4 Situational Exemptions

"Situational" exemptions apply to specified activities with a terrorist organization.

9.4.1 Duress-Based

Some situational exemptions require that the activity have taken place under duress, requiring examination of the duress factors to determine eligibility for the exemption.

If duress is required for exemption eligibility, then testimony covering all duress factors must be elicited and analyzed. Duress has been defined, at a minimum, as a reasonably-perceived threat of serious harm.[95] In general, the duress factors include:

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[redacted]

[95] Memorandum to Associate Directors et al., Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations, Jonathan Scharfen, Deputy Director (May 24, 2007).

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Relevant Questions

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There are three types of duress-based exemptions:

Material Support under Duress – INA § 212(a)(3)(B)(iv)(VI)

Date authorized: February 26, 2007 (for Tier III)[96]

[96] *See* Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9958-01 (February 26, 2007).

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April 27, 2007 (for Tier I and Tier II)[97]

Covered activity: Material support under duress

Additional requirements: n/a

The material support under duress exemptions are by far the most commonly utilized exemption in USCIS adjudications. As noted above, material support is defined broadly and even small amounts of food, supplies, etc. constitute material support.[98] Material support under duress to Tier I, II, or III terrorist organizations may be exempted.

Military-Type Training under Duress – INA § 212(a)(3)(B)(i)(VIII)

Date authorized: January 7, 2011[99]

Covered activity: Receipt of military-type training under duress from or on behalf of any organization that, at the time the training was received, was a terrorist organization.

Additional requirements: The applicant must establish that he or she has not received training that poses a risk to the U.S. or U.S. interests (e.g., training on production or use of a weapon of mass destruction, torture, or espionage).

Military-type training under duress may be exempted if it is from or on behalf of a Tier I, II or III terrorist organization. You must analyze the organization's activities to determine whether it met the definition of a terrorist organization at the time the alien received the training.[100]

18 U.S.C. § 2339D(c)(1) states that "military-type training" includes training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm, or other weapon, including any weapon of mass destruction (as defined in 18 U.S.C § 2232a(c)(2)). Please note that marching in

[97] *See* Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26138-02 (April 27, 2007).

[98] *See* Section 8, above: TRIG – Material Support.

[99] *See* Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 76 Fed. Reg. 14418-01 (March 16, 2011).

[100] Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for the Receipt of Military-Type Training under Duress, USCIS Office of the Director (PM-602-0030) (Feb. 23, 2011).

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formation and physical exercise do not meet the statutory definition of military-type training.

This exemption does not apply to the use of weapons in combat. If an applicant received military-type training under duress and also participated in combat, he or she would not be eligible for this exemption, even if the combat took place under duress.

Solicitation under Duress – INA § 212(a)(3)(B)(iv)(IV)(bb) and (cc) only and INA § 212(a)(3)(B)(iv)(V)(bb) and (cc) only

Date authorized: January 7, 2011[101]

Covered activity: Solicitation under duress of funds or other things of value for a terrorist organization, and solicitation under duress of individuals for membership in a terrorist organization.

Additional requirements: n/a

The solicitation of funds or other things of value (under INA § 212(a)(3)(B)(iv)(IV)(bb) for Tier I and Tier II terrorist organizations and § 212(a)(3)(B)(iv)(IV)(cc) for Tier III terrorist organizations) and the solicitation of individuals for membership (under INA § 212(a)(3)(B)(iv)(V)(bb) for Tier I and Tier II terrorist organizations and § 212(a)(3)(B)(iv)(V)(cc) for Tier III terrorist organizations) may be exempted.

Note that neither the solicitation of funds or other things of value for a terrorist activity (INA § 212(a)(3)(B)(iv)(IV)(aa)) nor the solicitation of individuals to engage in terrorist activity (§ 212(a)(3)(B)(iv)(V)(aa)) is covered by this exemption.

9.4.2 Voluntary Medical Care

Date authorized: October 13, 2011[102]

Covered activity: Voluntary medical care provided to individuals engaged in terrorist activities, undesignated terrorist organizations, or

[101] *See* Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 76 Fed. Reg. 14419-01 (March 16, 2011); *see also* Policy Memorandum, Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For the Soliciation of Funds or Members under Duress, USCIS Office of the Director (PM-602-0031) (Feb. 23, 2011).

[102] *See* Exercise of Authority Under the Immigration and Nationality Act, 76 Fed. Reg. 70463-03 (November 14, 2011); *see also* Policy Memorandum, Implementation of New Exemption Under INA Section 212(d)(3)(B)(i) for the Provision of Material Support in the Form of Medical Care, USCIS Office of the Director (PM-602-0052) (Nov. 20, 2011).

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members of terrorist organizations, except for medical care on behalf of a Tier I or Tier II terrorist organization.

Additional requirements: N/A

Medical care provided to members of a terrorist organization, to a terrorist organization, or to an individual the alien knows or reasonably should have known[103] has committed or plans to commit a terrorist activity, would render an applicant inadmissible in spite of the oaths of commitment to serve patients that are often taken by medical professionals. (For those individuals who provided medical care under duress,

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To address this, the Secretary of Homeland Security authorized this exemption to allow USCIS not to apply the material support inadmissibility provision to certain aliens who provided medical care to persons associated with terrorist organizations or the members of such organizations. This exemption is limited to the voluntary provision of medical care, which includes:

- Services provided by and in the capacity of a medical professional, such as physician, nurse, dentist, psychiatrist or other mental health care provider, emergency room technician, ambulance technician, medical lab technician, or other medical-related occupation; and

- Related assistance by non-medical professionals providing, for example, emergency first aid services to persons who have engaged in terrorist activity (e.g., Good Samaritans and first aid givers).

This exemption does not apply to the provision of medical supplies independent of the provision of medical care or medical advice. Nor does the exemption apply to transportation of an injured individual to a hospital or other location for medical treatment independent of the provision of any medical care or first aid. Both of these activities would fall under the provision of material support. These provisions of material support may, however, qualify for other exemptions such as the Certain Limited Material Support Exemption or the Insignificant Material Support Exemption.

Medical care on behalf of a Tier I or II Organization: INA § 212(d)(3)(B)(i) explicitly prohibits the exercise of exemption authority for aliens who "voluntarily and knowingly engaged in . . . terrorist activity *on behalf* of" a Tier I or II organization (emphasis added). Therefore, medical care cannot be exempted when the applicant provided the care voluntarily and knowingly on behalf of a Tier I or II organization. For example, this

[103] If the medical professional did not and reasonably should not have known that the patient he or she was treating was a member of a terrorist organization or involved in terrorist activities, then the inadmissibility/bar would not apply.

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would include situations in which a medical provider serves as a staff physician for a Tier I or II organization, or provides medical care to an organization's members in order to abet the group's pursuit of its terrorist aims. Note that medical care **on behalf of** a Tier I or Tier II organization is distinct from medical care provided to members of a Tier I or Tier II organization when the provider has no association with the Tier I or Tier II organization.

This restriction on exemptions for voluntary activities on behalf of Tier I or II organization would not apply to an alien who provided medical care on behalf of a Tier III terrorist organization, e.g., a staff physician. However, the role of the medical care provider and the activities of the Tier III organization involved should be carefully considered in determining whether to grant a discretionary exemption to an individual who has provided medical care on behalf of a Tier III organization. The fact that a group engaged in violent activities against civilians, for example, or later was designated as a terrorist organization after the applicant's association with the group, would weigh heavily towards a denial of this exemption and likely the immigration benefit sought.

9.4.3 Limited General Exemption

The Limited General Exemption applies to certain aliens who had already been granted an immigration benefit in the United States as of August 10, 2012, or who are beneficiaries of an I-730 Refugee/Asylee Relative petition filed at any time by a petitioner who was granted asylum or refugee status on or before August 10, 2012. Therefore, this exemption is primarily utilized outside of RAIO adjudications.

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Date authorized: August 10, 2012[104]

Covered activity:

Additional requirements:

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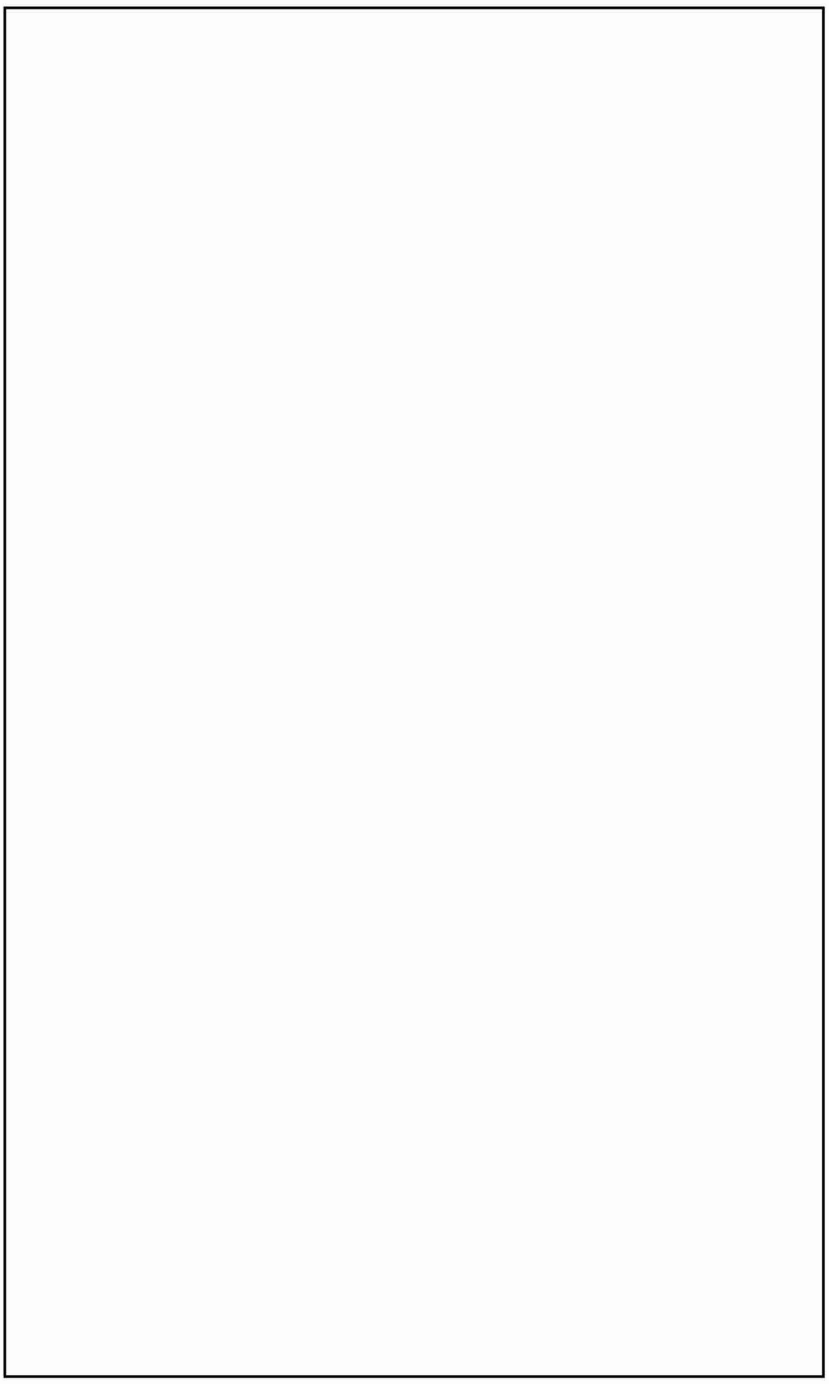

9.4.4 Iraqi Uprisings

Date authorized: August 17, 2012[105]

[105] *See* Exercise of Authority Under INA § Sec. 212(d)(3)(B)(i), 77 Fed. Reg. 51545-02 (Aug. 24, 2012); *see also* Policy Memorandum, Implementation of New Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) for Participation in the Iraqi Uprisings, USCIS Office of the Director (PM-602-0076) (Nov. 12, 2012).

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Covered activity:	Any activity or association relating to the uprisings against the government of Saddam Hussein in Iraq between March 1 through April 5, 1991.
Additional requirements:	(1) The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons not affiliated with Saddam Hussein's regime from March 1 through April 5 of 1991, or U.S. interests; and (2) The applicant must not have engaged in terrorist activity, not otherwise exempted, outside the context of resistance activities directed against Saddam Hussein's regime from March 1 through April 5 of 1991.

The "Iraqi Uprisings" is a term used to refer to a period of revolt in southern and northern Iraq between March 1 and April 5, 1991.[106] The uprisings in the south and north are popularly referred to as the Shi'a and Kurdish uprisings, respectively. Although these groups are different, their rebellion was fueled by the common belief that Saddam Hussein and his security forces were vulnerable following defeat by the allied forces in the Persian Gulf War.[107] Although the rebels achieved momentary victories, they were rapidly defeated by Iraqi government forces led by the Republican Guard.

9.4.5 Exemptions for Certain Limited Material Support (CLMS) and Insignificant Material Support (IMS)

Date authorized:	February 5, 2014[108] (separate exemptions authorized for CLMS and IMS)
CLMS covered activity:	Limited material support related to a Tier III terrorist organization that involves: (1) certain routine commercial transactions; (2) certain routine social transactions; (3) certain humanitarian assistance; or (4) sub-duress pressure.
IMS covered activity:	Insignificant material support related to a Tier III terrorist organization.

[106] Human Rights Watch, *Endless Torment: The 1991 Uprising in Iraq and its Aftermath* (1992).

[107] *Id.*

[108] Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 6914-01 (Feb. 5, 2014); Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 6913-02 (Feb. 5, 2014).

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Additional requirements:

CLMS only – (1) The applicant must not have provided the material support with any intent or desire to assist any terrorist organization or terrorist activity; **or**
IMS only – (1) The applicant must not have provided the material support with any intent of furthering the terrorist or violent activities of the individual or organization; and
Both CLMS and IMS – The applicant must not have provided material support:
(2) That the applicant knew or reasonably should have known could directly be used to engage in terrorist or violent activity;
(3) To any individual who the applicant knew or reasonably should have known had committed or planned to commit a terrorist activity on behalf of a Tier I/II designated terrorist organization;
(4) To terrorist activities that the alien knew or reasonably should have known targeted noncombatants, U.S. citizens, or U.S. interests;
(5) That the alien knew or reasonably should have known involved providing weapons, ammunition, explosives, or their components / transportation / concealment; and
(6) In the form of giving military-type training.

Both exemptions require that the applicant not have provided material support that he or she knew or reasonably should have known could be used **directly** to engage in violent or terrorist activity. Therefore, if an applicant has provided any quantity of weapons, explosives, ammunition, military-type training, or other types of support that are generally understood to be used for violent or terrorist activity, the applicant will, in general, not be eligible for either the CLMS or the IMS exemption. On the other hand, providing support such as food, water, or shelter that is generally not directly used for violent activity will usually not disqualify an applicant from consideration for these exemptions.[109]

The CLMS exemption is intended to cover otherwise eligible applicants for visas or immigration benefits who provided certain types of **limited** material support to an Tier III terrorist organization, or to a member of such an organization, or to an individual the applicant knew or reasonably should have known has committed or plans to commit a terrorist activity. The support provided must have been **incidental to routine commercial transactions, routine social transactions, certain humanitarian assistance, or in**

[109] Policy Memorandum, Implementation of the Discretionary Exemption under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Certain Limited Material Support, USCIS Office of the Director (PM-602-0112) (May 8, 2015); Policy Memorandum, Implementation of the Discretionary Exemption under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Insignificant Material Support, USCIS Office of the Director (PM-602-0113) (May 8, 2015).

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response to substantial pressure that does not rise to the level of duress ("sub-duress pressure").[110]

Routine commercial transactions are transactions in which the applicant could or would engage in the ordinary course of business. To be a routine commercial transaction, the transaction must have occurred on substantially the same terms as other transactions of the same type regardless of the parties to the transaction. A commercial transaction is not routine if it is motivated by the status, goals, or methods of the organization or the applicant's connection to the organization or conducted outside the course of the applicant's business activities.[111] To qualify as a routine commercial transaction, an applicant must have been the provider of goods and/or services, and not the customer.

Routine social transactions are transactions that satisfy and are motivated by specific, compelling, and well-established family, social, or cultural obligations or expectations. A routine social transaction is not motivated by a generalized desire to "help society" or "do good." It involves support no different than the support that the applicant would provide under similar circumstances to others who were not members of undesignated terrorist organizations.[112]

Certain humanitarian assistance is aid provided with the purpose of saving lives and alleviating suffering, on the basis of need and according to principles of universality, impartiality, and human dignity. It seeks to address basic and urgent needs such as food, water, temporary shelter, and hygiene, and it is generally triggered by emergency situations or protracted situations of conflict or displacement. It does not include development assistance that seeks the long-term improvement of a country's economic prospects and chronic problems such as poverty, inadequate infrastructure, or underdeveloped health systems.[113]

When an applicant has provided material support that may be considered "certain humanitarian assistance" in association with a humanitarian organization, vetting of that organization may be required. If you interview an applicant who has provided "certain humanitarian assistance" in association with a humanitarian organization, you should elicit as much detail as possible about the activity in question, including the time and location of the activity, as well as name and location of the organization. You must discuss the case

[110] Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 6914-01 (Feb. 5, 2014).

[111] Policy Memorandum, Implementation of the Discretionary Exemption under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Certain Limited Material Support, USCIS Office of the Director (PM-602-0112) (May 8, 2015).

[112] *Id.*

[113] *Id.*

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with your supervisor, who will then raise the case to your Division's TRIG POC, before you proceed with the adjudication.

Sub-duress pressure is a reasonably perceived threat of physical or economic harm, restraint, or serious harassment, leaving little or no reasonable alternative to complying with a demand. Pressure may be considered sub-duress pressure if providing the support is the only reasonable means by which the applicant may carry out important activities of his or her daily life. The pressure must come, either entirely or in combination with other factors, from the organization to which the applicant provided support.[114]

In order for the CLMS exemption to apply, the applicant, in providing material support, must not have intended or desired to assist any terrorist organization or terrorist activity.[115]

Insignificant Material Support

The IMS exemption is intended to cover otherwise eligible applicants for visas or immigration benefits who provided **insignificant** amounts of material support to an Tier IIIterrorist organization, or to a member of such an organization, or to an individual the applicant knew or reasonably should have known has committed or plans to commit a terrorist activity.

Insignificant material support is support that (1) is minimal in amount and (2) the applicant reasonably believed would be inconsequential in effect. In order to determine whether support is minimal, you must consider and evaluate its relative value, fungibility, quantity and volume, and duration and frequency.[116] Material support is "inconsequential in effect" if the actual or reasonably foreseeable impact of the support and the extent to which it enabled the organization or individual to continue its mission or his or her violent or terrorist activity was, at most, insignificant. It is not "inconsequential in effect" if it could prove vital to furthering the aims of an organization by meeting a particularized need at the time the support was provided or involved more than very small amounts of fungible support given with the intention of supporting non-violent ends.

For the IMS exemption to apply, the applicant must not have provided the material support with the intent of furthering the terrorist or violent activities of the individual or organization.[117]

For additional guidance on the application of the CLMS and IMS exemptions, contact your your Division's TRIG POC.

---

[114] *Id.*

[115] Exercise of Authority Under Section 212(d)(3)(B)(i), 79 Fed. Reg. 6914-01 (Feb. 5, 2014).

[116] Policy Memorandum, Implementation of the Discretionary Exemption under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Insignificant Material Support, USCIS Office of the Director (PM-602-0113) (May 8, 2015).

[117] Exercise of Authority Under Section 212(d)(3)(B)(i), 79 Fed. Reg. 6913-02 (Feb. 5, 2014).

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9.5 Procedures

9.5.1 212(a)(3)(B) Exemption Worksheet

(b)(7)(E)

9.5.2 Processing Cases

More than One Terrorism-Related Ground of Inadmissibility

Denials / Referrals

(b)(7)(E)

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10 LEGAL ANALYSIS

10.1 Burden and Standard of Proof

When there is evidence, testimonial or otherwise, indicating that an applicant is subject to TRIG, the burden is on the applicant to establish eligibility by the standard of proof required for the benefit he or she is seeking. The burden of proof refers to the duty of one party to prove a fact, while the standard of proof refers to the amount of evidence required to prove that fact.

In asylum cases, an applicant must establish by a preponderance of the evidence that he or she is not subject to any bars.[118]

In refugee adjudications, where evidence indicates an applicant may be subject to a ground of inadmissibility, including TRIG, the applicant must establish clearly and beyond doubt that the inadmissibility ground does not apply in order to be eligible for refugee status (see International and Refugee Adjudications Supplement— Burden and Standard of Proof for TRIG Inadmissibility Grounds).[119]

10.2 Documentation Relating to TRIG Issues

You must properly document all TRIG-related issues in a case, in line with policy and guidance (see Asylum Adjudications Supplement—Note Taking – National Security).

10.3 Dependents/Derivatives

TRIG inadmissibilities and bars also apply independently to any relative who is included in an applicant's request for an immigration benefit. In some instances, a principal applicant may be granted the benefit sought and his or her dependent/derivative may be denied the benefit sought or referred to immigration court because the dependent/derivative is subject to TRIG.[120]

11 CONCLUSION

As the United States continues to face national security threats, RAIO plays a critical role in defending the homeland by maintaining the integrity of our immigration benefit programs. In this regard, it is critical for you to properly assess each case in consideration of possible TRIG issues and to follow your division's procedures for processing these cases.

[118] INA § 208(b)(1)(B)(i); 8 C.F.R. §§ 208.13(a) and (c)(2)(ii).

[119] INA § 235(b)(2)(A).

[120] 8 C.F.R. § 208.21(a); INA § 207(c)(2)(A).

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12 SUMMARY

U.S. immigration laws contain provisions to prevent individuals who may be involved in terrorist activities from receiving immigration benefits. As an adjudicator, you will identify potential TRIG issues and process those cases in accordance with these laws.

12.1 Interviewing TRIG Cases

(b)(7)(E)

12.2 Terrorism-Related Inadmissibility Issues

An applicant is ineligible to receive most immigration benefits if the individual is described in any of the terrorism-related inadmissibility grounds unless an exemption is available and granted by USCIS. In addition to rendering inadmissible those seeking admission to the United States, the terrorism-related inadmissibility grounds are bars to asylum.

12.2.1 Terrorist Organizations

Under the INA, there are three catergories of terrorist organization, sometimes referred to as "tiers." Tier I designated terrorist organizations appear on the Foreign Terrorist Organizations (FTO) list while Tier II designated terrorist organizations are on the Terrorist Exclusion List (TEL). A Tier III undesignated terrorist organization is any group of two or more individuals that, whether organized or not, engages in terrorist activity, or has a subgroup that engages in terrorist activity. Depending on whether the organization is a designated terrorist organization or an undesignated terrorist organization, there are distinct immigration consequences.

12.2.2 Terrorism-Related Inadmissibility Grounds

The terrorism-related inadmissibility grounds are listed at INA § 212(a)(3)(B)(i)(I)-(IX).

12.2.3 Material Support

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(b)(7)(E)

12.2.4 TRIG Exemption Authority

INA § 212(d)(3)(B)(i), as revised by the 2005 REAL ID Act and the Consolidated Appropriations Act, 2008, includes a discretionary exemption provision for certain terrorism-related inadmissibility grounds under INA § 212(a)(3)(B). This exemption authority can be exercised by the Secretary of Homeland Security or the Secretary of State after consultation with each other and the Attorney General.[121]

13 RESOURCES

At various points during your interview preparation, you may encounter indicators that require additional research to make sure you can conduct an informed, thorough interview of a case with potential TRIG issues. For example, in order to determine if a group of two or more individuals meets the definition of a Tier III organization, you should research the group and assess the group's activities. The following resources provide useful information that you should take into consideration when adjudicating cases in which the applicant or a dependent may be barred/inadmissible for TRIG.

13.1 USCIS TRIG ECN

The RAIO TRIG Branch maintains a comprehensive, one-stop shop for resources on TRIG issues. This resource is available through the USCIS TRIG ECN.

13.2 USCIS Refugee, Asylum and International Operations Research Unit (RAIO Research Unit)

The RAIO Research Unit's Country of Origin Information (COI) research papers are a good starting point for officers. RAIO Research Unit (RRU) products include specific COI that may be helpful when adjudicating cases involving TRIG. The RRU products may be accessed through the RAIO Research Unit ECN page.

In accordance with each Division's established procedures, you may submit queries to the RRU (email to RAIOResearch@uscis.dhs.gov) when additional country conditions information is required to reach a decision in a case.

[121] INA § 212(d)(3)(B)(i). For some specific examples of the Secretary's exercise of discretion under this provision, *see* USCIS Fact Sheets.

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13.3 USCIS Fraud Detection and National Security Directorate

In support of the overall USCIS mission, the Fraud Detection and National Security Directorate (FDNS) was created to enhance the integrity of the legal immigration system, detect and deter benefit fraud, and strengthen national security.

The RAIO FDNS ECN provides a repository of open source intelligence and publications relating to national security in the "Country Specific Resources" and "News & Bulletins" sections.

13.4 Department of State

The Department of State's Office of Counterterrorism maintains a body of resource information on its website, which includes country reports on terrorism.

13.5 RAIO COI Tool

The RAIO COI Tool is a practical, data-driven tool designed to assist officers interviewing Syrian refugee applicants by providing reliable, specific, localized country of origin information. The tool itself is a Microsoft Word plug-in that integrates the Syria event database into the interviewing officer's assessment.

Use of the COI Tool allows officers to access information regarding locations and events in Syria relevant to the applicant's refugee claim, places of residence, and travel patterns. This applicant-specific COI Tool enhances the officer's ability to develop tailored lines of questioning, assess applicant credibility, and identify potential national security concerns and TRIG.

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PRACTICAL EXERCISES

Practical Exercise # 1 (b)(7)(E)

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Practical Exercise # 2 (b)(7)(E)

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SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

The following information is specific to international and refugee adjudications. Information in each text box contains adjudication-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

ADDITIONAL RESOURCES

2.

SUPPLEMENTS

International and Refugee Adjudications Supplement

Burden and Standard of Proof for TRIG Inadmissibility Grounds

If the evidence indicates that the refugee applicant may be inadmissible to the United States pursuant to INA § 212(a)(3)(B), then the refugee applicant must establish clearly and beyond doubt that the inadmissibility ground does not apply in order to be eligible for refugee[122] status.[123]

(b)(7)(E)

[122] Refugee cases include both Form I-590 and Form I-730 follow-to-join refugee (FTJ-R) adjudications.

[123] INA § 235(b)(2)(A).

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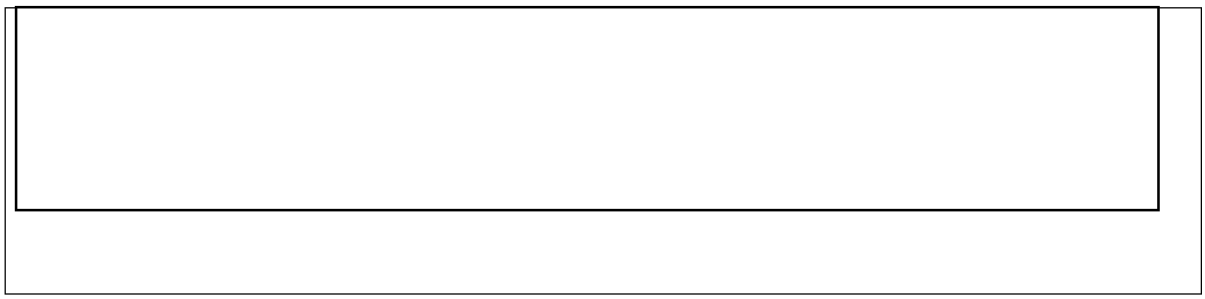

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SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

REQUIRED READING

1. Asylum Division Identity and Security Checks Procedures Manual (ISCPM), especially Section VIII of the ISCPM regarding Cases Involving Terrorism or Threats to National Security.
2. Asylum Division Affirmative Asylum Procedures Manual (AAPM).
3. ABC/NACARA Procedures Manual.

ADDITIONAL RESOURCES

1. *Matter of A-H-*, 23 I&N Dec. 774 (AG 2005).
2. *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004).
3. *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003).
4. *Barahona v. Holder*, 691 F. 3d (4th Cir. 2012).

SUPPLEMENTS

Asylum Adjudications Supplement

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Asylum Adjudications Supplement (b)(7)(E)

For further explanation and requirements, see RAIO Training module, *Interviewing - Note-Taking*, including the Asylum Adjudications Supplement. See also the Affirmative Asylum Procedures Manual (AAPM), the ABC/NACARA Procedures Manual and the Suspension of Deportation and Special Rule Cancellation of Removal under NACARA Lesson Plan.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

ANALYZING THE PERSECUTOR BAR

TRAINING MODULE

DATE (see schedule of revisions): 12/20/2019

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

ANALYZING THE PERSECUTOR BAR

Training Module

MODULE DESCRIPTION

This module addresses the legal analysis of claims where a refugee or asylum applicant may have been involved in the persecution of others as well as related interviewing considerations.

TERMINAL PERFORMANCE OBJECTIVE(S)

During an interview, you (the officer) will be able to elicit all relevant information to correctly determine when an applicant, who is otherwise a refugee, is ineligible for a grant of asylum or refugee status because he or she was involved in the persecution of others on account of a protected ground.

ENABLING PERFORMANCE OBJECTIVES

1. Summarize recent developments in U.S. law regarding the persecutor bar.
2. Explain the standard of proof applicable in the persecutor bar analysis.
3. Explain the factors to consider when determining whether or not an applicant may have ordered or incited an identifiable persecutory act on account of a protected ground.
4. Explain the factors to consider when determining whether or not an applicant may have assisted or otherwise participated in the persecution of another on account of a protected ground.
5. Describe indicators ("red flags") that an individual may have been involved in the persecution of others.

INSTRUCTIONAL METHODS

- Interactive presentation

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- Practical exercise
- Demonstration

METHOD(S) OF EVALUATION

Observed Practical Exercise and Written test

REQUIRED READING

1. *Negusie v. Holder*, 555 U.S. 511 (2009);
2. *Matter of A-H-*, 23 I&N Dec. 774 (AG 2005);
3. *Matter of Rodriguez-Majano*, 19 I&N Dec. 811 (BIA 1988);

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

4. *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011);
5. *Matter of Vides Casanova,* 26 I&N Dec. 494 (BIA 2015).

Additional Resources – International and Refugee Adjudications

Additional Resources – Asylum Adjudications

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR23	Knowledge of bars to immigration benefits (4)
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR4	Knowledge of the relevant sections of 8 Code of Federal Regulations (CFR) (4)
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
RI1	Skill and identifying issues of a claim (4)
RI2	Skill in identifying the information required to establish eligibility (4)
RI3	Skill and conducting research (e.g., legal, background, country conditions) (4)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
4/14/2015	Throughout document	Minor formatting edits; fixed broken links; a few recent cases added	RAIO Training
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training

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Throughout this training module, you will come across references to adjudication-specific supplemental information located at the end of the module, as well as links to documents that contain adjudication-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to the adjudications you will be performing.

For easy reference, supplements for international and refugee adjudications are in pink and supplements for asylum adjudications are in yellow.

You may also encounter references to the legacy Refugee Affairs Division (RAD) and the legacy International Operations Division (IO). RAD has been renamed the International and Refugee Affairs Division (IRAD) and has assumed much of the workload of IO, which is no longer operating as a separate RAIO division.

1 INTRODUCTION

The term "refugee" in the Immigration and Nationality Act (INA) "does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[1] The INA also specifically bars the Attorney General from granting asylum to such a person.[2] The persecutor bar may apply to government actors as well as private individuals.[3]

There are a number of human rights-related inadmissibility grounds that may arise for Nazi persecutors, genocidaires, torturers, and foreign government officials who have committed particularly severe violations of religious freedom and seek refugee status through overseas processing. [International and Refugee Adjudications Supplement – Grounds of Inadmissibility.] While there may be instances when acts which implicate the persecutor bar also trigger a human rights-related inadmissibility ground, this module is

[1] INA § 101(a)(42).

[2] INA § 208(b)(2)(A)(i). This bar also applies to: cancellation of removal, INA § 240A(e)(5); withholding of removal, INA § 241(b)(3)(B)(i); temporary protected status (TPS), INA § 244(c)(2)(B)(ii); adjustment of status of certain entrants before January 1, 1982 (legalization) (applicant must establish that he or she has "not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion), INA § 245A(a)(4)(C); naturalization of persons who have made extraordinary contributions to national security, INA § 316(f)(1); special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105-100, § 203, 111 Stat. 2160 (1997), 8 C.F.R. § 240.66(a); and withholding of removal under the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT), 8 C.F.R. § 208.16(d)(2).

[3] *Matter of McMullen*, 19 I&N Dec. 90, 96 (BIA 1984).

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focused exclusively on the persecutor bar. The human rights-related grounds of inadmissibility are discussed in the RAIO Training module, *Overview of Inadmissibility Grounds, Mandatory Bars, and Waivers*.

The statutory exclusion of persecutors from the refugee definition means that even if an applicant has been persecuted in the past, or has a well-founded fear of future persecution on account of one of the protected grounds, he or she does not meet the definition of a refugee under the INA if the persecutor bar applies.

Other statutes and provisions in the INA contain or have contained language relating to persecutors (e.g., the Displaced Persons Act [DPA][4] and the Holtzman amendment[5]). In this module, unless otherwise specified, reference to the "persecutor bar" refers exclusively to the language in the refugee definition in INA § 101(a)(42).

This module addresses individuals who may be barred from refugee or asylum status as "persecutors." This term is used to describe those individuals who have ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five protected grounds. In other settings, references may be made to the broader category of "human rights abusers" or "human rights violators." While persecutors may be included in that group, it is important to keep in mind that the term "persecutor" is a specific term of art in refugee and asylum adjudications, unlike general terms such as "human rights abuser" and "human rights violator."

This module:

- Lays out the elements of the law about which you must elicit testimony during the course of your interview
- Provides an analytical framework to help you analyze the persecutor bar issue
- Provides a list of possible indicators ("red flags") to help alert you when you must explore the persecutor bar issue
- Explains how credibility may play a part in your determinations

1.1 Burden of Proof and Duty to Elicit

[4] The Displaced Persons Act of 1948, Pub.L. No. 80-774, 62 Stat. 1009 (1948), as amended by Pub.L. No. 81-555, 64 Stat. 219 (1950).

[5] INA § 212(a)(3)(E); *see also* INA § 237(a)(4)(D).

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The burden is on the applicant to establish eligibility.[6] Asylum and refugee applicants are not expected to understand the complexities of U.S. asylum law and may not realize that they are subject to the persecutor bar, especially if they did not directly commit the act(s) of persecution.[7] Accordingly, although the applicant has the burden of proving eligibility, you have an equal duty in a non-adversarial interview to elicit detailed testimony from the applicant.[8] If you believe that the persecutor bar may apply, you must question the applicant about his or her possible involvement in persecutory acts. If the applicant denies involvement, you must then determine the credibility of that denial.

For additional information regarding credibility determinations, see section below, *Credibility and the Persecutor Bar* and RAIO Training modules, *Evidence* and *Credibility*, and Asylum Adjudications Supplement – Burden Shifting.

1.2 Standard of Proof

An applicant must establish that he or she is not subject to the persecutor bar by a preponderance of the evidence. When using the preponderance of the evidence standard, it is important to focus on the quality of the evidence, not the quantity.[9] Remember that assessing the quality of testimonial evidence means determining whether or not it is credible. See section below, *Credibility and the Persecutor Bar*.

1.3 The Rationale behind the Bar

The rationale for the persecutor bar is derived from the general principle in the *1951 Convention relating to the Status of Refugees* that even if someone meets the definition of a refugee, i.e., has a well-founded fear of persecution on account of a protected ground, he or she may nonetheless be considered to be undeserving or unworthy of refugee status.[10]

The BIA has recognized that the exclusion from the refugee definition in INA § 101(a)(42) of those who were involved in the persecution of others is consistent with the principles of the 1951 Convention.

---

[6] 8 C.F.R. § 208.13(a); *Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1992) (*"UNHCR Handbook"),* ¶ 196.

[7] *See Jacinto v. INS*, 208 F.3d 725, 733-734 (9th Cir. 2000) ("Applicants for asylum often appear without counsel and may not possess the legal knowledge to fully appreciate which facts are relevant…[adjudicators] are obligated to fully develop the record in [such] circumstances…").

[8] 8 C.F.R. § 208.9(b); *UNHCR Handbook,* ¶¶ 196, 205(b)(i).

[9] For further information on the preponderance of the evidence standard, see RAIO Training Module *Evidence Assessment*.

[10] *United Nations Convention Relating to the Status of Refugees*, art. 9F, July 28, 1951, 189 U.N.T.S. 150.

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> This exclusion from refugee status under the Act represents the view that those who have participated in the persecution of others may be unworthy or undeserving of international protection. The prohibited conduct is deemed so repugnant to civilized society and the community of nations that its justification will not be heard.[11]

2 ANALYTICAL FRAMEWORK

If at any time during your adjudication the persecutor bar issue arises, you will need to develop additional lines of questioning and ask follow-up questions until the record reflects that the applicant is either subject to or not subject to the bar. Often this will involve a credibility determination. You must conduct a particularized evaluation and examine all relevant facts in determining whether the persecutor bar applies.[12]

The INA does not define the terms listed in the persecutor bar: "order," "incite," "assist," or "otherwise participate in." Nor have the courts developed a uniform, bright-line test to apply when the persecutor bar is an issue. However, the following analytical framework, derived from existing case law, can assist you in analyzing whether the persecutor bar applies. This analytical framework is explored in greater detail below.

Step One: Determine if there is Evidence of the Applicant's Involvement in an Act that May Rise to the Level of Persecution

- Look for red flags in the evidence to alert you that the persecutor bar may be at issue.
- Evidence may include:
  - the applicant's testimony during the interview;
  - information in the applicant's file indicating his or her involvement with an entity known for committing human rights abuses; and
  - country of origin information (COI)
- If a red flag is present, examine whether there is further evidence of a specific act or acts that may rise to the level of persecution.

[11] *McMullen*, 19 I&N Dec. at 97.

[12] *Vukmirovic v. Ashcroft*, 362 F. 3d 1247, 1252 (9th Cir. 2004); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 926-27 (9th Cir. 2006); *Hernandez v. Reno*, 258 F.3d 806, 814 (8th Cir. 2001); *see Matter of A-H-*, 23 I&N Dec. 774, 784 (AG 2005), *overruled on other grounds by Haddam v. Holder*, 547 F. App'x 306 (4th Cir. Dec. 4, 2013) ("It is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies.").

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- Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.

Step Two: Analyze the Harm Inflicted on Others

- Did the harm rise to the level of persecution?
- Was there a nexus to a protected ground?
- Was the act a legitimate act of war or law enforcement?

Step Three: Analyze the Applicant's Level of Involvement

- Did the applicant order, incite, assist, or otherwise participate in the persecutory act(s)?
- Did the applicant know that the persecution was occurring?
- Did the applicant act under duress?

Fully explore this issue for the record and follow adjudication-specific guidance. Following the analytical framework above will help you avoid using faulty logic that is demonstrated in the following statements:

- "Bad Place + Bad Time = Bad Person"
- "I Know It When I See It"

These statements are not legal standards and should not be the basis of analysis in any decisions relating to the persecutor bar.

2.1 Step One: Determine if there is Evidence of the Applicant's Involvement in an Act that May Rise to the Level of Persecution

When there is an indication that the persecutor bar may be applicable, you must explore the issue thoroughly. Whether it emerges through the applicant's testimony, evidence in the file, or country of origin information (COI), a "red flag" will indicate that you must ask follow-up questions to determine if there is evidence of an act that may rise to the level of persecution. A red flag does not mean that the applicant will be automatically barred from asylum or refugee status. Once you have identified a red flag, you must ask follow-up questions to determine if there is evidence of an act that may rise to the level of persecution.

As noted, evidence may include:

- the applicant's testimony during the interview;

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- information in the applicant's file indicating that the applicant may have been involved with an entity known for committing human rights abuses;

- country of origin information

Potential Red Flags

Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.[13] However, belonging to an organization that engaged in the persecution of others is a "red flag," and you must carefully question the applicant regarding his or her duties or activities within the organization to ascertain whether the applicant was involved in any specific acts that may rise to the level of persecution. The following is a non-exhaustive list of possible red flags or indicators that will alert you to explore the applicant's actions further during your interview.

- Involvement with Agents of Persecution and Positions of Leadership in an Organization or Entity Known for Persecuting Others

Both testimony of the applicants and country of origin research may alert you to acts of persecution committed by organizations or entities known for persecuting others. When an applicant indicates that he or she worked for a government known to have committed human rights abuses, elicit details from the applicant about his position and activities within the government. Furthermore, holding a leadership position in an organization or entity known to have persecuted others during a time when such abuses have been documented is a significant red flag. Elicit testimony regarding the applicant's role(s) and responsibilities, and explore through questioning whether the applicant had any connections with acts that may rise to the level of persecution.

Relevant Questions

- What was the applicant's role(s) and position(s)?

- Did the applicant supervise anyone?

- To whom did the applicant report?

- What functions did the applicant's unit(s) or division(s) perform within the organization?

[13] *See* Matter of Rodriguez-Majano, 19 I&N Dec. 811, 814-15 (BIA 1988); Vukmirovic v. Ashcroft, 362 F.3d at 1252; Hernandez v. Reno, 258 F.3d at 814 (8th Cir. 2001); Xu Sheng Gao v. U.S. Att'y Gen., 500 F.3d 93, 99 (2d Cir. 2007) (mere association "with an enterprise that engages in persecution is insufficient" on its own to trigger the persecutor bar).

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- What was that unit or division's relationship with other units or divisions who may have been involved in persecutory acts?

See also suggested questions below regarding rank, duties, and structure of government or armed forces.

- Holding an Official Position within a Government or Other Similar Entity

You may be aware of country of origin information about branches of government at the national or local level that have been responsible for human rights abuses, e.g., the Ministry of Information in Iraq under Saddam Hussein, the civil patrol in Guatemala during the civil war, or the head of a neighborhood committee in China during the Cultural Revolution. Closely examine the activities of an applicant who is associated with a government or branch of government that is known to have committed human rights abuses.

Relevant Questions

- When did the applicant work for that branch of government?
- Why did the applicant work for the government?
- What were the applicant's duties and responsibilities?
- What rank, if any, did the applicant hold? If so, when?

- Membership in an Ethnic or Religious Group Involved in Ethnic Fighting

Where ethnic or religious violence has erupted, in some situations both sides in a conflict may have committed abuses. When interviewing an individual who claims to be a victim of ethnic violence during a civil war, elicit information regarding the applicant's activities during that time period, especially during times when human rights abuses committed by the applicant's group have been documented. Examples: the Bosnian war, the Rwandan genocide, and the Syrian civil war.

- The Military, Police, and Other Security Forces

Where country conditions indicate that the military, paramilitary, police, or other security forces have committed human rights violations against civilians, or members of their own organization (e.g., a whistleblower), elicit detailed testimony about the applicant's duties if he or she was a member of the military, police, or other security forces. Additionally, researching the structure of the military, paramilitary, policy or security forces in the applicant's country of nationality and eliciting background information from the applicant will be helpful in examining whether the persecutor bar may be at issue. Understanding the nature of the applicant's rank and position in the armed forces will help you to develop further lines of questioning into the applicant's activities.

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Relevant Questions

- In what branch of the police, military, or security forces did the applicant serve?
- How were the branches organized?
- Were the security forces divided into military and police forces? If, so, what kinds of functions did each perform?
- Were there paramilitary units?
- Within the branch in which the applicant served, in what specific unit or company did the applicant serve?
- Where did the applicant serve and when?
- Did the applicant serve in the field or at a desk job?
- If it was the military branch, did the applicant serve during a time of war? If so, was the applicant in a combat unit or a support unit?
- What was the applicant's position?
- How long did the applicant serve in the security forces?
- What specifically were his or her duties?
- What types of orders were carried out by the individual/unit/entity and who issued the orders?
- Were there ever any orders that the individual/unit/entity refused to carry out? If so, what were those orders and why were they not carried out?

- Military Service Requirement

Some countries require that all individuals or all males over a certain age serve in the armed forces for a set period of time. Research the service requirement of the applicant's country of nationality to alert you to the fact that the applicant may have served in the military. Explore the applicant's service or non-performance of service during the interview.

Relevant Questions

When an applicant has not listed military experience on his application, determine whether the country of the applicant's nationality had a mandatory service requirement at the time that the applicant was of service age. If there was such a requirement, ask why did the applicant not serve? Did he get an exemption? How? Did anyone assist him? How

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was he assisted? What kind of an exemption did he get, medical, educational, or otherwise? Did he pay a bribe? Did he have documentation that he needed to present to show an exemption? What kind of documentation? Where is that documentation?

2.2 Step Two: Analyze the Harm Inflicted on Others

2.2.1 Did the Harm Rise to the Level of Persecution?

In order to be subject to the persecutor bar, an applicant must have ordered, incited, assisted, or otherwise participated in conduct that rises to the level of persecution. Once you have identified an act, you must then determine whether the harm inflicted rises to the level of persecution.

Persecution has been defined as a threat to the life or freedom of another or the infliction of suffering or harm upon another.[14] Harm can be psychological as well as physical, and can include threats and serious economic harm.[15] If there is evidence of an act, but the harm did not rise to the level of persecution, the applicant is not subject to the bar. For additional guidance on what constitutes persecution, see RAIO Training module, *Definition of Persecution and Eligibility Based on Past Persecution*.

In the majority of cases where the persecutor bar arises, the evidence will implicate an act or acts that constituted harm that the victim(s) experienced as persecution, such as killing; torture or other cruel, inhumane, or degrading treatment; slavery; and rape or other severe forms of sexual violence. However, in certain instances, you may need to independently assess whether the victim would experience the act or acts in question as serious harm.

Relevant Questions

Elicit detailed testimony about:

- the type of harm that was inflicted
- the severity of the harm
- the effect the act(s) had on the victim(s) or others
- the reason or motivation behind why individual(s) were harmed

2.2.2 Was There a Nexus to a Protected Ground?

To find that the persecutor bar may apply, the persecutory act in question must be "on account of" at least one of the five protected grounds: race, religion, nationality,

[14] *Matter of Acosta*, 19 I&N Dec. 211, 221-23 (BIA 1987).

[15] *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007).

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membership in a particular social group, or political opinion.[16] However, it is not necessary that the applicant had a punitive or malignant intent, nor that the applicant shared the same persecutory motive as the person or entity that committed or orchestrated the persecution.[17]

Examples

> An individual, who was forcibly recruited into the Revolutionary United Front (RUF) of Sierra Leone and who had murdered a female villager and chopped off the limbs and heads of non-combatants, argued that because he did not share the RUF's intent to target political opponents, he did not engage in persecution on account of political opinion. The court found that the applicant's personal motivation was not relevant, and that the persecutor bar applied because the applicant "participated in persecution, and the persecution occurred because of an individual's political opinion."[18]
>
> The head constable of a local police department participated in raids of homes of innocent Sikh families, helped arrest innocent Sikhs without cause, and transport Sikhs to the police station on orders from the police chief, where they were subsequently beaten. He testified that he was personally opposed to the persecution of innocent Sikhs, and only stayed with the police force due to his need for a steady income. The court found that even though the constable stated that he did not share the persecutory motive, he still assisted in or participated in persecution of others on account of a protected ground.[19]

Relevant Questions

Because the persecutor bar requires that the persecutory act or acts were committed on account of one of the five protected grounds, elicit detailed testimony to ascertain who the victims of the persecutory acts were. Why were they targeted? How were the victims identified? By whom?

For additional guidance on the requirement that there be a connection between the persecution and one of the five protected grounds, see the RAIO Training Module, *Nexus and the Five Protected Grounds*.

2.2.3 Was the Act a Legitimate Act of War or Law Enforcement?

[16] INA § 101(a)(42); *Elias-Zacarias v. INS*, 502 U.S. 478 (1992).

[17] *Matter of Fedorenko*, 19 I&N Dec. at 69 (concentration camp guard assisted persecution even if not motivated by racial or religious prejudice); *Singh v. Gonzales*, 417 F. 3d 736, 740 (7th Cir. 2005); *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003); RAIO Training module, *Nexus and the Protected Grounds*.

[18] *Bah*, 341 F.3d at 351.

[19] *Singh*, 417 F.3d at 740.

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Legitimate Acts of War

The fear of general civil strife or war, and incidental harm resulting from such violence, may not, by itself, establish eligibility for asylum or refugee status. Likewise, involvement in a civil war may not, by itself, trigger the persecutor bar. Such harm may not constitute persecution if it is not directed at the victim(s) on account of a protected ground.

For example, in open combat, acts of warfare taken in furtherance of political goals are not necessarily acts committed on account of a protected ground. The BIA has stated:

> As the concept of what constitutes persecution expands, the group which is barred from seeking haven in this country also expands, so that eventually all resistance fighters would be excluded from relief. We do not believe Congress intended to restrict asylum and withholding only to those who had taken no part in armed conflict.[20]

Reference to international laws governing warfare may be useful in determining whether actions taken in the context of warfare constitute persecution or are "legitimate" acts of war.[21]

Examples

> An individual forced to assist guerrillas fighting in El Salvador did not participate in persecution on account of a protected ground when he covered guerrillas with weapons while they burned cars and drove supplies for battles, because this was considered a legitimate act of war.[22]
>
> The rape of Bosnian Muslim women by an ethnic Serb soldier in order to bring shame to the Bosnian Muslim community during the Bosnian War is not a legitimate act of war, and is in fact a crime of war, and would have the requisite nexus to a protected characteristic to subject an applicant to the persecutor bar.[23]

Likewise, true acts of self-defense do not have a nexus to a protected ground and would not subject an applicant to the persecutor bar.[24]

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[20] *Rodriguez-Majano*, 19 I&N Dec. at 816.

[21] *Rodriguez-Majano*, 19 I&N Dec. at 816; *see* RAIO Training Module *International Human Rights Law* for examples of international instruments relevant to determining what would be considered a "legitimate" act of war.

[22] *Rodríguez-Majano*, 19 I&N Dec. at 815-16.

[23] *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.N.T.S. 135 (entered into force Oct. 21, 1950) (Geneva Convention III); RAIO Training Module, *Nexus and the Five Protected Grounds.*

[24] *Vukmirovic*, 362 F. 3d at 1252-53 ("[h]olding that acts of true self-defense qualify as persecution would run afoul of the 'on account of' requirement in the provision.").

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Example

> A Bosnian Serb fended off attacks of Croats who attacked his village. He did not participate in physical attacks against Croats other than in self-defense. The Ninth Circuit held that, given these facts, there was insufficient evidence to find that the applicant was motivated by the Croats' ethnicity or religion and remanded the case to the Immigration Judge for further evaluation.[25]

If you identify an act that rises to the level of persecution but there is no connection to one of the five protected grounds, the applicant is not subject to the bar.

Legitimate Acts of Law Enforcement

Likewise, legitimate acts of law enforcement have no nexus to a protected ground and would not subject the applicant to the persecutor bar. [26]All countries have the right to investigate, prosecute, and punish individuals for violations of legitimate laws.[27] Government actors may seek to legitimately penalize individuals for violations of criminal laws of general applicability. Conversely, government actors may use the guise of prosecutions to harm applicants on account of a protected ground.[28] Consider all the facts in the case, along with relevant country of origin information, in determining whether the applicant was involved in a legitimate act of law enforcement. For additional guidance on the difference between prosecution and persecution, see RAIO Training module, *Nexus and the Protected Grounds.*

2.3 Step Three: Analyze the Applicant's Level of Involvement

You must evaluate all of the facts in order to determine whether the applicant is subject to the persecutor bar.[29] It is appropriate to look at the totality of the relevant conduct to determine whether the bar applies.[30] The persecutor bar applies even if the individual did not personally commit the persecutory act(s), so long as he or she "ordered, incited, assisted, or otherwise participated in the persecution."[31] It is not necessary for the

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[25] *Id.* at 1253.

[26] *See Cruz-Samayoa v. Holder*, 607 F.3d 1145, 1151-1154 (6th Cir. 2010).

[27] *Matter of A-G-*, 19 I&N Dec. 502, 506 (BIA 1987); *UNHCR Handbook*, para. 56; *Dinu v. Ashcroft*, 372 F.3d 1041 (9th Cir. 2004) (harassment resulting from an investigation does not give rise to an inference of political persecution where police are trying to find evidence of criminal activity and there is a logical reason for pursuit of the individual).

[28] *Matter of A-G-*, 19 I&N Dec. at 506; *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996); *UNHCR Handbook*, para. 57-59.

[29] *Vukmirovic*, 362 F. 3d at 1252; *Miranda Alvarado*, 449 F.3d at 926-27; *Hernandez*, 258 F.3d at 814.

[30] *Matter of A-H-*, 23 I&N Dec. at 784.

[31] INA § 101(a)(42)(B).

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applicant to have specific knowledge of particular acts of persecution for the bar to apply so long as the applicant is aware that his or her actions resulted in persecution.[32] But while application of the persecutor bar does not require direct personal involvement in the acts of persecution,[33] mere membership in an entity or organization that commits acts of persecution is not enough to apply the bar.[34]

2.3.1 Order

If an applicant admits to you that he or she personally ordered others to commit atrocities or harm against others, he or she may be subject to the persecutor bar. As discussed above, the harm inflicted must rise to the level of persecution and must have been on account of one of the five protected grounds.

Neither the BIA nor any federal circuit courts have applied the persecutor bar for directly "ordering" the persecution of others. However, in cases involving acts committed during the Holocaust, where the Displaced Persons Act (DPA) applied, an applicant was found to have assisted in persecution where he ordered the persecution of others.

Example

> A Latvian police chief ordered his men to arrest all the inhabitants of a village suspected of being a communist stronghold and to burn down the village. The village was subsequently burned, and all the villagers were shot and killed. The Second Circuit upheld the BIA's finding that "ordering" subordinates to arrest village inhabitants and burn the village to the ground constituted assistance in persecution.[35]

2.3.2 Incite

If an applicant admits to you that he or she incited others to harm people, he or she may be subject to the bar. Remember, the harm inflicted must rise to the level of persecution and must have been on account of one of the five protected grounds.

While neither the BIA nor any federal circuit courts has directly applied the persecutor bar under the term "incite" in the INA, some courts analyzed the term "incite" under the

[32] *Suzhen Meng v. Holder*, 770 F.3d 1071, 1075-76 (2d Cir. 2014) (noting that when "the occurrence of the persecution is undisputed, and there is such evidence of culpable knowledge that the consequences of one's actions would assist in acts of persecution…the evidence need not show that the alleged persecutor had specific actual knowledge that his actions assisted in a particular act of persecution") (citations omitted).

[33] *A-H-*, 23 I&N Dec. at 784.

[34] *Rodriguez-Majano*, 19 I&N Dec. at 814-15; *Yukmirovic*, 362 F.3d at 1252; *Hernandez*, 258 F.3d at 814.

[35] *Maikovskis v. INS*, 773 F.2d 435, 446 (2d. Cir. 1985).

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DPA. At least two courts found that involvement in the publication of anti-Semitic propaganda during the Holocaust constituted assistance in the persecution of others.[36]

The Attorney General has noted in discussion that "[t]o 'incite' means 'to move to a course of action: stir up: spur on: urge on' or 'to bring into being: induce to exist or occur.'"[37] The term "incite," along with the terms "assist" and "participate," "is broad enough to encompass aid and support provided by a political leader to those who carry out the goals of his group, including statements of incitement or encouragement and actions resulting in advancing the violent activities of the group."[38] Moreover, the terms "are to be given broad application" and "do not require direct personal involvement in the acts of persecution."[39] Finally, whether the alien served in a leadership role may be "highly relevant," and "in certain circumstances statements of encouragement alone can suffice" for a finding that an applicant incited or otherwise participated in the persecution of others.[40]

Example

Statements made by an Algerian opposition political leader in various newspapers could fit within the plain meaning of the word incite when those statements resulted in the violent activities of the armed faction of his political party.[41]

During the 1994 genocide in Rwanda, the radio station Radio Mille Collines played a role in organizing militias, transmitted lists of people to be killed, and urged ethnic Hutus to kill ethnic Tutsis. These acts, if examined under the persecutor bar analysis, would likely be considered evidence of inciting persecution.

2.3.3 Assist or Otherwise Participate in, or Actively Carry Out or Commit

[36] *U.S. v. Koreh*, 59 F.3d 431, 440 (3d. Cir. 1995) (editor of an anti-Semitic publication in Hungary was found to have assisted in the persecution of Hungarian Jews under the DPA by fostering a climate of anti-Semitism); *U.S. v. Sokolov*, 814 F. 2d 864, 874 (2d Cir. 1987) (German army propagandist assisted in persecution "by creating a climate of opinion where persecution is acceptable").

[37] *Matter of A-H-*, 23 I&N Dec. at 784, citing Webster's Third New International Dictionary of the English Language Unabridged 1142 (2002). *Matter of A-H-* remains good law for the general propositions as to the meaning of the words "incite," "assist," and "participate."

[38] *Matter of A-H-*, 23 I&N Dec. at 784.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 785.

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Where an applicant did not order or incite the persecution of others, he or she may still be subject to the persecutor bar if he or she "assisted," or "otherwise participated" in, or actively carried out or committed persecution of others.

Commit or Actively Carry Out

Although the persecutor bar does not expressly include the terms "commit" or "actively carry out," if an applicant admits to you that he or she directly committed or carried out persecutory acts, that applicant has "otherwise participat[ed]" in persecution, and the persecutor bar applies.

Example

> A former Iraqi intelligence officer admits to you that he used "creative" techniques when questioning individuals in his custody. When you ask what he means by "creative," he tells you that he sometimes beat these individuals to the point of unconsciousness and used electric shock against them. While this harm seems like enough to subject him to the bar if the detainees were targeted on account of a protected ground, you must develop the record with follow-up questions, not only about what he did, but also about the severity of the harm he caused and the characteristics of the targeted individuals.

Relevant Questions

In the example above, you should elicit testimony that includes:

- what the applicant means by "beating" and using "electric shock" against detainees;
- how many times he beat the detainees;
- how often he beat them;
- how he shocked them
- what he shocked them with;
- how often he shocked them;
- who the detainees were;
- why they were detained;
- whether any particular group of detainees were treated differently from others;

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- whether either the detention or any act of mistreatment was on account of the detainees' race, religion, nationality, membership in a particular social group, or political opinion.

Assist or Otherwise Participate

The Attorney General has explained that "[t]o 'assist' means 'to give support or aid: help,' And to 'participate' means 'to take part in something (as an enterprise or activity) usually in common with others.'"[42] To date, neither the BIA nor federal circuit courts have analyzed the meaning of the term "otherwise participate" independently from the term "assist." Accordingly, guidance from case law focuses on the term "assist."

When you analyze the facts of the case before you, focus on whether the applicant's particular conduct can be considered assistance in the *persecution* of others in the way the Supreme Court did in *Fedorenko*. The Supreme Court explained that:

> [A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.[43]

Accordingly, it is appropriate to think of acts that might subject an individual to the persecutor bar along a continuum of conduct.[44] The role the individual played in the commission of the persecutory act will determine whether he or she assisted or otherwise participated in persecution.

Courts have interpreted *Fedorenko* line-drawing as assigning accountability and personal culpability. According to the Ninth Circuit, to properly analyze what it means to assist or otherwise participate in persecution, you must identify the kinds of acts the applicant engaged in.[45] You must evaluate those acts along a continuum between the two examples listed in *Fedorenko* to determine the applicant's culpability. Also evaluate the surrounding circumstances, including whether the applicant acted in self-defense.[46]

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[42] *Matter of A-H-*, 23 I&N Dec. at 784, citing Webster's Third New International Dictionary of English Language Unabridged, at 132 ("assist") and 1646 ("participate").

[43] *Fedorenko*, 449 U.S. at 513 n.34 (1981).

[44] *See id.*; *Miranda-Alvarado*, 449 F.3d at 925-927.

[45] *Miranda-Alvarado*, 449 F.3d at 926.

[46] *Id.*

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Finally, ask yourself, did the applicant's acts *further* the persecution, or were they *tangential* to it?

To aid in this analysis, courts have suggested questions which help to place the applicant's activities along a continuum of conduct. For example, the Second Circuit asks: was the conduct *active* and did it have *direct consequences* for the victims or was the conduct *tangential* to the acts of oppression and *passive* in nature?[47] The Seventh Circuit draws a distinction between *genuine assistance* and *inconsequential association*. This court asks whether the applicant was *simply a member* of an organization during a pertinent persecutory period or whether the applicant *actually assisted or participated in* persecution.[48] Similarly, the Ninth Circuit asks whether the acts were instrumental to the persecutory end. Did the acts further persecution or were they tangential to it?[49] These questions are organized in the following chart:

Did the Applicant Assist in the *Persecution* of Others?		
Subject to the Bar	**OR**	**Not Subject to the Bar**
Did the applicant assist in the *persecution* of others?		Did the applicant merely assist in the *operation* of a location where persecution took place, where his or her duties were not related to the persecution?
Did the applicant's acts *further* the persecution?		Were the applicant's acts *tangential* to the persecution?
Was the conduct *active* and did it have *direct consequences* for the victims?		Was the conduct *tangential* to the acts of persecution and *passive* in nature?
Did the applicant *actually* assist or otherwise participate in persecution?		Was the applicant simply a member of an entity during a pertinent period of

[47] *Suzhen Meng*, 770 F.3d at 1075; *Weng*, 562 F.3d at 514; *Lin*, 584 F.3d at 80; *Balachova*, 547 F.3d at 385; *Gao v. U.S. Atty. Gen.*, 500 F.3d at 99; *Xie v INS*, 434 F.3d 136, 143 (2d Cir. 2006).

[48] *Singh*, 417 F.3d at 739.

[49] *Miranda-Alvarado*, 449 F.3d at 928.

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		persecution?

Relevant Questions

Elicit detailed testimony about:

- what the applicant did;
- what actions the applicant took, committed, or performed;
- what his or her position was;
- what his or her duties were;
- the dates and locations the applicant performed these actions;
- who, if anyone, the applicant worked for or took orders from;

Case Law Examples

Most case law on the persecutor bar explores the question of whether or not the applicant "assisted" in persecution. Not coincidentally, the majority of the cases you will encounter will involve applicants who did not order or incite persecution but may have assisted or otherwise participated in it. The following case summaries are divided into fact specific categories that may help you in your analysis. These categories include intelligence gathering, coercive population control, military or security forces, rebel or opposition forces, and government officials. In each category, the courts have examined the applicant's specific actions to determine whether or not the applicant assisted or otherwise participated in persecution.

- **Intelligence Gathering**

Examples

Did Not Assist in Persecution

Diaz-Zanatta v. Holder, 558 F.3d 450 (6th Cir. 2009) Peru (military intelligence analyst)

The applicant gathered information and passed it up the chain of command. For example, she gathered information on whether a particular professor at a university had communist tendencies. She also listened to and transcribed telephone conversations of designated individuals. When she heard that other factions of the Peruvian military were engaged in human rights violations, she reported her concerns to superiors and requested an immediate transfer. There was no evidence that information the applicant supplied actually assisted in

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persecution of any individuals, or that the applicant had prior or contemporaneous knowledge of the persecution.[50]

Did Assist in Persecution

Higuit v. Gonzales, 433 F.3d 417 (4th Cir. 2006) Philippines (intelligence operative)

For 10 years, the applicant provided the Marcos regime with intelligence about the leftist New People's Army and other anti-Marcos communist groups. The applicant testified that the information he gathered on these individuals led to their torture, imprisonment, and death. He argued that he never physically tortured or harmed any person. The Fourth Circuit concluded that while "a distinction can be made between genuine assistance in persecution and inconsequential association with persecutors," in this case there was "no dispute over [the applicant's] personal culpability."

- **Coercive Population Control**

Examples

Did Not Assist in Persecution

Weng v. Holder, 562 F.3d 510 (2d Cir. 2009) China (nurse's assistant)

The applicant provided post-surgical care to women who had undergone forced abortions, registered patients, assisted nurses in caring for patients, recorded vital signs, and maintained patient files. On one occasion she helped guard (unarmed) several women awaiting forced abortions for 10 minutes before helping one woman escape. The Second Circuit found that her conduct, considered in its entirety, was not sufficiently "direct, active, or integral" to the performance of forced abortions. It looked at the 10-minute unarmed guarding incident and her behavior as a whole and found that the post-surgical care she provided did not contribute to or facilitate the victims' forced abortions.

Lin v. Holder, 584 F.3d 75 (2d Cir. 2009) China (nurse)

The applicant was a maternity nurse at a state general hospital from 2003 to 2005, where she assisted with ultrasounds and other prenatal examinations, participated in live-birth deliveries, cared for newborns, and provided recovery care to women who had undergone forced abortions. She "did not participate in the abortion procedure itself," but the examinations she performed "were sometimes used to determine the position of the fetus so that a forced abortion could be performed

[50] See section below, *Did the Applicant Know that Persecution was Occurring?*

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without threatening the life of the mother." The Second Circuit looked to the applicant's behavior as a whole and found that her examinations did not contribute to or facilitate forced abortions in any direct or active way because they did not cause the abortions nor did they make it more likely they would occur. According to the Second Circuit, her actions were "tangential and not sufficiently direct, active or integral to amount to assistance in persecution."

Did Assist in Persecution

Chen v. U.S. Att'y Gen., 513 F.3d 1255 (11th Cir. 2008) China (employee at a family planning office)

The applicant voluntarily accepted employment at a family planning office and fully understood the forced abortion policy. She was responsible for watching over detained, pregnant women locked in rooms before their scheduled forced abortions. She monitored confined women to ensure they did not escape. She was provided with a rod or baton that she never actually used. She thought that forced abortions were limited to women who were one or two months pregnant and released a woman who was eight months pregnant with her second child. The Eleventh Circuit found while she did not perform the abortions herself or use force against the women, her conduct ensuring the woman did not escape was "essential to the ultimate persecutory goal." Her single redemptive act in releasing one woman, "while laudatory," did "not absolve her of the consequences of her personal culpability of her previous assistance."

Xie v. INS, 434 F.3d 136 (2d Cir. 2006) China (van driver)

The applicant occasionally transported pregnant women against their will to hospitals for forced abortions in a locked van. On each occasion the women physically resisted and wept. The court noted that the applicant's actions contributed directly to the persecution. By driving the van, the applicant ensured the women were brought to the place of their persecution: the hospitals where their forced abortions took place. The applicant claimed that his actions were not voluntary. The Second Circuit considered not just the voluntariness of the applicant's actions, but his behavior as a whole and whether his conduct was active and had direct consequences for the victims or was tangential to the acts of oppression and passive in nature. It concluded that the applicant played "an active and direct, if arguably minor, role" in the persecution. Further, the Second Circuit noted that even if voluntariness were an issue, nothing in the record indicated that the applicant did not have the ability to quit his job.

- **Military or Security Forces**

Examples

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Did Not Assist in Persecution

Kumar v. Holder, 728 F.3d 993 (9th Cir. 2013) India (constable who guarded Sikh prisoners and witnessed their mistreatment)

The applicant worked as a constable in the local police department in Punjab. He served as a guard at an intelligence facility where Sikhs suspected of being part of the militant separatist movement were detained and interrogated. The applicant did not arrest, transport, or interrogate the prisoners, but he witnessed prisoners being beaten. He spoke to his superiors about the mistreatment, but nothing was done. After he was promoted to head constable, he spoke to several superior officers about mistreatment he had witnessed but was transferred after only a few weeks in the position. The Ninth Circuit held that the BIA erred in finding that the applicant was subject to the persecutor bar because his position was integral to the functioning of a facility where persecution took place; rather, it should have analyzed whether his conduct was integral to the persecution itself.

Balachova v. Mukasey, 547 F.3d 374 (2d Cir. 2008) Russia (soldier during arrest and rape of two Armenian girls)

The applicant, under orders from his captain, broke down the door of a house to search for arms. The captain ordered the applicant to take two girls found inside the house to the car. The applicant told the two girls that they had to go with him. As he reached for one of the girls, she pulled away. The captain then commanded the applicant to hit the girl. The applicant refused, and was forced to relinquish his weapon. He remained handcuffed in the car while refusing to participate in a gang rape of both girls by fellow soldiers. The Second Circuit concluded that the applicant's actions were "tangential to the oppression and had no direct consequences for the victims."

Doe v. Gonzales, 484 F.3d 445 (7th Cir. 2007) El Salvador (Former lieutenant present during execution of Jesuits)

The applicant was a lieutenant in the Atlacatl Battalion who was present during the execution of priests at a Catholic university. He was ordered to accompany troops to kill a Jesuit priest, despite voicing his misgivings. He did not give orders, fire his gun, seize anyone, or block anyone's attempted escape. Troops killed six Jesuits, a cook, and her daughter on that mission. After the attack, the applicant assisted in destroying log books identifying soldiers who had participated. The Seventh Circuit noted that under different facts, personal presence by a military or police officer could maintain order over prisoners and discourage victims from attempting to escape, and as a result, could constitute assistance or participation in persecution. However, under the facts of this case, the applicant's mere presence did not "discourage attempts at escape, help to maintain order, or otherwise contribute to persecution." The Seventh Circuit also

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examined the applicant's assistance in destroying log books after the attack, and concluded that destruction of the log books did not constitute "assistance" in persecution. It reasoned that helping a murderer cover his tracks would make an individual an accessory after the fact to murder, but not a murderer. The Seventh Circuit remanded to the BIA to consider the applicant's asylum claim on other grounds.

Did Assist in Persecution

Quitanilla v. Holder, 758 F.3d 570 (4th Cir. 2014) El Salvador (Sergeant who oversaw investigation, capture, and transfer of anti-government guerrillas)

The applicant was a sergeant in the Salvadoran military for about five years, three of which he spent in the "Patrulla de Reconocimiento de Alcance Largo" (PRAL). He testified that, during his military service, he investigated and arrested about fifty guerrillas and civilians he believed to be "terrorists" aligned with anti-government guerrillas. He indicated that he never interrogated or mistreated anyone; he simply transferred the prisoners to his superiors. He denied that he was aware of human rights abuses in the Salvadoran military, but the IJ found him not credible on this point, pointing to extensive country conditions evidence detailing severe human rights abuses by the PRAL in particular. The Fourth Circuit found that the applicant's leadership role and oversight over the arrest and investigation actively "facilitated" the persecution of guerrillas and civilians and upheld the IJ's adverse credibility finding with respect to the applicant's knowledge. Thus, the applicant "assisted in the persecution of individuals because of their political views."

Miranda Alvarado v. Gonzales, 441 F.3d 750, *opinion amended and superseded on denial of reh'g*, 449 F.3d 915 (9th Cir. 2006) Peru (Interpreter during torture sessions)

The applicant was a member of the Civil Guard. His duties included protecting government officials and banks from guerrilla attacks. He was also a Quechua interpreter at interrogations during which suspects were subjected to electric shock torture and beatings. He quit after performing his duties for six years and had been present in such interrogations approximately 200 times. The Ninth Circuit explained that determining whether the applicant "assisted in persecution" requires a "particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability." It found that because the applicant translated questions and answers interspersed with electric shock treatment, he played an integral role in facilitating persecution. As a result, he was undisputedly a regular and necessary part of the interrogation. He was not a bystander, but was present and active during the alleged persecution.

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Singh v. Gonzales, 417 F.3d 736 (7th Cir. 2005) India (Supervisory constable who helped arrest fellow Sikhs)

The applicant was head constable in the local police department in Punjab during a period of considerable violence between Sikh separatist militants and the authorities. The department engaged in legitimate police activities but also systematically arrested without cause Sikhs accused of being militants. The applicant admitted that he brought suspects into the police station where they were wrongfully beaten by others, but claimed he did not share a persecutory motive. He also admitted that he went on nighttime raids that led to false charges and beatings of innocent Sikhs. The Seventh Circuit found that the applicant's acts constituted assistance or participation in persecution.

- **Rebel or Opposition Forces**

Examples

Did Not Assist in Persecution

Hernandez v. Reno, 258 F.3d 806 (8th Cir. 2001) Guatemala (Forcibly recruited by guerrillas)

The applicant was forcibly recruited by guerrillas and given weapons training, to which he objected. He was forced to join the organization after his life was threatened; he did not know that he would be asked to participate in violent activities. On one occasion, he was forced to fire his rifle at villagers but testified that while he fired, he purposefully shot away from the civilians. He escaped from the guerillas after 20 days. The Eighth Circuit stated that the BIA erred in only considering certain facts, and that if properly analyzed under the *Fedorenko* standard, the applicant "may be seen to have met his burden of proving that he did not assist or participate in the persecution of others." It remanded the case to the BIA to conduct a full analysis of the record.

Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988) El Salvador (Forcibly recruited by guerrillas)

The applicant was taken from his home by guerrillas and given military training. He accompanied the guerillas on propaganda trips, and once covered them with his weapon while they burned cars. After two months, he deserted. He was subsequently imprisoned and tortured with electric shock for having worked with guerrillas. The BIA explained that membership alone in an organization that engages in persecution is not enough to bar one from relief. The BIA also noted that a finding of persecution "requires some degree of intent on the part of the persecutor to produce the harm the applicant fears." The BIA determined that persecution does not include harm resulting from, or directly related to, military

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objectives of an armed conflict, including drafting of youths as soldiers, unofficial recruiting of soldiers by force, disciplining rebel group members, prosecution of draft dodgers, attacking of garrisons, burning of cars, and destruction of other property.

Did Assist in Persecution

Parlak v. Holder, 578 F.3d 457 (6th Cir. 2009) Turkey (Kurdish PKK supporter)

The applicant smuggled weapons into Turkey and buried them. He then led Turkish authorities to the location of the hidden weapons, even though he claimed they were for his own personal use. The Sixth Circuit found that "smuggling weapons across an international border to aid the Kurdistan Workers Party (PKK) in committing violent acts against Turks and Turkish-aligned Kurds constitutes assistance in persecution."

Matter of A-H-, 23 I&N Dec. 774 (AG 2005) Algeria (Leader of opposition political party), *overruled in part by Haddam v. Holder*, 547 F. App'x 306 (4th Cir. December 4, 2013)

The applicant, a self-proclaimed leader-in-exile of the Islamic Salvation Front of Algeria (FIS), supported and took credit for the unification of the armed factions of his party and other armed groups, which formed the Armed Islamic Group (GIA); made public statements that encouraged atrocities committed by armed groups in Algeria, and made no attempt to publicly disassociate himself from the armed faction of the party until the assassination of 2 FIS leaders. The Attorney General found that the BIA had not applied the correct legal standard when it found that the applicant was not subject to the persecutor bar. The Attorney General explained that "incite" means to move to a course of action, stir up, spur on; "assist" means to give support or aid, or help; and "participate" means to take part in something, usually in common with others. The Attorney General explained that under the correct legal standard, someone who had created and sustained ties between the political movement and the armed group, while aware of the atrocities committed by the armed group, who used his profile and position of influence to make public statements that encouraged those atrocities, and who made statements that appeared to condone the persecution without publicly and specifically disassociating himself or the movement from the acts of persecution, could be barred as a persecutor. The Attorney General remanded to the BIA to apply the correct analysis. (On a separate ground, the Attorney General also determined that there may be reasonable grounds for regarding the applicant as a danger to national security and remanded to the BIA to make factual findings).

On petition for review from the BIA's ultimate decision denying relief to the applicant in *A-H-*, the Fourth Circuit held, in an unpublished decision, that the Attorney General's construction of the persecutor bar was impermissible to the

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extent that it could be applied to an applicant whose actions had no causal relationship to an actual instance of persecution. The Fourth Circuit explained that under the Attorney General's test, an applicant who had created and sustained ties with a group that had previously engaged in persecution could be barred even if he did so long after the persecution took place; in such a case, no causal nexus would exist. Although it rejected the *A-H-* decision in this narrow respect, the Fourth Circuit's logic is consistent with USCIS guidance and did not disturb other aspects of the Attorney General's decision, which remains binding on all RAIO officers.

Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003) Sierra Leone (Forcibly recruited by RUF)

The applicant and his family were captured by the rebel group RUF. The RUF incinerated his father and raped and killed his sister. The applicant was kidnapped and forced to join the RUF. He tried to escape twice. He was ordered to murder a female prisoner and to chop off the limbs and heads of non-combatants. He stated that the RUF engaged in these practices in order to scare civilians so that they would not support the government. He argued that he did not engage in political persecution because he did not share the persecutory intent. The Fifth Circuit found that personal motivation is not relevant, that the applicant had participated in persecution, and the persecution occurred because of the victims' political opinions.

Matter of McMullen, 19 I&N Dec. 90 (BIA 1984) Ireland (Active Provisional Irish Republican Army (PIRA) member)

The applicant was a member of the Provisional Irish Republican Army (PIRA), a clandestine, terrorist organization. When the applicant joined the PIRA, its use of violence was escalating. The applicant was respected as an effective member of the PIRA and his duties included training other PIRA members and conducting special operations. He was also personally responsible for coordinating many illegal arms shipments from the United States to Northern Ireland, which the PIRA used to perpetrate acts of persecution and violence. The BIA found that the applicant "assisted" and "otherwise participated" in the persecution of others through his "active and effective" membership in the PIRA and through his coordination of arm shipments.

- **Government Officials**

Example

Did Not Assist in Persecution

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Gao v. U.S. Att'y Gen., 500 F.3d 93 (2d Cir. 2007) China (Supervisory bookstore inspector)

The applicant was the chief officer for the Culture Management Bureau in Qingdao City. His bureau was responsible for inspecting bookstores to determine if they were selling books prohibited under the Chinese government's cultural laws. He and his inspectors issued reports about prohibited books being sold. He confiscated prohibited books and issued citations. He reported these violations up to his superiors, who would then determine whether fines should be imposed or business licenses suspended. He was aware that a violator could receive 10 years in jail but never knew of anyone who was arrested or jailed. The mere fact that the applicant may have been associated with an "enterprise that engages in persecution" is insufficient to apply the bar. The bureau where the applicant worked did not exist solely to persecute those who illegally distributed banned materials, but also performed legitimate tasks such as enforcing copyright and pornography laws. The Second Circuit found that there was no identifiable act of persecution in which applicant assisted.

Did Assist in Persecution

Suzhen Meng v. Holder, 770 F.3d 1071 (2d Cir. 2014) China (public security official)

The applicant worked as a public security officer in China for 22 years. In this role, she reported pregnant women to China's family planning authorities, including those in violation of the state's coercive population control policies. She knew that women who violated the family planning policies would be punished, including by being forced to undergo sterilization or abortion. The Second Circuit upheld the BIA's conclusion that the applicant had assisted in persecution and rejected the applicant's argument that evidence linking her to a specific act of persecution was required in order for the bar to apply. It concluded that when "the occurrence of persecution is undisputed, and there is such evidence of culpable knowledge that the consequences of one's actions would assist in acts of persecution," evidence of an applicant's assistance or participation in a particular act of persecution is not necessary.

2.3.4 Know That the Persecution Was Occurring

In order for an applicant to be subject to the persecutor bar, the applicant must have "sufficient" or "prior or contemporaneous" knowledge of the persecution itself or knowledge that his or her actions would contribute to or result in the persecution of

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others.[51] Several courts have provided guidance on the knowledge requirement for the persecutor bar.

Example

> (*Castañeda-Castillo)* Castañeda was a lieutenant in the antiterrorist unit of the Peruvian military and worked in areas where the Shining Path was active. During an operation to search for Shining Path members, Castañeda led a patrol that was assigned to block escape routes from the village while two other patrols entered and conducted a search in the village. The two search patrols committed a brutal massacre of innocent villagers. Castañeda was in radio contact with his base commander, but not with the two search patrols who had entered the village. Therefore, he was unaware that the attack occurred and became a massacre. He stated he did not learn of the atrocities until three weeks after the operation. Because Castañeda did not have prior or contemporaneous knowledge, the First Circuit found that the persecutor bar did not apply.[52] The First Circuit used a hypothetical example of a bus driver who unknowingly and unwittingly drove a killer to the site of a massacre. It said the driver should not be labeled a persecutor even if the objective effect of his actions furthered the killer's secret plan.[53]

Whether knowledge is an issue in a case will depend on the specific facts of the case and the credibility of the applicant's claim.

Examples

> (*Diaz-Zanatta*) On the one hand, a Peruvian intelligence officer was found not to have assisted in the persecution of others because she testified credibly that she did not know how the information she gathered was used and was not aware that any person about whom she had gathered information was persecuted as a result of her actions.[54]
>
> (*Higuit*) On the other hand, the persecutor bar applied to a Filipino intelligence officer who admitted that he was aware that the information he gathered was used to torture, imprison, and kill political opponents.[55]

[51] *Diaz-Zanatta*, 558 F.3d 450; *Lin*, 584 F.3d 75; *Weng*, 562 F.3d 510; *Balachova*, 547 F.3d 374; *Gao*, 500 F.3d 93; *Castañeda-Castillo*, 488 F.3d 17; *Quitanilla*, 758 F.3d 570; *Suzhen Meng*, 770 F.3d 1071.

[52] *Castañeda-Castillo*, 488 F.3d at 21-22; *Castañeda-Castillo v. Holder*, 638 F.3d 354, 359 (1st Cir. 2011) (appeal after remand).

[53] *Castañeda-Castillo*, 488 F.3d at 20.

[54] *Diaz-Zanatta*, 558 F.3d 450.

[55] *Higuit*, 433 F.3d 417.

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If the applicant you are interviewing denies knowledge, the focus of your analysis will be whether the applicant's denial is credible. If you have a concern about the applicant's credibility, you must confront the applicant, informing him or her of your concern, and give him or her an opportunity to explain or elaborate. See section below, *Credibility and the Persecutor Bar.*

Relevant Questions

- Does the applicant know if what he or she did resulted in harm to others?
- Did he or she know of instances where others were persecuted as a result of the actions of individuals in similar positions?

2.3.5 Duress?

In many cases, an applicant may allege that he or she acted under duress when participating in persecution of others. Whether duress may negate an applicant's involvement in persecution under the refugee definition is currently an unsettled question. While the Department of Homeland Security (DHS) and the Department of Justice (DOJ) are developing regulations on this topic, under current provisions an applicant subject to the persecutor bar may not be granted asylum or refugee status even if the persecutory act(s) occurred under duress. While these regulations are pending, it is important to fully explore and document whether the applicant has a plausible claim for duress that could be adjudicated at a future date. If you find that the applicant has a plausible duress claim, follow the guidance for handling such cases pursuant to the type of adjudication you are performing. See International and Refugee Adjudications Supplement – Duress; Asylum Adjudications Supplement – Headquarters Review.

The duress issue was litigated before the U.S. Supreme Court in *Negusie v. Holder* in 2009.[56] Negusie was a dual national of Ethiopia and Eritrea who was forced to join the Eritrean army. When he refused to fight against Ethiopia, he was imprisoned, beaten with sticks and placed in the hot sun. After two years he was released and forced to work as a prison guard. He carried a gun, guarded the gate to prevent escape, kept prisoners from taking showers and obtaining fresh air, and forced prisoners to stay out in the hot sun.[57] He claimed that he committed these acts involuntarily. In the lower court decisions, the BIA and the Fifth Circuit held that the persecutor bar contains no exception for coerced acts.

The Supreme Court found that the Fifth Circuit erred by applying the holding of *Fedorenko v. United States*[58] to the applicant. In *Fedorenko*, an individual who served as

[56] *Negusie*, 555 U.S. 511 (2009).

[57] *Id.* at 514-515 (2009).

[58] *Fedorenko*, 449 U.S. 490 (1981).

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a guard at a concentration camp while held as a German prisoner of war was found to have assisted in the persecution of others without consideration of whether such participation was against his will.[59] While the *Fedorenko* Court found that voluntariness was not required to apply the persecutor bar, the *Negusie* Court explained that the *Fedorenko* decision interpreted the terms of the Displaced Person Act of 1948 and not the Refugee Act of 1980. Accordingly, the Court concluded that the *Fedorenko* holding does not control the BIA's interpretation of the persecutor bar under the INA. Because the BIA had not exercised its interpretive authority with regard to the INA, the Court remanded the case back to the BIA for the agency to determine, in the first instance, whether the persecutor bar in the refugee definition applies to involuntary actions or whether a duress exception may be read into the refugee definition. The BIA's review of this case is stayed while DHS and DOJ develop regulations.

Despite the holding in *Negusie*, court decisions prior to *Negusie* contain relevant guidance on lines of inquiry in assessing a voluntariness element in the context of culpability, and will assist you in fully exploring on the record whether an applicant may have a plausible claim for duress. A particularized evaluation is required to determine whether the applicant's behavior was culpable "to such a degree that he or she could be deemed to have assisted or participated in the persecution of others."[60]

For example, in *Hernandez v. Reno*, a case pre-dating *Negusie,* the Eighth Circuit criticized the BIA for solely evaluating the applicant's participation in shooting civilians in reaching its determination that the applicant was a persecutor.[61] The Eighth Circuit explained that the BIA should have also considered the fact that the applicant had been forcibly recruited into the guerrilla organization, that he shared no persecutory motives with the guerrillas, and that he participated in the shooting only while the commander stood behind him during the shooting and checked the magazine of his rifle afterwards. Furthermore, the BIA should have also taken into account the applicant's disagreement with his commander about the shootings immediately following the incident, and that at the first available opportunity, the applicant risked his life to escape the guerrillas.[62]

As discussed above, in all cases involving the persecution of others, even those where the applicant alleges that his or her acts were committed under duress, you must carefully weigh all relevant facts to determine whether the applicant's actions furthered the persecution of others on account of a protected ground. Consider these facts even in cases where the acts were committed involuntarily.[63]

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[59] *Id.* at 512 (interpreting the "voluntariness" aspect of the persecutor bar under the Displaced Persons Act).

[60] *Vukmirovic*, 362 F.3d at 1252.

[61] *Hernandez*, 258 F.3d at 814.

[62] *Id.*

[63] *See, e.g.*, *Miranda Alvarado*, 449 F.3d at 927.

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Example

(*Miranda-Alvarado v. Gonzales)* Upon considering the applicant's interpretation of interrogation questions during torture, his involvement in interrogations for six or seven years two to three times per month, his continued interpretation despite that he would not have suffered dire consequences if he stopped interpreting, and that he made little effort to avoid being involved in the interrogations, other than to ask for the torture to be lessened when it was so extreme that that the victim had difficulty speaking, the Ninth Circuit found that the applicant assisted in the persecution of others.[64]

Relevant Questions

- What led the applicant to commit, assist/participate in the act?
- Did the applicant believe that he or she had a choice?
- Could the applicant have reasonably avoided committing, assisting/participating in the act?
- Did the applicant take steps to avoid committing the act?
- What was the severity and type of harm inflicted and/or threatened by those coercing the applicant to engage in the act?
- To whom was/were those threats and/or harm directed? (e.g., the applicant, his or her family)?
- Was the person threatening the applicant with immediate harm or future harm?
- What was the perceived likelihood that the threatened harm would actually be inflicted? (e.g., past harm to the applicant, his or her family)?
- Any other relevant factors?

3 CREDIBILITY AND THE PERSECUTOR BAR

As explained in greater detail in the RAIO Training modules *Interviewing - Eliciting Testimony* and *Evidence,* while the burden of proof is on the applicant to establish eligibility, your duty to elicit all relevant testimony is equally important. As discussed above, if a "red flag" emerges, because of the non-adversarial nature of the interview, you must utilize interviewing techniques that best allow you to elicit detailed testimony from an applicant, and diligently conduct relevant country of origin (COI) research.

[64] *Id.*

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In addition to the applicant's testimony, general country of origin information may be the only other type of evidence available to you when you make your decision in a case involving the persecutor bar.[65] It is important to remember that reliable information may sometimes be difficult to obtain. The absence of such information should not lead you to presume that an applicant assisted or participated in persecutory acts by being a member of or associated with a group that committed persecutory acts.

If an applicant was in a particular place at a time when you know from COI that human rights abuses were being committed but denies any involvement or knowledge, the applicant should be questioned about his or her activities and awareness that abuses were taking place. The credibility of the applicant's responses should be examined in the same way that you would examine any statements that are material or relevant to the claim: the statements are credible if they are detailed, consistent and plausible. If the applicant testifies credibly that he or she did not order, incite, assist, or otherwise participate in the persecution of others on account of a protected ground then he or she is not subject to the persecutor bar. A negative credibility determination must contain well-articulated examples of flaws in the applicant's testimony.[66] Your notes must reflect that you explained your credibility concerns to the applicant, and in turn, gave the applicant an opportunity to address your concerns.

It is important to remember that the evidence refugee applicants can reasonably obtain varies greatly compared with the corroborating evidence some asylum seekers can reasonably obtain.

Relevant Questions

- Is the applicant aware that his or her unit committed human rights abuses ?
- Did the applicant hear or see other members of his or her unit commit human rights abuses?
- How was the applicant able to remain in a unit that committed human rights abuses without learning about them or being involved?

4 DECISION-MAKING AND WRITING

4.1 Mandatory Nature of the Persecutor Bar

[65] It is well-established that a fact-finder consider both direct and circumstantial evidence in the persecutor bar context. *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011).

[66] *See* RAIO Training Module, *Credibility*.

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If you determine that the applicant is subject to the persecutor bar, you cannot approve the case.

In asylum cases, you have no discretion to approve the case, even though the applicant may otherwise qualify for asylum or derivative status. If the asylum applicant is subject to the persecutor bar, you do not weigh that adverse factor against the risk of future persecution in an exercise of discretion. You will either deny the applicant, or if the person is not in status, refer the applicant for an immigration court hearing. See Asylum Adjudications Supplement – Discretion.

In the refugee context, there is no waiver available to an applicant who has been denied based on the persecutor bar. Denial in such cases is mandatory in the overseas context.

4.2 Applicability to Dependents

When a principal applicant is granted asylum or refugee status, his or her spouse and/or children, as defined in the Act, may also be granted status if accompanying or following to join. If the principal applicant is subject to the persecutor bar, neither the spouse nor the child is eligible for asylum or refugee status as a dependent. Conversely, if the principal applicant is not subject to the persecutor bar, but his spouse or his child is subject to the persecutor bar, the principal may be approved and the dependent will be denied or referred.[67]

4.3 Relationship to Terrorism-Related Inadmissibility Grounds (TRIG)

When analyzing the facts before you, it is also important to keep the persecutor bar distinct from the terrorist-related inadmissibility grounds, particularly the bar against material support. Some cases that you review will implicate the applicability of both bars. Under the TRIG analysis, the amount of support need not be large or significant, whereas in the persecutor bar analysis, an applicant must be found to have "ordered, incited, assisted, or otherwise participated" in the persecution.

Another distinction between these grounds arises regarding application of a duress exception. While the Executive Branch may provide exemptions by policy for applicants who provided material support under duress to designated or undesignated terrorist organizations, as noted above, the Executive Branch is still considering whether a duress exception should be read into the persecutor bar analysis, and what the limits of that exception would be. Although the relevant facts may occasionally overlap, it is important to keep TRIG and persecutor bar concepts distinct when analyzing the facts of the case before you.

[67] INA § 101(a)(42)(B); INA § 207(c)(2); 8 C.F.R. § 208.21(a).

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On a few occasions, when the applicant was a medical doctor in Syria, he provided medical care to patients whom he knew were members of several armed groups opposed to the Syrian Government. On one occasion, after a violent protest, the applicant was taken by the police and government agents to a locked area and told to revive a man who had fainted. The applicant provided medical care to the patient until he regained consciousness and was able to faintly speak. The police then made the applicant leave. The applicant saw signs of beating on the patient and feared the patient was beaten again after he left.

In such a situation, depending on the facts, testimony and any other relevant evidence, the applicant's treatment of members of armed groups opposing the Syrian regime could render him inadmissible for engaging in terrorist activity by providing material support to a terrorist organization, although he could be eligible for a TRIG exemption for the voluntary medical care. However, depending on the facts, testimony and other evidence, the applicant might also be subject to the persecutor bar for his medical care to the patient he feared was beaten by the police. The applicant would have to be questioned regarding, for example, his contemporaneous knowledge of the harm, why the patient was harmed, if he knew his medical care assisted in any later harm and if he acted under duress.

4.4 Addressing the Bar in your Decision

See Asylum Adjudications Supplement – Decision Writing.
See Asylum Adjudications Supplement – Note Taking.
See Asylum Adjudications Supplement – Identity Checks.
See Asylum Adjudications Supplement – One Year Filing Deadline.
See International and Refugee Adjudications Supplement – Decision Making and Recording.

5 CONCLUSION

Adjudicating claims that may involve the persecutor bar present certain challenges. You must carefully consider all relevant evidence in reaching your decision. As always, the law and the facts, rather than your emotions or intuition, must be your guide.

6 SUMMARY

The Rationale behind the Bar

The rationale for the persecutor bar is derived from the general principle in the *1951 Convention relating to the Status of Refugees* that even if someone meets the definition of refugee, i.e., has a well-founded fear of persecution on account of a protected ground, he or she may nonetheless be considered undeserving or unworthy of refugee status.

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Analytical Framework

Step One: Determine if there is Evidence of the Applicant's Involvement in an Act that May Rise to the Level of Persecution

- Look for red flags in the evidence to alert you that the persecutor bar may be at issue.
- Evidence may include:
  - the applicant's testimony during the interview;
  - information in the applicant's file indicating his or her involvement in an entity known for committing human rights abuses; and
  - country of origin information (COI).
- If a red flag is present, examine whether there is further evidence of a specific act or acts that may rise to the level of persecution.
- Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.

Step Two: Analyze the Harm Inflicted on Others

- Does the harm inflicted rise to the level of persecution?
- Is there a nexus to a protected ground?
- Was the act a legitimate act of war or law enforcement?

Step Three: Analyze the Applicant's Level of Involvement

- Did the applicant *order, incite, assist, or otherwise participate* in the persecutory act(s)?
- Did the applicant know that the persecution was occurring?
  - Prior or contemporaneous knowledge is required.
- Did the applicant act under duress?
  - Fully explore this issue for the record and follow Division specific guidance.

Do Not Confuse Persecutor Bar with TRIG

It is important not to confuse the persecutor bar with terrorist-related inadmissibility grounds and the security-related mandatory bars to asylum. While some cases may implicate the applicability of both bars, each issue should be analyzed separately.

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PRACTICAL EXERCISES

Practical Exercise # 1

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

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OTHER MATERIALS

STEP-BY-STEP PERSECUTOR BAR CHECKLIST

1. **Is there evidence of the applicant's involvement in an act that may rise to the level of persecution?** Yes ☐ No ☐

   If no, STOP – applicant is not subject to the bar. If yes, proceed to next step.

2. **Analyze the harm inflicted on others.**

   Yes ☐ No ☐

   If no, STOP – applicant is not subject to the bar. If yes, proceed to next step.

   Race ☐ Religion ☐ Nationality ☐ Membership in a PSG ☐ Political Opinion ☐

   If no boxes are checked, STOP – applicant is not subject to the bar. If yes, proceed to next step.

   Yes ☐ No ☐

   If yes, STOP – applicant is not subject to the bar. If no, proceed to next step.

3. **Analyze the Applicant's level of Involvement.**

   Yes ☐ No ☐

   If no, STOP – applicant is not subject to the bar. If yes, proceed to Step 3b.

   Yes ☐ No ☐

   If no, STOP – applicant is not subject to the bar. If yes, proceed to Step 3c.

   Yes ☐ No ☐

If applicant did not act under duress, the persecutor bar applies and he or she is ineligible for refugee or asylum status. If you find he or she has a plausible claim of duress, see adjudication-specific guidance.

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SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

The following information is specific to international and refugee adjudications. Information in each text box contains adjudication-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

International and Refugee Adjudications Supplement – Related Grounds of Inadmissibility

In addition to analyzing the possible applicability of the persecutor bar to refugee eligibility, when an applicant engages in activity that may have assisted in, or furthered, the harm or suffering of other individuals, the officer must also consider whether related grounds of inadmissibility may apply to the applicant. The related inadmissibility grounds are directed at preventing individuals from entering the United States if they have:

1. Ordered, incited, assisted or otherwise participated in Nazi Persecutions (INA Section 212(a)(3)(E)(i));

2. Ordered, incited, assisted or otherwise participated in genocide (INA Section 212(a)(3)(E)(ii));

3. Committed, ordered, incited, assisted or otherwise participated in torture or extrajudicial killing under the color of law (INA Section 212(a)(3)(E)(iii));

4. Recruited or used child soldiers in violation of section 2442 of title

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18, U.S. Code; or

5. As a foreign government official, committed particularly severe violations of religious freedom (INA Section 212(a)(2)(G)).

In the first three inadmissibility grounds, the same analysis of the persecutor bar to refugee status is applicable to the determination of whether an applicant ordered, incited, assisted, or otherwise participated in the relevant activity. Further discussion of these provisions can be found in the Inadmissibility module.

International and Refugee Adjudications Supplement – Decision Making and Recording

Please see Refugee Application Assessment Standard Operating Procedure (SOP): "D. Section IV – BARS AND INADMISSIBILITIES."

https://ecn.uscis.dhs.gov/team/raio/RAD/TrainingandQualityAssurance/Training%20Document%20Library/Assessment%20SOP.pdf

International and Refugee Adjudications Supplement – Duress

Pursuant to current guidance, all cases involving persecution committed under duress must be placed on hold for review at IRAD Headquarters to ensure the hold is appropriate. When a persecutor hold is appropriate, the applicant may be informed by the RSC regarding his or her options, which may include remaining on long-term hold with IRAD, requesting a denial or withdrawing from the USRAP in hope of resettlement in another country. Given the grave consequences for applicants, it is vital that officers elicit all relevant testimony to ensure that the persecutor bar does, in fact, apply. Testimony must be elicited regarding issues such as the applicant's level of involvement in persecution and his or her prior or contemporaneous knowledge of the persecution.

For additional information, *see* Refugee Affairs Division Memorandum, *Updated Holds Policy – Persecution Under Duress* (September 11, 2018).

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SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

Asylum Adjudications Supplement - Burden Shifting

The asylum regulations regarding the "mandatory bars" to asylum state that "if the evidence indicates that" an applicant ordered, incited, assisted, or otherwise participated in the persecution of any person on account of one of the five protected grounds, "he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act."[68]

As discussed earlier in this module, the burden is on the applicant to establish eligibility.[69] Credible testimony alone may be enough to meet the applicant's burden. While the applicant has the burden of proving eligibility, you have an equal duty in a non-adversarial interview to elicit detailed testimony from the applicant.[70] If the applicant's testimony, documents in the record, country of origin information, or other evidence indicates that the persecutor bar may apply, you must question the applicant about his or her possible involvement in persecutory

[68] 8 C.F.R. § 208.13(c).

[69] 8 C.F.R. § 208.13(a); *UNHCR Handbook, para 196*.

[70] 8 C.F.R. § 208.9(b); *UNHCR Handbook, para 196*, and 205(b)(i).

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acts. If the applicant denies involvement, you must then determine the credibility of that denial. For additional information regarding credibility determinations and evaluation of evidence, see RAIO Training modules, *Credibility* and *Evidence*. Just as you must identify inconsistencies and offer the applicant an opportunity to explain, in the instance where it appears the persecutor bar might apply, you must identify the issues of concern and elicit detailed information on which to base the determination. The applicant must establish that he or she is not subject to the persecutor bar by a preponderance of the evidence.

Asylum Adjudications Supplement - Note-Taking

Asylum adjudication procedures require that officers take notes in a sworn statement format when the applicant admits, or there are serious reasons to believe, he or she ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five enumerated grounds.

This is crucial because an applicant's admission may be used as a basis to institute deportation or removal proceedings against him or her, or as a basis for DHS to detain the applicant.

For further explanation and requirements, see RAIO Module, *Interviewing - Note-Taking*, including the Asylum Adjudications Supplement, and see the Affirmative Asylum Procedures Manual (AAPM).

Asylum Adjudications Supplement - Discretion

There may be some cases in which facts fall short of a mandatory bar to asylum but nonetheless warrant the denial or referral of the asylum application as a matter of discretion, even if the applicant has established refugee status.

Examples:

Although mere membership in an organization that is or has been involved in the persecution of others is insufficient to statutorily bar an applicant from a grant of asylum, it may be considered as an adverse factor when weighing the totality of the circumstances to exercise discretion to grant asylum.

An applicant testifies to serving in his country's police force for several years. Country conditions information reports that many individuals held in police custody are abused by police officers. The applicant admits that he had used

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extreme force in a number of situations in dealing with prisoners. There is insufficient evidence to support a finding that the applicant's actions amounted to persecution on account of one of the five grounds. In such a situation, the officer may be able to support a determination that asylum should not be granted as a matter of discretion.

Officers must bear in mind that the sound exercise of discretion requires a balancing of the fact that the applicant qualifies as a refugee, along with any other positive factors, against any negative factors presented in the case. This should be reflected in the assessment.

The likelihood of future persecution is an important factor in the exercise of discretion. A reasonable possibility of future persecution weighs heavily in favor of exercising discretion to grant asylum. The BIA has held that "the danger of persecution should generally outweigh all but the most egregious of adverse factors."[71]

NOTE: Denials and referrals of applicants who meet the definition of a refugee and are otherwise eligible for asylum, but are denied or referred because of acts that are not a bar to asylum must be reviewed by Headquarters Quality Assurance.

Asylum Adjudications Supplement – Decision Writing

If the evidence indicates that the persecutor bar may apply, the assessment must contain an analysis of that evidence. The analysis must include a summary of the material facts, an explanation of how those facts and other evidence support a finding that the bar may apply, and a conclusion as to whether or not the applicant is subject to the bar.

Where it appears that the persecutor bar may apply to the applicant, your analysis must give a detailed explanation as to whether the applicant ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five protected grounds. The analytical framework described in this module must be followed in order to accurately describe the relevant issues. Because it is an open area of law, the analysis must also address the issues of duress and intent, including the age and/or mental capacity of the applicant at the time he or she may have engaged in the acts of persecution.

Unlike applicants barred from receiving asylum or refugee status on other grounds,

[71] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

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an applicant found to be a persecutor CANNOT also be said to be a refugee because this bar is included in the definition of a refugee.

If the case contains evidence indicating that the persecutor bar may apply, but the applicant establishes by a preponderance of evidence that the bar does not apply, the assessment must include an analysis setting forth why the evidence raised the possibility that the bar applies, and that clearly articulates the facts and reasoning by which the bar was found not to apply.

If the facts indicate that a discretionary denial/referral may be warranted, then you must discuss the positive and negative factors considered in reaching that determination, and explain the reason for exercising discretion to grant, deny, or refer the case.

When writing a decision involving an applicant barred as a persecutor, you must analyze all elements of the refugee definition and consider any other bars that may apply. The assessment must not include a statement that "the applicant met the definition of a refugee," even when the applicant established that he or she suffered past persecution or has a well-founded fear of persecution on account of a protected ground. You must follow current Asylum decision writing guidance as to appropriate language to use to address the persecutor bar. A possible example would be: "However, the preponderance of evidence indicates that the applicant is subject to the persecutor bar because the applicant assisted in the persecution of others on account of [state the protected ground]." An analysis of why the applicant was found to be a persecutor must follow.

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Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	Safe Third Country Threshold Screening
Rev. Date	May 9, 2013
Lesson Description	The purpose of this lesson is to explain how to determine whether an alien seeking entry into the US from Canada at a land border is eligible for an exception to the Safe Third Country Agreement between the US and Canada, which would allow him/her to seek asylum in the United States.
Terminal Performance Objective	The Asylum Officer will be able to correctly determine whether the applicant in a "threshold screening" has established eligibility for an exception to the Safe Third Country Agreement.
Enabling Performance Objectives	1. Identify who is subject to the Safe Third Country Agreement. (OK4)(AIL4)(ACRR10) 2. Identify the exceptions to the Safe Third Country Agreement.(AIL4) 3. Identify the function of the threshold screening.(AIL4) 4. Identify the standard of proof required to establish eligibility for an exception to the Safe Third Country Agreement.(AIL4) 5. Distinguish between the processes for Land Border Port-of-Entry cases versus Removals from Canada In-Transit through the US.(OK6)(OK7) 6. Identify family relationships that may prompt eligibility for an exception. 7. Identify the types of lawful immigration status a qualifying family member must have to prompt eligibility for an exception.(AIL4) 8. Identify when an asylum claim is pending and whether it may provide a basis for an exception.(AIL4)(OK4) 9. Identify exceptions based on citizenship or statelessness with last habitual residence in Canada.(AIL4)(OK4) 10. Identify process and potential bases for a public interest exception.(AIL4)
Instructional Methods	Lecture, practical exercises
Student Materials/ References	INA Section 208(a)(2)(A), 235(b)(1)(B)-(F); 8 C.F.R. § 208.30; Agreement for the Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries; Procedural Issues Associated with Implementing the Agreement for the Cooperation in the

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	Examination of Refugee Status Claims from Nationals of Third Countries: Statement of Principles Forms: Form I-860: Notice and Order of Expedited Removal; Form I-867-A&B: Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act; Safe Third Country Agreement Threshold Screening Adjudication Worksheet; Form M-444C: Information about Threshold Screening Interview
Method of Evaluation	Written test
Background Reading	Joseph E. Langlois, Director, Asylum Division, US Citizenship and Immigration Service. APSS SAFE Screen Guidance, Memorandum to All Asylum Officer Personnel (Washington, DC: June 5, 2006) 9 pp.

CRITICAL TASKS

Knowledge of U.S. case law that impacts RAIO (3)
Knowledge of the Asylum Division mission, values, and goals. (3)
Knowledge of how the Asylum Division contributes to the mission and goals of RAIO, USCIS, and DHS. (3)
Skill in identifying information required to establish eligibility. (4)
Knowledge of the Asylum Division jurisdictional authority. (4)
Knowledge of forms required for exclusion/removal. (4)
Knowledge of Safe Third Country Agreement's impact on asylum. (4)
Skill in organizing case and research materials (4)
Skill in analyzing complex issues to identify appropriate responses or decisions. (5)
Skill in applying legal, policy, and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence. (5)
Knowledge of Custom and Border Protection (CBP) functions and responsibilities, as they relate to RAIO (2)

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Presentation

References

I. INTRODUCTION

The purpose of this lesson is to explain how to determine whether an alien is eligible for an exception to the bar on applying for asylum when the alien would be subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries ("Safe Third Country Agreement" or "Agreement").

II. BACKGROUND

Section 208(a)(1) of the Immigration and Nationality Act ("Act") permits any alien who is physically present in or who arrives at the United States to apply for asylum; however, section 208(a)(2)(A) of the Act specifically states that paragraph (1) shall not apply where, "pursuant to a bilateral or multilateral agreement, the alien may be removed to a country where the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General [now deemed to be the Secretary of Homeland Security under the Homeland Security Act] finds that it is in the public interest for the alien to receive asylum in the United States."

A more detailed discussion of the background underlying the Agreement may be found in the Supplementary Information discussion that accompanied publication of the Proposed Rule to implement the Agreement, published on March 8, 2004. 69 Fed. Reg. 10620.

On December 5th, 2002, the governments of the United States and Canada signed the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries. The Agreement allocates responsibility between the United States and Canada whereby one country or the other (but not both) will assume responsibility for processing the claims of certain asylum seekers who are traveling from Canada into the United States or from the United States into Canada.

Under the Agreement, U.S. and Canada have agreed that the "country of last presence" is obligated to accept the return of an asylum seeker from the "receiving country" under certain circumstances. Specifically, aliens who request protection from the "receiving country," either at a U.S.-Canada land border port-of-entry or while being deported through the "receiving country" by the government of the "country of last presence," may generally be returned to the "country of last presence."

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The "country of last presence" will then consider the alien's protection request under its legal system.

The general obligation of the "country of last presence" to accept the return of asylum seekers making protection claims was largely tempered by principles underlying the U.S. position while negotiating the Agreement: (1) to the extent practicable, the Agreement should not act to separate families; (2) the Agreement must guarantee that persons subject to it would have their protection claims adjudicated in one of the two countries; and (3) it would be applied only in circumstances where it is indisputable that the alien arrived directly from the other country. Reflecting these principles, the Agreement allows asylum seekers to join certain relatives already in the "receiving country." It also clearly stipulates that an asylum seeker subject to its terms must have his or her protection claim adjudicated in either Canada or the United States. And, the Agreement limits its application to two situations where aliens have come directly from the other country: those arriving at land border ports-of-entry and those transiting from the "country of last presence" through the "receiving country" during the course of deportation.

In addition to these limits on the Agreement's applicability, the Agreement also contains several exceptions allowing asylum seekers to pursue their protection claims in the "receiving country." These exceptions are discussed in detail below.

Finally, it is important to note that, because the Agreement is applicable only to aliens who may be treated as "applicants for admission" under INA § 235(a), the expedited removal process of § 235(b) has been selected as the principal implementation vehicle for the Agreement. The DHS regulations implementing the Agreement create within the expedited removal process a new mechanism for making determinations about how the Agreement applies to asylum seekers. This new mechanism is called the "threshold screening interview." For cases where the Agreement applies, the "threshold screening interview" will precede (and, in some cases, preempt) the INA § 235(b)(1)(B) credible fear interview process with which asylum officers are familiar.

Immigration judges will conduct a similar analysis in those cases where DHS does not apply the expedited removal process to an alien subject to the Agreement and instead places the alien in removal proceedings under INA § 240. 8 CFR 1240.11(g)

III. FUNCTION OF THRESHOLD SCREENING

The function of the threshold screening process is to determine whether an alien is subject to the Agreement, and, if so, whether the alien will be permitted to remain in the U.S. to pursue his or her protection claims based on the alien's qualification for one of the Agreement's exceptions.

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It is important to keep in mind that, while both the U.S. and Canada boast generous and effective protection regimes, in some individual cases, an applicant may have compelling reasons for not seeking protection in one nation, in favor of the other. Asylum officers are trained to make factual and legal determinations in the context of protection claims, so they are well-suited to the task of the threshold screening.

IV. STANDARD OF PROOF IN THRESHOLD SCREENING

The threshold screening is a fact-based determination, and is subject to a preponderance of the evidence standard of proof. Threshold screening interviews are conducted in Q&A format to create a sworn statement that is read back to the asylum seeker to ensure a complete and accurate record for supervisory and Headquarters Asylum (HQASM) review. There is no other review of the threshold screening determination.

8 CFR 208.30(e)(6)(ii)

Asylum officers will use all available evidence, including the individual's testimony, affidavits and other documentation, as well as available records and databases, to determine whether an exception to the Agreement applies in each alien's case. Credible testimony alone may be sufficient to establish that an exception applies, if there is a satisfactory explanation of why corroborative documentation is not reasonably available. In assessing whether evidence is reasonably available, asylum officers should be sensitive to the fact that asylum seekers fleeing persecution may often not have documents establishing eligibility for one of the Agreement's exceptions at the time they seek to enter the United States from Canada; however, they should also consider the length of time the asylum seeker spent in Canada, and whether one could reasonably be expected to have obtained documentation while in Canada. Also, computer systems and government database records, though helpful in verifying certain family relationships and questions concerning immigration status, may not be conclusive. Asylum officers conducting threshold screening interviews should rely upon their training and experience in evaluating credibility of testimony when there is little or no documentation in support of that testimony.

Excerpt from Supplementary Information to the Proposed Rule - "What Type of Evidence Will Satisfy USCIS When Determining Whether an Individual Meets One of the Exceptions in the Agreement?" 69 FR 10623

V. EXCEPTIONS APPLICABLE AT U.S.-CANADA LAND BORDER PORTS OF ENTRY

Aliens who request asylum, withholding of removal, or protection

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under the Convention Against Torture at a U.S. port-of-entry located on the shared U.S.-Canada land border will be ineligible to pursue their claims in the U.S. unless they qualify for one of the Agreement's exceptions. An alien qualifies for an exception to the Agreement under these circumstances if he or she:

8 CFR 208.30(e)(6)(iii)

a.) Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada;

b.) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who has been granted asylum, refugee, or other lawful status in the United States, provided, however, that this exception shall not apply to an alien whose relative maintains only nonimmigrant visitor status, as defined in section 101(a)(15)(B) of the Act, or whose relative maintains only visitor status based on admission to the United States pursuant to the Visa Waiver Program;

c.) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who is at least 18 years of age and has an asylum application pending before U.S. Citizenship and Immigration Services, the Executive Office for Immigration Review, or on appeal in federal court in the United States;

d.) Is unmarried, under 18 years of age, and does not have a parent or legal guardian in either Canada or the United States;

e.) Arrived in the United States with a validly issued visa or other valid admission document, other than for transit, issued by the United States to the alien, or, being required to hold a visa to enter Canada, was not required to obtain a visa to enter the United States; or

f.) The Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States.

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A. Citizen or habitual resident of Canada

Agreement, art. 2

8 CFR 208.30(e)(6)(iii)(A)

Applications made by individuals claiming to be citizens of Canada must be referred to HQASM prior to a determination. A passport may generally be considered presumptive proof of citizenship.

Aliens claiming citizenship in multiple countries may be admitted under this exception if they establish Canadian citizenship by a preponderance of the evidence.

Stateless individuals who last resided in Canada must establish both statelessness and habitual residence in Canada.

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. 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. Asylum Officers may wish to research State nationality laws to help identify statelessness.

Convention Relating to the Status of Stateless Persons, opened for signature Sept. 28, 1954, art. 1(1), 360 U.N.T.S. 117 (entered into force June 6, 1960)

Whether the applicant maintained a habitual residence in Canada is a question of fact that should be assessed based on the applicant's testimony and any documentation that establishes that the applicant, in fact, resided in Canada. Asylum Pre-Screening Officers (APSOs) should elicit specific information establishing place of residence and duration to determine whether the applicant habitually resided in Canada.

INA § 101(a)(21)

B. Family member in lawful status

Agreement, art. 4, ¶ 2(a)

8 CFR 208.30(e)(6)(iii)(B)

1. Qualifying family members with lawful immigration status in the United States, other than visitor (B-1, B-2, or visa waiver program), may serve as anchor relatives upon whom the applicant may base his/her request for exception to return under the Safe Third Agreement.

   Proof of relationship may be based on specific documentary evidence (such as a birth certificate establishing a parent-child relationship), or, on the credible testimony of the applicant alone.

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Additional supporting evidence could include a sworn statement executed by the anchor relative, or by the anchor relative's representative (not necessarily a legal representative) if the anchor relative is incapable of executing a sworn statement. Sworn statements by anchor relatives should identify the anchor by full name, date of birth, and alien registration number (if the anchor is not a US citizen). APSOs may wish to contact anchor relatives by telephone to confirm or supplement information provided in the statement.

To facilitate submission of documents by the anchor relative, the applicant should be afforded access to telecommunications equipment to contact the anchor, and to receive communication from the anchor.

The applicant's credible testimony alone may also be sufficient to establish a qualifying relationship, if obtaining documentary evidence is unreasonable. The testimony must establish that it is more likely than not that the relationship exists. To establish a relationship through credible testimony alone, the APSO should elicit information relating to the anchor relative's basic biographic information, such as birth date, age, place of residence, length of time in the U.S., or other information that confirms familiarity with the relative.

Matter of Dass, 20 I&N Dec. 120 (BIA 1989); Matter of S-M-J, 21 I&N Dec. 722 (BIA 1997); Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998) Matter of B-B-, Int. Dec. 3367 (BIA 1998)

The following family members may serve as anchor relatives:

a. The applicant's spouse, as defined in INA § 101(a)(35). The relationship must be based on a non-polygamous marriage valid under the laws of the place where the marriage was performed, and does not include unions precluded by U.S. law or regulations. Proof of a spousal relationship could include a marriage certificate or a sworn statement from the spouse.

69 Fed. Reg. 69480

Matter of H-, 9 I&N Dec. 640, 641 (BIA 1962)

Defense of Marriage Act, Public Law 104-199, section 3, 110 Stat. 2419 (1996).

b. Son, meaning the male offspring of the applicant, including those born either in or out of wedlock, step-sons, and those adopted prior to the age of 18. Proof of a parent-son relationship could include a birth certificate or adoption decree showing the applicant's name as one of the son's parents, or a sworn statement by the son (if he is 18 or over) or by the son's representative (if the son is under 18).

The terms, "son" and "daughter," as they are used in the Agreement, are equivalent to the "child" definition of INA § 101(b), with the exception that 101(b)(1)'s requirement that the "son" or "daughter" be "an unmarried person under

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twenty-one years of age" does not apply to analysis under the Agreement's exceptions. Id.

c. Daughter, meaning the female offspring of the applicant, including those born either in or out of wedlock, step-daughters, and those adopted prior to the age of 18. Proof of a parent-daughter relationship could include a birth certificate or adoption decree showing the applicant's name as one of the daughter's parents, or a sworn statement by the daughter (if she is 18 or over) or by the daughter's representative (if she is under 18).

d. Parent, meaning the father or mother of the applicant, either through birth or adoption prior to the age of 18, or a step-father or step-mother, meaning a person married to the father or mother of the applicant prior to the applicant's eighteenth birthday. Proof of parental relationship could include a birth certificate or adoption decree showing the applicant as the child of the named parent, or a sworn statement by the parent.

INA Section 101(b)(2)

e. Legal guardian, meaning a person currently vested with legal custody of the applicant or vested with legal authority to act on behalf of the applicant, provided that the applicant is unmarried and under age 18. Proof of guardianship could include a court-issued guardianship order or sworn statement by the guardian.

8 CFR 208.30(e)(6)(iv)

f. Sibling, meaning the brother or sister of the applicant, as a result of having the same mother or father through birth or adoption prior to the age of 18. This term also includes a step-sibling, meaning a person with a parent married to a parent of the applicant. Proof of sibling relationship could include birth certificates or adoption decrees for both the sibling and the applicant showing shared parentage, or a sworn statement by the sibling (if 18 or over), parent, or representative, or any combination of the above.

g. Grandparent, meaning the parent of the applicant's parent, as the term "parent" is defined above. Proof of grandparent relationship to the applicant could include birth certificates or adoption decrees of the applicant's parent and the applicant, or by sworn

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statement from the grandparent or the applicant's parent, or their representative, or any combination of the above.

h. Grandchild, meaning the son or daughter of the applicant's son or daughter as the terms "son" and "daughter" are defined above. Proof of grandchild relationship could include birth certificates or adoption decrees for the grandchild and the grandchild's parent (applicant's son or daughter), sworn statements from the grandchild (if 18 or over) or his/her parents or representative, or any combination of the above.

i. Aunt or uncle, meaning the sibling of the applicant's parent, or the spouse of an applicant's parent's sibling, as the terms "sibling," "parent," and "spouse" are defined above. Proof of relationship to an aunt or uncle could include birth certificates or adoption decrees showing common parentage of the aunt and the applicant's parent, or marriage certificate showing union with the applicant's parent's sibling, or sworn testimony from the aunt or uncle (if 18 or over), or his or her sibling, parent, or representative, or any combination of the above.

j. Niece, meaning the daughter of the applicant's sibling, as the terms "daughter" and "sibling" are defined above. Proof of aunt/uncle relationship to a niece could include birth certificates or adoption decrees of the applicant, the niece's parent (applicant's sibling), and the niece, sworn statements from the niece (if 18 or over), her parents, or her representative, or any combination of the above.

k. Nephew, meaning the son of the applicant's sibling, as the terms "son" and "sibling" are defined above. Proof of aunt/uncle relationship to a nephew could include birth certificates or adoption decrees of the applicant, the nephew's parent (applicant's sibling), and the nephew, sworn statements from the nephew (if 18 or over), his parents, or his representative, or any combination of the above.

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2. In-law relationships are not considered qualifying family members.

3. For purposes of this exception, there is no age restriction on the anchor family member in lawful immigration status.

4. Lawful immigration status for the purpose of exception to the Safe Third Agreement does not include family members in non-immigrant status under INA 101(a)(15)(B) or pursuant to the Visa Waiver Program. Proof of lawful immigrant status could include verification through DHS or EOIR databases, copies of documents that form the basis for such status (e.g. a U.S. birth certificate for citizenship based on birth in the U.S.; Court Order granting withholding of removal, etc.). Examples of eligible anchor status would include the following:

   The VWP is outlined in INA § 217 and implemented at 8 CFR part 217.

   a. U.S. Citizens
   b. U.S. Lawful Permanent Residents (LPRs), including conditional LPRs
   c. Asylees
   d. Refugees
   e. Aliens granted Temporary Protected Status
   f. Aliens granted withholding of removal
   g. Aliens with valid student and employment-related non-immigrant visas

C. Family Member 18 years of age or over who has a pending asylum application

   Agreement, art. 4, ¶ 2(b)

   8 CFR 208.30(e)(6)(iii)(C)

   1. This exception includes qualifying family members as defined in B.1.a-l, above.

   2. Unlike the previous category, this exception places an age restriction on the anchor family member.

      The anchor family member must be 18 or over, according to information contained in the asylum application, on the date of the threshold screening determination. This age restriction applies to all family members in this category, including spouses.

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3. A "family member" should be regarded as having an asylum application pending where he or she is a principal applicant or is included as a derivative beneficiary on an I-589 filed by another alien, or is in the U.S. and is the beneficiary of a pending Refugee/Asylee Relative Petition (Form I-730).

   a. Pending applications include the following:

      (i) Applications awaiting interview;
      (ii) Applications that have been; interviewed, but are awaiting decision;
      (iii) Applications in which a Notice of Intent to Deny has been issued, but which have not been denied;
      (iv) Applications that have been referred to an IJ and are pending before EOIR;
      (v) Applications that have been denied, but have an appeal pending with the BIA;
      (vi) Applications that have been denied but have a Petition for Review pending with a U.S. Court of Appeals.

   HQASM can be contacted to help determine if a family member's asylum application is pending review by a U.S. Court of Appeals.

   b. The following application will not be considered "pending:"

      (i) Applications that have been administratively closed;
      (ii) Applications that have been dismissed;
      (iii) Applications that have been terminated;
      (iv) Applications that have been withdrawn.

   c. The application must be pending on the date of threshold screening determination.

   d. Proof of filing of I-589 must be confirmed by RAPS and/or EOIR databases, or by proof of receipt (either through communication received from DHS or DOJ, or proof of docketing before a federal court).

   e. No assessment of the quality of the pending asylum application is required.
      (i) Neither the asylum filing bars of INA § 208(a)(2) or the eligibility bars of § 208(b)(2)(A) are relevant to the threshold screening determination.
      (ii) Likelihood of approval is not relevant to the

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threshold screening determination.

D. Unaccompanied Minors

Agreement, art. 4, ¶ 2(c)

For purposes of the Agreement, "unaccompanied minors" are

8 CFR 208.30(e)(6)(iii)(D)

1. Unmarried and under age 18 (age may be established through valid identity documents, dental and/or wrist bone examination, which is a process usually coordinated by the Public Health Service, or other evidence that established that it is more like than not that the alien is under age 18); and

8 CFR 1208.4(a)(6); 1240.11(g)(1)

69 Fed. Reg. 10623; 10630; 69483

2. Have no parent or legal guardian in either the United States or Canada.

Under CBP practices, unaccompanied juvenile aliens are generally not subject to Expedited Removal. As such, most aliens who might qualify for the agreement's "unaccompanied minor" exception will not undergo threshold screening interviews by asylum officers. Immigration judges, in removal proceedings under INA § 240, will determine whether unaccompanied minors are excepted from the Agreement by applying the Agreement's definition of "unaccompanied minor," which differs from that customarily used by CBP officers.

E. Individuals with a validly-issued U.S. visa, or Visa Waiver

Agreement, art. 4, ¶ 2(d); art.

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nationals required to have a visa in Canada

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8 CFR 208.30(e)(6)(iii)(E)

An applicant for admission at a U.S.-Canada land border port of entry may be denied admission by CBP and referred to an asylum officer for a threshold screening interview, even though he or she has a passport that contains a U.S.-issued visa. Aliens referred in this fashion may include those presenting currently genuine (not counterfeit) non-immigrant U.S. visa indicating an intention to apply for asylum, and determined by CBP to be an intending immigrant during the inspection process. Aliens found to possess genuine visas will meet an exception to the Agreement, even if they are an intending immigrant, and the officer will continue with consideration of the credible fear claim.

An example of validly issued, genuine visas, for purposes of this exception is a non-immigrant visa that was properly issued by a designated State Department official to an individual using a properly-issued passport, but the individual was found ineligible for admission into the U.S. because CBP determined the alien to be an intending immigrant.

Examples of visas that will not be considered validly issued for purposes of this exception to the Agreement are, obviously, counterfeit visas not issued by the U.S. Government. Additionally, visas in passports that were obtained through identity fraud and visas in photo-subbed passports will not be considered validly issued. However, where an alien has made a material misrepresentation to a consular officer for purposes of concealing his or her intent in order to apply for asylum in the U.S., a visa issued by the State Department in reliance on such a misrepresentation may still be regarded as validly-issued.

Aliens from countries participating in the U.S. Visa Waiver Program who are not exempt from Canadian visa requirements also qualify for an exception to the Agreement. However, at this time, all nationals of each U.S. VWP participating country are also visa exempt for Canadian purposes. Thus, this exception will not presently apply to any asylum seekers. VWP applicants who indicate an intention to apply for asylum will be referred to an asylum officer, who will conduct a threshold screening interview to determine the applicability of other Agreement exceptions.

A list of U.S. VWP participating countries and visa exempt Canadian nationalities may be found, respectively, at http://www.cic.gc.ca/english/visit/visas.asp (scroll down to "Visitor Visa Exemptions")

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F. USCIS Director or designee determines it is in the Public Interest to allow the individual to seek asylum in the U.S.

Agreement, art. 6

8 CFR 208.30(e)(6)(iii)(F)

For purposes of the public interest exception to the Agreement, an APSO will conduct the threshold screening interview and may recommend such a determination, but the final decision on affirmative public interest findings is made by the USCIS director or his/her designee.

Each public interest exception should be evaluated on an individualized, case-by-case basis, applying a "totality of the circumstances" analysis.

69 FR 69483-84

VI. EXCEPTIONS APPLICABLE TO INDIVIDUALS BEING REMOVED BY THE GOVERNMENT OF CANADA IN-TRANSIT THROUGH THE UNITED STATES

Parole status granted to an alien for the purpose of allowing him or her to transit through the U.S. during the course of removal by the Canadian government will be revoked upon the alien's indication of intention to seek asylum. The applicant will then be immediately referred for a threshold screening interview. For threshold screening of in-transit referrals, the only exceptions to the Agreement are the following:

- Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada; or

  Described in greater detail at Section V.(A) above.

- The Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States

  Described in greater detail at Section V.(F) above.

VII. SUMMARY

A. Function of the threshold screening

The function of the threshold screening process is to determine whether an alien is subject to the Agreement, and, if so, whether s/he will be permitted to remain in the U.S. to pursue his or her protection claims based on the alien's qualification for one of the Agreement's exceptions.

B. Standard of proof in threshold screening

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The threshold screening is a fact-based determination, and is subject to a preponderance of the evidence standard of proof.

C. Exceptions applicable at U.S.-Canada land border ports of entry

Aliens who request asylum, withholding of removal, or protection under the Convention Against Torture at a U.S. port-of-entry located on the shared U.S.-Canada land border will be ineligible to pursue their claims in the U.S. unless they qualify for one of the Agreement's exceptions.

An alien qualifies for an exception to the Agreement under these circumstances if he or she:

a. Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada;

b. Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who has been granted asylum, refugee, or other lawful status in the United States, provided, however, that this exception shall not apply to an alien whose relative maintains only nonimmigrant visitor status, as defined in section 101(a)(15)(B) of the Act, or whose relative maintains only visitor status based on admission to the United States pursuant to the Visa Waiver Program;

c. Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who is at least 18 years of age and has an asylum application pending before U.S. Citizenship and Immigration Services, the Executive Office for Immigration Review, or on appeal in federal court in the United States;

d. Is unmarried, under 18 years of age, and does not have a parent or legal guardian in either Canada or the United States;

e. Arrived in the United States with a validly issued visa or other valid admission document, other than for transit, issued by the United States to the alien, or, being required to hold a visa to enter Canada, was not required to obtain a visa to enter the United States; or

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f. The Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States.

D. Exceptions applicable to individuals being removed by the Government of Canada in-transit through the United States

For threshold screening of in-transit referrals, the only exceptions to the Agreement are the following:

a.) Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada; or

b.) The Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States.

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