U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

*RAIO Combined Training Course*

# CHILDREN'S CLAIMS

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# CHILDREN'S CLAIMS

Training Module

## MODULE DESCRIPTION:

This module provides guidelines for adjudicating children's claims. Issues addressed include guidelines for child-sensitive interview techniques and considerations for the legal analysis of claims involving child applicants. While the legal analysis sections specifically address refugee and asylum claims, other sections, including those that address child development and procedural issues, are relevant to claims made by children for other immigration benefits.

## TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing in the field, you (the Officer) will apply adjudicative and procedural guidance in issues that arise in claims made by children, in particular unaccompanied children.

## ENABLING PERFORMANCE OBJECTIVES

Examine the development of international law that protects the rights of children and children seeking refugee or asylum status.

Describe procedural considerations when working with child applicants.

Apply child-sensitive questioning and listening techniques that facilitate eliciting information from children.

Describe how persecution must be analyzed when looking at a claim of a child refugee or asylum-seeker.

Describe how nexus must be analyzed when looking at a claim of a child refugee or asylum-seeker.

## INSTRUCTIONAL METHODS

Interactive presentation

Discussion

Practical exercises

## METHOD(S) OF EVALUATION

Written exam

## REQUIRED READING

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, paras. 181–188, 213–219, Annex 1.

UNHCR, *Guidelines on International Protection No.8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (December 22, 2009), HCR/GIP/09/08, 28 pp.

UNHCR, *Resettlement Handbook*, Section 5.2, Children and Adolescents, Department of International Protection (July 2011), pp. 184-194.

UNHCR, *Children – BID Guidelines Information Sheet* (3 pp.) (June 2008).

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

Brief of American Medical Association, et al., *Roper v. Simmons*, 543 U.S. 551 (2005).

(Canadian Guidelines) Immigration and Refugee Board of Canada, *Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (Ottawa: 30 Sept. 1996), hereinafter "Canadian Guidelines."

Carr, Bridgette A., "Eliminating Hobson's Choice by Incorporating a 'Best Interests of the Child' Approach into Immigration Law and Procedure," *Yale Human Rights and Development Law Journal* 12, Spring 2009, pp.120–159.

Memorandum from Bo Cooper, INS General Counsel, to Doris Meissner, Commissioner, *Elian Gonzalez*, (3 Jan. 2000).

Duncan, Julianne, *Best Interest Determination for Refugee Children: An Annotated Bibliography of Law and Practice*, United States Conference of Catholic Bishops, 15 October 2008.

Geidd, Jay, "Inside the Teenage Brain," Frontline, PBS, January 2002.

Memorandum from Joseph E. Langlois, INS Asylum Division, to Asylum Office Directors, et al., *H.R. 1209 – Child Status Protection Act*, (HQIAO 120/12.9) (7 August 2002).

Lustig, Stuart L., MD, MPH, et al., *Review of Child and Adolescent Refugee Mental Health: White Paper from the National Child Traumatic Stress Network Refugee Trauma Task Force*, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (HHS), Boston, MA, 2003.

Lutheran Immigration and Refugee Service (LIRS), *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development*, June 1998.

National Organization for Victim Assistance, "Children's Reaction to Trauma and Some Coping Strategies for Children," *Issues of War Trauma and Working with Refugees: A Compilation of Resources*, edited by Susan D. Somach, 56–62, Washington, DC: Center for Applied Linguistics Refugee Service Center, 1995.

Office of Refugee Resettlement, Office of Health and Human Services, Unaccompanied Minors Program.

Perry, Nancy W. and Larry L. Teply, "Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys," *Creighton Law Review*, 18, 1985, pp. 1369–1426.

UN General Assembly, *Convention on the Rights of the Child*, G.A. Resolution 44/25, UN GAOR 20 Nov.1989.

UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997).

UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva: 1994).

UNHCR, *Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries 2001-2003* (Geneva: July 2004).

Walker, Anne Graffam, "Suggestions for Questioning Children," *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development*, Lutheran Immigration and Refugee Service, 63–64. Baltimore, MD: LIRS, 1998.

Memorandum from William R. Yates, Associate Director for Operations, USCIS, to Regional Directors, et al., *The Child Status Protection Act – Children of Asylees and Refugees*, (HQOPRD 70/6.1) (17 August 2004).

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

| Task/ Skill # | Task Description |
|---|---|
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |

## SCHEDULE OF REVISIONS

| Date | Section (Number and Name) | Brief Description of Changes | Made By |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

## TABLE OF CONTENTS

- Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

- For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

# 1 INTRODUCTION

The purpose of this module is to familiarize the student with guidelines for adjudicating children's refugee and asylum claims. The module will cover U.S. law and international guidance that bears on this issue, the procedural adjustments you must make when interviewing children, and the legal issues that must be considered when analyzing cases and making determinations.

The unique vulnerability and circumstances of children prompted USCIS and legacy INS to issue guidance relating to this vulnerable population. On Human Rights Day 1998, INS issued the *Children's Guidelines,* providing guidance on child-sensitive interview procedures and legal analysis of the issues that commonly arise in children's cases.

The *Children's Guidelines* resulted from a collaborative effort of INS and U.S. governmental and non-governmental organizations (NGOs), individuals, and the Office of the United Nations High Commissioner for Refugees (UNHCR). The Women's Commission for Refugee Women and Children was instrumental in the development of the guidance.

Changes in regulations and case law over the years have superseded much of the legal guidance set forth in the *Children's Guidelines*. However, guidance has been developed, and is provided in this module, based on current procedures and legal analysis that incorporate the principles of child-sensitive protection that were previously set forth in the *Children's Guidelines.*

A memorandum issued by RAIO's Asylum Division in 2007 serves as a resource on interviewing procedures for children.[1] It addresses the need to explore guardianship and parental knowledge and consent issues, which can assist in identifying unaccompanied children who may be victims of trafficking or other abuse.

During the last twenty years, the topic of child refugees and asylum seekers has drawn increasing attention from the international community. Human rights violations against children take a number of forms, such as abusive child labor practices, trafficking in children, rape, domestic violence, female genital mutilation, forced marriage, forced prostitution, and forced recruitment. Psychological harm may be a particularly relevant factor to consider. The effects of harm inflicted against a child's family member may also be a relevant factor to consider.

# 2 INTERNATIONAL GUIDANCE

As the issue of children as refugees and asylum-seekers has moved only relatively recently into the forefront of immigration law, relevant U.S. case law is somewhat scarce.[2] In the absence of case law, or when case law does not specifically address an issue, international instruments can provide helpful guidance and context on human rights norms.

The following international instruments and documents contain provisions specifically relating to children.[3] They recognize and promote the principle that children's rights are universal human rights.

## 2.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations (U.N.) General Assembly on December 10, 1948.[4] The UDHR sets forth a collective understanding of the rights that are fundamental to the dignity and development of every human being. Most relevant to your work are Article 14, which provides for the right to apply for asylum, and Article 25(2), which refers to the special care and assistance required for children. The rights contained in the UDHR have been expanded upon in international covenants and elsewhere, including the International Covenant on Civil and Political Rights, to which the United States is a Party.

[1] *See* Joseph E. Langlois, USCIS Asylum Division, *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 14 August 2007), Section II.

[2] In addition to the sources cited below, the information in this section of the module derives from section I., Background and International Guidance, of the *Children's Guidelines*.

[3] *See* RAIO modules on International Human Rights Law and Overview of UNHCR and Concepts of International Protection.

[4] Universal Declaration of Human Rights. G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

## 2.2 Convention on the Rights of the Child

Many of the components of international policy regarding children derive from the U.N. Convention on the Rights of the Child (CRC).[5] Adopted by the United Nations in November 1989, the CRC codifies standards for the rights of all children.
Article 3(1) of the CRC provides that "the 'best interests of the child' should be the primary consideration" in all actions involving children.[6] The "best interests of the child" principle holds that the state is ultimately responsible for ensuring that the basic needs of children are met and that the fundamental rights of children are protected. The internationally recognized "best interests of the child" principle is a useful measure for determining appropriate interview procedures for children, but it does not play a role in determining substantive eligibility for immigration benefits under the U.S. law. Additionally, under Article 12(1), children's viewpoints should be considered in an age and maturity-appropriate manner.[7]

Because the United States has signed but not ratified the CRC, its provisions, including those noted above, provide guidance only and are not binding on adjudicators.[8] However, having signed the CRC, the United States is obliged under international treaty law to refrain from acts that would defeat the object and purpose of the Convention.

On December 23, 2002, the United States ratified the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography.[9] The Optional Protocol calls for States Parties to prohibit and create criminal penalties for the sale of children, child prostitution, and child pornography.

Additionally, the United States ratified the Optional Protocol to the CRC on the involvement of children in armed conflict on January 23, 2003.[10] In violation of current international standards that establish a minimum age for participation in armed conflicts, children under age eighteen are forcibly recruited by state-sanctioned armies or private militias to participate in military combat in some countries. Among other things, the Optional Protocol calls for States Parties to ensure that children under eighteen years of age do not take a direct part in hostilities, sets out safeguards for those under eighteen years of age who are voluntarily recruited into their nation's armed forces, and prohibits

[5] Convention on the Rights of the Child (CRC), G.A. Res. 44/25, U.N. G.A.O.R., Nov. 20, 1989.

[6] CRC, Article 3.

[7] CRC, Article 12.

[8] Vienna Convention on the Law of Treaties, Art. 18(a), signed May 23, 1969, entered into force January 27, 1980.

[9] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. GAOR, May 25, 2000.

[10] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. GAOR, May 25, 2000.

non-governmental armed groups from recruiting or using persons under eighteen years of age as soldiers. In 2008, the Child Soldiers Accountability Act became U.S. law, providing criminal and immigration penalties for individuals who recruit or use child soldiers.[11]

## 2.3 The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (Hague Adoption Convention)

The Hague Adoption Convention establishes internationally agreed upon rules and procedures for adoptions between countries that have a treaty relationship under the Convention. The goal of the Convention is to protect the best interests of children, and also to protect birth parents and adoptive parents involved in intercountry adoptions.

The Hague Adoption Convention applies to all intercountry adoption initiated on or after April 1, 2008, by a U.S. citizen habitually resident in the United States seeking to adopt and bring to the United States a child habitually resident in any Convention country.

You will not see Hague applications or petitions because the USCIS National Benefits Center currently processes all Hague forms (Form I-800A and Form I-800). The U.S. Department of State grants final Form I-800 approval and issues the necessary Hague Adoption or Custody Certificates in the child's country of origin.

## 2.4 The United Nations High Commissioner for Refugees (UNHCR)

### 2.4.1 ExCom Conclusions

Over the years, the Executive Committee of the High Commissioner's Program[12] (or "ExCom") has adopted a number of conclusions concerning refugee children. Safeguarding the wellbeing of refugee children has long been a high priority of the UNHCR and the United States.

**UNHCR ExCom Conclusion No. 47**

In 1987, the Executive Committee issued its first conclusion devoted exclusively to children – Conclusion No. 47.[13] This Conclusion urged action to address the human rights and needs of children who are refugees, highlighted the particular vulnerability of unaccompanied and disabled refugee children, and highlighted the need for action by UNHCR to protect and assist them. Conclusion No. 47 condemned specific violations of

[11] Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). *See* Asylum Supplement, Bars to Applying for Asylum, below, for more detail on the CSAA.

[12] For additional information on the Executive Committee, *see* RAIO module, *UNHCR Overview*.

[13] UN High Commissioner for Refugees, Conclusion on Refugee Children, 12 Oct. 1987. No. 47 (XXXVIII) - 1987.

basic human rights, including sexual abuse, trafficking of children, acts of piracy, military or armed attacks, forced recruitment, political exploitation, and arbitrary detention. The document also called for national and international action to prevent such violations and assist the victims.

Conclusion No. 47 also emphasized that all action taken on behalf of refugee children must be guided by the principle of the "best interests of the child."[14]

**UNHCR ExCom Conclusion No. 59**

In Conclusion No. 59, issued in 1989, the Executive Committee reaffirmed and expanded upon the need for particular attention to the needs of refugee children, particularly in regards to access to education.[15] It also drew special attention to the needs of unaccompanied minors, emphasizing the need to develop legal methods to protect them from irregular adoption and forced recruitment into armed forces.

**UNHCR ExCom Conclusion No. 107**

The Executive Committee issued Conclusion No. 107 on Children at Risk in 2007. It recognizes that children should be prioritized in receiving refugee protection and assistance.[16] It also calls for UNHCR, Member States, and others to identify children at heightened risk due to the wider protection environment and individual circumstances, and to work to prevent such heightened risks.

### 2.4.2 UNHCR Policies and Guidelines

UNHCR has enacted policies and issued several sets of child-related guidelines in recent years.

**Policy on Refugee Children**

UNHCR's *Policy on Refugee Children*, issued in 1993, points out that children's needs are different from adults' due to their developmental needs, their dependence, including in legal matters, and their vulnerability to harm.[17] Thus, governmental actions relating to children must be "tailored to the different needs and potentials of refugee children," to avoid the tendency to think of refugees as a uniform group.

**Refugee Children: Guidelines on Protection and Care**

[14] *See* section on Convention on the Rights of the Child, above.

[15] UNHCR, Conclusion on Refugee Children, 13 Oct. 1989. No. 59 (XL), 1989.

[16] UNHCR, Conclusion on Children at Risk, 5 Oct. 2007. No. 107 (LVIII), 2007.

[17] UNHCR. Policy on Refugee Children, EC/SCP/82 (August 6, 1993).

In 1994 UNHCR issued *Refugee Children: Guidelines on Protection and Care*, incorporating international norms relevant to the protection and care of refugee children.[18] These Guidelines adopt a human rights perspective using the articles in the CRC to set UNHCR's standards. For the survival and development of children, UNHCR endorses a "triangle of rights:" the "best interests" rule, a policy of non-discrimination towards all refugee children, and age-appropriate participation of children in issues affecting their lives.

**Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum**

In 1997, UNHCR published the *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*.[19] The purpose of these Guidelines is threefold:

to increase awareness of the special needs of unaccompanied children and the rights reflected in the CRC;

to highlight the importance of a comprehensive approach to child refugee issues; and

to stimulate internal discussion in each country on how to develop principles and practices that will ensure that the needs of unaccompanied children are met.

The Guidelines emphasize that all children are "entitled to access to asylum procedures, regardless of their age," and that the asylum process should be prioritized and expedited for children's cases. UNHCR recommends that adjudicators take into account "circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability." It also notes that children may face child-specific persecution, such as recruitment of child soldiers, forced labor, trafficking of children for prostitution, and female genital mutilation. Finally, UNHCR recommends that where there is "doubt as to the veracity of the account presented or the nature of the relationship between caregiver and child,…the child should be processed as an unaccompanied child."

**UNHCR Guidelines on Determining the Best Interests of the Child**

The *Best Interests Determination (BID) Guidelines* set forth the formal process that UNHCR has established to determine the best interests of refugee children confronted with major decisions regarding their care or durable solutions, such as the possibility of voluntary repatriation, local integration, or resettlement.[20] UNHCR commits to undertake

[18] UNHCR, Refugee Children: Guidelines on Protection and Care (Geneva: 1994).

[19] UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997).

[20] UNHCR. Guidelines on Determining the Best Interests of the Child, May 2008.

a BID in three contexts: (1) identification of the most durable solution for unaccompanied and separated refugee children; (2) temporary care decisions for unaccompanied and separated refugee children in certain exceptional circumstances; and (3) decisions which may involve separating a child against his or her will from parents.

**UNHCR'S Guidelines on International Protection No. 8: Child Asylum Claims**

In 2009 UNHCR issued its *Guidelines on International Protection No. 8,* addressing child asylum and refugee claims.[21] The Guidelines provide substantive and procedural guidance on making determinations on children's claims, highlighting the specific rights and protection needs of children during this process and also addressing the application of the exclusion clauses (bars to protection) to children. Recommending a child-sensitive interpretation of the 1951 Refugee Convention, the Guidelines point out that the definition of a refugee has traditionally been interpreted in light of adult experiences, which has led to incorrect assessments of the refugee and asylum claims of children.

**UNHCR's Framework for the Protection of Children**

Reflecting the priority it places on safeguarding the wellbeing of children of concern and an evolution in its policy and practice, in 2012 UNHCR published *A Framework for the Protection of Children.*[22] It focuses on prevention and response to child abuse, neglect, violence and exploitation, building on UNHCR's policy and guidelines on the protection of children and relevant Executive Committee conclusions.

# 3 U.S. LAW

## 3.1 Definition of "Child"

The definition of the term "child," "minor," or "juvenile" for immigration purposes may differ depending on the context in which it is used.

- Under the CRC, eighteen years has been almost universally recognized as the legal age of adulthood.[23] Most laws in the United States recognize eighteen-year-olds as legal adults.[24] Under federal immigration law, however, there are a number of different statutory and regulatory provisions that govern specific contexts and set

[21] UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08.

[22] UNHCR, *A Framework for the Protection of Children*, 26 June 2012.

[23] CRC, Article 1.

[24] Child Welfare Information Gateway, *Determining the Best Interests of the Child: Summary of State Laws*, U.S. Department of Health and Human Services' Administration for Children and Families, Washington, DC, 2005.

out specific definitions and categories of children.

Following are some of the different contexts and definitions:

- The INA defines a "child" as "an unmarried person under twenty-one years of age"[25] for purposes of eligibility for most immigration benefits under the INA, including derivative refugee or asylum status. In the case of a derivative, the child would not be the principal applicant, but rather would have derivative status based on a parent's refugee or asylum claim. *See* Derivative versus Independent Status, below.
    - Refugee and IO officers adjudicate Refugee/Asylee Relative Petitions (Form I-730) for children up to age twenty-one.[26]
    - An unmarried child of a principal applicant granted asylum may receive a derivative grant of asylum if the child was under twenty-one at the time the application was filed.[27]
- For purposes of determining admissibility, "juvenile" is a term used in INA section 212 when discussing exceptions to criminal responsibility for persons under eighteen years of age.[28]
- DHS regulations also use the term "juvenile" to describe an individual under eighteen for purposes of determining detention and release and parental notification.[29]
- DHS regulations use the term "minor under the age of 14" for the following purposes:
    - A parent or legal guardian may sign for a person who is under fourteen (8 C.F.R. 103.5a(c)).
    - Service of any DHS document shall be made upon the person with whom the minor under fourteen lives, and if possible upon a near relative, guardian, committee, or friend (8 C.F.R. 103.5a(c) and 236.2).
- The Homeland Security Act of 2002[30] introduced a new term – "unaccompanied alien child" (or "UAC") – to define a child who has no lawful immigration status in the United

[25] INA § 101(b)(1); INA § 101(c)(1).

[26] INA § 209(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208; Memorandum from Joseph E. Langlois, Director, INS Asylum Division, to Asylum Office Directors, et al., *H.R. 1209 – Child Status Protection Act*, (HQIAO 120/12.9) (7 August 2002).

[27] *Id.*

[28] INA § 212(a)(2)(A)(ii).

[29] *See* 8 C.F.R. § 236.3.

[30] *Homeland Security Act of 2002*, Section 462, 6 U.S.C. § 279(g)(2).

States, has not attained eighteen years of age, and has no parent or legal guardian in the United States available to provide care and physical custody. This definition is discussed further in the Asylum Supplement. The Asylum Division has initial jurisdiction over the asylum claims filed by UACs, including those who are in immigration court proceedings.[31]

- When adjudicating children's refugee and asylum applications, the following definitions are helpful to know. For the Asylum Division, a "minor principal applicant"[32] is a principal applicant who was under eighteen years of age at the time of filing an asylum application. In the refugee context, such applicants are generally referred to as unaccompanied refugee minors (URMs) or Unaccompanied or Separated Children (UASCs).

  You will review all refugee and asylum claims for principal applicants under eighteen using this Training Module. However, for purposes of derivative determinations, this Training Module applies to all individuals under the age of twenty-one.

  Barring unusual circumstances, under USCIS procedures and policies, children age fourteen and above are able and expected to sign their own applications and other documents. If available, a parent signs on behalf of children younger than fourteen.[33]

## 3.2 Derivative versus Independent Status

Much of this module will focus on children applying independently as principal applicants for refugee or asylum status. Many will be unaccompanied or separated children. As principal applicants, they must establish that they are refugees. However, officers will also adjudicate claims in which a parent is the principal applicant and a child has derivative status.

Under the statute and DHS regulations, the child of a refugee or asylee is usually afforded the same status as his or her parent,[34] unless the child is ineligible for protection.[35]

---

[31] *See* Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Directors, et al., *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, (HQRAIO 120/9.7) (14 August 2007).

[32] Although most minor principal applicants are also UACs, some are accompanied by a parent or legal guardian (or have lawful immigration status in the United States) but are filing independently.

[33] 8 C.F.R. § 103.2

[34] 8 C.F.R. §§ 207.7 and 208.21(a).

[35] For additional information, see RAIO Training modules, *Persecutor Bar*, *Grounds of Inadmissibility*, and *National Security*.

You should follow the guidance covered in this Training Module when interviewing child beneficiaries. While the guidance covered in this Training Module is particularly relevant for children who raise independent claims, the procedural sections of this Training Module are useful for *all* cases involving children and young adults.

Refugee and International Operations Officers may adjudicate Refugee/Asylee Relative Petitions (Form I-730) filed for children outside of the United States who are derivative beneficiaries of refugees or asylees. This topic will be covered separately during the Refugee Division Officer Training Course. Asylum Officers will also adjudicate claims in which a child is included as a derivative applicant on a parent's claim.

While derivative status is statutorily available to children and spouses, there is no statutory or regulatory right of parents to be eligible for derivative status in the refugee and asylum context. The parent applicant must establish eligibility in his or her own right.[36]

**Children Who Turn Twenty-One Years of Age before the Interview**

Under the INA, as amended by the Child Status Protection Act of 2002 (CSPA), an unmarried child of a principal applicant may qualify as a beneficiary on a petition or as a derivative on an application if the child was under twenty-one at the time of filing the petition or application.[37] Children who turn twenty-one after the date of filing, but before the adjudication are not ineligible for beneficiary or derivative status on that basis.

For refugee and asylum purposes, there is no requirement that the child have been included as a dependent on the principal applicant's application at the time of filing. The child must be included prior to the adjudication.

If, however, the child turned twenty-one prior to August 6, 2002, he or she is not eligible for continued classification as a child unless the petition or application was pending on August 6, 2002.[38]

**Children Who Turn Twenty-One Years of Age before Adjustment**

The CSPA also amends INA section 209(b)(3) to allow dependents who are the subjects of pending adjustment petitions who turn twenty-one on or after August 6, 2002, to

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

[37] INA §§ 201(f); 207(c)(2)(b); 208(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208. *See also* Memorandum from Joseph E. Langlois, Director, INS Asylum Division, to Asylum Office Directors, et al., *H.R. 1209 – Child Status Protection Act*, (HQIAO 120/12.9) (7 August 2002).

[38] William Yates, USCIS Associate Director for Operations, *The Child Status Protection Act – Children of Asylees and Refugees*, Memorandum to Regional Directors, et al, (Washington, DC, 17 August 2004), pp.1-2; Michael Petrucelli, BCIS Deputy Director and Chief of Staff, *Processing Derivative Refugees and Asylees under the Child Status Protection Act*, Memorandum to Overseas District Directors (Washington, DC, 23 July 2003).

continue to be classified as children for adjustment purposes (which avoids the need to file an independent petition).[39]

As noted above, if an individual turned twenty-one prior to August 6, 2002, he or she is not eligible for continued classification as a child unless an application was pending with then-INS on August 6, 2002. While the Domestic Operations Directorate of USCIS issued revised guidance on the CSPA for family and employment-based petitions, which eliminated the requirement for a pending application on the CSPA effective date, this guidance memo does not apply to applications for children of refugees and asylees.[40] As a result, a dependent of a refugee or asylee who turned twenty-one years of age and whose principal's adjustment petition was adjudicated prior to the enactment of the CSPA lost his or her ability to adjust as a dependent of the principal applicant. While he or she did not lose the refugee or asylum status already granted, the former derivative does not gain the ability to adjust to legal permanent resident status as a principal applicant. In such situations, a *nunc pro tunc* (retroactive approval) procedure is permitted, although the need for such an adjudication will become increasingly rare as more time passes.

**Child Applying as Derivative of One Parent in Refugee and Asylum Claims**

If a child seeking refugee or asylum status is with one parent, USCIS does not need a parental release from the absent parent. However, in some circumstances for overseas cases, the Resettlement Support Center does require such a release based on the laws or regulations of the host country. Such a requirement does not affect the USCIS adjudication. *See* RAD Supplement regarding married children.

# 4 CHILD DEVELOPMENT

## 4.1 General Considerations

The needs of a child applicant are best understood if the applicant is regarded as a child first and an applicant second.[41] Child applicants will generally approach the interview and adjudication process from a child's perspective, not as applicants for a legal status before a government official.

---

[39] INA § 209(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208.

[40] William Yates, USCIS Associate Director for Operations, *The Child Status Protection Act – Children of Asylees and Refugees*, Memorandum to Regional Directors, et al, (Washington, DC, 17 August 2004), pp.1-2; Michael Petrucelli, BCIS Deputy Director and Chief of Staff, *Processing Derivative Refugees and Asylees under the Child Status Protection Act*, Memorandum to Overseas District Directors (Washington, DC, 23 July 2003).

*See also* USCIS Asylum Division, Affirmative Asylum Procedures Manual; "INS Discusses Adjustment of Status Issues For Children of Asylees," 69 Interpreter Releases 847 (1992).

[41] Jacqueline Bhabha and Wendy A. Young, "Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers," 75 Interpreter Releases 757, 760 (1 June 1998). (hereinafter Bhabha and Young)

Most of the information in this section is taken from the Lutheran Immigration and Refugee Service (LIRS) publication, *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development*.[42] This information, however, is applicable to any interview with a child.

Children's ages and stages of development affect their ability to apply for refugee and asylum status or other benefit and to articulate their claim and respond effectively in an interview.

## 4.2 Developmental Stages

Children worldwide develop physical, mental, and emotional capacity in universal stages, although culture and environment affect the outward display of the child's abilities and may cause delays in growth. According to these universal stages:

Children ages five and younger are fully dependent on their caretakers in all realms.

Between ages six and twelve, children begin to gain independent skills and the emotional, mental, and physical capacity to manage some life issues on their own.

At about age twelve, children begin to develop increasing ability to navigate on their own emotionally, physically, and mentally.[43]

Adverse circumstances may delay a child's development, sometimes permanently. Severe malnutrition or illnesses affect growth if they occur at crucial developmental stages. For example, a child lacking nutrition at certain stages may miss developmental milestones. We may see this effect in stunted growth or other outward physical manifestations.[44]

While general developmental stages have been studied for many years, new techniques that were developed during the 1990's now help researchers understand much about brain development that was poorly understood previously. The National Institute of Mental Health (NIMH) has funded longitudinal brain development studies from early childhood through young adulthood using non-invasive techniques.[45]

---

[42] LIRS, *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development* (June 1998)hereinafter LIRS.

[43] Child Development Institute, "Stages of Social-Emotional Development In Children and Teenagers."

[44] *Id.*

[45] National Institute of Mental Health, *Brain Development During Childhood and Adolescence Fact Sheet*, Science Writing, Press & Dissemination Branch, 2011.

A child's ability to participate in an interview will vary based on a number of factors in the child's development.

### 4.3 Factors that Influence Development

At each stage in development, numerous factors interact to shape the child's personality and abilities.[46] Factors influencing development are:

- chronological age;
- physical and emotional health;
- physical, psychological, and emotional development;
- societal status and cultural background;
- cognitive processes;
- educational experience;
- language ability; and
- experiential and historical background.

### 4.4 Factors that Accelerate or Stunt Development

Some children may seem to be much older or much younger than their chronological age. A number of environmental and experiential factors can stunt or accelerate dramatically the development of a child.[47] They include, but are not limited to:

- chaotic social conditions;
- experience with forms of violence;
- lack of protection and caring by significant adults;
- nutritional deficits;
- physical disabilities; and
- mental disabilities.

[46] LIRS, pp. 6-7.

[47] LIRS, p. 7.

## 4.5 Effects of Stress and Violence

Children who experience stress or emotional disturbances are more severely affected in their ability to reason or to control impulses than children who do not have such experiences.

Children who have been separated from parents and other traditional caretakers, even in non-violent situations, may be so severely traumatized that their mental and emotional development is delayed. When children are exposed to violence and war even while with protective adults, all aspects of their development are affected. If children are unprotected by parents or other competent adults during such situations, they are profoundly affected. Children who witness their parents or other caretakers harmed or killed are themselves deeply harmed. Children who are forced to harm others are also profoundly traumatized.[48]

## 4.6 Culture and Development

Culture affects the appearance of maturity of children in complex ways. The norms of the group determine the type of education and productive work a child participates in or whether the child remains at home or spends periods with groups of youth. Many other factors determine how various developmental stages are expressed. Additionally, children's development is interrupted by the factors that caused them to flee their homes.[49]

Children may act younger than their age if they are from a culture in which deference and respect to adults is a valued norm. They may, therefore, develop or express independent opinions only after reaching a culturally specified older age.

*Example*

Among Bhutanese refugee families, even adult children who continue to live with their parents are not expected to form independent political or social opinions but are expected to follow the guidance of their father who speaks for the whole family. When a young man marries and moves out of his father's home, he is expected to begin interacting with other men and offer opinions on community matters.

---

[48] Graça Machel, *UN Study on the Impact of Armed Conflict on Children*, UN GAO A/51/306 (3 August 1996); UN Children's Fund (UNICEF), *Machel Study 10-Year Strategic Review: Children and Conflict in a Changing World*, (April 2009).

[49] Stuart L. Lustig, MD, MPH, et al., *Review of Child and Adolescent Refugee Mental Health: White Paper from the National Child Traumatic Stress Network Refugee Trauma Task Force*, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (HHS), Boston, MA, 2003.

Children may act older than their chronological age if they are the oldest child in a family and have been expected to manage complex household obligations, such as caring for the safety of younger children.

*Example*

A Congolese refugee girl of fourteen was culturally expected to assume the role of head of family after the death of her parents. She managed to survive and escape with two younger siblings. The younger siblings exhibited age-appropriate development of self-care and independence. The fourteen year old, on the other hand, because of her experience as caretaker, appeared to be a much older teen.

## 4.7 Preconceptions

Children will bring to the interview a unique set of preconceived notions that could hinder your attempts to elicit information. Such preconceptions may include the ideas that:

- **All governments are corrupt**

The child may be arriving from a country where he or she has already had extensive interaction with or knowledge of a corrupt government.[50] Such a child may assume that the fraud, abuse of authority, and mistreatment of the citizens he or she witnessed in the country of origin is just as pervasive in the United States.

- **Others still at home will be harmed**

Especially when a child comes from a country in which informants and their family members are harmed, the child may not understand that the U.S. government has no interest in harming, or doing anything to bring about the harm of, his or her relatives still in the country of origin.[51]

- **He or she should feel guilty for fleeing**

It is not uncommon for any refugee or asylum applicant to experience "survivor's guilt" for having fled to a country of asylum, especially when family members were left behind.[52]

- **Others will be privy to the testimony**

[50] LIRS, p. 35.

[51] LIRS, p. 36.

[52] LIRS, p. 36.

Many young people do not understand that in the setting of interviews conducted by RAIO officers, confidentiality protections generally prevent USCIS from sharing information with others without the applicant's consent. This misconception is most likely to hinder an interview when an applicant feels shame as a result of his or her mistreatment, most commonly in cases of sexual abuse.

You must earn the trust of the child applicant in order to dispel these preconceptions and put the applicant at ease.[53]

# 5 PROCEDURAL CONSIDERATIONS

The majority of children who appear before you do so as a dependent of a parent who has filed an application or petition for an immigration benefit. However, this Training Module provides useful guidance for all individuals under the age of twenty-one and regardless of whether they are derivative or independent applicants.

While this Training Module is particularly relevant for children who raise independent refugee or asylum claims, the procedural sections may be useful for all cases involving children and young adults. Although young people between the ages of eighteen and twenty-one will be interviewed much in the same manner as adults, you should bear in mind that an applicant whose claim is based on events that occurred while under the age of eighteen may exhibit a minor's recollection of the past experiences and events.

## 5.1 Officers in the RAIO Directorate

All officers in the RAIO Directorate are trained on interviewing children and adjudicating their claims in the event that they are called upon to interview a child. It is in the child's best interests to be interviewed by an official who has specialized training in children's claims. To the extent that personnel resources permit, RAIO should attempt to assign officers with relevant background or experience to interview children.

## 5.2 Interview Scheduling

RAIO should make every effort to schedule siblings' interviews with the same officer and in the same time period, provided that such cases are identified in advance of the interviews. In cases where siblings are interviewed by different officers, the officers should consult with one another about the claims and, to the extent possible, should be reviewed by the same supervisory officer.

## 5.3 USCIS Initial Jurisdiction for Unaccompanied Alien Children's Asylum Cases

[53] See section 6, *Interview Considerations*.

For asylum procedural considerations, see ASM Supplement – Procedural Considerations.

# 6 INTERVIEW CONSIDERATIONS

Child applicants may be less forthcoming than adults and may hesitate to talk about past experiences in order not to relive their trauma. RAIO has designed the following procedures with children's behavior and cognitive ability in mind to help you interact more meaningfully with children during an interview.

## 6.1 Presence of a Trusted Adult at the Interview

It is usually appropriate for a trusted adult to attend an interview with the minor applicant in order to establish the interview conditions most likely to elicit a full story.[54] A child's lack of experience in talking with government officials can make testifying difficult, particularly when discussing traumatic events. A trusted adult is a support person who may help to bridge the gap between the child's culture and the environment of a USCIS interview. The function of the adult is not to interfere with the interview process or to coach the child during the interview, but to serve as a familiar and trusted source of comfort. As appropriate, you may allow the adult to provide clarification, but you should ensure that those children able to speak for themselves are given an opportunity to present the claim in their own words.

The policy of allowing a trusted adult to participate in this process does not mean to suggest that the trusted adult serve as a substitute for a guardian or legal representative, neither is there a requirement that a trusted adult or legal representative be present at the interview. The child may be accompanied at the interview by both a trusted adult and a legal representative.

When conducting an interview of a child in the presence of an adult, you should assess whether the child is comfortable speaking freely in front of the adult. In order to ascertain the child's level of comfort with the adult, you may initially bring the child into the interview room alone, and ask if the child would like for the accompanying adult to be present. This approach will generally work best with adolescents. Where warranted, you may additionally ask the child at the end of the interview if he or she has anything to add in private. If at any point during the course of the interview you determine that the child is uncomfortable or afraid of the adult, you should continue the interview without that person. Given concerns regarding human trafficking, particularly in children, attention to the nature of the relationship between the child and the adult is particularly important.

[54] *See* UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva: 1994) p. 102; and RAIO Training Module, *Interviewing - Introduction to the Nonadversarial Interview*, Sec.5.5: "In some interviews the applicant has another person present. In the case of children, this may be a "trusted adult" who participates in order to help the child feel at ease."

As appropriate and with the consent of the child, you are encouraged to interview the trusted adult, if any, in order to confirm his or her relationship to the child, any guardianship arrangement, and the adult's legal authority to speak on behalf of the child.[55] The adult may also have information about parental knowledge of and consent to the application. The trusted adult may also be able to provide information on the child's claim where the child's age at the time of harm or interview prevents him or her from fully detailing events. Where inconsistencies arise between the applicant's and the adult's testimony, an opportunity must be given to the child to reconcile inconsistencies apparent at the interview. Note that it is not a requirement that a witness or trusted adult be present at the interview.

## 6.2 Guardianship, Parental Knowledge, and Consent

If a child appears at the interview without a parent or guardian, you should inquire into the location of the child's parents, and whether the parents are aware of the child's whereabouts and that the child has applied for an immigration benefit.[56]

You should elicit information about issues of guardianship and parental knowledge of and consent to the application. Questions of guardianship may be particularly important for unaccompanied minors because whether or not there is a parent or legal guardian informs your decision of whether to categorize the applicant as an unaccompanied minor or unaccompanied alien child (in the asylum context) or unaccompanied refugee minor (in the refugee context). Attention must be paid to the child's capacity to apply as a principal applicant, the parents' knowledge of the child's application, and the identity and trustworthiness of the guardian, if any. Additionally, the information you elicit is useful in identifying any potential conflict of interest and informing policy-making.

Below are questions and issues that you should take into account when conducting an interview with a minor principal applicant. These questions provide a general framework for exploration of issues of guardianship and parental knowledge and consent. Interview notes should reflect the below-requested information. A minor principal applicant's inability to demonstrate a guardianship arrangement or parental knowledge and consent does not foreclose the adjudication or approval of the application If there is a concern regarding parental notification and confidentiality, or a concern for the child's welfare and/or safety, please contact your division's Headquarters for further guidance.

- With whom is the child living?

[55] *See* Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Directors, et al., *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, (HQRAIO 120/9.7) (14 August 2007).

[56] *Id.*

- Did anyone accompany the child to the interview?
- Is there a guardianship arrangement (for purposes of the unaccompanied minor definition, guardianship refers to a formal – legal/judicial – arrangement)?
- If there is an adult caregiver but not a legal guardian, what arrangements has the adult made to provide for the child?
- Is there one or more living parent?
- Do the parents know that the child is applying for an immigration benefit?

## 6.3 Conducting a Non-Adversarial Interview

Although all interviews with child applicants are to be conducted in a non-adversarial manner, it is crucial when interviewing children that the tone of the interview allows the child to testify comfortably and promotes a full discussion of the child's past experiences.[57] Research into child development and particularly brain and cognitive development has shed light on obstacles to children's ability to encode and recall information and best practices that help overcome those obstacles.[58]

In many cases, girls and young women may be more comfortable discussing their experiences with female officers, particularly in cases involving rape, sexual abuse, prostitution, and female genital mutilation.[59] To the extent that personnel resources permit, offices should have female officers interview such applicants.

## 6.4 Working with an Interpreter

Interpreters play a critical role in ensuring clear communication between you and the child, and the actions of an interpreter can affect the interview as much as those of an officer.[60] As in all interviews, you should confirm that the child and the interpreter fully understand each other. You should also confirm that the child understands the role of the interpreter. This is particularly important in cases where the interpreter does not have the child's best interests at heart, such as when there is a possibility that the private

[57] 8 C.F.R. § 208.9(b).

[58] For additional information, see *European Asylum Curriculum,* Module 6.1 "Interviewing Children," May 2011 (Unit 3.2 discusses the Dialogical Communication Method ); and Michael E. Lamb, et al., "Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol," *Child Abuse & Neglect* 31, no.11-12, Nov.-Dec. 2007, pp. 1201-1231.

[59] See Phyllis Coven, INS Office of International Affairs, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women* (Gender Guidelines), Memorandum, May 26, 1995, p. 5.

[60] For additional information, see RAIO module, *Interviewing - Working with an Interpreter.*

interpreter is part of a trafficking ring. In cases where the child appears to be uncomfortable with the interpreter, or where the interpreter does not appear to be interpreting correctly, you should stop the interview and reschedule with a different interpreter.

The identity of the interpreter is especially significant when children have been victims of sexual violence.[61] In such situations, or when children have suffered abuse within the family, children may be very reluctant to share such information if the interpreter is of the opposite gender or if the interpreter is a parent, relative, or family friend. Every effort should be made to make sure that the child is comfortable testifying through the interpreter.

## 6.5 Building Rapport

The child may be reluctant to talk to strangers due to embarrassment or past emotional trauma.[62] You may have to build rapport with the child to elicit the child's claim and to enable the child to recount his or her fears and/or past experiences. Where the child finds you friendly and supportive, the child is likely to speak more openly and honestly.

You must be culturally sensitive to the fact that applicants are testifying in a foreign environment and may have had experiences leading them to distrust persons in authority. A fear of encounters with government officials in countries of origin may carry over to countries of reception.[63] This fear may cause some children to be initially timid or unable to fully tell their story.[64]

You may be able to overcome much of a child's timidity or nervousness with a brief rapport-building phase during which time neutral topics are discussed, such as general interests, family, pets, hobbies, and sports. You may wish to ask family members or the attorney about the child's interests before the interview to ease conversation. This rapport-building phase also permits you to assess the child's ability to answer questions.

Once the child appears comfortable, you should make a brief opening statement before beginning the formal interview.[65] You can explain in very simple terms in the opening statement what will happen during the interview and the roles that you, the applicant,

[61] See Gender Guidelines, p. 5; and RAIO Training module, *Interviewing - Working with an Interpreter*.

[62] LIRS, p. 45.

[63] UNHCR Handbook, para. 198.

[64] LIRS, p. 38; Nancy W. Perry and Larry L. Teply, "Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys," Creighton Law Review (vol. 18, 1985), pp. 1369-1426, reprinted in Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* (Charlottesville, Virginia: Lexis, 1997), pp. 584-585 (hereinafter Perry and Teply).

[65] For an example of an opening statement to be used in interviews of children, see ASM Supplement – Sample Opening Statement for Children.

interpreter, and/or attorney will play. Knowing what to expect will help ease the child applicant's anxiety.[66]

The tone of the opening statement is intended to build trust and to assure the child that you will be asking questions to help you understand his or her claim. The statement gives children permission to tell you when they do not understand a question. Children need to know that it is permissible for them to tell adults when they either do not understand a question or do not know an answer. Children also need to be reassured that, unless the child consents, embarrassing or traumatic events from the past generally will not be shared with others, including family members, friends, or individuals from their home country.[67]

## 6.6 "Reading" the Applicant

During the interview you must take the initiative to determine whether the child understands the process and the interview questions. You should watch for non-verbal cues, such as puzzled looks, knitted eyebrows, downcast eyes, long pauses, and irrelevant responses. While these behaviors may signal something other than lack of comprehension, they may also signal that a child is confused.[68] In such circumstances, you should pause, and if no appropriate response is forthcoming, rephrase the question.

Correspondingly, you should expect the child to be attuned to your body language. Children rely on non-verbal cues much more than adults to determine whether they can trust the person.[69] You should be careful neither to appear judgmental nor to appear to be talking down to the child.

## 6.7 Explaining How to Respond to Questions

Children in some cultures are taught to listen to adults but not to speak in their presence. Other children may have spent time in school or other environments where providing answers to questions is expected and responding with "I don't know" is discouraged.

If necessary, you may explain to the child how to use the "I don't know" response.[70]

***Example***

[66] LIRS, pp. 45-46.

[67] See 8 C.F.R. § 208.6 on disclosure to third parties.

[68] LIRS, pp. 46-47.

[69] *Id.*at 27; Perry and Teply, p. 1380.

[70] *Id.*at 50.

> Officer: If I ask you the question, 'How many windows are in this building?' and you don't know the answer to that question, you should say, 'I don't know.' Let's practice that. 'How many windows are in this building?'
> Child: I don't know.

This approach helps to ensure that the child understands when to provide an "I don't know" response. This approach could also be used to let the child know that it is also fine to respond "I don't understand" when a question is not clear.

## 6.8 Reassuring the Applicant

If at any time during the course of the interview the child begins to feel uncomfortable or embarrassed, you should offer verbal reassurances. You may empathize with the child by saying, "I know that it's difficult to talk about this, but it is important for me to hear your story."[71] Additionally, a simple expression of interest (e.g., "I see" or "uh-huh") may be enough for the child to continue.

You may also shift the focus of the questioning to a non-threatening subject until the child regains his or her confidence. Reassurance, empathetic support, carefully framed questions, encouragement, and topic-shifting are crucial techniques for facilitating interviews of children.

- Note, however, that it is important not to interrupt a child in the middle of a narrative response. *See* General Rules below in section on Child-Sensitive Questioning and Listening Techniques.

## 6.9 Taking Breaks

You should take the initiative in suggesting a brief recess when necessary. Sometimes a child's way of coping with frustration or emotion is "to shut down during the interview, to fall into silence, or respond with a series of 'I don't know' and 'I don't remember' responses."[72] Many children may not take the initiative to request a recess if needed. A young child, for example, may stop answering questions or cry rather than interrupt you with a request to go to the bathroom or rest. The responsibility may fall to you to monitor the child's needs.

## 6.10 Concluding the Interview

[71] Perry and Teply, p. 1381, citing John Rich, MD. *Interviewing Children and Adolescents* (London: MacMillan & Co., 1968), p. 37.

[72] Symposium: Child Abuse, Psychological Research On Children As Witnesses: Practical Implications Forensic Interviews And Courtroom Testimony, 28 PAC. L.J. 3 (1996), p. 70, (hereinafter Symposium).

As the interview draws to a close, you should return to a discussion of the neutral topics with which the interview began. This approach will help to restore the child's sense of security at the conclusion of the interview.[73] As with all cases, you should ask the child if he or she has any final questions or anything to add and inform the child of the next steps in the application process.

## 6.11 Child-Sensitive Questioning and Listening Techniques

Children may not understand questions and statements about their past because their cognitive and conceptual skills are not sufficiently developed. Your questions during the interview should be tailored to the child's age, stage of language development, background, and level of sophistication. A child's mental development and maturity are important considerations when determining whether the child has satisfied his or her burden to establish eligibility for an immigration benefit, including that he or she meets the definition of a refugee.[74] In order to communicate effectively with a child applicant, you must ensure that both the officer and the child understand one another.

You should take care to evaluate the child's words from the child's point of view. Most children cannot give adult-like accounts of their experiences and memories, and you should be conscientious of age-related or culturally-related reasons for a child's choice of words.

***Example***

> The phrase "staying awake late" may indicate after 10 p.m. or later to you, while the phrase could mean early evening for a child.[75]

Children's perceptions of death can cloud their testimony concerning such matters. Children may not know what happened or may feel betrayed by an adult who has died, and some may not understand the permanence of death.[76] Even older children may not fully appreciate the finality of death until months or years after the event.

***Example***

> Instead of saying that a relative died or was killed, a child may state that the individual "went away" or "disappeared," implying that the individual may return.

[73] UNHCR, *Interviewing Applicants for Refugee Status* (1995), p. 48.

[74] UNHCR Handbook, para. 214.

[75] Perry and Teply, p. 1383.

[76] Perry and Teply, p. 1419, citing R. Kastenbaum. "The Child's Understanding of Death: How Does it Develop?" Explaining Death to Children (E. Grollam, ed. 1967), p. 98.

Proper questioning and listening techniques will result in a more thorough interview that allows the case assessment to be more complete and accurate. The following techniques should help you elicit more thorough information.

| GENERAL INTERVIEWING AND LISTENING RULES<br>You should endeavor to: | |
|---|---|
| 1 | • **Use short, clear, age-appropriate questions.**[77]<br>• **Example:** "What happened?" as opposed to "What event followed the arrest?" |
| 2 | • **Avoid using long or compound questions.**[78]<br>• **Example:** "What time of year did it happen?" and "What time of day did it happen?" as opposed to "What time of year and what time of day did it happen?" |
| 3 | • **Use one- or two-syllable words in questions; avoid using three- or four-syllable words.**[79]<br>• **Example:** "Who was the person?" as opposed to "Identify the individual." |
| 4 | • **Avoid complex verb constructions.**[80]<br>• **Example:** "Might it have been the case…?" |

[77] Symposium, p. 40.

[78] Ann Graffam Walker, Handbook on Questioning Children: A Linguistic Perspective (Washington, DC: ABA Center on Children and the Law, 1994), pp. 95-98 reprinted in LIRS, p. 63. (hereafter Walker); and Symposium, p. 40.

[79] Symposium, p. 40 (note that this technique is generally more important when conducting the interview in English without an interpreter).

[80] Symposium, p. 40.

| | |
|---|---|
| 5 | • **Ask the child to define or explain a term or phrase in the question posed in order to check the child's understanding.**[81] |
| 6 | • **Ask the child to define or explain the terms or phrases that he or she uses in answers, and then use those terms.**<br>• **Example:** If a child says that his father "disappeared," ask him what he means by "disappeared," and then use that term in questions involving that event. |
| 7 | • **Use easy words, not complex ones.**[82]<br>• **Example:** "Show," "tell me about…," or "said" instead of "depict," "describe," or "indicate." |
| 8 | • **Tolerate pauses, even if long.**[83] |
| 9 | • **Ask the child to describe the concrete and observable, not the hypothetical or abstract.**[84] |
| 10 | • **Use visualizable, instead of categorical, terms.**[85]<br>• **Example:** Use "gun," not "weapons." |
| 11 | • **Avoid using legal terms, such as "persecution."**[86]<br>• **Example:** Ask, "Were you hurt?" instead of "Were you persecuted?"<br>• **Example:** Explain, "Asylum is a way to stay in the United States if |

[81] Walker, reprinted in LIRS, p. 63; Symposium, p. 40.

[82] Walker, reprinted in LIRS, p. 63.

[83] Perry and Teply, p. 1380.

[84] Symposium, p. 40.

[85] *Id.*

[86] *Id.*

| | |
|---|---|
| | there are people who hurt or want to hurt [you] back home and [you are] afraid of returning."[87] |
| 12 | • **Avoid using idioms.**<br>• Idioms are phrases that mean something other than what the words actually say. Such phrases could be difficult for both the interpreter and the child applicant.<br>• **Example:** Ask, "Do you understand?" not, "Is this over your head?" |
| 13 | • **Use the active voice instead of the passive when asking a question.**[88]<br>• **Example:** Ask, "Did the man hit your father?" instead of "Was your father hit by the man?" |
| 14 | • **Avoid front-loading questions.**[89]<br>• Front-loading a question places a number of qualifying phrases before asking the crucial part of the question.<br>• Example: "When you were in the house, on Sunday the third, and the man with the gun entered, did the man say…?" |
| 15 | • **Keep each question simple and separate.**[90]<br>• **Example:** The question, "Was your mother killed when you were 12?" should be avoided. The question asks the child to confirm that the mother was killed and to confirm his or her age at the time of the event. |

[87] Christopher Nugent and Steven Schulman, "Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children," 78 No. 39 INTERPRETER RELEASES 1569, 1575 (2001).

[88] Symposium, p. 40.

[89] *Id.*

[90] LIRS, p. 47.

| | |
|---|---|
| 16 | • **Avoid leading questions.**<br><br>• Research reveals that children may be more highly suggestible than adults and are more likely to answer according to what they think the interviewer wants to hear.[91] Leading questions may influence them to respond inaccurately. |
| 17 | • **Use open-ended questions to encourage narrative responses.**<br><br>• Children's spontaneous answers, although typically less detailed than those elicited by specific questioning, can be helpful in understanding the child's background.[92] Try not to interrupt the child in the middle of a narrative response. |
| 18 | • **Explain any repetition of questions.**<br><br>• Make clear to the child that he or she should not change or embellish earlier answers.[93] Explain that you repeat some questions to make sure you understand the story correctly. "Repeated questions are often interpreted (by adults as well as children) to mean that the first answer was regarded as a lie or wasn't the answer that was desired."[94] |
| 19 | • **Never coerce a child into answering a question during the interview.**[95]<br><br>• Coercion has no place in any USCIS interview. For example, you may never tell children that they cannot leave the interview until they answer your questions. |
| 20 | • **Accept that many children will not be immediately forthcoming about events that have caused great pain.** |

[91] *Id.* at 26; Perry and Teply, pp. 1393-1396.

[92] LIRS, p. 47.

[93] Walker, reprinted in LIRS, p. 64; Symposium, p. 23.

[94] Walker, reprinted in LIRS, p. 64.

[95] Symposium, p. 41.

# 7 CREDIBILITY CONSIDERATIONS

You must be sensitive to the applicants' cultural and personal experiences irrespective of the applicant's age. This becomes critical when assessing whether testimony is credible.[96] The task of making an appropriate decision when interviewing children, including making a credibility determination, requires that you be aware of the following issues involving the testimony of children.

## 7.1 Detail

Children may not know the specific details or circumstances that led to their departure from their home countries. Children may also have limited knowledge of conditions in the home country, as well as their own vulnerability in that country.

For both developmental and cultural reasons, children cannot be expected to present testimony with the same degree of precision as adults.[97] More probing and creative questions are required.

*Example*

The child may not know whether any family members belonged to a political party. You should probe further and ask the child whether his or her parents attended any meetings and when the meetings were held. You should also make an inquiry into the location of the meetings, other people who attended the meetings, and whether the people had any problems. The child's knowledge of these matters may support a conclusion regarding the family's political association, despite the fact that the child may not know the details of the association.

### Measurements of Time and Distance

Children may try to answer questions regarding measurements of distance or time without the experience to do so with any degree of accuracy.
You must make an effort to ascertain the child's quantitative reasoning ability.

*Example*

You should determine the child's ability to count before asking how many times something happened.[98]

[96] For additional information, see RAIO modules, *Cross-Cultural Communication* and *Credibility*.

[97] Canadian Guidelines, p. 8.

[98] Symposium, p. 41.

Even older children may not have mastered many of the concepts relating to conventional systems of measurement for telling time (minutes, hours, calendar dates).

Not only is imprecise time and date recollection a common problem for children owing to their cognitive abilities, it can also be a product of their culture.[99] The western mind typically measures time linearly, in terms of successive – and precise – named days, months, and years. Many cultures, however, note events not by specific date but by reference to cyclical (rainy season, planting season, etc.) or relational (earthquakes, typhoons, religious celebrations, etc.) events.

*Example*

In response to the question, "When were you hurt?" it may not be uncommon for a child to state, "During harvest season two seasons ago" or "shortly after the hurricane." These answers may appear vague and may not conform to linear notions of precise time and named dates, but they may be the best and most honest replies the child can offer.

Even in those cultures where time is measured by a calendar, it may not comport to the Gregorian calendar used in the western world.

*Examples*

Many Guatemalans still use the Mayan calendar of twenty-day months.
In certain Asian cultures, a baby is considered to be "one" on his or her date of birth thereby causing, to the western mind at least, a one-year discrepancy between the child's age and date of birth.

In many Latin cultures, two weeks is often "15 days" because the first and last days are counted.

Certain Asian cultures count the first day or year, adding one day or year to the time of the event.

**"I don't know" Responses**

In certain cultures, "I don't know" is used when an individual has no absolute knowledge but has an opinion about the truth of the matter in question.

*Example*

[99] For additional information, see RAIO module, *Cross-Cultural Communication.*

A child may respond "I don't know" when asked who killed his or her parents, but upon further inquiry may state that everyone in his or her home village believes that it was government forces. You should generally probe further regarding these opinions. The child's awareness of community opinion may provide information about the issue in question even though the child may initially state "I don't know."

## 7.2 Demeanor

The term "demeanor" refers to how a person handles himself or herself physically – for example, maintaining eye contact, shifts in posture, and hesitations in speech. A child may appear uncooperative for reasons having nothing to do with the reliability of his or her testimony.

*Example*

Different cultures view expressions of emotion differently. An individual raised in the United States might question the credibility of a child who, without crying or expressing emotion, is able to retell how his or her parents were killed in front of him. It could be, however, that the child was raised in a culture that deems improper any expression of emotion in front of an authority figure. Trauma, discussed below, may also affect demeanor.

### Trauma

You should be careful when interpreting certain emotional reactions or psychiatric symptoms as indicators of credibility. Children who have been subjected to extreme abuse may be psychologically traumatized. Lengthy confinement in refugee camps, repeated relocation, or separation from family can also greatly impact the psychological well-being of children. Children who are separated from their families due to war or other violence are placed at even greater psychological risk than those children who remain in the care of parents or relatives.

Any applicant, regardless of age, may suffer trauma that may have a significant impact on the ability of an applicant to present testimony.[100] Symptoms of trauma can include depression, indecisiveness, indifference, poor concentration, avoidance, or disassociation (emotionally separating oneself from an event). A child may appear numb or show emotional passivity when recounting past events of mistreatment. A child may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause applicants to block certain experiences from their minds in order not to relive their horror by retelling what happened. Inappropriate laughter or long pauses before answering can also be a sign of trauma or embarrassment.

[100] For additional information, *see* RAIO module, *Interviewing Survivors of Torture*.

These symptoms can be mistaken as indicators of fabrication or insincerity, so it is important for you to be aware of how trauma can affect an applicant's behavior.

### Age and Developmental Considerations

In reviewing a child's testimony, you should consider the following:

- the child's age and development at the time of the events
- the child's age and development at the time of the retelling
- the child's ability to recall facts and communicate them

### Other Considerations

You may encounter gaps or inconsistencies in the child's testimony. The child may be unable to present testimony concerning every fact in support of the claim, not because of a lack of credibility, but owing to age, gender, cultural background, or other circumstances.[101] See section on Detail, above.

You should keep the following in mind:

- the impact of the lapse of time between the events and the retelling
- the difficulty for all individuals in remembering events that took place many years earlier; children who may have been very young at the time of an incident will have greater difficulty in recalling such events
- the needs of children with special mental or emotional issues
- the limited knowledge that children may have of the circumstances surrounding events

*Example*

> A child may not know the political views of his or her family, despite the fact that his parents were among the most visible individuals in the opposition party. When asking follow-up questions, you learn that the applicant was seven years old when his parents were assassinated and the relatives who raised him were reluctant to share any information about his parents' activities.

- the role of others in preparing children for interview

All children have been coached to some degree. Some children may have been coached by a human trafficker or an ill-informed adult to tell a particular story, which the child repeats at the interview in order not to anger the adult. The fact that a child begins to tell a fabricated story at the interview should not foreclose further inquiry, and you should

[101] For additional information, *see* RAIO module, *Credibility*; *see also* Bhabha and Young.

undertake a careful and probing examination of the underlying merits of the child's case.[102] Quite often a child does not intend to deceive when making a fabrication or exaggeration; rather the statement may serve another purpose for the child such as to avoid anticipated punishment, to be obedient to the perceived authority figure (perhaps a legal representative, trusted adult, or you), to please others, or to protect a family member or friend.

## 7.3 Evidence

In evaluating the evidence submitted to support the application of a child seeking refugee or asylum status, adjudicators should take into account the child's ability to express his or her recollections and fears, and should recognize that it is generally unrealistic to expect a child to testify with the precision expected of an adult. The *UNHCR Handbook* advises that children's testimony should be given a liberal "benefit of the doubt" with respect to evaluating a child's alleged fear of persecution.[103] In the concurring opinion to *Matter of S-M-J-*, "the benefit of the doubt" principle in asylum adjudications is described thus:

> [W]hile the burden of proof is borne by the asylum applicant, our law does not include a presumption that an applicant is unbelievable. If as adjudicators we intentionally or subjectively approach an asylum applicant and presume an individual to be a liar rather than a truth teller, we violate not only our duty to be impartial, but we abrogate the statute and regulations which govern our adjudications.[104]

A child, like an adult, may rely solely on credible testimony to meet his or her burden of proof; certain elements of a claim, however, such as easily verifiable facts that are central to the claim, may require corroborating evidence.[105] A child, through his or her advocate or support person, is expected to either produce such documentation or offer a reasonable explanation as to why those documents cannot be obtained. What is reasonable will depend on the child's individual circumstances, including whether or not the child is represented and the circumstances of his or her flight. Additionally, a child who has been in contact with his or her family may have greater access to documentation than a child who has had no contact with family members.

Given the above-noted considerations of issues that may arise in children's cases, all efforts should be made during the interview to present the applicant with adverse information and to give the applicant an opportunity to provide an explanation.

---

[102] LIRS, p. 51.

[103] UNHCR Handbook, para. 219.

[104] *Matter of S-M-J-*, 21 I&N Dec. 722, at 739 (BIA 1997) (Rosenberg, L., concurring).

[105] INA § 208(b)(1)(B)(ii); *see Matter of S-M-J-*, 21 I&N Dec. at 725.

Where adverse information is discovered after the interview, the office should consider scheduling a re-interview in order to give the applicant an opportunity to address the issue. It is inappropriate to rely on adverse information that the applicant has not had an opportunity to address.

Given the difficulties associated with evaluating a child's claim, you should carefully review relevant country conditions information.[106] While the onus is on the child, through his or her advocate or support person, to produce relevant evidence, including both testimony and supporting material where reasonable to expect it, you should also supplement the record as necessary to ensure a full analysis of the claim.[107]

Apart from the child's testimony, you may consider other evidence where available, including:

- Testimony or affidavits from family members or members of the child's community
- Evidence from medical personnel, teachers, social workers, community workers, child psychologists, and others who have dealt with the child

*Example*

A report from a child psychologist who has interviewed the child may indicate that the child suffers from post-traumatic stress, a conclusion that could support your determination regarding past or future persecution.

- Documentary evidence of persons similarly situated to the child (or his or her group), physical evidence, and general country conditions information.

# 8 LEGAL ANALYSIS

## 8.1 Introduction

This section will focus on the particular legal issues you may encounter when adjudicating the claim of a child who has filed his or her own refugee or asylum application. This section does not create new law or alter existing law, nor does it attempt to address all the legal issues that may arise in adjudicating a child's refugee or asylum claim. Instead, it identifies particular issues relevant to children that you may encounter

[106] For additional information, see RAIO module, *Country Conditions Research*; *Matter of S-M-J-*, 21 I&N Dec. at 726.

[107] In a 2010 First Circuit case, the diverging views of the majority opinion and the dissenting opinion illustrate how the credibility and persecution determination can be impacted based on whether or not the adjudicator accepts evidence from a myriad of sources in a child's asylum case. *Mejilla-Romero v. Holder*, 600 F.3d 63 (1st Cir. 2010), *vacated and remanded by Mejilla-Romero v. Holder*, 614 F.3d 572 (1st Cir. 2010) (expressly citing to the need for the case to be adjudicated under the INS Children's Guidelines on remand).

and places those issues within the context of U.S. and international law and UNHCR guidance.

Unlike the child who is a derivative applicant under the parent's application, the child who has filed a separate application must provide evidence about his or her own story, frequently without the support of familiar adults. The child may not even fully understand why or how the events leading to the application came about.

In order to be granted protection, the child applicant must establish that he or she meets the definition of a refugee contained in the Immigration and Nationality Act, irrespective of age.[108] The *UNHCR Handbook* equally states, "[t]he same definition of a refugee applies to all individuals, regardless of their age." Consequently, the best interests principle, while useful for procedural and interview considerations, does not replace or change the refugee definition in determining substantive eligibility.

While the burden of proof remains on the child to establish his or her claim for protection, when assessing eligibility, you must consider the effects of the applicant's age, maturity, ability to recall events, potentially limited knowledge of events giving rise to the claim, and potentially limited knowledge of the application process.[109] You should also attempt to gather as much objective evidence as possible to evaluate the child's claim to compensate for cases where the applicant's ability to testify about subjective fear or past events is limited. Given the non-adversarial nature of the adjudication and the special considerations associated with adjudicating a child's claim, a close working relationship with the child's representative and support person may be necessary to ensure that the child's claim is fully explored.

## 8.2 Persecution

As in all refugee and asylum cases, you must assess whether the harm that the child fears or has suffered is serious enough to constitute "persecution" as that term is understood under the relevant domestic and international law.[110]

### Harm that Rises to the Level of Persecution

Given the "variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary."[111] The harm a child fears or has suffered may still qualify as persecution despite

[108] INA §§ 101(a)(42)(A); 208(a)(2); UNHCR Handbook, para. 213.

[109] See section V.F., Evidence, for more on the child's burden of proof; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Geneva: February 1997), p. 10.

[110] For additional information, *see* RAIO modules, *Refugee Definition* and *Past Persecution*.

[111] UNHCR Handbook, para. 52; *see also* Bhabha and Young, pp. 761-62.

appearing to be relatively less than that necessary for an adult to establish persecution.[112] This is because children, dependent on others for their care, are prone to be more severely and potentially permanently affected by trauma than adults, particularly when their caretaker is harmed.

As in all cases, adjudicators should analyze persecution as objectively serious harm that the applicant experienced or would experience as serious harm. The persecution determination relates to the harm or suffering imposed on an applicant by the persecutor, rather than only to the individual acts taken by the persecutor. In the cases of adults, this distinction is not usually determinative. But it can be important in some children's cases. A child who has very limited ability to remember, understand and recount the discrete actions of the persecutor can still establish that those actions imposed on him objectively serious harm that he experienced as serious harm. (Of course, having established persecution, the applicant must also establish that the persecutor imposed the persecution on the applicant on account of a protected ground, which may require additional evidence about the persecutor's actions, whether in the form of the applicant's testimony or some other type of evidence, such as testimony of others or country conditions.)

In *Mendoza-Pablo v. Holder,* the Court of Appeals for the Ninth Circuit considered the harms suffered by Mendoza-Pablo as a part of his family in assessing whether the events of his childhood constituted persecution and concluded that "the BIA's ruling that Mendoza-Pablo did not suffer past persecution because his exposure to persecution was 'second-hand' reflects an incorrect view of the applicable law."[113] The court noted that case law made it clear that an infant can be the victim of persecution, even in the absence of present recollection of the actions and events that imposed the persecution, citing to *Benyamin v. Holder*, 579 F.3d 970, 972 (9th Cir. 2009) (the harm suffered as a result of enduring genital mutilation as a five-day-old infant constitutes persecution).[114]

Mendoza-Pablo was born in the mountains several weeks premature, shortly after his pregnant mother fled from Guatemalan government forces that had attacked her ancestral village, burned the village to the ground, and massacred its inhabitants, including several of Mendoza-Pablo's close relatives. The court noted that the specific attack was documented in credible human rights sources as part of a "fierce and largely one-sided civil war with insurgent groups predominantly of Mayan ethnicity."[115] The newborn child suffered serious harms as a result. The court declined to isolate the initial acts taken by the persecutors in the applicant's village from their direct consequences for the applicant.

---

[112] See Marina Ajdukovic and Dean Ajdukovic, "Psychological Well-Being of Refugee Children," Child Abuse and Neglect 17:6, 843 (1993); Betty Pfefferbaum, "Posttraumatic Stress Disorder in Children: A Review of the Past 10 Years," J. Am. Acad. Child Adolesc. Psychiatry, 36:11, at 1504-05.

[113] *Mendoza-Pablo v. Holder,* 667 F.3d 1308, 1315 (9th Cir. 2012).

[114] *Benyamin v. Holder,* 579 F.3d 970, 972 (9th Cir. 2009).

[115] *Mendoza-Pablo*, 667 F.3d at 1310.

Rather it viewed those initial acts as directly imposing a broader set of harms on the applicant (premature birth and early malnourishment with their ongoing health consequences, forced flight and permanent deprivation of home, etc.). These were harms which the persecutors imposed on the applicant and which the applicant did experience, regardless whether he had memory of the initial actions.

In *Jorge-Tzoc v. Gonzales*, the Court of Appeals for the Second Circuit noted, "Jorge-Tzoc was a child at the time of the massacres and thus necessarily dependent on both his family and his community . . . This combination of circumstances [displacement - initially internal, resulting economic hardship, and viewing the bullet-ridden body of his cousin] could well constitute persecution to a small child totally dependent on his family and community."[116]

Jorge-Tzoc's family and other families were targeted by the Guatemalan army's campaign against Mayans. When he was seven years old, Jorge-Tzoc's sister, her husband, and her mother-in-law were fatally shot by Guatemalan soldiers. While Jorge-Tzoc did not witness any murders, he saw many corpses, including the bullet-ridden body of his cousin lying on the ground. The army's campaign resulted in his father selling their land and the family's relocation to a one-room home in Quiche where they struggled to survive. When the family returned to the village after a year away, they found that the house was full of bullet holes and the family's animals were unrecoverable.

The Seventh Circuit held in *Kholyavskiy v. Mukasey* that the adjudicator should have considered the "cumulative significance" of events to the applicant that occurred when he was between the ages of eight and thirteen.[117] The applicant was subjected to regular "discrimination and harassment [that] pervaded his neighborhood" and his school. The harm included being regularly mocked and urinated on by other school children for being Jewish, being forced by his teachers to stand up and identify himself as a Jew on a quarterly basis, and being called slurs and being physically abused in his neighborhood.

Additionally, the Ninth Circuit held in *Hernandez-Ortiz v. Gonzales*, "[A] child's reaction to injuries to his family is different from an adult's. The child is part of the family, the wound to the family is personal, the trauma apt to be lasting...[I]njuries to a family must be considered in an asylum case where the events that form the basis of the past persecution claim were perceived when the petitioner was a child."[118]

Hernandez-Ortiz involved two Mayan brothers from Guatemala who fled to Mexico in 1982 at the ages of seven and nine due to the Guatemalan army's arrival in their village,

[116] *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006).

[117] *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008).

[118] *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007).

the beating of their father by soldiers in front of their mother, and the flight of their brother who was later killed by the army on suspicion of being a guerilla sympathizer.

Similarly, in *Ordonez-Quino v. Holder*, the First Circuit Court of Appeals considered the case of a Mayan applicant from Guatemala who had been internally displaced as a child when his family's home and lands were destroyed. In 1980, when he was about five or six years old, the applicant was injured in a bombing attack by the Guatemalan military, resulting in near-total hearing loss and developmental delays that affected him throughout his life. The Court disagreed with the BIA's conclusion that this "isolated" incident did not rise to the level of persecution.

Citing the decisions in *Jorge-Tzoc* and *Hernandez-Ortiz*, the Court held that the BIA's decision was not supported by substantial evidence. It noted, "there is no indication that the BIA considered the harms Ordonez-Quino suffered throughout this period from his perspective as a child, or that it took the harms his family suffered into account....This combination of circumstances – bombing attacks, permanent injury, the loss of a home, the razing of lands, and internal displacement lasting years – could certainly support a finding of past persecution for an adult. Such a string of events even more strongly supports a finding of past persecution for a small child, whose formative years were spent in terror and pain."[119]

In a concurring opinion to *Kahssai v. INS*, Judge Reinhardt of the Ninth Circuit noted that the effects of losing one's family as a child can constitute serious harm. "The fact that she did not suffer physical harm is not determinative of her claim of persecution: there are other equally serious forms of injury that result from persecution. For example, when a young girl loses her father, mother and brother-sees her family effectively destroyed-she plainly suffers severe emotional and developmental injury."[120]

While age should be taken into account in making the persecution determination, not all harm to a child, including physical mistreatment and detention, constitutes persecution. In *Mei Dan Liu v. Ashcroft*, the Seventh Circuit upheld a finding by the BIA that harm Liu experienced at the age of sixteen did not constitute persecution.[121] Liu, a Chinese national, had been forcibly taken to the Village Committee Office and interrogated by police and pressured to confess involvement in Falun Gong. On two occasions, police and guards pulled her hair, causing her to cry, and pushed her to the ground. She was detained for

[119] *Ordonez-Quino v. Holder*, No. 13-1215, --- F.3d ----, 2014 WL 3623012 (1st Cir. July 23, 2014).

[120] *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (Reinhardt, J., concurring opinion).

[121] *Mei Dan Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Santosa v. Mukasey*, 528 F.3d 88, 92 (1st Cir. 2008) (upholding the BIA's conclusion that Santosa did not establish past persecution in part because he suffered only "isolated bullying" as a child); *cf. Xue Yun Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005) (suggesting that the hardships suffered by fourteen year old applicant, including economic deprivation resulting from fines against her parents, lack of educational opportunities, and trauma from witnessing her father's forcible removal from the home, could be sufficient to constitute past persecution).

two days. The police reported Liu's arrest to her school and she was expelled. One month later, the police searched Liu's home and questioned her and her mother, pushing her mother to the floor.

In holding that the evidence did not compel a finding that Liu suffered harm rising to the level of persecution, the court stated, "age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution…There may be situations where children should be considered victims of persecution though they have suffered less harm than would be required for an adult. But this is not such a case. Though a minor, Mei Dan was near the age of majority – she was sixteen – at the time the events took place. Whatever slight calibration this may warrant in our analysis is insufficient to transform her experiences with the Chinese authorities from harassment to persecution."

**Types of Harm that May Be Imposed on Children**

The types of harm that may be imposed on children are varied. In addition to the many forms of persecution adults may suffer, children may be particularly vulnerable to sexual assault, forced marriage, forced prostitution, forced labor, severe abuse within the family, and other forms of human rights violations such as the deprivation of food and medical treatment.[122] Cultural practices, such as female genital mutilation (FGM), may constitute persecution. When considering whether a cultural practice will amount to persecution, not only must the adjudicator consider whether the harm is objectively serious enough to rise to the level of persecution, but also whether the applicant subjectively experienced or would experience the procedure as serious harm. For example, if an individual applicant welcomed, or would welcome, FGM as an accepted cultural rite, then it is not persecution to that applicant. Existing case law does not definitively address how to determine whether FGM imposed in the past on a young child, who did not have the capacity to welcome or reject the practice, constitutes past persecution. However, since FGM is clearly serious harm objectively, you should consider FGM under such circumstances as persecution unless the evidence establishes that the child did not experience it as serious harm. An adult applicant's testimony about her own subjective experience as a young child, both of the event itself and her later experiences of the direct consequences, should be given significant weight. If, for example, an adult applicant testifies that she underwent FGM as a child but does not consider it to have been serious harm, then it generally would not be considered persecution. Alternatively, an adult applicant's testimony that she considers the FGM she underwent as a child to be serious harm generally would suffice to establish her subjective experience of persecution.

Fundamental rights of children are listed in the CRC. They include the right to be registered with authorities upon birth and acquire a nationality (Art. 7.1), to remain with

[122] Bhabha and Young, pp. 760-61.

one's family (Art. 9.1), to receive an education (Art. 28), and to be protected from economic exploitation (Art. 32).[123] Where such rights are denied, the impact of these harms on the child must be explored in order to determine whether the violations, considered individually or cumulatively, amount to persecution.

**Identification of the Persecutor – Private versus Public Actors**

Children's claims may often involve forms of harm that have not traditionally been associated with government actors. Harms such as child abuse, forced labor, or criminal exploitation of children are often inflicted by non-state actors. Where a nexus to a protected ground can be established, the applicant must demonstrate both that the private persecutor has the requisite motivation to persecute and that the government is unable or unwilling to protect the child from the alleged persecutor.[124]

The fact that a child did not seek protection in his or her country of origin does not necessarily undermine his or her case. You must explore what, if any, means the child had of seeking protection. Depending on the age and maturity of the child, he or she may be able to contribute some personal knowledge of the government's ability to offer protection, but it is far more likely that you will have to rely on objective evidence of government laws and enforcement. Special attention should be paid to the child's ability to affirmatively seek protection and government efforts to address criminal activities relating to children.[125]

Reasonable explanations for why a child did not seek protection include evidence that:

- The applicant was so young that he or she would not have been able to seek government protection,
- The government has shown itself unable or unwilling to act in similar situations, or
- The applicant would have increased his or her risk by affirmatively

[123] Convention on the Rights of the Child.

[124] See *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990); see also RAIO module, *Persecution*.

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

seeking protection.

## 8.3 Well-founded Fear of Future Persecution

### General Considerations[126]

Child-specific issues also arise in determining whether a child has a well-founded fear of persecution.[127] A well-founded fear of persecution involves both subjective and objective elements, meaning that an applicant must have a genuine fear of persecution and that fear must be objectively reasonable. For children, however, the balance between subjective fear and objective circumstances may be more difficult for an adjudicator to assess. The *UNHCR Handbook* suggests that children under the age of sixteen may lack the maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors.[128] "Minors under 16 years of age...may have fear and a will of their own, but these may not have the same significance as in the case of an adult." You must evaluate the ability of a child to provide information "in the light of his [or her] personal, family and cultural background."[129]

The Sixth Circuit, in *Abay v. Ashcroft*, acknowledged the Children's Guidelines' reference to the *UNHCR Handbook* on the subject of a child's subjective fear. In *Abay*, the Sixth Circuit court overturned an Immigration Judge's finding that the nine-year-old applicant expressed only a "general ambiguous fear," noting that young children may be incapable of articulating fear to the same degree as adults.[130]

On the other hand, a child may express a subjective fear without an objective basis. In *Cruz-Diaz v. INS*, the Fourth Circuit noted that the seventeen-year-old petitioner who had entered the United States two years prior had a subjective fear of persecution but had not established an objectively reasonable fear with a nexus to one of the protected grounds.[131]

### Personal Circumstances

You should examine the circumstances of the parents and other family members, including their situation in the child's country of origin.[132]

---

[126] For additional information, see RAIO module, *Well-Founded Fear*.

[127] *Matter of Acosta*, 19 I&N Dec. 211, 224 (BIA 1985); *Matter of Mogharrabi*, 19 I&N Dec.439, 446 (BIA 1987); see also RAIO module, *Well-Founded Fear*.

[128] UNHCR Handbook, para. 215.

[129] UNHCR Handbook, para. 216.

[130] *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004).

[131] *Cruz-Diaz v. INS*, 86 F.3d 330, 331 (4th Cir. 1996) (per curiam).

[132] UNHCR Handbook, para. 218.

### *Family as similarly situated*

You may be able look to the child's family as individuals similarly situated to the applicant. A well-founded fear of persecution may be supported by mistreatment of a child's family in the home country. The First Circuit Court of Appeals concluded that evidence of mistreatment of one's family is probative of a threat to the applicant.[133] Conversely, if the child's family does not relocate and is not harmed, the likelihood of an objectively reasonable fear may be reduced. The failure to relocate may nonetheless be overcome when it is due to a parent's conflict of interest rather than a decreased threat to the child.[134] Where there appears to be a conflict of interest between the child and the parents, you "will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt."[135]

### *Family's intentions*

If the child was sent abroad by his or her parents or family members, the circumstances of that departure are relevant to the child's refugee or asylum application. "If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution...," that may suggest that the child has such a fear as well.[136] On the other hand, a family's actions toward a child – abandonment, neglect, or selling a child into slavery – may support a child's fear of persecution at the hands of relatives.

### *Child's arrival*

The circumstances of a child's flight and arrival in a second country may provide clues as to whether the child has a well-founded fear of persecution.[137] If the child arrives in the company of other refugees who have been found to have a well-founded fear of persecution, this may, depending on the circumstances, help to establish that the child's fear is well-founded.

## Internal Relocation

[133] *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985); see also UNHCR Handbook, para. 43; *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998).

[134] Bhabha and Young, 764.

[135] UNHCR Handbook, para. 219.

[136] UNHCR Handbook, para. 218.

[137] See 8 C.F.R. § 208.13(b)(2); UNHCR Handbook, para. 217.

It is generally not reasonable to expect a child to internally relocate by himself or herself; however, you should examine whether circumstances show that internal relocation would be reasonable.[138]

## 8.4 Nexus to a Protected Ground

Regardless of the nature or degree of harm the child fears or has suffered, that harm must be on account of one of the five protected grounds contained in the definition of a refugee. Children, like adults, may raise one or more protected grounds as the basis for a refugee or asylum claim. You must explore all possible grounds for refugee or asylum status and should take into account the age and relative maturity of the child in assessing the child's ability to articulate his or her claims.

This Training Module looks briefly at the protected grounds in general and then turns to an analysis of membership in a particular social group because claims based on this ground are frequently novel and analytically complicated. Similarly, RAIO has addressed membership in a particular social group in a separate Training Module.[139]

### Burden of Proof

As with all claims, the burden falls to the applicant to establish the connection between the past or future persecution and one or more of the five protected grounds. Because children may lack, or have limited access to, the necessary documents or other evidence sufficient to support a finding of nexus to one of the protected grounds, you may have to rely on testimony of the child or of others, solely or in combination with other supporting evidence such as country conditions, to establish these elements.

Although the Board has issued several opinions that emphasize an applicant's burden to produce all accessible documents, testimony alone can be sufficient to establish a claim where the applicant credibly testifies that he or she is unable to procure documents.[140] This distinction may be particularly important in analyzing a child's claim, especially if the child has no legal representation.

### Inability to Articulate a Nexus to a Protected Ground

---

[138] *Cf.* Lepe-Guitron v. INS, 16 F.3d 1021, 1025-1026 (9th Cir. 1994) (finding that petitioner's seven-year period of lawful unrelinquished domicile, for purposes of a discretionary waiver of deportation, began on the date his parents attained permanent resident status, as he was a child at the time; and minor's domicile is the same as that of its parents, since most children are presumed not legally capable of forming the requisite intent to establish their own domicile (citing *Rosario v. INS*, 962 F.2d 220, 224 (2d Cir. 1992)).

[139] *See* RAIO Training Modules, *Nexus and the Protected Grounds* and *Nexus – Particular Social Group.*

[140] See *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); INA § 208(b)(1)(B)(ii); 8 C.F.R. § 208.13(a); see also section 5.6, *Evidence*, and RAIO Training Module, *Evidence*.

Analyzing whether a child applicant has established a nexus to a protected ground in a refugee or asylum claim may be particularly difficult because a child may express fear or have experienced harm without understanding the persecutor's intent. A child's incomplete understanding of the situation does not mean that a nexus between the harm and a protected ground does not exist. The applicant's testimony is only one type of evidence. There must be sufficient evidence to support a finding of nexus, but the applicant's inability to testify about nexus will not preclude an officer from determining that nexus is established by other reliable evidence, whether that is the testimony of others, country conditions, or other relevant evidence.

The persecutor may have several motives to harm the applicant, some of which may be unrelated to any protected ground. There is no requirement that the persecutor be motivated ***only*** by the protected belief or characteristic of the applicant. Moreover, an applicant is not required to establish that the persecutor is motivated solely by a desire to overcome the protected characteristic.[141] When the child is unable to identify all relevant motives, a nexus can still be found if the objective circumstances support the child's claim of persecution on account of a protected ground.[142]

**No requirement for Punitive Intent**

The inherent vulnerability of children often places them at the mercy of adults who may inflict harm without viewing it as such, sometimes to such a degree of severity that it may constitute persecution. The Board of Immigration Appeals has held that a punitive or malignant intent is not required for harm to constitute persecution on the basis of a protected ground.[143] A persecutor may target the applicant on account of a protected characteristic in the belief that he or she is helping the applicant.

Consequently, it is possible that a child's claimed harm may arise from a culturally accepted practice within his or her community. In such cases, an adjudicator must look

[141] *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988).

[142] INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996). If you are processing refugee applications overseas, you must determine if a reasonable person would fear that the danger arises on account of one of the five grounds. If you are adjudicating asylum applications under INA § 208, you must determine whether the applicant's possession of one of the five protected grounds is "at least one central reason" motivating the persecutor. *See RAIO Training Module, Nexus and the Protected Grounds* for further discussion. The "one central reason" standard was added to the statute by the REAL ID Act, and applies only to asylum adjudications. The Board has explained, however, that the "one central reason" language should be interpreted consistent with prior Board precedent that allows nexus to be established where the persecutor has mixed motivations. "Having considered the conference report and the language of the REAL ID Act, we find that our standard in mixed motive cases has not been radically altered by the amendments. The prior case law requiring the applicant to present direct or circumstantial evidence of a motive that is protected under the Act still stands." *Matter of J-B-N- & S-M-*, 24 I&N Dec. at 214. These are the same cases governing mixed motivation cases in refugee processing, thus the substantive analysis in the two contexts is essentially the same.

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

carefully at both the degree of harm and whether any of the reasons for inflicting the harm involve a protected ground.

### Inability to Articulate a Political Opinion

When a child claims persecution or a well-founded fear of persecution on the basis of political opinion, the age and maturity of the child must be taken into account. A young child may have difficulty articulating a political opinion. Because the level of children's political activity varies widely among countries, however, you should not assume that age alone prevents a child from holding political opinions for which he or she may have been or will be persecuted. The nexus inquiry is focused on the persecutor's state of mind, not the applicant's. The critical question in a political opinion claim is if the persecutor perceives the applicant as having a political opinion (regardless of whether it is a sincere, strong or well-expressed opinion and even regardless of whether the applicant actually has such an opinion) and if the persecutor targets the applicant on account of that perception.

In *Civil v. INS*, the First Circuit affirmed the Board's holding that the young applicant failed to establish a well-founded fear of persecution based on either political opinion or membership in a social group consisting of "Haitian youth who possess pro-Aristide political views."[144] Although the court found sufficient grounds to affirm the underlying decision, it criticized the Immigration Judge's conclusion that "it is almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children," noting that the evidence submitted by the petitioner cast serious doubts on the presumption that youth "are unlikely targets of political violence in Haiti." Similarly, in *Salaam v. INS*, the Ninth Circuit overturned a BIA finding of adverse credibility where the BIA held it was implausible that the petitioner had been vice president of a branch of an opposition movement at the age of eighteen.[145]

It may also be possible for a child's claim to be based on imputed political opinion.[146] The adjudicator should carefully review the family history of the child and should explore as much as possible the child's understanding of his or her family's activities to determine whether the child may face persecution based on the imputed political beliefs of family members or some other group with which the child is identified.

### Membership in a Particular Social Group

[144] *Civil v. INS*, 140 F.3d 52 (1st Cir. 1998).

[145] *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (per curiam).

[146] *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996); see *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (evidence that every family in a Guatemalan village lost a male member to the guerrillas and that the military raped a woman every eight to fifteen days, based on the mistaken belief that the villagers had voluntarily joined the guerrillas, compelled a finding that the applicant's rape by soldiers was on account of a political opinion imputed to her).

In order to establish eligibility for asylum based on membership in a particular social group, an applicant must establish that the group constitutes a particular social group within the meaning of the refugee definition; that the applicant is a member or is perceived to be a member of that group; and that the persecutor was or will be motivated to target the applicant on account of that membership or perceived membership in the particular social group.[147] The BIA clarified in a 2014 precedent decision that there is a three-prong test for evaluating whether a group constitutes a particular social group:

> [A]n applicant . . . seeking relief based on "membership in a particular social group" must establish that the group is
>
> (1) composed of members who share a common immutable characteristic,
> (2) defined with particularity, and
> (3) socially distinct within the society in question.[148]

Issues of social group that are likely to arise in a child's asylum claim include social groups defined by family membership, social groups defined in whole or in part by age, and social groups defined in whole or in part by gender. The question of whether the group with which the child applicant identifies himself or herself can be considered a particular social group for the purpose of asylum eligibility will be analyzed in the same manner as with adults.

Case law on particular social group continues to evolve. It is discussed in more detail in the RAIO Training Module, *Nexus - Membership in a Particular Social Group*, including the subsection on age as a characteristic. Children's cases, however, often involve complex and/or novel particular social group formulations, and the following points are important to keep in mind when analyzing whether a child has established eligibility for protection based on membership in a particular social group.

---

[147] *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006); *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). *See also* Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[148] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). The Board in *M-E-V-G-* renamed the "social visibility" requirement as "social distinction," clarifying that social distinction does not require literal visibility or "outwardly observable characteristics." 26 I&N Dec. at 238. Rather, 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." *Id.* The Board also clarified that social distinction relates to society's, not the persecutor's, perception, though the persecutor's perceptions may be relevant to social distinction. The Board defined particularity as requiring that a group "be defined by characteristics that provide a clear benchmark for determining who falls within the group." *Id.* at 239. Membership in a particular social group can be established through "[e]vidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like." *Id.* at 244.

- Common bases for children's particular social group claims include family membership, gang violence, female genital mutilation, forced marriage, and abuse within the family.

- Other harms faced by children may include trafficking, gender-based violence, rape, forced prostitution, forced recruitment by rebels or para-military, and child exploitation. The appropriate particular social group depends on the facts of the case and may involve the trait of socially recognized lack of effective protection.

***Example***

A particular social group of "formerly trafficked [nationality]" may be appropriate for certain cases. It is similar to the particular social group of former child soldiers proposed by the Third Circuit in *Lukwago v. Ashcroft*, 329 F.3d 157 (3rd. Cir. 2003), in that group membership is based on a shared past experience. In such cases, in order to avoid circularity, the past experience of trafficking could not qualify the individual for protection (unless, of course, it had been imposed on account of some other protected ground). Instead, harm feared due to the status of having been trafficked could qualify. In terms of evaluating the particular social group for the *Acosta* test, the trait of being formerly trafficked is immutable, and the trait of being a national of a certain country is immutable or fundamental. The group must also have well-defined boundaries, and the assessment would need to include country conditions information indicating that that society distinguishes formerly trafficked individuals from others in society. The nexus analysis would need to be carefully articulated to show that the applicant was or would be harmed on account of the trait of having been trafficked. Whether future harm feared by an applicant on account of this particular social group would rise to the level of persecution would be very fact-dependent. The adjudicator would then need to examine whether the applicant will be targeted on account of his or her status of being formerly trafficked.

***Example***

While the Third Circuit in *Escobar v. Gonzales*, 417 F.3d 363 (3d. Cir. 2005), found that homeless children who live in the streets in Honduras did not constitute a particular social group in that case, this does not foreclose the possibility of a particular social group involving street children. It would be necessary to examine whether they had faced harm or fear future harm due to their status as street children. As with any particular social group case, it would be necessary to evaluate whether the trait of being a street child is immutable and whether a group of street children is sufficiently discrete and socially distinct. A child's inability to

control whether or not he or she is homeless may be an indication of immutability. Additionally, evidence that street children are targeted for social cleansing by authorities in that country or are subject to specific laws could potentially indicate that the group is discrete and socially distinct.

- Family alone can constitute a particular social group. If a person is targeted because of the family connection, then the particular social group of family is appropriate. This is true even if the original family member on whom the connection is based is not targeted due to a protected ground.[149] The shared familial relationship is the common trait that defines the group. In most societies, the nuclear or immediate family is socially distinct, while in some societies, more extended relationships may also be socially distinct. Possible formulations are "Immediate [or nuclear] family" or "Immediate [or nuclear] family of [X individual]."

- A particular social group for gang recruitment may not succeed where recruitment is conducted in order to fill the ranks of the gang and not on account of a protected ground; youths who resist gang recruitment generally do not constitute a particular social group.[150] Former gang membership also generally does not form the basis of a particular social group,[151] as it is generally agreed that the shared characteristic of terrorist, criminal or persecutory activity or association, past or present, **cannot** form

[149] *See, e.g.*, *Aldana-Ramos v. Holder*, --- F.3d ----, No. 13-2022, 2014 WL 2915920 (1st Cir. June 27, 2014).

[150] *Matter of S-E-G-*, 24 I&N Dec.579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec.591 (BIA 2008) (rejecting two proposed particular social groups related to gang recruitment: (1) "persons resistant to gang membership;" and (2) "young persons who are perceived to be affiliated with gangs." The finding that gang recruitment does not constitute persecution on account of a protected ground is somewhat analogous to the Supreme Court's holding in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (a Guatemalan guerrilla group's attempt to recruit the respondent to join their group and the respondent's refusal to do so does not establish a nexus to a protected ground such as political opinion). Neither *S-E-G-* nor *Elias-Zacarias* foreclose the possibility that under different facts, individuals who refuse recruitment or refuse to otherwise cooperate with gangs or guerillas could be members of a particular social group. *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1081 (9th Cir. 2014) (holding that the BIA erred in relying on *S-E-G-* to find that "individuals taking concrete steps to oppose gang membership and gang authority" was not a socially distinct group without conducting an evidence-based inquiry into the facts of the individual case as required under *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014)).

[151] In asylum cases arising within some circuits, former gang membership **may** form a particular social group if the former membership is immutable and the group of former gang members is socially distinct. *See Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014); *Urbina-Mejia v.Holder*, 597 F.3d 360 (6th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). *See also,* USCIS Asylum Division Memorandum, *Notification of Ramos v. Holder: Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit* (Mar. 2, 2010). Even where former gang membership may be the basis of a particular social group, you must consider if the applicant is subject to a mandatory bar and whether the applicant merits a favorable exercise of discretion (balancing of factors). For mandatory bars, consider the serious non-political crime bar, as well as the other bars, including terrorist related inadmissibility grounds; also, past gang-related activity may serve as an adverse discretionary factor that is weighed against positive factors.

the basis of a particular social group.[152] Nonetheless, there may be other protected grounds involved in a gang-related case. Always examine whether there are other factors involved in cases where an individual is targeted by gangs, such as political opinion, family connection, LGBT issues, or religion.[153]

- "Females [of the applicant's tribe or nationality] who have not yet undergone FGM as practiced in their culture" may be an appropriate particular social group formulation when the claim is based on FGM. You must assess whether FGM is persecution to an individual applicant, including in cases where FGM is imposed on a young child who does not have the capacity to welcome it as an important rite. As FGM is clearly objectively serious harm, the point of inquiry is the applicant's perception of it.[154] If the applicant is still a young child who may not have the capacity to form an opinion about FGM, apply standard principles of supplementing the child's testimony with other evidence, e.g., accompanying adult's testimony, objective evidence in the form of country conditions reports concerning what the child was or would be subjected to.[155] It is also important to ask whether the applicant fears FGM to a child[156] or

[152] *See Matter of W-G-R-*, 26 I&N Dec. 208, 215 n.5 (BIA 2014); USCIS OCC Memorandum from Lynden Melmed, *Guidance on Matter of C-A-* (Jan. 12, 2007); *Cantarero v. Holder*, 734 F.3d 82, 85-86; *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007).

[153] A decision that could be useful when assessing gang-related claims is *Martinez-Buendia v. Holder*, 616 F.3d 711 (7th Cir. 2010). The applicant organized Health Brigades to travel to rural parts of Colombia and offer volunteer health services. The guerrilla group, FARC, demanded she publicly attribute her Health Brigade work to the FARC; she refused and was attacked. Instead of addressing the potential particular social group (which the dissent did address in a concurring opinion), the court found that the facts made it clear that the FARC imputed an anti-FARC political opinion to her, which led to the increasingly violent nature of their persecution of her. In reaching its decision, the court noted, "in certain cases, 'the factual circumstances alone may constitute sufficient circumstantial evidence of a persecutor's . . . motives'."

[154] In *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1315 (9th Cir. 2012), the court noted that an infant can be the victim of persecution, even in the absence of present recollection of the events that constituted the persecution, citing to *Benyamin v. Holder*, 579 F.3d 970, 792 (9th Cir. 2009) (enduring genital mutilation as a five-day-old infant constitutes persecution). It is reasonable to consider FGM persecution if the applicant currently says it was serious harm. *See Matter of A-T-*, 25 I&N Dec. 4, 5 (BIA 2009) ("It is difficult to think of a situation, short of a claimant asserting that she did not consider FGM to be persecution, where the type of FGM suffered by the respondent, at any age, would not rise to the level of persecution.").

[155] In *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004), the Sixth Circuit overturned an Immigration Judge's finding that the 9-year-old applicant expressed only a "general ambiguous fear," noting that young children may be incapable of experiencing fear to the same detgree as adults.

[156] *Kone v. Holder*, 596 F.3d 141, 153 (2d Cir. 2010) (remanding a petitioner's claim for the BIA to consider whether "a mother who was herself a victim of genital mutilation" experiences persecution when her daughter may "suffer the same fate"); *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004) (recognizing that a petitioner for asylum and withholding of removal can demonstrate direct persecution based on the harm of "being forced to witness the pain and suffering of her daughter" if she were subjected to FGM); *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007). *A-K-* involved a Senegalese father who feared that his two USC daughters would be subjected to FGM. Note that under *A-K-*, there is no nexus unless the parent fears FGM to their child in order to target the parent for the parent's protected ground. *Matter of A-K-* does not foreclose the possibility of FGM on a family member due to the applicant's political opinion constituting persecution to the applicant.

whether an applicant fears FGM to another family member due to the applicant's political opinion.[157]

- "Females [of the applicant's tribe or nationality] who are subject to cultural expectations that they will submit to arranged marriages" may be an appropriate particular social group for forced marriage claims. As arranged marriages are an important tradition in many cultures, the issue is whether an individual subjectively experiences or would experience the marriage as serious harm. The analysis acknowledges that the harm from the forced marriage can continue even after the marriage ceremony.

**Firm Resettlement**

The BIA has long held that a parent's resettlement status is imputed to his or her children.[158] The Ninth Circuit has also looked to "whether the minor's parents have firmly resettled in a foreign country before coming to the United States, and then derivatively attribute[d] the parents' status to the minor."[159] However, this may no longer be the case, and in interpreting whether a child is firmly resettled, you should apply the BIA's framework for analyzing firm resettlement in its 2011 decision, *Matter of A-G-G-*.[160] In this decision, the BIA announced a new four-step framework for deciding firm resettlement cases that first focuses exclusively on the existence of an offer.[161] For this reason, you should not rely on case law issued prior to May 2011 that conflicts with the holding in *Matter of A-G-G-* and does not follow the BIA's new approach. See the RAIO Training Module, *Firm Resettlement.*

**Serious Nonpolitical Crime**

In all cases where the question arises as to whether there is reason to believe that an applicant has committed a serious nonpolitical crime, an adjudicating officer must consider an applicant's culpability in determining whether the crime is "serious" within the meaning of the INA. Relevant factors would include: (1) whether and to what extent

---

[157] An applicant may fear FGM to a family member due to the applicant's possession of a protected trait (political opinion or one of the four other grounds). *See* *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) (threat of FGM to petitioner's wife in order to harm petitioner, a former Mungiki member, could constitute persecution to petitioner for having left the Mungiki).

[158] 8 C.F.R. § 208.15; *Matter of Ng*, 12 I&N Dec. 411 (BIA 1967) (holding that a minor was firmly resettled in Hong Kong because he was part of a family that resettled in Hong Kong); *Matter of Hung*, 12 I&N Dec. 178 (BIA 1967) (holding that because parents were not firmly resettled in Hong Kong, the minor child also was not firmly resettled there).

[159] *Vang v. INS*, 146 F.3d 1114, 1116 (9th Cir. 1998) (holding that the parents' status is attributed to the minor when determining whether the minor has firmly resettled in another country).

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

[161] *A-G-G-*, 25 I&N Dec. at 501.

the applicant acted under duress; (2) the applicant's intent, with age being a relevant factor; and (3) whether and to what extent the applicant knew they were committing a crime. This analytical approach is consistent with the purposes of the serious nonpolitical crime bar, and with basic principles of criminal and protection law. Age becomes a significant factor when this issue arises in a child's claim, as youth may be a relevant factor when assessing culpability.

For additional information regarding grounds of inadmissibility for refugees and bars to applying for or eligibility for asylum, see Division Supplements. See also RAIO Training Module, *Inadmissibilities,* and the Asylum Division Lesson Plan, *Mandatory Bars to Asylum.*

# 9 OTHER IMMIGRATION STATUSES AVAILABLE TO CHILDREN

For additional information, see ASM Supplement – Other Immigration Statuses Available to Children.

# 10 SUMMARY

## 10.1 International Guidance

It is important to look to international law for guidance when binding U.S. case law does not speak to the relevant issue. International instruments such as the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and several UNHCR Executive Committee Conclusions and UNHCR published policies provide insight and guidance regarding how to handle protection claims from minors.

## 10.2 Child Development

When interviewing children you must recognize that a child's stage of development can affect the interview – both in tone and content. Children who are in a younger stage of development may not be able to recall facts or analyze issues as well as more mature children or adults. Furthermore, children's perceptions of the world will not conform to those of most adults and could create an obstacle to a smooth interview.

## 10.3 Procedural Considerations

In order to address the unique situation of child applicants, you must make adjustments to their interviews and interview style to facilitate the process. Procedural adjustments include allowing the child to be interviewed by an officer with relevant experience and scheduling the interviews of family members – especially siblings – as close in time as possible.

Other procedural considerations necessary in children's cases include determining whether or not the minor applicant is unaccompanied, determining a minor's capacity to apply for protection, who may be able to speak on the child's behalf, and evaluating any conflicts between the child and the parents' interests.

## 10.4 Interviewing Considerations

In order to create a child-friendly atmosphere, you must attempt to build a rapport with the child, "read" the child applicant for any sign of anxiety, and guide the child through the interview process. Questions should be posed with the child's mental development and maturity in mind. Whenever possible, officers must accommodate child applicants who would like a trusted adult to be present during the interview. You should ask questions concerning the child's guardianship and parental consent to and knowledge of the refugee or asylum application. While these questions usually do not affect substantive eligibility, they are nonetheless important for evaluating the child's care and custody situation.

Because children are less likely than adults to be able to articulate their claim and obtain supporting documents, you may be required to consider more sources of information to evaluate the objective merit of the claim. This includes taking testimony from other individuals, looking to documentary evidence of individuals similarly situated to the applicant, and taking into account the amount of information that a child of that age can be expected to know and recall.

Children, as adults, are not required to provide corroborating evidence and may rely solely on testimony when the testimony is credible. However, children cannot be expected to present testimony with the same degree of consistency or coherency as adults, and you must consider children's development levels and emotional states when evaluating their testimony.

## 10.5 Legal Analysis

The definition of a refugee contained in the INA applies to all individuals regardless of their age. Although children do not enjoy a lessened standard for refugee or asylum eligibility, there are considerations that must be taken into account when analyzing children's claims. First, the harm that a child suffered or fears may rise to the level of persecution even when the same harm claimed by an adult would not be considered persecution. Second, though the child may be able to express a subjective fear of persecution, he or she might not be able to articulate the objective reasons for that fear, such that evidence from other sources must be considered on this point. Third, an examination into the circumstances in which a child finds himself or herself – how he or she arrived in a second country, the location of his or her relatives, or the harm that has befallen his or her parents, for example – may reveal facts that support the child's refugee or asylum claim.

A child's inability to understand all of the circumstances surrounding his or her flight creates difficulty in analyzing the nexus of the harm or feared harm to a protected ground. Officers must pay close attention to the objective facts surrounding the child's claim to determine if there is a nexus regardless of the child's ability to articulate one. Many claims raised by children will be on account of membership in a particular social group. The body of case law that discusses the issue of particular social group applies to children just as it does to adults.

Other legal issues that may involve child-specific considerations include the application of some of the bars to refugee status or asylum, or inadmissibilities for refugee applicants.

## PRACTICAL EXERCISES

There are no practical exercises for this module.

# OTHER MATERIALS

## Sample Opening Statement for Children

I am glad that you are here today, and that your friend Mr. (Ms.) [name of support person, if any] is here with you. Do you know what we are going to do today? We are going to talk about why you left [name of country of origin], and why you may not want to go back there. As we talk, you and I both have jobs to do. My job is to understand what happened to you. But I need your help. Your job is to help me to understand by telling me as much as you can remember – even the little things.

I will be asking you some questions today. Some questions will be easy for you to answer. But you may not understand other questions. It is okay if you do not understand a question. Just tell me that you do not understand and I will ask the question differently. But please do not guess at an answer or make an answer up.

If you do not know the answer to the question, that is okay too. Just tell me that you don't know the answer. No one can remember everything.

As we talk today, I will write down what we say because what you tell me is important. Do not get nervous about my taking notes. Later, if I forget what we said, I can look it up.

I understand that you may be nervous or scared to tell me about what happened to you. Unless there is some reason it would make you afraid, we will tell your parents about your application if we are able to, but I will not tell anyone else in [name of country of origin] about what you tell me today. Also, none of your friends or other family members will know anything about what you tell me, unless you write a special letter that allows me to share information with them.

Before we start, do you have any questions that you would like to ask me? Or is there anything that you want to tell me? If you think of something while we are talking, let me know. If you have to go to the bathroom or want to stop for a while, also let me know.

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1. USCIS Refugee Affairs Division, *Standard Operating Procedure: Children's Cases* (4 January 2011).

2. Memorandum from John W. Cummings, Deputy Director, INS Office of International Affairs, to Overseas District Directors, *Guidelines for Children's Refugee Claims*, (120/6.4) (30 Jan. 1999).

### ADDITIONAL RESOURCES

1. Lummert, Nathalie and Margaret MacDonnell, *From Identification to Durable Solutions: Analysis of the Resettlement of Unaccompanied Refugee Minors to the United States and Recommendations for Best Interest Determinations*, United States Conference of Catholic Bishops, July 2011.

2. UNHCR, *Field Handbook for the Implementation of UNHCR BID Guidelines* (2011).

3. Duncan, Julianne, *Current Challenges in the Resettlement of Minors Through UNHCR and the Best Interest Determination Process*, United States Conference of Catholic Bishops, June 2003.

4. UNHCR, *Guidelines on Determining the Best Interests of the Child* (2008).

### SUPPLEMENTS

**RAD Supplement – Married Minors**

The Refugee Affairs Division and Department of State have independently issued guidance on how to adjudicate refugee cases involving married children.[162] If

[162] Memorandum from Terry Rusch, Director, Office of Admissions Bureau of Population, Refugees, and Migration, Department of State, to Overseas Processing Entities, *Program Announcement 2010-03 Guidance on Processing Married Minors* (8 Dec. 2009).

UNHCR refers a case involving married minor, you may find a BID in the file under certain circumstances. If no BID is in the case file and you have concerns about the well-being of the married child, you must consult the team leader and request that a BID be done.

The information in this section is taken from Refugee Affairs Division Guidance and Department of State Program Announcement 2010-03.

The following principles apply when processing married minors[163] for the U.S. Refugee Admissions Program (USRAP):

1. In general, **a marriage must be legally valid in the place of celebration**. Camp marriages may be accepted in certain circumstances.[164]

2. **Married minors who are both under age 18 and are traveling without their parents.** United Nations High Commissioner for Refugees (UNHCR) Best Interest Determinations (BIDs) [165] are required for both children. The children are considered unaccompanied minors and may be placed in foster care.

3. **Married minors who are both under age 18 and at least one set of parents is traveling with the couple.** BIDs are not required. The married couple must have their own case, which should be cross-referenced with the parents' case so that they may be interviewed altogether.

4. **Married couple where one spouse is under age 18 and the other spouse is over age 18.** A BID is generally not needed for the minor, even if he/she is not traveling with the parents. A minor questionnaire should be completed by the RSC for the minor spouse.

An officer may request a BID (for UNHCR P1 or P2 referrals) if there are cases which fall outside the norm and the officer would like a closer examination of what is in the best interests of the child. Ex: a BID could be requested for a 16-year-old

[163] Minors are under the age of 18.

[164] If a marriage is invalid based on a failure to comply with formal registration requirements, a marriage may still be valid for immigration purposes if the parties were prevented from formal perfection of the marriage due to circumstances relating to their flight from persecution. Examples of circumstances beyond the couple's control and relating to the flight from persecution would include inability to access host country institutions due to refugee camp policies or conditions, discriminatory government policies or practices, and other consequences of the flight from persecution. A couple who has been prevented from formal perfection of the marriage must also show other indicia of a valid marriage. The relevant considerations may include: holding themselves out to be spouses, cohabitation over a period of time, children born to the union, and the color of a marriage ceremony.

[165] BIDs are required for unaccompanied or separated children referred by UNHCR under Priority 1 or Priority 2.

married to a 50-year-old or where there is some suspicion of abuse.

The UNHCR BID Guidelines do not explicitly address the issue of minors who are married. However, in the absence of guidance in the Guidelines, some UNHCR offices have addressed it and have come up with the following position: A formal BID is not required for unaccompanied and separated children who marry before they turn 18 years, and the marriage has been carried out in accordance with national law and Convention on the Rights of the Child (CRC) standards. Such individuals will no longer be considered unaccompanied or separated children. However, to ensure that the marriage has been carried out in accordance with national law and CRC standards, that the child has not been forced into marriage, and that the case is not one of child trafficking, it is recommended that a best interests assessment be conducted prior to determining the recommended durable solution.

**RAD Supplement – Standard Operating Procedures for Children's Cases**

Since 2003, refugee adjudications have required that a formal Best Interest Determination (BID) be prepared by UNHCR for each child referred to the United States Refugee Program (USRAP) as a principal applicant.[166] The requirement has been formalized in SOPs for Children's Cases adopted in January, 2011.[167] Officers must review the BID to verify that the child's protection needs are being met in the application and adjudication process.

**Key Elements of a Valid BID**

Was the BID prepared by a qualified child welfare professional?

Was the BID signed by the preparer or full BID panel?

Did the BID include a thorough exploration of the child's past and current family situation?

Did the BID provide information on how long the child has been living with the current caregiver?

Did the BID describe the child's relationship with his or her caregiver, including the physical/health, emotional/psychological and economic situation of the child?

Was a diligent search for family carried out (consistent with child and family safety and

[166] Memorandum from Terry Rusch, Director, Office of Admissions, Bureau of Population, Refugees and Migration, Department of State, to U.S. Refugee Program Processing Entities, *Program Announcement 2001-01 USRP Policy on Resettling Unaccompanied Refugee Minors (URM's)*, (20 November 2002).

[167] USCIS Refugee Affairs Division, Standard Operating Procedure: Children's Cases, (4 January 2011).

country conditions)?

**Information To Be Elicited and Recorded in an Interview with a UASC**

During the USCIS interview, in addition to the general procedures for conducting a refugee status interview, when interviewing UASCs, Officers should also:

Verify information in BID with child

Determine the capacity of child to have input into her or his claim

Verify parental information to the extent possible. If there is a living parent, the Officer should note the address and phone number (if known) of the child's parent, whether the parent is aware of the child's whereabouts, and whether the parent is aware that the child has applied for refugee status

When interviewing a separated child:

- Determine the validity and bona fides of the child's relationship to the relative, foster parent(s), caregiver(s) or guardian(s)
- Place caregiver(s) under oath
- Note caregiver's name, address, relationship to child, duration of relationship, and whether there is any legal relationship between the two
- Question caregiver as appropriate
- Assess the nature and durability of the relationship between the child and caregiver
- Assess the caregiver's financial ability and commitment to continue to care for the child if resettled together
- Ensure that your interview notes reflect discussion of the above topics
- Ensure that your interview notes reflect that the BID and the RSC minor questionnaire have been seen and reviewed

**Information To Be Included in the Refugee Assessment**

After the USCIS interview:

Document clearly in the Assessment whether the Officer concurs with the recommendations in the BID. This concurrence should be noted on page 4 of the Assessment in the Justification section.

If the officer does not concur, an explanation of what the officer recommends should be included.

- Example 1: If a separated child is found to be a refugee, but the officer

has concerns about the current guardian, the officer may conclude that "Child is found to be a refugee; however, case should be returned to UNHCR or the referring entity for resolution of the caregiving arrangement prior to final USCIS approval."

- Example 2: Unresolved custody issues may be addressed by noting, for example: "Child's mother is in refugee camp. BID does not address her whereabouts or why child is not with her. Return case to UNHCR for further inquiry."

### Officer Responsibility for Child Safety

The officer must note any of the following:

1. A child is living alone.
2. A child is living with an inappropriate guardian.
3. A child is screened off the case and will now be alone.
4. The officer has any other concern about child safety.

These issues should be reported to the SRO or TL. The SRO or TL will report these concerns to the RSC or UNHCR to ensure the child's safety and continued access to U.S. Refugee Admissions Program, as appropriate.

### Conflicts between the Child's and Parents' Interests

In a refugee referral, if parent and child are together, UNHCR normally only recommends permanent separation of a child from the parent(s) if severe abuse or neglect is evident. The BID decision does not determine legal custody of the child.

Although the child welfare laws of the host country typically have mechanisms for a legal decision relating to child custody, in most of the countries in which we are interviewing refugees, the country of first asylum declines to intervene in refugee child/parent conflict, even in cases of severe abuse. In such cases, UNHCR generally asks biological parents to sign a release of custody document in cases in which a biological parent's whereabouts are known and it is safe to do so. Cases in which the biological parent refuses to sign the release of custody and the foster caregiver(s) does not have legal custody of the child should be referred to RAD HQ for resolution and may need to be returned to UNHCR for further inquiry into the custody arrangement.

### BID Process for Unaccompanied and Separated Refugee Children

In 2003 the U.S. Department of State announced that the United States abides by the "best interest" rule as stated in the Convention on the Rights of the Child.

Furthermore, the United States relies on the formal Best Interest Determination process of UNHCR to determine a course of action for an unaccompanied refugee child being referred to the USRAP for resettlement.[168]

USCIS has participated in the Vulnerable Minors Working Group with other government departments and agencies as well as concerned NGO's to determine how best to implement U.S. policy in regard to child adjudications. Procedures issued in January, 2011 provide guidance to refugee officers adjudicating cases of unaccompanied and separated children (UASC).[169] In 2011 RAD adopted procedures for all refugee cases in which a child is the principal applicant. These procedures require you to:

1. Determine that the Best Interest Determination (BID) is in the file and is valid;
2. Verify the information in the BID and decide if you concur with the recommendations;
3. Review the BID for each UASC to ensure that child's safety and interests are being considered; and
4. Use child-sensitive methods when eliciting testimony and adjudicating the claim.

[168] Memorandum from Terry Rusch, Director, Office of Admissions, Bureau of Population, Refugees and Migration, Department of State, to U.S. Refugee Program Processing Entities, *Program Announcement 2001-01 USRP Policy on Resettling Unaccompanied Refugee Minors (URM's)*, (20 November 2002).

[169] USCIS Refugee Affairs Division, *Standard Operating Procedures: Children's Cases* (4 January 2011).

## SUPPLEMENT B – ASYLUM DIVISION

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

### REQUIRED READING

1. *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997).

2. *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2d Cir. 2006); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004); *Liu v. Ashcroft*, 380 F.3d 307 (7th Cir. 2004); *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000); *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000); *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985).

3. 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).

4. Memorandum from Ted Kim, Acting Chief, USCIS Asylum Division, to Asylum Office Staff, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (HQRAIO 120/12a) (28 May 2013).

5. Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Directors, et al., *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS* (HQRAIO 120/9.7) (14 August 2007).

6. Memorandum from Jeff Weiss, Acting Director, INS Office of International Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees), *Guidelines for Children's Asylum Claims*, (120/11.6) (10 Dec.1998).

### ADDITIONAL RESOURCES

1. American Bar Association, Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States (August 2004), pp. 111

2. Bhabha, Jacqueline and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, Harvard University, Cambridge, MA, 2006, pp. 18–23, 108–137, 143–145, 188–191.

3. Bhabha, Jacqueline and Wendy A. Young. "Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers," Interpreter Releases, Vol. 75, No. 21, 1 June 1998, pp. 757–773.

4. Neal, David L. Chief Immigration Judge, Executive Office for Immigration Review. Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, Memorandum for All Immigration Judges. (Washington, DC, 22 May 2007), 11 pages.

5. Nugent, Christopher and Steven Schulman. "Giving Voice To The Vulnerable: On Representing Detained Immigrant and Refugee Children," Interpreter Releases, Vol. 78, No. 39, 8 October 2001, pp.1569–1591.

6. UNHCR, *Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries, 2001–2003* (Geneva, July 2004), 14 pages.

7. Peters, Jean Koh, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* (2nd ed. 2001).

8. Symposium: Child Abuse, Psychological Research on Children as Witnesses: Practical Implications Forensic Interviews and Courtroom Testimony, 28 PAC. L.J. 3 (1996), 92 pages. (NOTE: Myers, J., Saywitz, K., & Goodman, G., [1996] Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony. Pacific Law Journal, 28, 3–90.)

## SUPPLEMENTS

**ASM Supplement – Procedural Considerations**

With the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Congress gave USCIS initial jurisdiction over any asylum application filed by an unaccompanied alien child (UAC), including those in removal proceedings.[170] This law took effect on March 23, 2009. As a result, UACs filing for asylum who previously would have had their case heard by an immigration judge in the first instance now receive an affirmative interview with

[170] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), P.L. 110-457, Dec. 23, 2008. *See* Joseph E. Langlois, USCIS Asylum Division, *Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children*, Memorandum (Mar. 25, 2009).

you. In conducting the interview of a possible UAC in removal proceedings, you should verify that the applicant was a UAC at the time of filing such that USCIS has jurisdiction over the claim.

In most of these cases another Department of Homeland Security entity, either U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE), will have already made a determination of UAC status after apprehension, as required for the purpose of placing the individual in the appropriate custodial setting. In such cases, if the status determination by CBP or ICE was still in place on the date the asylum application was filed, you should adopt that determination without another factual inquiry. Unless there was an affirmative act by the Department of Health and Human Services (HHS), ICE, or CBP to terminate the UAC finding before the applicant filed the initial application for asylum, you should adopt the previous DHS determination that the applicant was a UAC. In cases in which a determination of UAC status has not already been made, you should make an initial determination of UAC status.

**Minor Principal and Unaccompanied Minor Fields in RAPS**

In August 2007, the Asylum Division incorporated a new mechanism in RAPS to capture data on minor principal applicants, both accompanied and unaccompanied.[171] The mechanism allows the Asylum Division to track applicants who are unaccompanied minors and reminds you that modified procedures are in order when handling a minor principal applicant's claim. The ability to gather information on the adjudication of unaccompanied minors' applications assists the Asylum Division in developing or refining policy with regard to these cases.

**Definition of Minor Principal, Unaccompanied Minor, and Unaccompanied Alien Child (UAC)**

- **Minor Principal**

A minor principal is a principal applicant who is under eighteen years of age at the time of filing an asylum application.

- **Unaccompanied Minor**

For purposes of making a determination in RAPS as to whether the applicant is an unaccompanied minor, an unaccompanied minor is very similar to an

[171] Joseph E. Langlois, USCIS Asylum Division, *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, Memorandum (Aug. 14, 2007). See the memo for more details about the commands used in RAPS to capture this data.

unaccompanied alien child (UAC). An unaccompanied minor is a child who is under eighteen years of age and who has no parent or legal guardian in the United States who is available to provide care and physical custody.[172] This definition encompasses separated minors, e.g., those who are separated from their parents or guardians, but who are in the informal care and physical custody of other adults, including family members. Note that a child who entered the United States with a parent or other adult guardian but who subsequently left the parent's or guardian's care would be considered an unaccompanied minor.

For purposes of the unaccompanied minor definition, guardianship refers to a formal (legal/judicial) arrangement. If the parent is deceased and there is no legal guardianship arrangement, the child would be considered unaccompanied.

- **Unaccompanied Alien Child (UAC)**

The Homeland Security Act of 2002 defines aUAC as a person under 18 years of age, who has no lawful immigration status in the United States, and who either has no parent or legal guardian in the United States or has no parent or legal guardian in the United States who is available to provide care and physical custody.[173] Other than defining a UAC as a person who has no lawful immigration status in the United States, the term "unaccompanied minor" as adopted in the August 2007 Asylum Division memo is the same as the term "unaccompanied alien child (UAC)." The definition of a UAC is important, as USCIS has initial jurisdiction over asylum applications filed by UACs even if the UAC is in removal proceedings.

**Submission of Juvenile Cases to HQASM for Quality Assurance Review**

Certain asylum claims filed by principal applicants under the age of eighteen or considered an unaccompanied alien child at the time of filing must be submitted to the Headquarters Asylum Division (HQASM) for quality assurance review before

[172] *See* Section 462 of the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (defining the term "unaccompanied alien child").

[173] Section 462 of the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2).

they can be finalized.[174] HQASM review is required of certain cases filed by minor principal applicants in the purely affirmative asylum context or by UAC minor principal applicants with pending removal proceedings who are before USCIS by virtue of the TVPRA's initial jurisdiction provision. Asylum Offices should check the most recent version of the Quality Assurance Referral Sheet for the categories of children's cases that require HQASM review.

**Applications from Children without Parental Knowledge or Consent**

**A Child's Capacity to Apply and Who Speaks for the Child**

Statutorily, subject to the filing bars, "[a]ny alien who is physically present in the United States or who arrives in the United States," without regard to immigration status, has the right to apply for asylum.[175] Under certain circumstances, however, children may lack the capacity to assert this right to apply for asylum. In the case of young children who lack the capacity to make immigration decisions, you will need to determine who has the legal authority to speak for the child. Generally, the parent will have the authority to speak for the child, unless (as discussed below) there are conflicts between the parent's and child's interests that prevent this.

There is no age-based restriction to applying for asylum. Where an asylum application is submitted on behalf of a child by someone other than the child's parent or legal guardian, however, USCIS need not "process…applications if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for ignoring the parents' wishes."[176] In the case involving Elian Gonzalez, an application for asylum was filed on behalf of a six-year-old Cuban boy against the wishes of his father in Cuba. INS determined that the child did not have the capacity to seek asylum on his own behalf, and that it was his father who had authority to speak for him in immigration matters.[177] Important to INS's decision was the finding that Elian was not at risk of

[174] Joseph E. Langlois, Chief, Asylum Division, *Issuance of Revised Quality Assurance Referral Sheet and Instructions on Submission of Certain Claims for Quality Assurance Review*, Memorandum (Feb. 9, 2007); John Lafferty, Chief, Asylum Division, *Changes to Case Categories Requiring Asylum Headquarters Review*, Memorandum (Jan. 27, 2014). *See also* Ted Kim, Acting Chief, Asylum Division, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by UAC*, Memorandum (May 28, 2013), which explained that in cases in which CBP or ICE has already determined that the applicant is a UAC, Asylum Offices will adopt that determination and take jurisdiction over the case. The memorandum clarified that in those cases, if the UAC status determination was still in place on the date of the initial filing of the asylum application, USCIS would take initial jurisdiction over the case even if there appeared to be evidence that the applicant may have turned 18 as of the date of initial filing; and those cases will still receive HQ-QA review as juveniles.

[175] INA § 208(a)(1); 8 C.F.R. § 103.2(a)(2).

[176] Bo Cooper, INS General Counsel, *Elian Gonzalez*, Memorandum (Jan. 3, 2000).

[177] *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

persecution or torture, that Elian's father had Elian's best interests in mind, and that the father did not have conflicts of interest that would prevent him from representing the child's best interests in immigration matters. The Eleventh Circuit upheld the INS policy, noting that line-drawing on the basis of age is an adequate approach to determining who may individually file for asylum.

In contrast, older children may have the capacity to assert a claim. In *Polovchak v. Meese*, a Seventh Circuit case involving a twelve-year-old boy's grant of asylum counter to his parents' wishes to return to Russia, the court evaluated the applicant's capacity to assert his individual rights as part of the court's procedural due process balancing test: "At the age of twelve, Walter was presumably near the lower end of an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents; at age seventeen (indeed, on the eve of his eighteenth birthday), Walter is certainly at the high end of such a scale, and the question whether he should have to subordinate his own political commitments to his parents' wishes looks very different. The minor's rights grow more compelling with age, particularly in the factual context of this case."[178] While the court was not evaluating capacity to apply for asylum, its findings on age and capacity to assert individual rights are nonetheless instructive in the asylum context. Although the court acknowledged that a child may have the capacity to assert a claim, it found that the parents had a significant liberty interest in being notified of the claim and given an opportunity to participate

## Confidentiality and Notification of Parents

Federal regulations governing asylum adjudications generally do not permit the disclosure to third parties of information contained in or pertaining to an asylum application without the written consent of the applicant.[179] As a general matter, however, we would notify the parent of a claim by a child when the parent does not seem to be the one submitting the claim. Where a child lacks capacity and a parent or legal guardian has the authority to speak for the child, that parent or legal guardian may not in fact be a third party as a legal matter, so that notification of the parent or legal guardian will not implicate the asylum confidentiality provisions in 8 CFR § 208.6.[180] Further, even in cases where a child has capacity to assert a claim, the parent's liberty interest in directing the interests of their child generally requires notification of and an opportunity to participate in the proceedings, unless such notification would pose a serious risk to the child (such as in cases involving

[178] *Polovchak v. Meese*, 774 F.2d 731, 736-37 (7th Cir. 1985); *see also* 8 C.F.R. § 103.2(a)(2) (providing that a parent or legal guardian may sign an application or petition of a person under the age of fourteen); 8 C.F.R. § 236.3(f) (providing for notice to parent of juvenile's application for relief).

[179] 8 C.F.R. § 208.6.

[180] *See Polovchak*, 774 F.2d at 735 (noting "the fundamental importance of the parents' interest in the residence, nurture and education of a minor child, then twelve or thirteen").

abuse or where the parent is involved in the persecution). Where a child applies for asylum without the parents' knowledge and/or consent, many complex issues are raised, and the Asylum Office should contact HQASM to coordinate in addressing any issues relating to the child's capacity to apply for asylum, potential conflicts between a child's and the parents' interests concerning the asylum application, or notification of the parent.

**Affirmative Asylum Process for Unaccompanied Alien Children**

In 2008 the TVPRA made USCIS responsible for adjudicating all asylum claims of unaccompanied alien children (UACs). It was recognized that unaccompanied children would benefit from a non-adversarial interview in lieu of the adversarial process of the immigration courts.[181] Responsibility for adjudicating their protection claims has moved from the immigration courts to the affirmative asylum system of USCIS.

The TVPRA is discussed in detail in the ADOTC since most of its provisions do not apply to children seeking refugee status outside the United States.

**ASM Supplement – Bars to Applying for Asylum**

**One-Year Filing Deadline**

The TVPRA amended the INA to state that the one-year filing deadline does not apply to unaccompanied alien children.[182] As of the TVPRA's effective date of March 23, 2009, when you determine that a minor principal applicant is unaccompanied, you should forego the one-year filing deadline analysis and conclude that the one-year filing deadline does not apply. The one-year filing deadline continues to be applicable for accompanied minor principal applicants (those with a parent or legal guardian) and for adult principal applicants. Additionally, as the unaccompanied alien child definition includes the element that the child may not have lawful immigration status, the one-year filing deadline must still be analyzed for in-status unaccompanied minors.

[181] 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*, Memorandum (HQRAIO 120/12a) (Mar. 25, 2009).

[182] *See* INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A). For additional information, see Asylum lesson plan, One-Year Filing Deadline.

Accompanied minors and in-status unaccompanied minors may qualify for the extraordinary circumstances exception to the one-year filing deadline based on legal disability.[183] While unaccompanied minors are specifically listed in the regulations as an example of a category of asylum applicants that is viewed as having a legal disability that constitutes an extraordinary circumstance for the purposes of the one-year filing deadline, the circumstances that may constitute an extraordinary circumstance are not limited to the examples listed in the regulations. The same logic underlying the legal disability ground listed in the regulations is relevant also to accompanied minors: minors, whether accompanied or not, are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.

As long as an accompanied minor applicant applies for asylum while still a minor (while the legal disability is in effect), the applicant should be found to have filed within a reasonable period of time. Depending on the circumstances of each case, after reaching the age of 18, the applicant may also establish that he or she has filed within a reasonable period of time.

In *Matter of Y-C-*, petitioner, an unaccompanied fifteen-year-old, attempted to file an asylum application with an Immigration Judge five months after being released from over a year in immigration custody.[184] The Immigration Judge refused to accept the application, but the petitioner successfully filed a second application within one year of being released from custody. The BIA found that the petitioner had established extraordinary circumstances because "he did not, through his own action or inaction, intentionally create these circumstances, which were directly related to his failure to meet the filing deadline." Note that this case was decided before the TVPRA's amendment to the INA to exclude unaccompanied minors from the one-year filing deadline took effect.

**Safe Third Country**

As of March 23, 2009, the provision in the INA that allows an individual to be barred from applying for asylum based on a safe third country agreement cannot be applied to an unaccompanied alien child.[185] The Safe Third Country Agreement between the United States and Canada, currently the only safe third country agreement between the United States and another country, already has an exception for unaccompanied minors. Even if future safe third country agreements are created, INA § 208(a)(2)(E), as created by the TVPRA, does not permit a safe third

[183] 8 C.F.R. § 208.4(a)(5).

[184] *Matter of Y-C-*, 23 I&N Dec. 286, 288 (BIA 2002).

[185] *See* INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A). *See also* INA § 208(a)(2)(A) ; Asylum lesson plan, Safe Third Country Threshold Screening.

country agreement to apply to unaccompanied alien children.

**Serious Nonpolitical Crime**

The Child Soldiers Accountability Act of 2008 (CSAA), which was signed into law and became effective on October 3, 2008, creates both criminal and immigration prohibitions on the recruitment or use of child soldiers.[186] 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. 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 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).[187] The regulations are pending publication. 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. It is still an open question whether the statute permits an exemption for children under the age of 15.

**ASM Supplement – Other Immigration Statuses Available to Children**

**Special Immigrant Juvenile Status**

Special Immigrant Juvenile (SIJ) status provides legal permanent residency under certain conditions to unmarried children present in the United States who are under twenty-one years of age.[188] First, a juvenile must be declared dependent on a state juvenile court or legally committed to, or placed under the custody of, an agency or department of a state, or an individual or entity appointed by a State or juvenile court, and the juvenile court must find the child's reunification with one or both of

[186] 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 the Child Soldiers Accountability Act, Public Law No. 110-340*, Memorandum to Field Leadership (Dec. 31, 2008); CSAA, sec. 2(b)-(c).

[187] CSAA, sec. 2(d)(1). *See also* Asylum lesson plan, Mandatory Bars to Asylum and RAIO Training Module, *Discretion*.

[188] INA § 101(a)(27)(J) .

his or her parents not viable "due to abuse, neglect, or abandonment, or a similar basis found under State law" and must determine that "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence." Second, the Department of Homeland Security must consent to the grant of SIJ status. In cases where the child is in the custody of the Department of Health and Human Services (HHS), the Secretary of HHS must specifically consent to juvenile court jurisdiction to determine the custody status or placement of an alien.

**Victims of Trafficking or Criminal Activity**

The T visa is available to aliens present in the United States who have been the victims of a severe form of trafficking in persons, who are physically present in the United States on account of such trafficking, and who "would suffer extreme hardship involving unusual and severe harm upon removal."[189] Aliens must comply with governmental requests for assistance in investigation or prosecution of the acts of trafficking, though persons unable to cooperate due to physical or psychological trauma or those under the age of eighteen are exempt from this obligation. After three years of continuous presence from the date of admission as a nonimmigrant, the T visa holder may adjust status.

The U visa is available to aliens who have "suffered substantial physical or mental abuse as a result of having been a victim" of qualifying criminal activity, which violated U.S. law or occurred in the United States.[190] The person must possess information related to the criminal activity and have been helpful or be likely to be helpful in the investigation or prosecution of the criminal activity. Where the person is under sixteen years of age, a parent, guardian, or next friend may possess information and assist in the investigation or prosecution, in the place of the child under sixteen. A U visa holder may adjust status after three years of continuous presence from the date of admission as a nonimmigrant.

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

[189] INA § 101(a)(15)(T)(i).

[190] INA § 101(a)(15)(U)(i). *See* USCIS Adjudicator's Field Manual, chapter 39, for further details.

## REQUIRED READING

None

## ADDITIONAL RESOURCES

1. Policy Memorandum from the Office of the Director, *Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes; Updates to Adjudicator's Field Manual (AFM) Chapters 21.4, 21.5, 21.6, 21.10 and 71.1; AFM Update AD12-10* (PM-602-0070) (9 July 2012).

2. Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, concluded at the Hague 29 May 1993, entered into force for the United States April 1, 2008.

3. Memorandum from Lori Scialabba, Associate Director, Refugee, Asylum & International Operations Directorate, and Don Neufeld, Acting Associate Director of Domestic Operations, USCIS, to Field Leadership, *Intercountry adoption under the Hague Adoption Convention and the USCIS Hague Adoption Convention rule at 8 CFR 204, 213a and 322*, (HQDOMO 70/6.1.1-P) (31 October 2008).

4. Memorandum from Lori Scialabba, Associate Director, Refugee, Asylum & International Operations Directorate, and Don Neufeld, Acting Associate Director of Domestic Operations, USCIS, to Field Leadership, *Acceptance of an I-600A and I-600 after 4/1/2008 for a child habitually resident in a Hague Adoption Convention country – adoptions and grants of custody obtained before April 1, 2008*, (14 July 2008).

5. U.S. Department of State's adoption website: www.adoption.state.gov

## SUPPLEMENTS

**IO Supplement**

**Adoptions**

Most RAIO adjudications involving adoptions are intercountry adoption applications and petitions, reviewed by Overseas Adjudications Officers. A special unit covers this subject during the IOTC. However, their work is described briefly

here. Additionally, Refugee Officers sometimes have to sort out issues related to the validity of a claimed adoption during their adjudications.

**Intercountry Adoptions**

U.S. citizens adopt children from all over the world. International Operations officers adjudicate intercountry adoption cases filed by prospective adoptive parents (PAPs) residing both within and outside the United States.

In general, two separate intercountry adoption processes exist: 1) Orphan processing under INA § 101(b)(1)(F), and 8 CFR section 204.3, and 2) Hague Adoption Convention processing under INA §101(b)(1)(G), and 8 CFR section 204.300. Therefore, PAPs interested in adopting a child from another country must first decide on the specific country from which they will adopt. The procedures and laws USCIS officers apply in intercountry adoptions depend on whether the Hague Adoption Convention governs the adoption.

International Operations officers only adjudicate applications and petitions related to the Orphan process. The USCIS National Benefits Center in Lee's Summit, Missouri currently processes all Hague-related applications and petitions. In both processes, the USCIS officer will determine the prospective adoptive parents' suitability and eligibility to adopt a child and the child's eligibility to immigrate to the United States.

In addition to the two intercountry adoption processes described above, International Operations officers may also adjudicate Immediate Relative petitions on behalf of adopted children under INA § 101(b)(1)(E).

U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

*RAIO Combined Training Course*

# CORE VALUES AND GUIDING PRINCIPLES FOR RAIO EMPLOYEES

TRAINING MODULE

*This Page Left Blank Intentionally*

# Core Values and Guiding Principles for RAIO Employees

**Course:** RAIO Combined Training

**Terminal Performance Objective:** In working to fulfill the mission of the Refugee, Asylum, and International Operations Directorate (RAIO), you, as an officer at RAIO, will recognize the core values and guiding principles of the Directorate, and understand how the concrete goals set by management for each division are used to measure success in fulfilling the mission.

**Enabling Performance Objectives:**

1. Describe the mission of RAIO.
2. Examine the goals that RAIO endeavors to achieve consistent with DHS and USCIS strategic goals and USCIS core values.
3. Explain the guiding principles and core values to which RAIO adheres.
4. Identify the unique role that RAIO plays within USCIS and the overall protection environment.

## 1. RAIO Overview

The Refugee, Asylum, and International Operations Directorate (RAIO) is responsible for extending protection and humanitarian assistance, and providing other immigration benefits and services to eligible persons both domestically and internationally. Our officers play a critical role in extending citizenship and immigration benefits to eligible individuals while exercising vigilance in matters involving fraud detection and national security. RAIO also maintains effective intergovernmental liaisons; engages in consultations for capacity building of protection systems in other countries; implements bilateral information sharing agreements for identity management and confidentiality; and advances USCIS strategic priorities in the international and refugee protection arenas.

RAIO has a distinct mission within USCIS and DHS. This is our mission:

> With a highly dedicated and flexible workforce deployed worldwide, the Refugee, Asylum, and International Operations Directorate will excel in advancing U.S. national security and humanitarian interests by providing immigration benefits and services with integrity and vigilance and by leading effective responses to humanitarian and protection needs throughout the world.

The Strategic Goals set by RAIO are to:

1. Responsibly provide protection, humanitarian and overseas immigration benefits, and information services;

2. Mitigate systemic vulnerabilities of the U.S. immigration system through RAIO's mission and international presence; and

3. Effectively and efficiently support RAIO's mission delivery.

RAIO consists of three operational divisions: the Refugee Affairs Division, the Asylum Division, and the International Operations Division, as well as a directorate-level management support organization. The total number of staff in RAIO is 1298. RAIO has a global presence at 25 U.S. Embassies and Consulates in 22 countries within three Districts (Click here for map). Additionally, RAIO conducts refugee interviews in more than 60

international locations (Click here for map). Domestically, there are eight Asylum field offices (Click here for map), as well as the Headquarters units in Washington, D.C., Anaheim, California, and Miami, Florida.

The **Refugee Affairs Division** (**RAD**) has approximately 155 authorized positions and is the DHS entity responsible for administering the U.S. Refugee Admissions Program along with the Department of State and other stakeholders. It includes Refugee Officers who conduct interviews overseas with refugee applicants identified for possible resettlement to the United States, as well as security vetting and liaison with anti-fraud and law enforcement colleagues to ensure adjudication integrity. RAD is also responsible for conducting protection screenings for migrants interdicted at sea by the U.S. Coast Guard.

The **Asylum Division** (**Asylum**) has approximately 828 authorized positions. Asylum is responsible for the adjudication of affirmative asylum applications, credible fear and reasonable fear screenings, and the adjudication of applications filed under Section 203 of the Nicaraguan Adjustment and Central American Relief Act ("NACARA 203"). Asylum personnel engage in various fraud detection and deterrence strategies that promote the integrity of the U.S. immigration system. Asylum officers also contribute to the mission of RAD by serving on refugee processing circuit rides overseas to adjudicate refugee claims.

The **International Operations Division** (**IO**) has approximately 225 employees United States and in 22 other countries. Employees include foreign nationals in addition to US citizens, and approximately 40 percent of the IO staff is composed of foreign nationals. IO is charged with advancing the USCIS mission in the international arena and adjudicating immigration benefit requests for admission into the United States. The types of petitions and applications adjudicated overseas are: naturalization of U.S. military personnel and their dependents, family-based and orphan petitions, following-to-join refugees and asylees, and issuance of travel documents to people outside the United States. IO also authorizes parole requests from individuals outside the U.S. due to a compelling emergency, administers the Cuban Haitian Entrant Program (CHEP), and assists RAD with refugee processing. In addition, IO engages with foreign government officials, representatives of international organizations, and non-governmental organizations (NGOs) from countries around the world to promote the mission of the agency.

In order to realize the strategic goals set by the Associate Director of RAIO, it is important to be familiar with the RAIO Strategic Plan found here. The annual performance goals and

metrics set for the Directorate reflect the values outlined in the Strategic Plan and each one maps back to a DHS Priority and the USCIS Strategic Plan. Reviewing these documents will assist you in understanding your specific role and how it contributes to the RAIO mission within USCIS.

## 2. Core Values of USCIS

USCIS has identified four core values to which all employees must adhere. These values are:

- Integrity
- Respect
- Ingenuity
- Vigilance

- **Integrity**

  We shall always strive for the highest level of **integrity** in our dealings with our customers, our fellow employees, and the citizens of the United States of America. We shall be ever mindful of the importance of the trust the American people have placed in us to administer the nation's immigration system fairly, honestly, and correctly.

- **Respect**

  We will demonstrate **respect** in all of our actions. We will ensure that everyone we affect will be treated with dignity and courtesy regardless of the outcome of the decision. We will model this principle in all of our activities, with each other, our customers, and the public. Through our actions, USCIS will become known as an example of respect, dignity, and courtesy.

- **Ingenuity**

  As we meet the challenges to come, we will strive to find the most effective means to accomplish our goals. We will use **ingenuity**, resourcefulness, creativity, and sound management principles to strive for world-class results. We will approach every challenge with a balance of enthusiasm and wisdom in our effort to fulfill our vision.

- **Vigilance**

In this era of increased global threats and national security challenges, we will remain mindful of our obligation to provide immigration services in a manner that strengthens and fortifies the nation. We will exercise a holistic approach to **vigilance** as we perform our mission. We will carefully administer every aspect of our immigration mission so that new immigrants and citizens can hold in high regard the privileges and advantages of lawful presence in the United States.

The core values that all USCIS employees must adhere to are directly tied to the specific mission of the RAIO Directorate. Each day RAIO employees listen to stories of human indignity and apply domestic and international law which may or may not extend permanent protection to these vulnerable people and those seeking a new life in the U.S. Due to the severity of the consequences of making a decision that leads to *refoulement*, RAIO employees must be fully prepared to adjudicate cases with quality and integrity. RAIO places a premium on training for its employees. We have an extensive initial training program and continual training throughout one's career that keeps employees apprised of the changes in law, policies, and procedures that are necessary for adjudicating humanitarian-based immigration applications. We also have one hundred percent supervisory review of refugee and asylum determinations.

## 3. RAIO Principles for Upholding the USCIS Core Values

- Respect all individuals and communities with whom we work irrespective of their culture, religion, or other customs and values.
- Be cognizant of the different cultures or customs you may encounter where you are residing or working so as not to compromise the image and interests of the U.S. Government.
- Demonstrate respect for human rights and the right of every man, woman, and child to live in dignity free from discrimination. Provide special consideration for the most vulnerable populations, e.g. children, LGBTI individuals, survivors of torture or gender-based violence.
- Uphold U.S. protection responsibilities and fully understand and adhere to the RAIO role in protection and the provision of other immigration benefits. Enhance the integrity of RAIO programs, including ensuring public safety and the security of the United States through proper administration of our immigration laws.
- Exercise sound judgment in all matters of official business, including outside the workplace, particularly when on duty overseas.

- Understand the distinct and unique roles and responsibilities of all actors in the protection environment and immigration field.
- Work collaboratively with other entities to fulfill commitments to facilitate an effective and efficient immigration process.
- Proactively facilitate access to information that may be shared with other agencies and organizations, but safeguard access to information that must remain confidential.
- Promote the safety, health, and welfare of RAIO employees engaged in work domestically and abroad.
- Exhibit the highest standard of integrity at all times and expect the same from peers, superiors, and subordinates.
- Uphold your duty to report allegations of waste, fraud, and abuse.
- Alert proper authorities when learning of serious abuse or violations of human rights.
- Uphold your duty to immediately report allegations of misconduct to the USCIS Office of Security and Integrity (OSI) and/or the Department of Homeland Security's (DHS) Office of Inspector General (OIG).

**Practical Exercise**

In order to demonstrate your knowledge of the USCIS core values and RAIO guiding principles, please think of the types of situations you may encounter on the job that will require you to apply these values and principles. Write down at least two scenarios and be ready to share them during the face-to-face portion of the course.

## 4. As an Officer of the U.S. Government . . .

As an officer at RAIO, you have been entrusted with enormous responsibility by the U.S. Government. You must conduct yourself at all times, both at the workplace and at all other times, with the utmost professionalism and integrity. You may not engage in any outside activity or business that directly or indirectly conflicts with the performance of your duties.

When abroad, your workdays and personal days are similar to that of Foreign Service Officers of the Department of State or Peace Corps Volunteers --- workdays and personal

days are not divided by a bright line with separate rules and responsibilities. Rather, you must maintain the highest standards of integrity and professional conduct 24 hours per day, 7 days per week, in the international environment. Conduct that shows poor judgment or lack of discretion which may affect an individual or the Agency's ability to carry out its mission is not acceptable.

Oath of Office

At the end of this course, when you graduate and become an officer at RAIO, you will take an Oath of Office. In taking this Oath, you are agreeing to serve your country with integrity and vigilance, mindful of the confidence and trust placed in you by your fellow Americans.

**Oath of Office**

*I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.*

—5 U.S.C. § 3331

When taking the oath of office you are assuming a position of public trust. It is your duty to uphold the Constitution, laws, and regulations of the United States and never be a party to their evasion. You must put loyalty to the highest moral principles and to country above loyalty to any persons, party, or department and it is incumbent upon you to safeguard information that is learned in the performance of your duties.

Furthermore, when taking the oath, you are affirming your commitment to ensure the integrity of the immigration process and to conduct yourself with professionalism and integrity at all times. We must all do our part to live up to our Oath of Office and strive to protect our workplaces from the serious harm caused by cases of corruption and bribery. As a RAIO officer you have a responsibility to abide by the core values of USCIS and guiding principles of RAIO, described in this document.

> Our work is too important, and our reputation too valuable, to allow for the USCIS name to be tarnished. It's up to each of us to do our part to be vigilant and mindful of the confidence placed upon us by our fellow Americans.
>
> —USCIS Senior Leadership

# OTHER MATERIALS

## Reporting Allegations of Misconduct

### You have a duty to report allegations of misconduct

All USCIS employees have a duty to report allegations of misconduct by both USCIS employees and contractors. Examples of alleged misconduct that must be reported immediately to OSI and/or DHS OIG include, but are not limited to:

- Fraud, corruption, bribery, and embezzlement,
- Theft or misuse of funds and theft of government property,
- Perjury,
- Physical assault,
- Unauthorized release of classified information,
- Drug use/possession,
- Unauthorized use/misuse of sensitive official government databases,
- Misuse of official position for private gain,
- Misuse of a government vehicle or property,
- Failure to properly account for government funds,
- Unauthorized use/misuse of a government purchase or travel card,
- Falsification of travel documents,
- Falsification of employment application documents,
- Misconduct by an employee at the GS-15 level or higher, and
- Arrest of an employee or contractor by law enforcement personnel, including your own arrest.

**How to report misconduct to OSI Investigations**

Allegations of misconduct are to be reported immediately to OSI by any of the following methods:

- Completing the USCIS Employee Misconduct Reporting Form online through the UCSIS intranet
- Faxing allegations to OSI at 202-233-2453, or
- Mailing allegations to OSI at the following address:

  Chief, Investigations Division
  Office of Security and Integrity MS 2275
  U.S. Citizenship and Immigration Services
  633 Third Street NW, 3rd Floor
  Washington, DC 20529-2275

**An employee or contractor may also report any allegation to the DHS Office of the Inspector General by any of the following methods**:

- Calling the toll-free DHS Hotline at 1-800-323-8603
- Faxing the OIG at 202-254-4297
- Emailing the OIG at dhsoighotline@dhs.gov, or
- Mailing the OIG at the following address:

  DHS Office of Inspector General/MAIL STOP 0305
  Attention: Office of Investigations - Hotline
  245 Murray Lane SW
  Washington, DC 20528-0305

**What happens next?**

Depending upon the nature of the allegations, OSI may:

- Refer the matter as required to the DHS OIG for review and investigative determination,

- Conduct an investigation,
- Refer the matter for an official Management Inquiry, or
- Refer the matter to the appropriate USCIS manager for information and action as necessary.

Employees may be subject to disciplinary or adverse action, up to and including removal from the Federal Service, for substantiated misconduct.

U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

## *RAIO Combined Training Course*

# CREDIBILITY

TRAINING MODULE

Note: The Asylum Supplement is not included in this module; it will be added at a later time. For this reason, the Asylum Supplement is in draft.

*This Page Left Blank Intentionally*

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

# CREDIBILITY

## Training Module

## MODULE DESCRIPTION

This module provides guidance on evaluating the credibility of an applicant's testimony, factors upon which a credibility determination may be based, factors upon which a credibility finding may not be based, and how to determine whether any non-credible aspects of a claim affect eligibility. Additionally, the module provides guidance on how to handle credibility issues 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. Distinguish between appropriate and inappropriate factors to consider in evaluating credibility of the applicant and the evidence presented.
2. Distinguish between minor v. substantial and internal v. external inconsistencies in the evidence presented by the applicant.
3. Identify credibility issues raised in cross-cultural communication among parties to the interview.
4. Identify the role of corroborating documentary evidence in evaluating credibility of the applicant and the evidence presented.
5. Address credibility problems at the interview.
6. Explain the analytical framework for a credibility determination.

## INSTRUCTIONAL METHODS

Interactive presentation

Discussion

Practical exercises

## METHOD(S) OF EVALUATION

Multiple-choice exam

Observed practical exercises

## REQUIRED READING

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

| Task/ Skill # | Task Description |
|---|---|
| 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 relevancy 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) |

## SCHEDULE OF REVISIONS

| Date | Section (Number and Name) | Brief Description of Changes | Made By |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

## TABLE OF CONTENTS

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

"If you give me six lines written by the most honest man, I will find something in them to hang him."

– Cardinal Richelieu (1585–1642), Prime Minister of France

"Anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness's entire testimony, few trials would get all the way to judgment."

–Kadia v Gonzales, 501 F.3d 817, 821 (7th Cir. 2007).

# 1 INTRODUCTION

Evaluating the credibility of an applicant's testimony is fundamental to the evaluation of eligibility and, in many cases, is the determining factor. You must make an independent judgment as to the applicant's credibility in every case. While making your decision, you must remain impartial and unbiased.

All applicants for asylum and refugee status must submit an application form and must be interviewed. 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. Other interviews conducted by officers in the RAIO Directorate, such as asylee/refugee following-to-join, naturalization, orphan, and certain relative petition cases, may also require an interview

and a credibility determination. The main purpose of the interview is to elicit and provide information related to eligibility for an immigration benefit or for some other official purpose. The interview also provides an opportunity for the interviewee to ask questions that he or she may have and to present relevant information.

This module provides guidance on general considerations in evaluating the credibility of an applicant, factors upon which a credibility determination may be based, factors upon which a credibility finding may not be based, and how to determine whether any non-credible aspects of a claim affect eligibility. Additionally, the module provides guidance on how to handle credibility issues that arise during the interview. The division-specific supplements provide guidance on how to record your credibility analysis – in asylum adjudications through the assessment or Notice of Intent to Deny (NOID) (See ASM Supplement Decision-Writing); in refugee adjudications through the assessment form (See RAD Supplement –Decision Recording; and in international operations through the Adjudications Worksheets and, where appropriate, Service Center return memoranda and decision letters.

## 2 GENERAL CONSIDERATIONS

### 2.1 Duty to Remain Neutral

Your duty as an adjudicator is to remain neutral and unbiased. You must evaluate the record as a whole and fairly assess the testimony and evidence you have gathered and which the applicant has presented to you.

### 2.2 Burden of Proof - A Cooperative Approach

A non-adversarial interview requires a cooperative approach between you and the applicant. While the applicant must establish eligibility, you have a duty to fully and fairly develop the record – by conducting country of origin information research, where applicable, by carefully reviewing the file, and by eliciting testimony during the interview.

In the asylum and refugee context, credible testimony may be enough for the applicant to meet his or her burden unless you decide that corroborating documentation is necessary. In such cases, the applicant must provide the corroborating evidence unless he or she does not have it and cannot reasonably obtain it.

### 2.3 Take into Account the Factors as a Whole

It is crucial that you consider all the evidence available to you when analyzing an applicant's credibility. In discussing the proper approach to credibility determinations, the Third Circuit outlined the following approach, stating that:

[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. Where, as here, the asylum applicant has presented testimony that was for the most part quite detailed, internally consistent, materially in accord with his asylum application, and accepted by the [adjudicator], and there is supportive evidence of general country conditions and some corroborative documentation of the applicant's testimony, the [adjudicator] is not justified…in concluding that the applicant is not credible based on a few equivocal aspects not logically compelled by the record or by reason or common sense.[1]

*Examples*

- ***Matter of Pula***

  The BIA found that the credibility of an applicant's testimony was not impeached by minor discrepancies in the written asylum application, which was prepared by interpreters, "[i]n view of the detail, consistency, and candor of the applicant's lengthy testimony."[2]

- ***Matter of O-D-***

  The BIA upheld an immigration judge's (IJ) negative credibility finding in the asylum case of an 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 respondent is insufficient to overcome the pall cast on the respondent's credibility by virtue of his submission of the counterfeit document."[3]

- ***Matter of B -***

  Negative factors in a case must be balanced against positive factors to determine whether, on the whole, an applicant is credible. This proposition holds true even

[1] *Jishiashvili v. U.S. Attorney General*, 402 F.3d 386, 396 (3d Cir. 2005).

[2] *Matter of Pula*, 19 I&N Dec. 467, 472 (BIA 1987).

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

where there are several factors that may point toward a lack of credibility. For example, in *Matter of B-* the BIA considered an IJ's negative credibility finding based on several factors – the applicant's allegedly evasive demeanor while testifying, inability to remember exact dates, departure to the U.S. while his brother and family remained behind, and failure to have others from Afghanistan testify to corroborate his general experience. In overturning the IJ's determination, the BIA, "impressed with the indications of the applicant's truthfulness," accepted the applicant's explanations for not looking at the judge while testifying and his inability to remember exact dates. The BIA also rejected the relevance of the applicant's brother's staying behind and discounted his failure to provide corroborating evidence that would have been of limited usefulness. Because the applicant's testimony was consistent throughout the examination and lengthy cross-examination, consistent with his written application, and contained no embellishments, the BIA found that on the whole, the applicant was credible.[4]

- ***Matter of Kasinga***

  Taking into account all the factors as a whole refers not only to the whole of the applicant's testimony, but also to the individual circumstances of each applicant. The BIA rejected a negative credibility finding that was based upon an alleged lack of rationality, persuasiveness, and consistency in the applicant's presentation, finding that the 19-year-old applicant presented a plausible, detailed, and internally consistent asylum claim. The BIA considered the applicant's age (17) at the time of her flight from her country, her father's death, her separation from her mother and control by an "unsympathetic aunt," her long journey to the U.S., her eight months in INS detention at several facilities, and her explanations for any possible credibility concerns when determining that the applicant was credible.[5]

## 2.4 No Moral Component

There is no moral component to credibility determinations. The purpose of evaluating the credibility of an applicant is solely to determine eligibility, not to punish the applicant if he or she is untruthful.

The fact that an applicant may have made untrue statements during an interview raises questions about the veracity of the claim and should be considered. However, not all untrue statements lead to a denial or referral of the application.

---

[4] *Matter of B-*, 21 I&N Dec. 66, 70-71 (BIA 1995).

[5] *Matter of Kasinga*, 21 I&N Dec. 357, 364 (BIA 1996).

*Example*

A Salvadoran citizen told an INS enforcement officer that he was Mexican. When the applicant applied for asylum, he asserted that he was Salvadoran. The Court of Appeals for the Ninth Circuit found that the immigration judge erred in finding that the misrepresentation made the applicant ineligible for asylum. The misrepresentation supported the claim for asylum eligibility, because the applicant's misrepresentation to the enforcement officer whom he feared might deport him was consistent with the applicant's testimony that he feared deportation to El Salvador.[6]

## 2.5 Credibility Concerns Must Be Clearly Articulated

A credibility finding must be clearly articulated and based on objective facts. It cannot be based on "gut feelings" or intuition, as intuition and gut feelings are unreliable, particularly when interviewing a stranger from a different culture through an interpreter. To ensure that your credibility determination is fair and impartial, follow the analytical framework outlined below.

# 3 AN ANALYTICAL FRAMEWORK FOR CREDIBILITY DETERMINATIONS

You must evaluate credibility in every case and carefully analyze the applicant's testimony in light of all of the evidence in the record. After gathering all the facts, if you find that the applicant is not credible, you must provide a specific, clearly articulated basis for the adverse credibility finding.7

An applicant's retelling of his or her story to you during the interview will inevitably have some flaws. Evaluating those flaws is fundamental to the evaluation of eligibility and arguably the most challenging part of your job.

The testimony an applicant gives during the interview must be reasonably detailed, consistent with what he or she and others say and have said before, and plausible in light of logic. This testimony is evidence, just like a passport is evidence of identity or a human rights report is evidence of the political and economic conditions of a specific country or region.

---

[6] *Turcios v. INS*, 821 F.2d 1396 (9th Cir. 1987).

[7] *See*, e.g., *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998); *Hajiani-Niroumand v. INS*, 26 F.3d. 832 (8th Cir. 1994); and *Malek v. INS*, 198 F.3d 1016 (7th Cir. 2000).

The credibility determination is an evidentiary determination. It is the basis upon which you decide what evidence to use in your assessment and how much weight to give that evidence.

***Factors upon which a Credibility Finding Must Be Based***

An applicant's testimony is credible if it is detailed, consistent, and plausible. Therefore, a clear and well-articulated basis for a negative credibility finding should accurately describe significant material flaws in consistency, detail, and/or plausibility.

The REAL ID Act of 2005 added some additional factors that may be considered in making a credibility determination, all based on prior case law. As discussed below, these factors apply only to asylum determinations and should be considered only as part of a negative credibility determination that finds flaws in consistency, detail, and/or plausibility. See "Other Relevant Factors" below.

You can minimize subjectivity in your credibility determinations by taking a methodical approach and using the following analytical framework, derived from existing statutory guidance and case law. This framework provides a step-by-step process for determining whether flaws in the applicant's testimony might lead to a negative credibility finding.

- Step One: Identify the type of credibility concern
- Step Two: Determine if the concern is material (relevant) to the claim
- Step Three: Inform the applicant of your concern
- Step Four: Ask the applicant to explain
- Step Five: Assess the reasonableness of the explanation

If there are no significant material flaws in the applicant's testimony, the applicant is credible.

## 3.1 Step One: Identify the Type of Credibility Concern

There are four factors upon which you must always assess the credibility of an applicant's testimony:

1. Detail
2. Internal Consistency
3. External Consistency
4. Plausibility

There are other relevant factors that may be taken into consideration when making a credibility determination, but which must be used with caution and only after you have determined whether the testimony contained material flaws in detail, internal consistency, external consistency, or plausibility. *See* Other Relevant Factors below.

You must learn to identify and distinguish among these factors. For example, a political activist is unable to tell you the name of the party leader. Is this a lack of detail or a plausibility factor?

### 3.1.1 Detail

#### General Rule

An applicant should be able to provide sufficient detail to indicate first-hand knowledge of the events that form the basis of his or her claim. Therefore, the applicant's ability or inability to provide detailed descriptions of the main points of the claim is critical to the credibility evaluation. The applicant's willingness and ability to provide those descriptions may be directly related to your skill at placing the applicant at ease and eliciting all the information necessary to make a proper decision.[8] Impatience with an applicant or frequent interruptions may result in the applicant providing fewer details.

It is reasonable to assume that a person relating a genuine account of events that he or she has experienced will be able to provide a higher level of detail, especially sensory detail, about that event than he or she could if the account were not genuine. A person claiming a leadership role in an opposition political party should be able to provide more detail about the inner workings of the party, the leadership and the party goals, than someone who was merely a supporter. The more recent the event the greater the level of detail an applicant may be capable of providing. It is reasonable to expect more detail from an applicant describing events that took place within the past year than if he or she were describing events that took place several years ago.

The more detailed testimony an applicant gives, the more opportunities there will be for it to contain inconsistencies and contradictions. This is true for even the most truthful applicant. 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.

#### Factors That Impair Memory

In evaluating whether an applicant has provided sufficient detail to indicate first-hand knowledge of events, you must take into account the amount of time that has elapsed

[8] See RAIO Training Modules, Interviewing: Eliciting Testimony and Interviewing: Introduction to the Non-Adversarial Interview.

since the events occurred; the possible effects of trauma; the applicant's background, education, and culture; and any other factors that might impair the applicant's ability to remember. Additionally, you should exercise caution 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. If several people are questioned about an event they experienced together, each will probably remember different details. The applicant will not necessarily remember the type of detail you would remember in a similar situation.

**Your Duty to Elicit Detail**

The applicant may not know the type of detail you seek and may believe that stating simply that he or she was arrested, without more, is sufficient to answer your question, "What happened?" Furthermore, in the refugee context, since the applicant may already have divulged the details to a case worker, he or she may believe that you already have the details.

It would be improper to find that an applicant failed to provide sufficient detail without first attempting to elicit detail from the applicant with follow-up questions. The purpose of the interview is to elicit all relevant and useful information bearing on the applicant's eligibility for the benefit being sought. Keep in mind that in a non-adversarial interview you control the interview. Therefore, you cannot reach a negative credibility finding based on lack of detail if you do not pose questions regarding the specific detail you are requesting.

*Example*

**Follow-up Questions Regarding an Arrest**

"Please describe exactly what happened to you when you were arrested."
"Where were you when you were arrested?"
"Where were you taken when you were arrested?"
"What was said to you when you were arrested?"

As with any credibility concern, if the applicant does not provide a reasonable amount of detail about an incident when asked specific questions, you must inform the applicant of your concerns and provide the applicant an opportunity to address those concerns and offer explanations for the lack of detail.

*Examples*

- "I've asked several questions about the circumstances surrounding your arrest, and you have only told me the place and time you were arrested. Please

provide me with information about where you were taken and how you were treated."

- "If you are unable to provide these additional details, please explain to me why you cannot."

- "You said that you printed political leaflets several times at your office and that you had to hide to do so. However, you told me you cannot describe the leaflets, where you got the paper, or how you were able to hide from your co-workers. Please explain why you cannot tell me these things."

If after being asked follow-up questions focusing on specific details, the applicant still cannot provide any detail about the arrest, and if there is no explanation for the applicant's inability to provide detail, the applicant may be found not credible.

**The Applicant's Obligation to be Truthful**

Just as you are obligated to elicit relevant details, the applicant is required to tell the truth and fully cooperate with you in establishing the facts of his or her claim. The applicant must:

- supply all pertinent information concerning him or herself and past experience in as much detail as is necessary to enable you to establish the relevant facts

- give a coherent explanation of all the reasons invoked in support of his application and should answer any questions you ask

- make an effort to support his or her statements by providing any available evidence, by giving satisfactory explanations for any lack of evidence, and by making every reasonable effort to procure necessary evidence

*Example*

**(Incorrect Adverse Credibility Finding Due to Lack of Detail)**

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

*Example*

**(Correct Adverse Credibility Finding Due to Lack of Detail)**

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 has happened to [him]," but the applicant declined to do so.[9]

### 3.1.2 Consistency

An applicant's statements (oral or written) that are internally consistent, consistent with the applicant's other statements, and consistent with other evidence in the record, such as country conditions reports, may support a positive credibility finding.10

An applicant's testimony may contain minor inconsistencies and omissions that generally will not, alone, undermine credibility. However, substantial, material inconsistencies or omissions are a negative factor that can lead, when viewed as part of the record as a whole, to an adverse credibility finding.11

Minor mistakes, such as those that result from faulty memory, may not reliably indicate that a claim is not credible. Whether an inconsistency is considered minor or substantial depends not only on the nature of the inconsistency, but also on the record as a whole.

Inconsistencies may arise during the course of the interview when the applicant contradicts himself or herself, or when the documentation presented by the applicant contradicts the claim. For example, a passport submitted to establish identity 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 and/or, in overseas refugee processing, between family members on cross-referenced cases.[12] In the following-to-join context, you may identify inconsistencies between

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

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

[11] *See Ismaiel v. Mukasey*, 516 F.3d 1198 (10th Cir. 2008) (...the significance of an omission must be determined by the context, and rigid rules cannot substitute for common sense.), *Pop v. INS*, 270 F.3d 527 (7th Cir. 2001); (inconsistencies went to the heart of the asylum claim). *See also Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (discrepancies not significant enough to support adverse credibility finding).

[12] Refugee resettlement cases will often be cross-referenced with other family members. For purposes of refugee interviews, discrepancies between cross-referenced cases would be considered an inconsistency, though confidentiality should be considered when addressing such issues with the applicant. In the asylum context, RAPS

information in the principal refugee or asylum application and the following-to-join family member's testimony. These would be external credibility issues. Inconsistencies between the applicant's claim and reliable country conditions information would be considered external credibility flaws.

**Internal Consistency**

Dealing with internal consistency requires you to assess whether "[t]he material facts are coherent and internally consistent with facts asserted by the applicant, witnesses or dependents, and with any [personal] documentary evidence relied upon by the applicant,"[13] such as identity documents. It is for you to consider how well the evidence fits together and whether or not it contradicts itself.

In the assessment of internal consistency, you should watch for the level of detail and the introduction of inconsistencies, keeping in mind at all times that there may be mitigating circumstances in some cases, such as mental or emotional trauma, inarticulateness, fear, or mistrust of authorities.[14] When dealing with either internal or external consistency make certain that you inform the applicant of your concerns (without violating confidentiality of other's asylum or refugee claims) and give the applicant an opportunity to address those concerns and offer an explanation.

*Examples*

The following are examples of inconsistencies or omissions that, standing alone, generally would not lead to a negative credibility finding:

- The applicant failed to list on his written application two incidents that involved harm to relatives and that were collateral to his claim.15

may reveal cases of related family members, but for confidentiality purposes those cases should not usually be referenced in the decision making process. In the following-to-join context, information in the refugee or asylum application may relate to family relationships, including when and how the following-to-join applicant last had contact with the principal. While confidentiality rules preclude you from informing the applicant of those inconsistencies, they may direct the line of questioning to probe more deeply into the related issues. If some contradictory information comes to your attention, it should be treated as an external inconsistency since there is no legal connection between the two cases.

[13] European Asylum Curriculum Course on Evidence Assessment, online materials sub-module 3, unit 3.2 "Assessing the Claim's Credibility" (Oct. 28, 2010).

[14] James A. Sweeney, *Credibility, Proof and Refugee Law*, 21 Int'l J. Refugee L. 700 (2009).

[15] *Aguilera-Cota v. INS*, 914 F.2d 1375 (9th Cir. 1990).

- The applicant stated on his written application that he had been shot at, but stated in oral testimony that he had never been shot at. The applicant explained that his representative (or in the refugee context, the RSC or UNHCR) was the one who made the statement in the written application and the applicant signed without reading it.[16]

- There was an inconsistency between applicant's statement on the application that he and his brothers were accosted by "unknown armed men," and his testimony that they were accosted by "death squads."[17]

The last example is an example of a very common perceived inconsistency that results when an officer fails to clarify language in an interview. It is very easy to resolve such inconsistencies during the interview. "When you say 'death squads,' what do you mean?"

### 3.1.3 External Consistency

External consistency relates to country of origin information (COI),[18] known facts, and other pieces of evidence provided by the applicant or ascertained by you in the course of your investigation.

**Consistency with Known Objective Information**

Material facts asserted by the applicant should be consistent with generally known facts and your COI research. Where relevant, you are required to conduct research into COI. In conducting that research you should keep in mind the difference between assessing the likelihood of future persecution and the more immediate task of determining whether the material facts asserted by the applicant in relation to past or current events are consistent with country information.

When an asylum or refugee applicant has established his or her general credibility (i.e., is sufficiently detailed, internally consistent and plausible), you can accept a claimed fact as credible when there is reliable COI to support the applicant's evidence about a material fact, and other reliable evidence does not contradict the applicant's account. 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 well find COI information to support the applicant's claim that there was such a protest at that place and time. If so, the applicant's testimony is externally consistent. Not all protests or other events, however, will be documented in COI. Nevertheless, you may still find those applicants

[16] *Garrovillas v. INS*, 156 F.3d 1010 (9th Cir. 1998).

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

[18] For additional information in using COI in adjudication, *see* RAIO Training Module, *Researching and Using Country of Origin Information in RAIO Adjudications*.

credible based on their testimony. When in doubt, discuss the issue with your supervisor who may discuss the issue with the RAIO research unit.

**Contradictory Reliable Country of Origin Information**

Reliable COI that clearly contradicts a claimed material fact is a negative credibility factor.

*Example*

> An applicant gives the name of a member of parliament representing the area where the applicant lived and voted, but reliable COI gives a different person as the member of parliament representing the applicant's area.
>
> Keep in mind, however, that politicians are voted in and out, so you should make sure the COI you consult relates to the relevant period when the politician was elected to parliament and the relevant area where the applicant lived– the current country report may not provide this information. When you see a contradiction, make sure that it applies to the right period of time. Verify external information before applying it to the facts of the case.

Where there is a perceived inconsistency, you must confront the applicant to give him or her an opportunity to explain the inconsistency. You should review the record to ensure that you have permitted the applicant an opportunity to explain prior to dismissing the applicant from the interview. In some cases, inconsistencies between the applicant's statements and COI may not be discovered until after the interview. In such a situation the nature of the discrepancy must be analyzed. In some cases, the circumstances may warrant a re-interview of the applicant. You should consult with your supervisor about how to proceed.

**Lack of Country of Origin Information**

With some claimed incidents or events there will be no corroborative objective evidence that the incident/event actually took place. This in itself would not be proof that the incident/event did not occur. 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. It may well be that the media is suppressed by the authorities in the particular country, and such incidents are purposely not reported.

**Use Caution**

Countries' circumstances can change rapidly, and the most recent COI may not reflect the current situation. Also, use caution in evaluating an applicant's lack of knowledge regarding events or organizations in his or her country. An applicant may be unaware of

the clandestine activities of part of his organization due to a high level of secrecy within the organization or the applicant may be from a rural area to which news does not easily reach and the interviewee's viewpoint may be extremely localized. An applicant's gender, level of education, and/or socioeconomic status may also play a role in the type of COI knowledge the individual has or can reasonably be expected to have. *See* RAIO Training Module, *Researching and Using Country of Origin Information in RAIO Adjudications*.

***Examples***

The following are examples of substantial inconsistencies that may lead to a negative credibility determination if the applicant does not provide a reasonable explanation for the inconsistency. As you read them, determine whether these inconsistencies would be considered "internal" or "external:"

- The applicant testified that she was arrested and detained only once; however, she stated in her written application that she was arrested and detained twice and provided a detailed written description of each detention.

- The applicant initially testified that he fled his home the same day that he was threatened and went into hiding in a distant village. Later, the applicant testified that he stayed in his home village and continued to work for several weeks after he was threatened.

- The applicant claimed to have been harmed because she was a member of a political party in 1984, but country conditions reports establish that the party was not founded until 1990.

- 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. Examination of her school transcript indicated that she received high marks in conduct throughout her years in school.[19]

- 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. His

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

mother's letter, introduced as evidence, conflicted with all of the applicant's versions of the story.[20]

### 3.1.4 Plausibility

The facts asserted by the applicant should be plausible. That is, they should conform to objective rules of reality. 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.

Being improbable or unlikely is not the same as being implausible. Improbable things happen frequently. What may appear to be implausible in the United States may be very common in another country.[21] In determining whether an applicant's story is plausible you should take great care to avoid substituting your own subjective feelings about how the world works for an objective determination of whether the events described by the applicant could be possible. Do not rely on your views of what is plausible based on your own experiences, which are likely to be quite different from the applicant's. Additionally, it is important to recognize that exceptional events do occur.

The finding that aspects of an applicant's claim are implausible must be supported by evidence in the record and may not be based on your personal beliefs or opinions. Your "finding that an applicant's testimony is implausible may not be based upon speculation, conjecture, or unsupported personal opinion."[22] "Personal beliefs cannot be substituted for [the] objective and substantial evidence" necessary to support a plausibility/implausibility finding.[23]

If you determine that an applicant's testimony is not plausible, you should provide an explanation with specific and clearly articulated reasons for your determination.

The fact that no corroboration of the existence of a particular group or event is found in country reports generally does not render the claim implausible. The weight to be given to the fact that country conditions information fails to corroborate a claim depends on the specific allegations, the country, and the context of the claim.

---

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

[21] *See Cordero-Trejo v. INS*, 40 F.3d 482 (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.")

[22] *Elzour v. Ashcroft*, 378 F.3d 1143, 1153 (7th Cir. 2004); *Jishiashvili v. U.S. Attorney General*, 402 F.3d 386, 393 (3d Cir. 2005).

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

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."[24]

When an applicant testifies in an interview to a material fact that seems implausible to you, always question the applicant closely about the details surrounding that material fact. If the applicant is able to provide a consistent and reasonable explanation of how the event occurred, that portion of the testimony is credible.

***Examples/Practical Exercise***

Read the following fact patterns. For each example, determine whether the statement is plausible or implausible. We will discuss in class.

1. The applicant claimed that, although she was detained at the county jail two miles from her brother's home, she watched, unaided by technology, from a jail window as the police entered her brother's home and arrested him.

   Plausible or implausible? _____
   Explain: _____

2. The applicant's claim indicated that she was pregnant with the same child for 16 months. When confronted with the implausibility of this, the applicant explained: "That is how we do it in my country."

   Plausible or implausible? _____
   Explain: _____

3. The applicant claimed that the Stalinist Courts in Switzerland had persecuted him.

   Plausible or implausible? _____
   Explain: _____

4. A prison guard risked a government career by accepting a bribe of a gold bracelet.

   Plausible or implausible? _____
   Explain: _____

5. The applicant claimed that "the Moroccan government commonly forced political dissidents to leave the country and to sign a document promising never to return

[24] *Jishiashvili*, 402 F.3d at 393.

(or, at least not for ten years)." A report from the State Department indicated that "[t]here are no known instances of enforced exile in Morocco and that the government offered self-imposed exiles amnesty starting in 1994."[25]

Plausible or implausible? _____
Explain: _____

6. A university-educated man said he spoke Punjabi, Hindi, Bengali, and English, could not read or write Punjabi, although he claimed to have lived in Punjab and operated a business there for eight years.[26]

Plausible or implausible? _____
Explain: _____

### 3.1.5 Other Relevant Factors

Other relevant factors include demeanor, candor, and responsiveness. These factors apply only in asylum adjudications. When considering these, use the analytical framework in this lesson to determine if a credibility concern is material and relates to detail, consistency, and/or plausibility. *See* ASM Supplement – REAL ID and Other Relevant Factors for these additional factors that you may take into consideration in the asylum context.

## 3.2 Step Two: Determine if the Credibility Concern is Material

A fact is material if it would influence the outcome of the eligibility determination because it relates to a required legal element. *See* "Applicant's Burden" in RAIO Training Module, *Evidence*. Another way to say this is a fact is material if it goes to the heart of the claim. If there are inconsistencies found, are they material to the claim? Do they lead to a conclusion that the applicant's evidence is not credible? If the answer is no to both questions, there is no credibility concern.

In asylum claims, a credibility concern need not go to the heart of the claim. *See* ASM Supplement – REAL ID Act and "Other Relevant Factors."

## 3.3 Step Three: Inform the Applicant of Your Concern

Insufficient detail: "Why can't you tell me more about…?"

Inconsistency within the testimony: "Earlier in the interview you said X, now you are saying Y…"

---

[25] *See* *Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001).

[26] *See* *Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003).

| | |
|---|---|
| Inconsistency between the testimony and other evidence: | "Your I-589 says X, now you are telling me Y…" |
| Implausibility: | "How is it possible that…?" |

### 3.4 Step Four: Give the Applicant an Opportunity to Explain

The following are suggested phrases for eliciting an explanation:

"Help me understand . . ."

"Why is there a difference between what is on your application and what you told me today?"

"Please explain to me . . ."

"Who completed this form?"

### 3.5 Step Five: Assess the Reasonableness of the Explanation

To determine if an explanation is reasonable, you should apply the same factors that are used to make initial credibility determinations. Ask yourself whether the explanation is detailed, consistent, and/or plausible. If it is, then the explanation is reasonable and the applicant is credible on that point. If the explanation is vague or inconsistent with another part of the record or the applicant's testimony, or implausible in light of logic or country conditions, then it is not reasonable and a negative credibility determination is justified.

*Examples*

Examples of reasonable explanations, depending on the context, include:

- I am sorry, my memory is poor and I misspoke earlier.
- The date on the application is the date using the calendar from my home country and is different from the one used in the United States.
- When the police came to my house the first time, they did not arrest me, that is why I told you I have only been arrested once.

## 4 What May Not Be Considered in Making a Credibility Determination

There are a number of factors that should not be considered when making a credibility determination. The factors listed below are some of those; this is not an exhaustive list. Some of the following factors are always inappropriate to consider in evaluating credibility because they do not shed light on whether or not an applicant is credible. Other factors discussed below may be considered with caution or may lead you to test the applicant's credibility further during the interview. None of the factors, however, can form the sole basis for finding that a claim is not credible.

## 4.1 An Officer's Views of a Country or Situation

You may have lived in or traveled in a particular country, or you may have formed opinions about a country based on the experiences of friends or associates. Although knowledge gained from such experiences or contacts may be useful in developing lines of questioning during the interview or when gathering additional reliable COI, such personal knowledge is not evidence and your decision cannot be based in any way on such personal opinions and views.

## 4.2 An Officer's Moral Judgment

Your moral judgment of an applicant's behavior is irrelevant to a determination of whether or not events occurred as the applicant described. Moral judgments can never form the basis for a credibility determination. For example, in unusually strong language, the Ninth Circuit found it was inappropriate for the immigration judge to find that an applicant was not credible because he failed to marry the mother of his two children.[27]

## 4.3 An Officer's Personal Opinion about How an Individual Would Act

Your opinion about how an individual would act in a given situation or that an applicant has not acted rationally is irrelevant to a determination of whether or not events occurred as the applicant described. The comparison of how an applicant acted in a given situation to how the officer believes a "rational person" would act in such a situation is not a reliable indicator of credibility. What is rational to one person is not necessarily rational to another person, particularly if the two are from different backgrounds or cultures. Additionally, people do not always act rationally. For example, it would be inappropriate to find an applicant not credible because the officer believes that no rational woman would place herself at risk by publicly distributing anti-government pamphlets in a country where dissent is not tolerated and women do not take part in political life. If the facts of the case lead the officer to believe that the applicant acted in a manner that was unusual in light of the applicant's country and background, it is appropriate to ask the applicant about his or her behavior, in a non-adversarial, nonjudgmental manner, or to

[27] *Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986).

test credibility by asking for additional detail. For example: "I understand that it must have been dangerous for you to distribute the pamphlets. What led you to take this risk?"

### 4.4 Use of an Attorney

The fact that the applicant files an application prepared by an attorney or consults with an attorney before making a statement does not indicate whether the application or statement is true or not. An applicant may be afraid to reveal information to a government official, or may not know which information is important to reveal, until consultation with an attorney.

However, if a statement made after receiving advice from an attorney contradicts an earlier statement made by the applicant, then you should elicit further information to determine whether there is a reasonable explanation for the change in testimony. Such inconsistencies and explanations should be considered in the same manner as any other inconsistencies and explanations that may arise in a case.

### 4.5 Self-Serving Statements

"Self-serving" refers *only* to statements that serve no purpose and provide no evidence, such as the statement, "I never tell lies." You may disregard self-serving statements.

An applicant's own statement in support of his or her claim is generally not a self-serving statement and you must consider it. Almost all the statements an applicant makes at the interview are made in an attempt to obtain a benefit. The fact that a supporting statement is made by the person seeking the benefit is not an indication that the statement is not relevant, reliable or credible.

### 4.6 Delay in Filing the Claim

The fact that an applicant did not apply for asylum or refugee status as soon as possible does not mean that the applicant fabricated the claim. A genuine refugee may wait until he or she is in a safe country before making a claim, may be unaware of his or her eligibility for refugee status, and /or may be unaware of the procedures for obtaining refugee status. If it is relevant to the claim, it is important to ask why the applicant delayed in filing and assess the applicant's response.

### 4.7 Contact—Or Lack of Contact—with U.S. Embassy

The fact that an asylum or refugee applicant did not approach the U.S. Embassy in his or her home country is not necessarily relevant to a determination of whether or not events occurred as the applicant described. An applicant may have felt unsafe waiting in the country for the application to be processed, or may have believed that applying for a visa would have placed him or her at further risk. On the other hand, the applicant's ability to obtain a visa may present a legitimate line of questioning during the interview. However, unless that part of the

testimony is materially inconsistent with the applicant's claim, it cannot form the basis for a negative credibility finding.

(Note: U.S. Embassies do not have authority to adjudicate claims for refugee or asylum status. They may refer cases to USCIS to make a refugee status determination, but they rarely do so.)

## 4.8 Failure to Apply for Refugee Status in a Third Country

The fact that an asylum or refugee applicant failed to apply for refugee status in a third country does not mean that the applicant lacks credibility. There may be many reasons why an applicant who fears persecution in his or her home country did not apply for protection in a third country, including economic, political, or family reasons. In such circumstances, it is important to ask the applicant why he or she did not apply in the third country and assess his or her answer.

## 4.9 Similar Claims

The fact that the applicant's claim is similar to other claims is not in itself determinative of credibility, because there are reasons that claims may be similar that are unrelated to the applicant's credibility. For example, an applicant's claim may be similar to other applicants' claims because there is a pattern of persecution in the applicant's country, resulting in many similar claims. Or, the applicant may have a genuine claim, but several other applicants copied it and filed their own claims based on the same or similar facts.

However, unrelated claims may also be similar because the applicants went to the same source for a fabricated claim. You may come across some "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 basis for an adverse credibility determination but may alert the officer to look particularly closely at the credibility of the claim. You must provide the applicant with an opportunity to present the full claim and explain any discrepancies between the testimony and the application in order to determine whether the applicant's claim is credible.

The following are two types of "boilerplates" you may encounter in the asylum or refugee context:

### 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."[28] Citing Singh

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

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.'"[29]

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, if not known; under what circumstances; and how the people who signed the affidavits had knowledge of the content. The officer should point out to the applicant the extreme similarity in the documents and provide the applicant 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.

In refugee processing, it is unlikely that the applicant would submit an affidavit from a witness. Applicants' statements are taken by UNHCR and/or the RSCs and the applicants, except in exceedingly unusual circumstances, do not have assistance of counsel or others outside the program to aid in their case preparation.

**Inter-proceeding similarities**

The Second Circuit upheld an IJ's adverse credibility finding based on a comparison of striking similarities found in affidavits that were submitted separately in unrelated asylum applications.[30]

The court warned of the problems that such findings could entail, identifying four possible explanations for such similarities:[31]

- 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

---

[29] *Mei Chai Ye v. USDOJ*, 489 F.3d 517, 524-26 (2d Cir. 2007) ("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").
[30] *Mei Chai Ye v. USDOJ*, 489 F.3d 517 (2d Cir. 2007).
[31] *Id.* at 524.

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."[32] 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,
    a. there is any likelihood that they are mere coincidence, or;
    b. it is plausible that different asylum applicants inserted truthful information into a standardized template or, for illiteracy reasons, conveyed it to a scrivener tied to an unchanging style, or;
3. the similarities are due to a common translator converting valid accounts into similar stories, or
    a. the applicant was an innocent victim of plagiarism.
4. Rigorously comply with procedural safeguards concerning notice,[33] 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.[34]

In the refugee context, there are times when refugees may have similar claims, which may or may not give rise to a credibility concern. Refugees often have spent many years living in either camps or urban settings with other refugees from their country and may

[32] *Id.*
[33] *Id.* at 525 n.5 (explaining in greater detail the protections afforded by the notice requirements).
[34] *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."

have heard that some stories 'work' for getting their cases approved. It does not mean, however, that the person sitting in front of you did not experience the claimed harm; you will need to elicit testimony to determine whether the applicant is credible.

**Considerations**

Confronting an applicant about significant similarities between the applicant's and others' applications raises a number of issues that must be carefully handled, in close coordination with others in your chain of command, including supervisors, FDNS, and, in the overseas refugee processing context, the Refugee Affairs Division's Security Vetting and Program Integrity Branch.

First, the confidentiality of the applicant must not be violated. The Court in *Mei Chai Ye*[35] made clear that an applicant must be given meaningful notice of the similarities and 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 the any ongoing investigation is not jeopardized.

Third, an 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. It would not be appropriate to base an adverse credibility solely on lack of truthfulness about the preparation of an application.36 However, such lack of candor may be appropriate to consider along with other relevant factors when evaluating credibility. While being untruthful about the identity of the person who prepared an application is not material to the actual claim, it may be another relevant factor to consider in the totality of circumstances. 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.

## 4.10 Claims That Differ

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

[36] In the overseas refugee processing context, Resettlement Support Center staff who are under cooperative agreement with the Department of State assist the applicant with filling out application forms; as such, this does not apply to refugee applicants.

You may become familiar with certain types of claims originating from a particular country. However, the fact that a given claim may be different from other claims made by refugee applicants from the same country is not necessarily in itself determinative of credibility. Human behavior is rarely consistent, and as a result, events in any given country cannot be expected to always be consistent.

### 4.11 COI Fails To Corroborate Claim

The fact that country condition information does not corroborate the applicant's claim is not necessarily determinative of credibility. In some instances, you may be the first to learn about a particular instance of human rights abuses or other developments in another country. In some refugee-producing countries, freedom of expression and association is non-existent, and human rights monitors are prevented from visiting the country or areas of unrest. This makes it difficult for organizations that document human rights abuses to obtain up-to-date information. Even where human rights monitors have access to a country, they are not able to document every human rights abuse that occurs.

The instance in which COI does not corroborate the claim should not be confused with the instance in which COI is clearly and directly inconsistent with the claim. Where country conditions do not corroborate the claim, the country conditions simply fail to address or shed light on the applicant's situation. Where COI is clearly and directly inconsistent with the claim, COI might show the claim is not plausible. In some instances, the applicant's details may be inconsistent with COI because the applicant experienced or witnessed the event differently.

### 4.12 Ineligibility for Benefit

The fact that the applicant does not qualify for the benefit sought is not relevant to the credibility determination. For example, it is possible that an applicant for refugee status is truly and honestly afraid of future harm, but his or her fears are not objectively reasonable based on country information. Therefore, the applicant's testimony may be credible, but his or her fears are not well-founded.

## 5 ADDRESSING CREDIBILITY AT THE INTERVIEW

The interview is the most important tool that you have in assessing credibility. Most of the direct evidence that you develop for each case will come during the interview. The most important thing to keep in mind during the interview is that it is your responsibility to elicit as much relevant information as you can.

### 5.1 Probing Credibility

In general, the following techniques should aid you in evaluating the credibility of applicants. Some of the techniques discussed below apply specifically to cases in which fraud is suspected.

### 5.1.1 Elicit general biographical information about the applicant at the beginning of the interview to establish a baseline

Such information should include where the applicant lived, with whom he or she lived, whether the applicant continued living at the same residence until departure from his or her country, where the applicant worked, when the applicant stopped working, and information about the applicant's schooling. General biographical information, contained in the application, provides a general picture of the applicant's life. You may then take the applicant's background into account when evaluating the type of information you expect the applicant to be able to provide.

Additionally, applicants who have fabricated asylum or refugee claims sometimes are not prepared for all of the basic background information elicited at the beginning of the interview and therefore may present this type of evidence truthfully. If an applicant has fabricated a claim, it may conflict with this general baseline biographic information, which may alert you that the claim is not genuine.

### 5.1.2 Listen carefully to what the applicant says

Only by listening carefully to the applicant's testimony can you determine whether it is consistent. You should also remain attentive to avoid missing information. If you miss information, you may be unclear about whether information related later in the interview is consistent with information related previously.

### 5.1.3 Elicit as much detail as possible

If an applicant is not credible, he or she may not be able to provide details about the alleged events that form the basis of the asylum or refugee claim. For example, if the applicant claimed to have been a political leader who actively campaigned by giving speeches at rallies, you should consider eliciting information about the party. If the applicant cannot describe basic information about the party (such as its goals or structure), the credibility regarding the extent of his participation in the party is put into question. Furthermore, if an applicant is fabricating a story, asking the applicant to provide greater detail can result in a higher probability of an inconsistency being discovered.

### 5.1.4 When appropriate, ask questions out of chronological order

If an applicant is not telling the truth, he or she may have memorized the story in sequence. If you ask questions so that the applicant is required to describe events out of chronological order, the applicant may not be able to relate the story accurately. Caution must be

exercised, however, because a truthful applicant who is nervous, forgetful, or suffering from the effects of trauma might also become confused when having to explain events out of order. It is also helpful to elicit general baseline biographic information in chronological order, as explained above, before eliciting information about the claim for asylum or refugee status. An applicant who is fabricating a claim may not be able to fit the claim in the chronology of the biographical information. When engaging in this practice, you must take particular care not to create confusion through unclear questioning; instead ensure that the applicant is aware of the precise time period or event about which you are questioning him or her.

### 5.1.5 When appropriate, ask the applicant to explain certain events a second time

If the applicant is not being truthful, he or she may relate events differently the second time. You must exercise caution in assessing whether the two answers provided are actually inconsistent or whether the applicant is just providing additional detail that was not initially requested.

### 5.1.6 Develop a firm understanding of any discrepancy before asking the applicant to explain

Before asking about a discrepancy, it may prove helpful to rephrase questions or repeat back to the applicant what the applicant said to be sure that the meaning is clear. Eliciting additional information surrounding an apparent discrepancy may clarify facts or create a stronger record of the discrepancy. The point is not to trap an honest applicant in a lie, but rather to carefully develop a record of relevant information that you will use to evaluate the applicant's eligibility. Therefore, when you notice one or more inconsistencies, it is important to have a firm understanding of those discrepancies before asking the applicant to explain them.

### 5.1.7 Take careful notes

Evidence of the reasons for a negative credibility finding must be documented in the interview notes. For asylum or refugee interviews, you must record all of your questions and the applicant's answers in a modified Q&A format (*see* RAIO Training module, *Interviewing – Note Taking*). If you have recorded the applicant's statements carefully, you will be able to refer to specific testimony when questioning the applicant about any inconsistencies. This can help avoid confusion and may prevent disputes about what the applicant did or did not say earlier in the interview. Finally, if there is a request for review of the decision, the reviewer must have a clear record in order to understand whether the credibility determination was made correctly.

### 5.1.8 Closely review documents submitted by the applicant

You should carefully examine the contents of any documents the applicant submits when he or she is still in your office, paying particular attention to names and dates. After the

applicant has presented his or her claim, you should compare it with the information in the documents and ask the applicant about any discrepancies. It is often difficult to determine whether documents issued in another country are genuine. If they are not genuine, or if the applicant's claim is fabricated, then the information contained in the documents may not match the details of the applicant's claim or biographical data.

However, you should keep in mind that sometimes applicants obtain false documents in order to leave their country to escape harm. Also, in some countries, it is easier for an individual to pay to get fraudulent civil documents than it is to get genuine documents. Possession of false documents, in itself, may not be a sufficient basis to make a negative credibility finding or to find an applicant ineligible for the benefit sought. In the asylum and refugee context, you must determine whether any discrepancies between documents and the applicant's testimony present inconsistencies that are material to the applicant's claim. When processing asylee/refugee following-to-join cases or family-based immigrant petitions, you may issue a request for evidence and suggest DNA testing when fraudulent documents are submitted to establish a parent-child relationship.

### 5.1.9 Provide the applicant an opportunity to address perceived credibility flaws

Raising a concern regarding a discrepancy does not always have to happen immediately. Sometimes the issue will resolve itself as the claim is developed. Raising each inconsistency immediately can stifle the flow of the interview and the applicant's train of thought. It may confuse the applicant, resulting in the appearance of a credibility issue when in fact none might exist. This could also make you appear skeptical or lacking in neutrality. You should find a way to make note of discrepancies during the interview. Later, at an appropriate time before the close of the interview, you should review all of the discrepancies noted and make sure they have been resolved. *See* RAIO Training module, *Interviewing – Eliciting Testimony*.

As noted above, you must provide the applicant an opportunity during the interview to explain any inconsistency, implausibility, or lack of detail that you discover. The applicant may have a legitimate reason for having related testimony that appears to contain an inconsistency, or there may have been a misunderstanding between you and the applicant. Similarly, there may be a reasonable explanation for a discrepancy or inconsistency between information on the application and the applicant's oral testimony. On the other hand, if the applicant does not offer a reasonable explanation after being given an opportunity to do so, you may make a negative credibility determination.

It is incumbent on you to have sufficiently reviewed the materials in the case file prior to the interview to be able to identify any inconsistencies in the course of the interview and confront the applicant with them at the time of the interview. Nonetheless, there may be some rare situations (for example when submitted documents are later discovered to be fraudulent) in which you discover a discrepancy or misrepresentation only after the

interview. If the inconsistency is material and affects the outcome of the refugee or asylum case, every effort should be made to conduct a second interview. In some cases, a second interview may not be possible. In this type of situation, you should request guidance from his or her immediate supervisor or team leader.

While current case law is silent on how to determine whether an explanation is reasonable, a technique you can employ to assist you in making such determinations is to apply the same factors that are used to make the initial credibility determination. Ask yourself whether the explanation is detailed, consistent, and plausible. If it is, then the explanation is reasonable and the applicant is credible on this point. If the explanation is vague, inconsistent with another part of the record or the applicant's testimony, or implausible in light of logic or country conditions, then it may not be reasonable and a negative credibility determination may be justified. In analyzing whether an explanation for an inconsistency is reasonable, you must be able to articulate specific and cogent reasons. You must also take into account the explanations provided by the applicant.

### 5.1.10 Remaining composed and professional, even if fraud is suspected

You should never argue with applicants. When you ask an applicant to explain the reasons for apparent inconsistencies, implausible statements, or lack of detail, the applicant may become defensive, evasive, and/or argumentative. However, you must remain professional at all times and not argue with the applicant or confront the applicant in a manner or tone that puts an applicant on the defensive. One effective way of doing this is to lead off confronting the applicant about an inconsistency by saying, "Help me understand…" In a non-adversarial manner, you should simply ask the applicant to explain the inconsistency, ask for further clarification if necessary, and write the applicant's explanation in the interview notes.

Similarly, you should remain composed and you must avoid unprofessional body language. If you do not believe an applicant, you should not use body language to convey your disbelief. For example, you should not tap the desk impatiently, ask a rapid series of leading questions, shake your head or laugh in disbelief, or roll your eyes.

## 6 SPLIT CREDIBILITY FINDING

In some cases, you may determine that part of the applicant's testimony is not credible, but that another part is credible. You should identify those parts of the testimony that were found not credible, explain why they were found not credible, and state whether they are relevant to the applicant's claim. You should also identify those parts of the claim that were deemed credible. In some instances, unexplained credibility concerns related to part of the applicant's testimony can be a basis for finding that the entire testimony is not credible.

*Examples*

- In a case involving a Christian from Pakistan, the IJ found credible the testimony that the petitioner was a Christian, but found not credible his account of incidents he claimed to have suffered in Pakistan on account of his religion. The IJ denied based on the adverse credibility finding. The petitioner filed a motion to reopen based on updated country reports that purportedly detailed increasingly harsh conditions for Christians in Pakistan. The BIA denied the motion on the ground that the proffered evidence did not address the IJ's original adverse credibility finding against the petitioner. The Second Circuit found that the new evidence may establish a well-founded fear despite the negative credibility finding on the past persecution claim. The court did not analyze the basis for the adverse credibility finding, only whether that testimony "necessarily infects related but essentially freestanding claims made by the same petitioner." 37 The court held that "an applicant may prevail on a theory of future persecution despite an IJ's adverse credibility finding as to past persecution, so long as the factual predicate of the applicant's claim of future persecution is independent of the testimony that the IJ found not to be credible."[38]

- Likewise, in a case involving an Ethiopian government crackdown on opposition sympathizers, the Seventh Circuit held that the applicant's claim of future persecution was "distinct from her evidence of past persecution concerning her detention and beating for participating in the AAPO."[39] According to the court, "[g]iven these distinct facts, the prior adverse finding need not undermine [the applicant's] theory of future persecution."[40]

- The Ninth Circuit has refused to rely on testimony regarding a subjective fear of future persecution because of an adverse credibility determination of the applicant's past persecution claim. The court held, "[w]e cannot rely on [the applicant's] testimony as establishing the subjective element [of the well-founded fear test], [] because the IJ and the BIA, with substantial basis in the record, found that the 'applicant's testimony [was] not worthy of credence."[41] The court, however, found the applicant's fear of future persecution to be genuine because of the substantial documentary evidence providing strong support for the objective component of the applicant's well-founded fear claim.[42]

- A negative credibility determination with respect to a future persecution claim will not per se defeat an asylum claim where there is evidence of past persecution. In a Chinese forced sterilization case, the Fourth Circuit held that even though an applicant failed to credibly demonstrate a well-founded fear of future persecution, the

[37] *Paul v. Gonzales*, 444 F.3d 148, 154 (2d Cir. 2006).
[38] *Id.*
[39] *Gebreeyesus v. Gonzales*, 482 F.3d 952, 955 (7th Cir. 2007).
[40] *Id.*
[41] *Al-Harbi v. INS*, 242 F.3d 882, 890 (9th Cir. 2001).
[42] *Id.*

IJ erred in failing to consider the applicant's claim of past persecution based on his wife's forced abortion. [43]

## 7 TOTALITY OF THE CIRCUMSTANCES

You must base your credibility determination on the totality of the circumstances in the claim, taking into account any cross-cultural misunderstandings that may have arisen, translation or language difficulties, trauma the applicant has suffered, the applicant's background, your time constraints and the difficulty in evaluating the behavior of a stranger. During your determination, you have a duty to remain neutral and unbiased.

### 7.1 Cross Cultural Misunderstandings[44]

#### 7.1.1 Body language

The meaning of body language varies from culture to culture. These differences can cause the applicant, interpreter, and you to misconstrue the non-verbal signals of one another.

*Examples*

- While indicating affirmation in the United States, nodding the head indicates negation in some other cultures. If you are insensitive to cultural differences, you might erroneously suspect that an applicant is lying when he verbally answers, "No," but at the same time nods his head.

- Eye contact is another 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 in authority. You generally should not view this as a sign of evasiveness.

#### 7.1.2 Customs

A cultural *faux* pas may distract you or the applicant, resulting in responses or non-verbal signals that might be misconstrued as signs of untruthfulness.

*Example*

A female officer might shake the hand of an Asian Buddhist monk, not knowing that this would be considered extremely inappropriate in the monk's culture. This action may disturb the monk (and/or the interpreter) and, until he regains composure, may

[43] *Lin-Jian v. Gonzales*, 489 F.3d 182, 191-92 (4th Cir. 2007).
[44] *See* RAIO Module, *Cross-Cultural Communication*.

cause the monk (and/or the interpreter) to reply to questions in a shaken manner - giving an impression that he is not being forthright.

### 7.1.3 Culturally-based perceptions

To accurately assess credibility, you must be sensitive to differences in culturally-based perceptions.

*Examples*

- Different cultures have different perceptions of and measurements of time. In some cultures, events are remembered not by specific dates, but in reference to seasons, religious holidays, or other important events. Even in cultures where time is measured by calendar, the applicant may be using a different calendar than the Gregorian calendar used in the United States, and errors are sometimes made in translating from one calendar to another.

- In some Asian cultures, a child is considered to be one year old at birth. Thus, an applicant from one of those cultures may state that he or she is 30 years old, while a calculation of the age based on the birth date in the application might indicate that the applicant is 29 years old, by Western standards.

- Identification of family members also varies between cultures. For example, an individual referred to as "brother" in one culture may actually be considered a "cousin" in another culture.

### 7.1.4 Interpreter's or applicant's English speaking ability, language, or dialect[45]

Usually, English is neither the applicant's nor the interpreter's first language. Therefore, their ability to speak and understand English may be limited.

Even if both the applicant and interpreter understand English, misunderstandings may arise from having learned English in another country. There may be nuances of American English with which they are not familiar.[46]

In some cases, the applicant and interpreter may not speak the same first language, or may speak distinctly different dialects of the same language. Using a language or dialect that one or both do not speak or understand fully will cause problems in the interpretation.[47]

---

[45] For additional information, *see* RAIO Module, *Interviewing: Working with an Interpreter.*

[46] *See* *Senathirajah v. INS*, 157 F.3d. 210, 213 and 219 (3d Cir. 1998).

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

Furthermore, the interpreter's and applicant's inexperience with interpretation and the interview process can create an obstacle to good communication. The applicant may speak too rapidly or explain too much at once, making it difficult for all information to be interpreted accurately. Likewise, an officer may ask several questions at once, speak too quickly or give a long explanation. These factors may lead to misunderstandings that, if unresolved, can adversely affect the credibility evaluation.

*Examples*

- An immigration judge ruled that an applicant was not credible due to inconsistencies in his testimony and failure to establish his identity. The Sixth Circuit ruled that the applicant was denied a fair hearing because the interpreter was incompetent. Although the interpreter was fluent in English and Fulani (the applicant's first language), he spoke a different dialect of Fulani than the applicant. An examination of the record indicated several instances of misunderstanding between the applicant and the interpreter.[48]

- An immigration judge found that a Guatemalan applicant was not credible. The U.S. Court of Appeals, Ninth Circuit, found that the record indicated that the Quiché-speaking applicant did not understand some of the questions being interpreted for him. Although the interpreter was interpreting in Quiché, 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.[49]

- A Haitian applicant whose application stated that she lived with her father, was asked where she lived after her father was killed. She replied that she stayed with her relatives in Cape Haitien. In Haitian Creole, there is one word that means both 'parent' and 'relative'—'paran.' The interpreter, however, interpreted the word as 'parents,' causing the officer to doubt the applicant's veracity.

- A Spanish-speaking applicant was asked why she did not immediately flee her country after being threatened. She replied that she could not, using the word "embarazada" meaning that she was pregnant and could not travel. The interpreter stated that she was too "embarrassed" to travel.

## 7.2 Trauma from Flight and Past Persecution[50]

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

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

[50] *See* RAIO Module, *Interviewing Survivors of Torture and Other Severe Trauma.*

Many asylum and refugee applicants have experienced trauma to some degree. Severe trauma such as torture can greatly affect the survivor long after the actual event. Trauma sufferers may not wish to discuss the details of their experiences; they may have difficulty remembering all of the events that occurred; and may exhibit other symptoms, such as an inability to maintain eye contact, loss of composure, anxiety, and suspicion of others. These factors can give the appearance that the applicant is not being forthright at the interview.

## 7.3 Submission of Fraudulent Documents

### 7.3.1 General Rule

***Knowingly*** submitting a false document to prove a central element of an applicant's asylum claim may indicate lack of credibility. "Such fraud tarnishes the [applicant's] veracity and diminishes the reliability of [the applicant's] other evidence."[51]

### 7.3.2 Considerations

"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 asylum eligibility. On the other hand, there may be reasons, fully consistent with the claim of asylum, 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"[52] or lack of knowledge that the document is fraudulent.[53]

The Ninth Circuit agreed with the manner in which the BIA distinguished between the two types of uses of fraudulent documents and their different impacts on a credibility determination:

The BIA set forth a clear division 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.*" (emphasis added)… The BIA concluded [in *Matter of O-D-*] that the applicant's presentation of the fraudulent documents, "submitted to prove a central element of the claim in an asylum adjudication, indicates his lack of credibility." The BIA then carefully distinguished such false presentations from those in the second category of cases. In the second category, the use of false documents to facilitate travel or gain entry does not serve to impute a lack of credibility to the petitioner. The BIA stated, "there may be reasons, fully consistent with the claim of asylum that will

[51] *Matter of O-D-*, 21 I&N Dec. 1079, 1083 (BIA 1998).
[52] *Id.*
[53] *Corovic v. Mukasey*, 519 F.3d 90, 97-98 (2d Cir. 2008).

cause a person to possess false documents, such as the creation and use of a false document to escape persecution by facilitating travel." We [the Ninth Circuit] agree with the BIA's classifications.[54]

Note that for the submission of a false document to support a negative credibility finding, the evidence in the record must establish that the applicant ***knew*** that the document he or she submitted was fraudulent.[55]

*Examples*

- 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."[56]

- 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] 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."[57] The Seventh Circuit upheld the negative credibility finding that was based solely on the submission of these allegedly false newspaper articles.

## 7.4 Personal Background of the Applicant[58]

The level of education or sophistication of an applicant may affect his or her ability to articulate a claim. If you perceive that the applicant is having difficulty articulating a claim, you should review the baseline you established early in the interview to ensure that that you are asking questions appropriate to the applicant's level of involvement, age,

[54] *Akinmade v. INS*, 196 F.3d 951, 955-56 (9th Cir. 1999).
[55] *See, e.g., Corovic v. Mukasey*, 519 F.3d at 97-98 (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).
[56] *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 (6th Cir. 2005).
[57] *Hysi v. Gonzales*, 411 F.3d 847, 852 (7th Cir. 2005).
[58] *See* RAIO Module, *Cross-Cultural Communication*.

history of trauma, or other element and inquire further into the applicant's background to determine if there are reasons, other than lack of credibility, that explain the applicant's inability to express the claim. A close review of the biographical data in the application may give you information that indicates the applicant's level of sophistication.

In questioning an asylum or refugee applicant whose claim is based on religion or membership in an organization, it is important to establish at what level the applicant participated. A mere member or supporter cannot be expected to have the same knowledge as a leader or intellectual in a movement. A clear distinction must be made between adherents and experts.[59]

## 7.5 Time Constraints

Time pressures are a reality for you. However, attempting inappropriately to rush an interview may cause you to lose focus, become impatient, and miss information related by the applicant. This could lead you to believe erroneously that the applicant did not provide enough detail, that there were gaps in the applicant's testimony, or that the testimony was internally inconsistent. Some interviews may simply take longer to conduct in order to evaluate credibility accurately. You should follow your division's procedures in your interview.

## 7.6 Difficulty in Evaluating the Behavior of a Stranger

Generally, you will not have previously encountered the applicants you interview. First impressions of an applicant may be unreliable. Care should be taken to avoid misinterpreting the applicant's actions and words.

For example, an applicant's reticence and confusion in answering questions may indicate that the applicant is shy, did not understand your question, or fears authority figures, rather than indicate that the applicant is not telling the truth. An initial impression that an applicant is truthful because he or she can easily relate the claim may also be erroneous, because the applicant's fluency may be due to an outgoing personality rather than a credible story.

## 7.7 Duty to Be Neutral and Unbiased

Your duty is to adjudicate claims in a neutral manner, free of personal opinions, preferences, and biases. If you are not neutral, as you are required to be, this lack of neutrality may result in erroneous decisions, including erroneous credibility

[59] *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").

determinations. Lack of neutrality can affect the way you view evidence, the way you make a decision, and how you treat an applicant. You should avoid conjecture based on your personal world-view, known approval or denial rates, or your perceptions of fraud in previous cases. Your personal views cannot substitute for actual evidence in the record.

For example, you may have learned that the human rights conditions in country X are among the worst in the world. If you feel that all applicants from there are deserving of refugee or asylee status, you are not adjudicating the case in a neutral manner. This bias should not lead you to overlook inconsistencies in an application from country X or to forget to inquire about mandatory bars, for the applicant before you might not be eligible for protection.

On the other hand, you may have just interviewed several applicants from country X and found them not credible. You cannot assume that all applicants from that country are fabricating their claims. If you do, you have breached your duty to be a neutral adjudicator. Lack of neutrality may cause you to deny otherwise eligible applicants based solely on the country of origin or type of claim presented.

## 8 INVESTIGATING CREDIBILITY ISSUES – SOME TOOLS TO USE IN EVALUATING CREDIBILITY FLAWS

Maintaining your role as a neutral adjudicator can be difficult. As discussed above, your own personal baggage and your own subjective opinions could affect profoundly the outcome of your credibility analysis. Below are four effective aids you can use to help you remain neutral.

1. Except When/Especially When
2. Parallel Universe Thinking
3. Doubting and Believing Scale
4. Temporarily Set aside Decision Making[60]

### 8.1 Except When / Especially When

This is a particularly useful tool when you are basing your decision in whole, or in part, on a generalization. If you are trying to explain your reasons for an adverse credibility determination and you find yourself saying to yourself, "Everybody knows…" you are probably engaging in a generalization of some sort. You need to examine that generalization, try to test it, and, if necessary, narrow it.

[60] This is generally not an option in refugee processing, and is subject to case processing time limitations within other divisions.

You test a generalization in three stages:

- Articulate your generalization.
- Add "except when" and brainstorm as many different circumstances as you can.
- Add "especially when" and brainstorm as many different circumstances as you can.[61]

***Examples***

- A generalization that is used quite often in credibility determinations is *falsus in uno falsus in omnibus*, or false in one thing, false in all things. Stated in plain English, this generalization means: If an applicant has lied about one thing, it is probable that he or she is lying about everything. Ask yourself: How true is this generalization? Post-REAL ID Act, several circuit courts have addressed the issue of *falsus in uno, falsus in omnibus*. The First Circuit has applied this concept and noted, in dicta, that the REAL ID Act endorses it.[62] The Seventh Circuit has rejected the application of this concept, stating:

> The immigration judge failed to distinguish between material lies, on the one hand, and innocent mistakes, trivial inconsistencies, and harmless exaggerations, on the other hand. In effect, he applied the discredited doctrine of *falsus in uno, falsus in omnibus* (false in one thing, false in all things), which Wigmore called "primitive psychology," and in a characterization that we endorsed, an "absolutely false maxim of life."[63]

The Second Circuit has also addressed the issue of *falsus in uno*, but has addressed it using the "Except When/Especially When" analysis. The Second Circuit applied the concept, affirming the immigration judge's adverse credibility determination based on the applicant's submission of a single fraudulent document to prove the nexus element of his claim. In affirming the IJ decision the court looked more closely at the generalization, in order to conform to circuit precedents and identified five exceptions to the general rule, none of which applied in the case before it.[64] The five situations where *falsus in uno* will generally not apply, as identified by the Second Circuit are as follows:

---

[61] D. Binder & P. Bergman, *Fact Investigation: From Hypothesis To Proof* (West Pub., 1984).

[62] *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 23 n. 6 (1st Cir.2007).

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

[64] *Siewe v. Gonzales*, 480 F.3d 160, 170 (2d Cir. 2007).

- A finding that an applicant submitted false evidence does not excuse the assessment of evidence that is independently corroborated.[65]

- The presentation of fraudulent documents that were created to escape persecution may actually tend to support an individual's application.[66]

- False evidence that is wholly ancillary to the alien's claim may, in some circumstances, be insufficient by itself to warrant a conclusion that the entirety of the alien's uncorroborated material evidence is also false.[67]

- A false statement made during an airport interview, depending on the circumstances, may not be a sufficient ground for invoking *falsus in uno*. Aliens may "not be entirely forthcoming" during the initial interview due to their perception that it is "coercive" or "threatening," particularly aliens who may have a well-founded fear of government authorities in general.[68]

- An alien's submission of documentary evidence that the alien does not know, and has no reason to know, is inauthentic, is no basis for *falsus in uno.*

The court engaged in a process similar to "Except When/Especially When" and in doing so crafted a rule that clearly limits the application of the general rule. The "Except When" analysis will help you to find the limits of a generalization and you can use the "Especially When" analysis to help narrow an overly broad generalization.

## 8.2 Parallel Universe Thinking[69]

Parallel Universe Thinking is a process in which you set aside your judgment or disbelief of an applicant's statement or behavior in order to brainstorm on what possible reasons, *in a parallel universe,* might cause a person to actually do what the applicant claimed. This is a tool that helps you overcome your own cultural biases and apply what you have learned about cross-cultural/inter-cultural communications problems. It helps you understand behavior and asks you to brainstorm alternative explanations for the applicant's behavior that you might find initially puzzling or annoying. This tool requires that you suspend your certainty regarding realities you may not yet fully comprehend. It requires that you engage in constructive ignorance, reminding yourself about how much

---

[65] *Poradisova v. Gonzales*, 420 F.3d 70, 77 (2d Cir.2005).

[66] *Lin v. Gonzales*, 445 F.3d 127, 132-33 (2d Cir.2006).

[67] *Zhong v. USDOJ*, 461 F.3d 101 (2d Cir. 2006).

[68] *Guan v. Gonzales*, 432 F.3d 391, 396 (2d Cir.2005).

[69] Bryant and Peters, *Five Habits of Cross Cultural Lawyering, reprinted in* Race, Culture, Psychology, and Law 57-59 (Kimberly Holt Barrett & William H. George eds., 2004).[

you do not know about the applicant, before rushing to judgment. You must try to understand the applicant's world and behavior as *the applicant* understands it.

The goal of "Parallel Universe Thinking" is to avoid jumping to conclusions based on your own cultural biases and recognize that other possible explanations exist. You might find yourself in a position of disbelieving something an applicant tells you about what he or she did, or what was done to him or her, because "people just don't act that way." When you find yourself having such a thought, ask yourself if you were in a "parallel universe," what are some possible explanations for the statement or behavior? Employing the tool of Parallel Universe Thinking will help you understand whether there might be a credible explanation for an applicant's statement or behavior that you might have misunderstood based on cultural or personal bias.

## 8.3 Doubting and Believing Scale[70]

*There was a case of two asylum officers who worked in the same office, under the same supervisor, and who had radically different grant rates—one over 50% and the other under 10%—even though they interviewed the same pool of applicants. When the supervisor was asked why the disparity, he answered, "One officer expects every applicant to be truthful and the other expects every applicant to lie."*

Most people tend to be either "doubters" or "believers" as part of their general outlook on life. Whichever tendency is characteristic of you, it will affect your credibility determinations. One way you can control for your natural tendencies is to subject each case to systematic doubting and believing.

Methodological doubting and believing is a form of critical thinking. Usually critical thinking is thought of as a process in which ideas or information are analyzed through systematic skepticism, subjecting everything to question and accepting nothing on its own. Most people, even those who tend to be believers, are comfortable with critical thinking as an exercise in skepticism. It is harder to play "the believing game"[71] in which you try to be as welcoming as possible to every fact the applicant asserts, actually trying to believe him or her. The purpose of methodological believing is to find the hidden virtues in the applicant's claim—a mirror image of methodological doubting, where the goal is to discover the flaws. You should try to engage in both methods in order to evaluate a claim completely. It is important to know yourself and have some idea of where you tend to fall on the believing/doubting spectrum. If you tend to be a doubter, you should put more effort into methodological believing. If you tend to be closer to the believing end of the scale you should put more effort into methodological doubting.

[70] Peter Elbow, *Embracing Contraries: Explorations in Learning and Teaching* (Oxford, 1986).

[71] Peter Elbow, *The Believing Game and How to Make Conflicting Opinions More Fruitful* http://scholarworks.umass.edu/context/peter_elbow/article/1001/type/native/viewcontent

### 8.4 Temporarily Set Aside Decision Making

If you feel distracted by a behavior or characteristic of the applicant or the applicant's attorney, rather than allowing this immaterial or irrelevant factor to affect your decision-making, you might try this tool. Within reasonable limits, set aside the case and come back to it when the distracting characteristic has faded from your memory. Rely on your notes and reach your decision from the record before you. One BIA Member wrote that reviewing the written record in a case was a "substantial, and much underrated, advantage" that insulated the BIA from "the almost inevitable, and often distracting, frustrations and extraneous factors that could accompany such personal interaction . . ."[72] Because RAIO officers work under significant time constraints that support the goals and integrity of our programs, setting aside a such a case must not interfere with the decision making timeframes established by your office. Speak with your supervisors so that you understand your office policy. This method is generally not available to Refugee Officers engaged in refugee processing overseas, unless they need further guidance from Headquarters.

## 9 CONCLUSION

Assessment of credibility is an evidentiary determination. There is no moral component to credibility; the issue is to determine what evidence is reliable enough on which to base your decision.

## 10 SUMMARY

A methodological approach to credibility breaks the evaluation of credibility down into three determinations.

- Internal consistency— whether the material facts are internally coherent and consistent with facts asserted by the applicant through his or her production of evidence

- External consistency— whether material facts are consistent with independent evidence such as COI or other sources that may be introduced by the applicant or you, the adjudicator

- Plausibility— whether the facts asserted by the applicant conform to the objective rules of reality

[72] *Matter of A-S-*, 21 I&N Dec. 1106, 1114 (BIA 1998)(Schmidt, dissenting).

Credibility analyses should be based on factors such as consistency, detail, and plausibility. You may also consider, in the totality of the circumstances, other factors such as demeanor, candor, and responsiveness; inaccuracies or falsehoods; and any other relevant factor, but you should not base the credibility determination on these factors alone.

Credibility analyses should not be based on such factors as:

- Your moral judgment
- Your personal opinion about how an individual would act
- The fact that applicant's testimony supports his or her application.
- Delay in filing the claim
- Contact— or lack of contact— with the U.S. Embassy
- The fact that the applicant's story is similar to other claims
- The fact that the applicant's story differs from other claims
- The fact that COI fails to corroborate the claim
- The fact that a refugee or asylum applicant's fear does not appear to be well-founded

In the asylum and refugee context, the interview is the most important tool you have in assessing credibility. There are various techniques you can employ to test for credibility, but the most important technique is to conduct as thorough an interview as possible. The more detail you elicit, the better your credibility determination will be. During the interview you should address with the applicant any concerns you have about the applicant's credibility and give the applicant an adequate opportunity to respond to your concerns and attempt to answer them.

# PRACTICAL EXERCISES

## Practical Exercise # 1

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

## OTHER MATERIALS

There are no Other Materials for this module.

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**RAD Supplement**

**Inadmissibility under INA §212(a)(6)(C)**

A principal applicant who lies to obtain, or attempt to obtain, a benefit for himself or herself, or for an unqualified family member, may be inadmissible under INA §212(a)(6)(C). In order to invoke this provision:

1. the misrepresentation must be willful
2. there must be evidence of the lie or misrepresentation (such as DNA findings or contradictory testimony).

General inconsistencies will usually lead to a finding that the applicant is not credible rather than inadmissible under INA §212(a)(6)(C).

## SUPPLEMENT B – ASYLUM DIVISION – DRAFT

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

**Supplement will be added at a later time.**

## REQUIRED READING

1.

## ADDITIONAL RESOURCES

1.

2.

## SUPPLEMENTS

**ASM Supplement**

**Supplement will be added at a later time.**

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

**There are no IO Supplements**

## REQUIRED READING

1.

2.

## ADDITIONAL RESOURCES

1.

2.

## SUPPLEMENTS

**IO Supplement**

**Module Section Subheading**

U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

***RAIO Combined Training Course***

# DISCRETION

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# 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

## 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)

## 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 |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

## TABLE OF CONTENTS

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

# 1 INTRODUCTION

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

- Adjustment of status under Immigration and Nationality Act (INA) §§ 245 and 209(b) (with limited exceptions such as NACARA § 202 and Haitian Refugee

[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.

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 presented in his behalf to determine whether … relief appears in the best interests of this country."[3]

[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).
[3] *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

*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

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

[4] *The American Heritage Dictionary of the English Language*, Fourth Edition Houghton Mifflin Company (2000), available at: http://www.thefreedictionary.com/discretion (last visited October 20, 2011).
[5] *Collins English Dictionary – Complete and Unabridged*, HarperCollins Publishers 2003, available at http://www.thefreedictionary.com/discretion (last visited October 20, 2011).
[6] Ronald M. Dworkin, Is Law a System of Rules?, in *The Philosophy of Law* 52 (R.M. Dworkin ed., 1977).
[7] *Immigration and Naturalization Service v. Doherty*, 502 U.S. 314 (1992).

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. [IO Supplement – Common Forms Requiring Adjudicative Discretion]

### 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.

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]

[8] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).
[9] Morton, John, Director, ICE. *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,*

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, but 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 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.

---

Memorandum to All Field Office Directors, All Special Agents In Charge and All Chief Counsel, (Washington, D.C. June 17, 2011.

[10] 8 CFR § 208.14(c).

[11] INA § 207(c)(1).

[12] See, 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—…).

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 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

[13] 6 U.S.C. § 275.
[14] 8 CFR § 208.13(b)(1)(i); NOTE: This is a different standard than is 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).
[15] *INS v. Abudu*, 485 U.S. 94, 105 (1988); *INS v. Rios-Pineda*, 471 U.S. 444 (1985); *INS v. Bagamasbad*, 429 U.S. 24 (1976).

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 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.

[16] *See* INA §207(c)(3),
[17] *Matter of Marin*, 16 I&N Dec. 581, 586-87 (BIA 1978).

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 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

[18] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press, 1969
[19] INA §240(c)(4)(A)(ii)
[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.*

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. [RAD Supplement – Balancing Positive and Negative Factors] [Asylum Supplement – Balancing Positive and Negative Factors]

### 3.1.4 Totality of the Circumstances

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:

[22] *See* INA § 208(b)(2)(A)(ii).
[23] *Matter of Marin*, 16 I&N Dec. 581, 586-87 (BIA 1978).
[24] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).
[25] *Ibid.*

> "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 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. Recent guidance published by ICE, on the subject of prosecutorial discretion, lists 19 factors that may be taken into account and then ends with the statement, "[t]his list is not exhaustive and no one factor is determinative."[26] 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 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."[27] 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

[26] Morton, John, Director, ICE. *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,* Memorandum to All Field Office Directors, All Special Agents In Charge and All Chief Counsel, (Washington, D.C. June 17, 2011

[27] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

exists, and other evidence attesting to a respondent's good character (*e.g.*, affidavits from family, friends, and responsible community representatives).[28]

### 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.[29]

## 3.3 Weighing Positive and Negative Factors

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.[30] This instruction arises from the fact that the underlying protection

[28] *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).
[29] *Ibid.*
[30] 8 CFR § 208.13(b)(1)(i) (Discretionary referral or denial).

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.[31] 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.[32] 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). [33]

## 4 DISCRETION IN DECISION WRITING

### 4.1 Positive Exercise of Discretion

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."[34]

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.[35]

### 4.2 Negative Exercise of Discretion

[31] 8 CFR § 208.13(b)(1)(iii)(A).
[32] 8 CFR § 208.13(b)(1)(iii)(B); *see Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012).
[33] INA §212(a)(9)(B)(v).
[34] 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).
[35] See USCIS Basic Lesson, *Exercising Discretion*, July 2009, page 11.

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.

## 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."[36] 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

[36] *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

- 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 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.

## PRACTICAL EXERCISES

There are no student materials for practical exercises.

## OTHER MATERIALS

There are no Other Materials for this module.

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

None

### ADDITIONAL RESOURCES

None

### SUPPLEMENTS

**RAD Supplement – Balancing Positive and Negative Factors**

One of the most common applications of discretion you will be called upon to make is the adjudication of form I-602, Application by Refugee for Waiver of Grounds of Excludability. Refugee Officers may be called upon to adjudicate I-602 Waivers in the course of their normal duties adjudicating I-590 applications (Classification as a Refugee). Authority for International Operations Officers to adjudicate I-602 Waivers is delegated in the regulations.[37] The following is an explanation of the factors you should consider in adjudicating I-602 Waivers.

- First you should make certain that the person filing the application is a refugee. The applicant may be classified as a refugee following an interview by a qualified officer from USCIS, or the applicant may be the immediate relative of a refugee who is entitled to derivative status. In addition to having been classified as a refugee, the applicant must be subject to at least one ground of inadmissibility.

- After the eligibility of the applicant to file form I-602 is established, you must consider the specific sections of 212(a) that apply, keeping in mind that sections 212(a)(4), 212(a)(5), and 212(a)(7)(A) do not apply to refugees pursuant to section 207(c)(3). Also remember that

[37] 8 CFR § 207.3(a).

inadmissibility under sections 212(a)(2)(C), 212(a)(3)(A), (B), (C), and (E) is not eligible for a waiver.[38]

- In considering the application for a waiver you must weigh the positive and negative factors presented. In adjudicating a discretionary waiver application under § 207(c) of the INA, the humanitarian, family unity, or public interest considerations must be balanced against the seriousness of the offense that rendered the applicant inadmissible.

- In making this determination, the officer should recognize that the applicant, if the principal refugee, has established past or a well-founded fear of future persecution, which is an extremely strong positive discretionary factor.

- If an applicant is inadmissible under section 212(a)(2) of the Act because he or she committed a crime involving moral turpitude, the officer should not grant a waiver under section 207(c) of the INA except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an applicant clearly demonstrates that denying refugee status would result in exceptional and extremely unusual hardship. In considering whether the seriousness of the applicant's crime you may look to the definition of "aggravated felony" in the Act.[39] If the conviction seems to fit the definition of an aggravated felony, you should assume that it was a serious crime. If the crime does not meet the definition of aggravated felony, another factor you may consider in making the determination of whether the applicant was convicted of a serious crime is whether the type and circumstances of the crime indicate that the alien will be a danger to the community. In making such a determination you should consider:
  - the nature of the conviction
  - the sentence imposed
  - the circumstances and underlying facts of the conviction

- Positive factors to be considered in exercising discretion might include:
  - Likelihood of well-founded fear
  - Family unity
  - Medical needs of the applicant or family members
  - Risk of *refoulment* by the country of first asylum

[38] INA § 207(c)(3).
[39] INA § 101(a)(43).

## SUPPLEMENT B – ASYLUM DIVISION

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

## REQUIRED READING

None

## ADDITIONAL RESOURCES

None

## SUPPLEMENTS

### ASM 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.[40] 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.[41]

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.[42]

4. Next, you look to see if the applicant can reasonably relocate within his/her

[40] 8 CFR § 208.13(b)(1).
[41] 8 CFR § 208.13(b)(1)(i).
[42] 8 CFR § 208.13(b)(1)(i)(A).

country of persecution and thereby avoid any future persecution.[43]

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 the officer's 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.[44]

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.[45] 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.

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.[46] If so, you may grant asylum in the absence of a well-founded fear of persecution.[47] 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

[43] 8 CFR § 208.13(b)(1)(i)(B).
[44] 8 CFR § 208.13(b)(1)(ii).
[45] 8 CFR § 208.13(b)(1)(iii)(A); see also, *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).
[46] *Matter of L-S-*, 25 I&N Dec. 704, 714 (BIA 2012).
[47] 8 CFR § 208.13(b)(1)(iii)(B); see also, *Matter of H-*, 21 I.&N. Dec. 337 (BIA 1996).

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.

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

## REQUIRED READING

### SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

## ADDITIONAL RESOURCES

None

## SUPPLEMENTS

**IO Supplement – Common Forms Requiring Adjudicative Discretion**

Officers within the International Operations Division 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**

Additional training on discretion will be provided during the International Operations Division Training Course (IODTC).

# RAIO DIRECTORATE – OFFICER TRAINING

## *RAIO Combined Training Course*

# EVIDENCE

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# 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

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

| Task/ Skill # | Task Description |
|---|---|
| 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) |

## 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. | MMorales, RAIO Training |
| August 3, 2015 | Throughout document | Reorganization of module, some stylistic edits, updated links | RAIO Training. |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

## TABLE OF CONTENTS

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

## 1 INTRODUCTION

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.

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

[1] *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); UNHCR Handbook, ¶ 74 (reissued, Geneva, Dec. 2011).

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* ASM 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. Circumstances that may affect the weight of the evidence include reliability, relevance, content, form, and the nature of the evidence.

---

[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).

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 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 determination.[5] *See* RAIO Training Module, *Credibility*, section on "Similar Claims." If

[5] *See* *Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006); *Nadeem v. Holder*, 599 F.3d 869, 873 (8th Cir. 2010).

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* RAD 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* ASM 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 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 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.

[6] UNHCR Handbook, ¶ 93.

**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 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]

[7] *See* RAIO Training Module, *Fraud.*

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.

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

[8] *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); *see, 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).

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]

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

[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*.

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* ASM 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).

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).

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* ASM 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* RAD Supplement – Applicant's Burden and ASM 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

- 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.

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.

| Standard of Proof | | Refugee | Asylum | Int'l Ops |
|---|---|---|---|---|
| **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**<br>**Clear and convincing** | *Firm belief or conviction* | | Filed within one year | • Rebut prior fraudulent marriage<br>• Citizenship of children born out of wedlock |
| **Preponderance of the evidence** | *More than 50% chance* | • Meets refugee definition<br>• Special humanitarian concern<br>• Not firmly resettled<br>• Facts supporting eligibility | • Meets refugee definition<br>• Not subject to any bars<br>• Facts supporting eligibility | Eligibility for benefit sought |
| **AND**<br>**To the Satisfaction of the adjudicator** | *Probably true* | | Exceptions to 1-year rule | |
| **AND**<br>**More Likely Than Not** | | | | |
| **Reasonable possibility** | *One in ten chance* | Well-founded fear | Well-founded fear<br>Reasonable fear | Well-founded fear |
| **Significant possibility** | *Substantial and realistic possibility* | Interdictions at sea | Credible fear | |

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).

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).

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]

---

[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).

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)

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).

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").

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.

## 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

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.

# PRACTICAL EXERCISES

**Practical Exercise # 1**

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

## OTHER MATERIALS

There are no Other Materials for this module.

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**RAD Supplement**

**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

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.

**RAD 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,

*Credibility*, section 3.1.2 Consistency.

## SUPPLEMENT B – ASYLUM DIVISION

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

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1. 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

**ASM 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).

**ASM 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]

**ASM 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.*

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.

**ASM 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.*

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

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.

**ASM 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).

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]

**ASM 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)

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.

**ASM 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*.

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**IO Supplement**

**There are no IO Supplements**

U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

***RAIO Combined Training Course***

# NOTE-TAKING

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# NOTE-TAKING

## Training Module

### MODULE DESCRIPTION:

This module outlines the importance of taking clear and comprehensive notes during the interview, the characteristics of proper notes, and procedures for proper note-taking.

### TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing in the field, you will be able to create in your notes a clear record of all relevant information necessary to adjudicate the immigration benefit, petition, protection determination, or other immigration-related request.

### ENABLING PERFORMANCE OBJECTIVES

1. Explain the importance and purpose of creating an accurate written record of an interview.
2. Write or type comprehensive and readable interview notes, following proper procedures for note-taking.
3. Explain which parties may have access to your interview notes.
4. Separate inappropriate inferences which should not be recorded from objective observations which may be documented.
5. Explain when you are required to switch your note-taking to a more detailed question-and-answer format of note-taking.
6. Explain the importance of using note-taking techniques that do not interfere with the interview.

### INSTRUCTIONAL METHODS

- Interactive presentation
- Practical exercises

## METHOD(S) OF EVALUATION

- Written exam
- Practical application during mock interview exam

## REQUIRED READING

1.

2.

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

1.

2.

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

| Task/ Skill # | Task Description |
|---|---|
| ITK7 | Knowledge of strategies and techniques for note-taking (4) |
| ITS10 | Skill in taking notes to capture information (4) |

## 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. | MMorales, RAIO Training |
| June 12, 2015 | 3.1.2 – Sworn Statements | Removed outdated procedural information | RAIO Trng |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

## Table of Contents

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

Officers in the RAIO Directorate conduct interviews primarily to determine eligibility for immigration benefits or requests; to corroborate information provided by applicants, petitioners, and beneficiaries; and/or to establish whether a person understands the consequences of his or her actions.

The modules of the RAIO Directorate – Officer Training Course and the division-specific training courses constitute primary field guidance for all officers who conduct interviews for the RAIO Directorate. The USCIS Adjudicator's Field Manual (AFM) also provides guidance for officers when conducting interviews, particularly for officers in the International Operations Division. There may be some instances where the guidance in the AFM conflicts with guidance provided by the RAIO Directorate. If this is the case, you should follow the RAIO guidance. Further guidance regarding interviews for specific applications will be discussed during division-specific trainings.

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

## 1 INTRODUCTION

This module is part of a series of interviewing modules that discuss various topics, including the basic principles and components of conducting a non-adversarial interview, the goals and techniques of eliciting information, and considerations when conducting an interview through an interpreter. This module provides guidance on creating a written record documenting the testimony and events that occur during an interview, and explains effective note-taking techniques. Please refer to the other interviewing modules for additional guidance on conducting RAIO interviews.

- *Interviewing – Introduction to the Non-Adversarial Interview*
- *Interviewing – Note-Taking*
- *Interviewing – Working with an Interpreter*
- *Interviewing – Interviewing Survivors of Torture*

## 2 THE IMPORTANCE OF PROPER NOTE-TAKING

### 2.1 Notes Serve as a Record

The two main purposes of taking notes during an interview are to:

- Support the decision regarding the interviewee's eligibility for the immigration benefit, petition, protection determination, or other immigration-related request
- Enable a reviewer to reconstruct what transpired during an interview

It is critical that you take clear and legible notes. Officers in the RAIO Directorate conduct several different types of interviews. In all interviews, notes must reflect what transpired during the interview and support the decision. In many instances, there may be a delay between the interview and when a final determination is made in a case. You may have to refer back to your interview notes to substantiate your analysis. In addition, your notes will be reviewed by others, such as supervisors and headquarters staff.

> The importance of taking accurate notes that provide a full picture of the interview cannot be overstated. In most cases, the subsequent reviewers were not present during the interview and must rely on your notes to adjudicate the case. It is important to remember that each part of your analysis must be supported by evidence in the record, and that your notes will form the primary record of the interview.

### 2.2 Access to an Officer's Notes

The following people may have access to an Officer's interview notes:

*USCIS Field Office staff*

**Refugee, Asylum, and International Operations (RAIO) Directorate:** Other Officers within the RAIO Directorate review interview notes when conducting re-interviews, reviewing Requests for Review, adjudicating the case at a later date, or conducting quality assurance (QA) review. Supervisors also review the interview notes when reviewing the decision. Other staff, including field management, Quality Assurance/

Trainers (QA/Ts), Fraud Detection and National Security (FDNS) Officers, and locally engaged staff (LES), may also review the notes in certain cases.

**Field Operations:** USCIS domestic Field Operations staff will also access and review interviewing Officer notes during subsequent adjudications, including adjustment of status and naturalization.

### *USCIS Headquarters (HQ) staff*

RAIO HQ staff, including Officers who conduct training and QA review, Division Managers, and the RAIO Research Unit review interview notes. On occasion, the Office of the Chief Counsel (OCC) reviews cases, including interview notes. In addition, the Administrative Appeals Office (AAO) reviews appeals of certain petitions and applications.

### *Interviewees and representatives*

The Freedom of Information Act (FOIA) provides access to all federal agency records that are not protected from release by exemptions.[1] An applicant or his or her attorney of record may request a review or a copy of the record of proceedings. This includes any written record of an interview conducted by an Officer. Although generally interview notes are not provided in response to a FOIA request, notes have occasionally been provided.

(For additional information regarding an Officer's responsibilities under FOIA/Privacy Act, please see RAIO Training Module, Overview of Alien Registration Files (A-Files) and Handling Records.)

### *Department of State (DOS)*

Department of State (DOS) staff may have access to electronic files. This includes access to interview assessments and interview notes. For example, DOS staff may access I-604 adoption investigation interview notes, I-130 interview notes, I-407 notes, or notes pertaining to a refugee interview in the Worldwide Refugee Admissions Processing System (WRAPS) database. At times, staff from the Bureau of Population, Refugees, and Migration (PRM) may review interview notes if there is a particularly sensitive issue to resolve in a refugee case.

### *Courts and lawyers*

If an asylum applicant is placed in immigration proceedings, a number of people may have access to the interview notes. Immigration Judges, part of the Executive Office for Immigration Review (EOIR) conduct immigration court proceedings. In these proceedings, Immigration and Customs Enforcement (ICE) trial attorneys represent the

[1] 5 U.S.C 552

Department of Homeland Security (DHS). The ICE trial attorney reviews the notes, and if he or she introduces the interview notes as evidence, all parties to the proceeding, including the Immigration Judge, will have access to the interview notes.

The Board of Immigration Appeals (BIA) is EOIR's appellate component and has jurisdiction over appeals of decisions by Immigration Judges. As part of their review process, BIA Board Members and staff may review interview notes contained in the record.

If the BIA ruling is appealed, attorneys representing the government in the U.S. Courts of Appeals may have access to interview notes.

In the event that an interviewee is at some point in time identified as a possible human rights violator, the Officer's interview notes may be accessed by attorneys of the ICE Human Rights Law Division (HRLD) and ICE Human Rights Violators and War Crimes Center (HRVWCC). These units are charged with investigation, litigation, and removal of human rights violators.

In rare circumstances, courts hearing cases unrelated to immigration benefits may have access to the interviewing officer's notes.

***Other U.S. Government officials***

Certain Government officials and contractors may have a need to examine information in connection with an asylum and/or refugee application, as well as a need to review information pertaining to certain asylum, refugee, credible fear, and reasonable fear applications, and as such, may have access to an Officer's notes.[2]

For example, in certain situations, interview notes may be shared with law enforcement personnel, or with DHS employees outside of USCIS.

# 3 CHARACTERISTICS OF PROPER INTERVIEW NOTES

## 3.1 Format

There is no standardized format for interview notes. While all notes must conform to certain requirements, many different formats are used by officers. As you become more familiar with interviewing and taking notes, you will find the format that works best for you. There are three examples of interview notes taken in different formats in the Other Materials section of this module. For the Asylum Division, Format Example #1 is strongly suggested.

[2] 8 CFR 208.6

Regardless of how you format your interview notes, you must maintain an accurate written record of information elicited during the interview. Although you are not always required to keep a verbatim record of the interview, you must ensure that the notes are representative of the interviewee's testimony.

### 3.1.1 Modified Q&A Format

Refugee officers are required to take notes in modified Q&A format. Asylum officers and officers in International Operations are encouraged to use this format. Notes taken in modified Q&A format contain both the question asked by the officer and the interviewee's response. In modified Q&A format, it is not necessary to write down every word spoken. Rather, you should capture what was discussed during the interview to the fullest extent possible without interfering with the flow of the interview. If you are able to record a verbatim record, you may do so.

For instance, rather than writing, "Have you ever applied for a visa to the United States?" the Officer can write, "Visa to U.S.?" If the applicant responds: "I applied for a visa in Bangkok in March 2004, but the Consular Officer denied me. I applied again in New Delhi in September 2006, and I was granted the visa," the written notes could state: "Applied, Bangkok, 3/04, denied. Applied, New Delhi, 9/06, granted."

At the end of the interview, you should review your notes and correct any typographical errors, grammatical mistakes, or spelling errors that distort the meaning of what was said at the interview. If typing your notes, be mindful that the autocorrect and spell-check functions on your word processing program may have altered words that you did not intend to change.

### 3.1.2 Sworn Statements

You are usually not required to take verbatim notes. However, there may be certain instances in interviews when it is essential to capture every word. In such instances, Officers in the Asylum and International Operations Divisions should take sworn statements, and Refugee Officers should take notes in greater detail in the modified Q&A format.[3] (Note: do not confuse a sworn statement as a note-taking format with the Form G-646 *Sworn Statement of Refugee Applying for Entry into the United States*, which is sometimes referred to by the same name.)

Sworn statements are taken in Q&A format. However, in contrast to the modified Q&A format, sworn statements reflect a verbatim record of the specific questions asked, and the interviewee's answers. At the end of the interview, you must review the sworn statement with the interviewee and representative, if applicable, and have the interviewee

[3] In general, refugee officers do not use sworn statements. However, refugee officers are required to follow the I-730 SOP when conducting I-730 (V92/93) interviews, which requires the use of sworn statements in the circumstances outlined above. For more information, please refer to the Division-specific training on I-730 interviews.

initial each page and sign the final page to attest that the sworn statement is true and correct.

### *Circumstances Requiring Sworn Statements or Increased Detail in Note-Taking*

Even if your Division does not typically use sworn statements, each Division has specific guidance on the requirement for extra detail when recording notes under certain circumstances. In addition, the officer must switch to a more detailed format of note-taking if any of the following circumstances arise during the interview:

- The interviewee admits, or there are serious reasons to believe, that he or she is or has been associated with an organization included on either the Foreign Terrorist Organizations List or the Terrorist Exclusion List (available at http://www.state.gov/s/ct/), or that he or she is or has been a member of any other terrorist organization.

- The interviewee admits, or there are serious reasons to believe, that he or she is, or has been, involved in terrorist activities.

- The interviewee admits, or there are serious reasons to believe, that he or she assisted or otherwise participated in the persecution of others on account of one of the five protected grounds in the refugee definition.

- The interviewee admits, or there are serious reasons to believe, that he or she assisted or otherwise participated in the commission of torture.

- There are serious reasons for considering the interviewee a threat to U.S. national security.

- The interviewee admits, or there are serious reasons to believe, that he or she committed or was convicted of a serious crime outside the U.S. and the file does not contain a record of the conviction.

- The interviewee admits, or there are serious reasons to believe, that he or she committed human rights abuses.

- When the officer believes it is appropriate to take notes in a more detailed format in his or her discretion.

While there are Division-specific guidelines on ways in which to take notes, all of these circumstances have in common: serious reasons to believe, or an admission by the interviewee, that he or she has committed acts that may render the interviewee ineligible for the benefit sought because he or she:

- Is inadmissible to the United States
- Is subject to a mandatory bar

- May be subject to a discretionary denial

Please see the supplements at the end of the module for Division-specific guidance regarding note-taking. [RAD Supplement – Increased Detail in Note-Taking, ASM Supplement – Sworn Statements, IO Supplement- Sworn Statements]

## 3.2 Requirements for Proper Note-Taking

### 3.2.1 Notes Must Be Legible

As noted above, a number of persons may read your interview notes during the life cycle of a case. Accordingly, interview notes taken by hand must be legible so that a reviewer can easily read and understand what was written. There is no requirement to use a specific penmanship style for interview notes; however, printed handwritten text tends to be more legible than cursive text.

Writing too small is a common mistake that officers make when taking interview notes by hand. Make sure that your writing is clear and large enough to read. Taking notes on lined paper may help you prevent your handwriting from becoming too small.

The consequences of developing a record that is not legible are significant. For example, in the Asylum context, Immigration Judges or ICE trial attorneys may simply disregard an officer's notes, if illegible. In the refugee context, an officer adjudicating a Request for Review (RFR) who is unable to read the interviewing officer's notes will often send the case back for a reinterview because he or she is unable to concur that the decision is supported by the record. An Officer reviewing material support exemptions may have to request a reinterview if he or she is unable to read the notes taken at the time of interview.

If you write your notes by hand, you must evaluate your handwriting and adapt your writing style so that your notes are legible to others. Remember, the purpose of taking interview notes is to create a record. Notes are often scanned into an electronic version and reprinted, which decreases the quality of the image. Therefore, notes that are barely legible may become even harder to read. Remember, if your notes are not legible, you have, in effect, failed to create that record.

Officers who have access to a Government-issued computer and printer should follow their Division's guidance as to whether interview notes should be typed or handwritten.

### 3.2.2 Notes Must Accurately Reflect the Questions You Ask and the Interviewee's Response

A reviewer should be able to reconstruct what occurred during the interview by reading the interview notes. The interview notes must support the officer's decision.

You may conduct multiple interviews in a day, and the facts of one case can blur with the facts of another. Also, circumstances may delay the writing of an assessment or completion of a worksheet, or require another officer to complete a case. Thus, relying on your memory of what happened in a particular interview is inappropriate. It is imperative that notes be detailed and clear.

It is very difficult to place an interviewee's answers in context if the questions you ask are not also recorded. What at first glance appears to be a discrepancy in the applicant's testimony is often the result of an ambiguously worded question. Recording your questions in the interview notes is helpful in assessing the reliability of the applicant's testimony.

Accurate interview notes are crucial for analyzing the internal consistency of an interviewee's testimony, as well as other concerns about credibility that may arise during the interview. It is essential to document any credibility issues that arise during the interview in your notes. [See Section 4.1.1 below on referencing notes during the interview.]

If you repeat a question, but change the wording of the question to help the applicant understand, your notes should reflect the change in wording. This will both reflect accurately what occurred during the interview and show your efforts to be understood.

***Example***

| Officer | Interviewee |
|---|---|
| Duties in the military? | Was a cook. |
| What did you do as cook? | Cooked for Officers |
| Did you do anything else other than cook for Officers during your day? | No |
| Can you tell me about what types of things you do when you cook for Officers? | Just cook. |
| Do you purchase the ingredients, or wash dishes, or serve the food? | Just cook. |

| | |
|---|---|
| I have asked you many questions about your five years of service in the Iraqi military. So far, you have told me the only thing you did during the five years was cook for officers, without providing me with any detail. I would think that someone who served in the military for five years would be able to tell me more details about what he or she did during that time than just cook for Officers. Could you explain why you cannot provide more detail? | I cooked for Officers, nothing else. |

*Example*

| Officer | Interviewee |
|---|---|
| Duties in military? | Cook. |
| (Repeat Q) or (Repeat Q 3X) | same answers |

The first example above accurately reflects the officer's effort to elicit detailed testimony regarding the interviewee's duties in the military and the interviewee's unwillingness or inability to provide sufficient detail. These notes, along with other examples from the interview, may help support a negative credibility determination based on lack of material detail.

The second example from the same interview would not support a negative credibility determination. It appears as if the officer asked, "What were your duties in the military?" three times, without varying the question. Example #2 does not show that attempts were made to rephrase questions, or elicit more detail regarding the subject.

### 3.2.3 Notes Must Not Include the Officer's Opinions, Suppositions, or Personal Inferences

Your opinions, suppositions, or personal inferences must not be included in the interview notes. This should not be confused with subjective statements that the interviewee may make, which should be included in the notes.

You must ensure that your notes are an accurate and objective written record of the interview. For example, an exclamation point placed next to a portion of the interviewee's testimony would be inappropriate, as it might suggest bias.

### 3.2.4 Notes Must Include What the Interviewee Did Not Say, When Appropriate

It is sometimes important to include information in your notes other than the applicant's testimony. This includes noting questions that the applicant does not answer, and certain non-verbal communication that occurs during the interview. This helps put the interview notes in context. Any important observations an officer makes that are relevant to the decision should be recorded in the notes. These may include indications that the applicant is silent or non-responsive to a question; or engages in any other non-verbal actions, such as crying, that could affect the interview in any way. It is important to be as objective as possible when writing such notes. The purpose of including this information is to create a complete picture of the interview and allow reviewers to reconstruct what occurred during the interview. The observations included in your notes during the interview are also evidence with regard to the interviewee's claim, application, or petition. You may need to record non-verbal communication in your notes in situations like the ones described here.

*Example*

| Officer | Interviewee |
|---|---|
| When was your home attacked? | [Applicant is crying] |

*Example*

| Officer | Interviewee |
|---|---|
| What is your middle son's name? | (silence) |
| Can you tell me your second son's name? | (long pause) John. |

It is best to put such information in parentheses or brackets to set it apart from the rest of the notes.

*Example*

| Officer | Interviewee |
|---|---|

| | |
|---|---|
| How long did you know your wife before you proposed? | (30 second pause) (glanced towards wife)<br><br>Wife: We knew each other for seven months<br><br>App: Umm—seven months |
| (Instructed wife not to respond on husband's behalf.) | |
| Who was the best man at your wedding? | (looks to wife) (silence) |
| Did you have a best man at your wedding? | Yes |
| What was his name? | (looks to wife) (silence) |

Any interpreter comments or questions directed at an Officer should also be recorded in your notes.

***Examples***

| Officer | Interviewee |
|---|---|
| | (Interpreter indicated that a particular word could have two possible meanings in his language and requested that the Officer clarify the applicant's testimony) |

| Officer | Interviewee |
|---|---|
| | (Interpreter asked applicant follow-up questions several times) |
| (Reminded interpreter of her role during the interview) | |

Without this information in the record, it would be difficult for a reviewer to determine that there were problems with the interpretation.

### 3.2.5 Notes Must Identify the Speaker if More than One Person Is Providing Testimony

You should record in your notes the names of everyone present at the interview and the reasons for their presence at the interview, if necessary. Witnesses may provide testimony on behalf of the interviewee. The officer may make a statement he or she wants recorded in the notes. The principal applicant's family members may be interviewed. In addition, if there is a representative, he or she may make a statement at the end of the interview, or may ask the interviewee additional questions. In these situations, the Officer should clearly identify in the notes who is speaking, and note, when it is required, that an oath was administered prior to taking testimony [see section 3.2.8 below].

### 3.2.6 Notes Must Include Certain Identifying Information on Each Page

You must include certain identifying information on each page of the interview notes, regardless of whether your notes are typed or handwritten. There is always a risk that the interview notes may be placed out of order, or even become separated from the file. For these reasons, it is important to record a page number as well as identifying information, such as an A-number, on each page of your notes. Refer to Division-specific guidance for further information.

[RAD Supplement - Requirements for Each Page of Interview Notes; ASM Supplement – Include Identifying Information on Each Page].

### 3.2.7 Notes Must Not Include Abbreviations that a Reviewer Will Not Understand

If you use any abbreviations in your notes, they should be few in number and should be clear enough that anyone who reviews the interview notes will easily understand what they mean. Shorthand should never be used. To avoid confusion, you may include a key for common abbreviations in your interview notes.

### 3.2.8 Record Administration of Oath and Use of Interpreter

The fact that the interview is being conducted under oath must be recorded. If you are taking notes in a sworn statement, or are taking down verbatim a question-and-answer statement, the exact wording of the oath should be included in your notes. If you are taking notes in a less formal modified Q&A format, your interview notes should simply reflect that the interviewee was placed under oath. In overseas refugee processing, you are not required to note that the interview is being conducted under oath in the written record; instead, you must check the appropriate boxes on the front page of the Refugee Application Assessment to indicate that the oath was administered, and whether the interviewee understands the interpreter or officer. You are also required to fill in the interviewee's native language and the language in which the interview was conducted.[4]

[4] Refugee Application Assessment SOP; Refugee Application Assessment

In asylum processing, if you are fluent in a language other than English, you must obtain certification before you are permitted to conduct interviews in that language. In overseas refugee processing, you are not required to obtain language certification, but you are generally discouraged from conducting interviews in languages other than English. If an interview is conducted without the use of an interpreter, you must make a clear notation of the language you and the interviewee spoke during the interview. Please see the RAIO Training Module, *Interviewing – Working with an Interpreter* for Division-specific guidance on conducting an interview in a language other than English. [ASM Supplement - Oath and Interpreter]

### 3.2.9 Notes Must Indicate Instances When the Officer Confronts Interviewee with Adverse Information

During the interview, the officer must provide the interviewee with an opportunity to explain any discrepancy or inconsistency that is relevant to the determination of eligibility. The interviewee may have a reasonable explanation for the discrepancy, or there may have been a misunderstanding between you and the interviewee. Therefore, it is critical that your interview notes clearly reflect your questions regarding the potentially adverse information, as well as the interviewee's responses. [RAD Supplement - Recording Credibility]

The example below involves an interview with a birth parent in an adoption case to determine whether the child meets the legal definition of an orphan:

***Example***

| Officer | Interviewee |
|---|---|
| Where is Mr. Khamar, your husband and the father of your child, currently living? | He passed away in 2000. |
| Can you tell me what the cause of death was? | He had lung cancer. |
| Are you certain of the cause of death and date? | Yes. I was there at the hospital when he passed away. |
| Ms. Khamar, in the statement you submitted previously you stated that the child's father, your husband, was killed in a car | I don't know. |

| | |
|---|---|
| accident in 2002. Today you stated that your husband died of lung cancer in 2000. Can you explain why the information you provided me today is different from what you stated previously? | |

### 3.2.10 Notes Must Substantiate the Analysis

Your interview notes substantiate your decision. You must record in your notes all of the information that you elicit during the interview regarding the interviewee's eligibility for a benefit, petition, or request. Your decision about the interviewee's eligibility must be supported by the record you create of the interview. As stated previously, the record includes your notes. Therefore, you must not include any information in the assessment or worksheet that is not reflected in your notes, or is not otherwise part of the record. [ASM Supplement – Important Information to Record]

### 3.2.11 Notes May Refer to Any Document Deficiencies in the File

Upon thorough review of the case file, you may identify missing documents or other such deficiencies and make reference to this in your notes. The interview notes should also reflect that you asked the interviewee for the missing documentation and that the interviewee was afforded a reasonable period of time to submit that documentation.[5]

For example, upon reviewing and preparing for an I-730 (V92/V93) interview, you may notice that the file does not contain any documentary evidence to support the identity of the beneficiary. Before the interview, you may make a notation in your notes and on the corresponding V92/V93 worksheet.[6] During the interview, the notation should remind you to ask about the deficiency. You must clearly distinguish your pre-interview notations from your discussion of the issue with the interviewee.

## 4 Effective Note-Taking Methods and Techniques

### 4.1 Develop Non-Intrusive Note-Taking Techniques

It is important to develop a note-taking technique that allows you to create an accurate record while maintaining rapport with the interviewee. Your technique should not distract the interviewee from providing responses to your questions.

[5] USCIS, BASIC Participant Guide, Module 208A Part 1, "Interviewing Techniques," January 2010, EPO C, (7), pg. 10.

[6] Note for International Operations Officers: IO Officers should use the Visa 92/V93 Interview Worksheets when conducting interviews of all Visa 92 or V93 beneficiaries. The worksheets are intended to guide these interviews. Please refer to the I-730 Standard Operating Procedure and I-730 Miscellaneous Guidance.

If you focus more on note-taking than on the interviewee, it may appear as if you are not listening, which can be very disconcerting to the interviewee. Officers must develop skills to accurately take notes while maintaining a non-adversarial approach and rapport with the interviewee. Note-taking must never interfere with conducting the interview.

If an interpreter is used, you can use the time when the interpreter is speaking to write notes. When interviewing in English, it may be best to write your notes while the interviewee is responding to your questions so that you can write as much of what the interviewee says as possible and ensure that your notes are as accurate as possible. When writing notes in this manner, you will need to be careful to maintain rapport with the interviewee so that the interviewee can tell that you are paying attention to him or her.

Note-taking may be intimidating to the interviewee; he or she may wonder what you are going to do with your notes and if government officials from his or her country will have access to your notes. During your introduction, you should explain that you will be taking notes during the interview, as well as the purpose of taking notes and any applicable confidentiality provisions.

Whether handwriting or typing notes, you must become comfortable with taking notes in a manner that does not interrupt the flow of the interview. For example, if typing notes, the computer monitor should be positioned at an angle that will help maintain eye contact with the interviewee.

At the conclusion of the interview, typed notes should be saved immediately, printed, and placed in the file as soon as possible. As noted earlier, you should review your notes and correct any errors that might distort the meaning of what was said at the interview, taking into account that autocorrect and spell-check functions on your word processing program may have altered words.

**Note:** All Officers may only use Government-issued computers (including laptops), VPN tokens, USB flash drives, and printers to type and print notes.[7]

### 4.1.1 Officers May Refer to the Notes at Any Time During the Interview

You may refer back to your notes during the course of the interview. For example, you might do this to clarify contradictory information provided during another part of the interview. This is a recommended practice. If you find that you cannot take notes fast enough, it may help if you read a section of the notes you have already taken, and confirm with the interviewee that what you wrote is correct. This will allow you extra time to catch up with your notes when the interpreter is repeating the information back to the interviewee in his or her language. This practice will also enable you to make sure that you have recorded the interviewee's testimony correctly. In addition, prior to

[7] DHS Sensitive Systems Policy Directive 4300A,Version 8.0, March 14, 2011, Section 4.8.3.b

concluding the interview, it is helpful to review your notes to ensure that you have captured all information necessary to complete your adjudication.

# 5 CONCLUSION

Officers in the RAIO Directorate will conduct interviews for a variety of reasons. Creating a comprehensive and accurate written record of an interview is essential. You must be familiar with RAIO's requirements for notes, along with effective note-taking techniques. Finally, you must understand what information must be elicited and recorded in your interview notes, along with appropriate procedures for taking notes in a more detailed format, such as Q&A or a sworn statement.

You should apply the principles, techniques, and guidelines on note-taking set forth in this module to all interviews conducted within Refugee, Asylum and International Operations.

# 6 SUMMARY

## 6.1 The Importance of Proper Note-Taking

### Notes Serve as a Record

- Your notes must support the decision regarding the interviewee's eligibility for the immigration benefit, petition, protection determination, or other immigration-related request.
- Your notes must enable the reviewer to reconstruct what transpired during an interview

### Access to an Officer's Notes

- Your notes could potentially be reviewed by many people, both within USCIS and the RAIO Directorate, and outside.

## 6.2 Characteristics of Proper Interview Notes

### Format

- Modified Q&A

Refugee Officers are required to take notes in modified Q&A format. Asylum Officers and International Operations Officers are encouraged to take notes in modified Q&A format.

- Sworn Statements

Switch to a more detailed format of note-taking (see Division-specific materials) if any of the following circumstances arise during the interview:

- The interviewee admits, or there are serious reasons to believe, that he or she is associated with a terrorist organization, or that he or she is or has been a member of any terrorist organization.
- The interviewee admits, or there are serious reasons to believe, that he or she is, or has been, involved in terrorist activities.
- The interviewee admits, or there are serious reasons to believe, that he or she assisted or otherwise participated in the persecution of others on account of one of the five protected grounds in the refugee definition.
- The interviewee admits, or there are serious reasons to believe, that he or she assisted or otherwise participated in the commission of torture.
- There are serious reasons for considering the interviewee a threat to U.S. national security.
- The interviewee admits, or there are serious reasons to believe, that he or she committed or was convicted of a serious crime outside the U.S., and the file does not contain a record of the conviction.
- The interviewee admits, or there are other serious reasons to believe, that he or she committed human rights abuses.
- When the Officer believes it is appropriate to take notes in a more detailed format, in his or her discretion.

**Requirements for Proper Note-Taking**

The interview record must:

- Be legible
- Accurately reflect the questions you ask and the interviewee's response
- Not include your opinions, suppositions, or personal inferences
- Include what the interviewee did not say, when appropriate
- Identify the speaker if more than one person is providing testimony
- Include certain identification information on each page
- Not include abbreviations that a reviewer will not understand
- Indicate that the oath was administered and whether an interpreter was used
- Indicate instances in which the interviewee is confronted with adverse information
- Substantiate your analysis
- Refer to any document deficiencies in the file, if material

- Adhere to any Division specific guidance on note-taking.

## 6.3 Effective Note-Taking Methods and Techniques

### Develop Non-intrusive Note-Taking Techniques

- When an interpreter is present, you can use the time when the interpreter is speaking to write your notes.
- Keep in mind that note-taking may be intimidating to the interviewee. Explain the purpose of note-taking and applicable rules of confidentiality to reassure the interviewee.
- Whether handwriting or typing notes during the interview, ensure that your manner of note-taking does not interfere with the flow of the interview.

### Refer to your notes at any time during the interview

Refer back to your notes during the interview and at the conclusion of the interview to ensure completeness and accuracy.

## PRACTICAL EXERCISES

There are no Practical Exercises for this module.

## OTHER MATERIALS

The following sample interview excerpts are the same interview presented in different formats. These samples of note-taking formats are based on a refugee interview. RAIO interviews cover a variety of adjudications. These various interview types, as well as the issues presented within any given interview, will affect the level of detail, topics and extent of follow-up required.

## FORMAT Example #1

This simple table format allows you to tab quickly (if typing) between your questions and the interviewee's responses. In addition, this format provides a clear delineation between what you say and what the interviewee says. Use of this format is strongly suggested for Asylum Officers.

> Note: These samples demonstrate the acceptable use of acronyms. The abbreviations (BM/Burma, MO/mother, and SI/sister) are from the Worldwide Refugee Admissions Processing System (WRAPS), and are familiar to RAD staff.

MY-000000
04/25/11
RO Smith
SOE, Christina

| Officer | Interviewee |
|---|---|
| Why left BM? | I was about to be arrested by BM military. |
| Why? | They accused me of helping my MO escape from their hand. |
| How you know? | My auntie informed me, "The BM military were looking for you." |
| Where looked for you? | My house. |
| Auntie live there? | Yes. |
| Where were you? | I was at boarding hostel with my SI. |
| Why want to arrest MO? | BM military accused her of defying their order for refusing to send car for BM porter. |
| Did you help MO escape? | Only because she was sick, she had to be transferred to another hospital. I helped my MO transfer to another hospital. That's why they accused me of helping her escape from their hand. |
| Boarding hostel and your house in same town? | Yes. Falam. |
| I know you were not there, but what did auntie tell you about the soldiers' visit? | My auntie came to me and said "BM military came to our house looking for you b/c you helped your MO escape from their hand. They left message that if you come back you should report to the military." |

| | |
|---|---|
| Did auntie agree to do anything? | No. |
| Did auntie tell them where you were? | No. She said I was traveling. |
| Did auntie say she would tell you to report yourself to the military? | Yes. |
| What you do? | I decided to run away. |
| When? | Same day auntie told me, March 15, 2007. |
| Activities between March 15 and April 17 when you crossed border? | I went to Kalaymyo where I was hiding for 2 wks. And about 2 wks in Rangoon. |
| Travel with anyone? | My MO and my SI. |
| MO and SI stay with you whole time? | Yes. |
| Time of day when auntie told you? | Evening. |
| Where? | At boarding hostel. |
| Time fled? | About 3 hours from the inform. I got from my auntie. |
| Why thought you would be arrested? | b/c they already see us as who is against their order. |
| Can you go back to BM? | No. |
| What would happen? | Military would arrest and imprison me. |
| Reason? | 1st, since they are already see us as people against their order, they see us as enemy. 2nd, b/c we run away from BM. |
| Problem with running away from BM? | They think all of us who run away are enemy. |
| Why? | They are gov't. We run away from them. So they think we are against what they do. |
| Are you against gov't? | It's not that I'm against them. |
| Work in BM? | Just before I left I was a teacher at boarding school. And in Rangoon I was an assistant accountant. |
| Ever involved in any protests/political activities? | No. |

## FORMAT Example #2

MY-000000
4/25/11
RO Smith
SOE, Christina

Why left Burma? I was about to be arrested by BM military.
Why? They accused me of helping my MO escape from their hands.
How do you know? My auntie informed me, "The BM military were looking for you."
Where looked for you? My house.
Auntie live there? Yes.
Where were you? I was at boarding hostel with my SI.
Why want to arrest MO? BM military accused her of defying their order for refusing to send car for BM porter.
Did you help MO escape? Only because she was sick, she had to be transferred to another hospital. I helped my MO transfer to another hospital. That's why they accused me of helping her escape from their hand.
Boarding Hostel and your home in same town? Yes, Falam.
I know you were not there, but what did auntie tell you about the soldiers' visit? My auntie came to me and said, "BM military came to our house looking for you b/c you helped your MO escape from their hand. They left message that if you come back you should report to the military."
Did auntie agree to do anything? No.
Did auntie tell them where you were? No. She said I was traveling.
Did auntie say she would tell you to report yourself to the military? Yes.
What you do? I decided to run away.
When? The same day.
Activities between March 15 and April 17 when you crossed border? I went to Kalaymo where I was hiding for 2 wks. And about 2 wks in Rangoon.
Travel with anyone? My MO and my SI.
MO and SI stay with you whole time? Yes.
Time of day when auntie told you? Evening.
Where? Boarding hostel.
Time fled? About 3 hours from the inform. I got from my auntie.
Why thought you would be arrested? b/c they already see us as who is against the government.
Can you go back to BM? No.
What would happen? Military would arrest and imprison me.
Reason? 1st, since they already see us as people against their order, they see us as enemy. 2nd, b/c we run away from BM.
Problem with running away from BM? They think all of us who run away are enemy.
Why? They are gov't. We run away from them. So they think we are against what they do.
Are you against gov't? It's not that I am against them.
Work in BM? Just before I left I was a teacher at boarding school. And in Rangoon I was an assistant accountant.

Ever involved in any protests /political activities? No.

## FORMAT Example #3

MY-000000
4/25/11
RO Smith
SOE, Christina

Q. Why left Burma?
A. I was about to be arrested by BM military.
Q. Why?
A. They accused me of helping my MO escape from their hands.
Q. How do you know?
A. My auntie informed me, "The BM military were looking for you."
Q. Where looked for you?
A. My house.
Q. Auntie live there?
A. Yes.
Q. Where were you?
A. I was at boarding hostel with my SI.
Q. Why want to arrest MO?
A. BM military accused her of defying their order for refusing to send car for BM porter.
Q. Did you help MO escape?
A. Only because she was sick, she had to be transferred to another hospital. I helped my MO transfer to another hospital. That's why they accused me of helping her escape from their hand.
Q. Boarding Hostel and your home in same town?
A. Yes, Falam.
Q. I know you were not there, but what did auntie tell you about the soldiers' visit?
A. My auntie came to me and said, "BM military came to our house looking for you b/c you helped your MO escape from their hand. They left message that if you come back you should report to the military."
Q. Did auntie agree to do anything?
A. No.
Q. Did auntie tell them where you were?
A. No. She said I was traveling.
Q. Did auntie say she would tell you to report yourself to the military?
A. Yes.
Q. What you do?
A. I decided to run away.
Q. When?
A. The same day.
Q. Activities between March 15 and April 17 when you crossed border?
A. I went to Kalaymo where I was hiding for 2 wks. And about 2 wks in Rangoon.
Q. Travel with anyone?
A. My MO and my SI.
Q. MO and SI stay with you whole time?
A. Yes.

Q. Time of day when auntie told you?
A. Evening.
Q. Where?
A. Boarding hostel.
Q. Time fled?
A. About 3 hours from the inform. I got from my auntie.
Q. Why thought you would be arrested?
A. b/c they already see us as who is against the government.
Q. Can you go back to BM?
A. No.
Q. What would happen?
A. Military would arrest and imprison me.
Q. Reason?
A. 1st, since they already see us as people against their order, they see us as enemy. 2nd, b/c we run away from BM.
Q. Problem with running away from BM?
A. They think all of us who run away are enemy.
Q. Why?
A. They are gov't. We run away from them. So they think we are against what they do.
Q. Are you against gov't?
A. It's not that I am against them.
Q. Work in BM?
A. Just before I left I was a teacher at boarding school. And in Rangoon I was an assistant accountant.
Q. Ever involved in any protests /political activities?
A. No.

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**RAD Supplement – Requirements for Each Page of Interview Notes**

Refugee Officers should leave a margin at the top and bottom of each page of interview notes of about one inch (2.54 cm), for both handwritten and typed notes. This is to accommodate the use of A4-sized paper in most overseas locations. The Refugee Application Assessment and the notes of the interview are scanned into the Worldwide Refugee Application Processing System (WRAPS). If the interviewer takes notes on A4-sized paper without paying attention to margins, a person located in the United States who is printing the notes from the scanned document will not be able to read the portion of the notes that is outside the margin size of 8 ½ × 11- inch paper.

Each page of notes must identify the RSC case number and the page number.

**RAD Supplement – Recording Credibility**

**Notes Must Indicate Instances When the Interviewee Was Confronted with Adverse Information**

The Refugee Application Assessment has a box the Refugee Officer must check to confirm that the interviewee was confronted during the interview with any potentially adverse information. However, checking the box does not take the place of recording in the interview notes all instances in which the interviewee was confronted with any adverse information.

Please see RAIO Training Module *Introduction to the Non-Adversarial Interview* for more information about confronting an interviewee about potentially adverse information.

**RAD Supplement – Increased Detail in Note-Taking**

When you are interviewing overseas for the Refugee Affairs Division, you must use a more detailed form to record your notes when the interviewee indicates that he or she has taken part in any activities listed in Section 3.1.2 Circumstances Requiring Sworn Statements or Increased Detail in Note-Taking. It is not necessary to record verbatim everything that is said; however, your notes must contain an accurate representation of every question asked and every response given using the wording and vocabulary used by the interviewee (most often through the interpreter). Once you have gone into the more detailed method of recording your interview notes, you must remain in that mode until the interview is completed. The Refugee Affairs Division does not use the sworn-statement format used by the Asylum Division because RAD interviews outside the U.S., and it is very unlikely that a refugee would appear in a U.S. Court.

## SUPPLEMENT B – ASYLUM DIVISION

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

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**ASM Supplement – Oath And Interpreter**

**Notes Must Include a Notation that Oath Was Administered and Indicate When Interpreter Was Present**

- Include a Notation that the Oath was Administered to the Interpreter Monitor

  On some occasions during an asylum interview, a professional interpreter will be used to monitor (via telephone) the interpretation by the applicant's interpreter. As the interpreter monitor is not present at the interview to sign an oath form, the notes must indicate that the oath was administered to the interpreter monitor.

- Include Both Interpretations Where There is a Dispute in Interpretation Between the Applicant's Interpreter and the Interpreter Monitor

  When using a professional interpreter to monitor the interpretation of the interpreter provided by the applicant, there may be instances in which a dispute in interpretation between the interpreter monitor and the applicant's interpreter arise. If there is such a dispute, the asylum officer must give the applicant's interpreter an opportunity to provide a reasonable explanation for the discrepancy. If the applicant's interpreter is unable to do so and the interpreted testimony will be used in the assessment, the asylum officer must use the interpreter monitor's

interpretation of the applicant's testimony in the assessment; however, the interview notes must preserve both the interpretation given by the applicant's interpreter and the interpreter monitor, clearly indicating which interpretation was provided by the monitor and which was provided by the applicant's interpreter.

Officers should consult the Asylum Procedures Manual for note-taking procedures relating to the Use of Monitoring Services in Asylum Interviews.[8]

**ASM Supplement – Include Identifying Information on Each Page**

Each page should have the following information clearly written or typed in the top right-hand corner:

- A Number, Case Number or NIV Receipt number, depending on the type of case being interviewed
- Date of the interview
- Page number in the following format: 1 of 13, 3 of 15, etc.
- Officer's Name and ID number, if applicable
- Name of Applicant

**ASM Supplement –Important Information to Record**

**Elements that Must be Included in the Notes**

It is imperative that the interview notes be sufficiently detailed and clear. Furthermore, accurate interview notes are crucial for probing into the internal consistency of an applicant's claim.

Interview notes should include the following:

- Factors that address the elements of the refugee definition
- Factors that affect credibility, including the applicant's opportunity to respond to any perceived inconsistencies

[8] Asylum Procedures Manual, Revised July 2010, Section II.J.4.b.v

- Factors that relate to mandatory bars and discretionary denials
- Indications that the Asylum Officer pursued all relevant lines of questioning, followed-up on relevant points, and provided the applicant an opportunity to add additional information before the conclusion of the interview
- The applicant's (and any dependent's) current immigration status
- Factors that relate to the one-year filing deadline

**ASM Supplement – Sworn Statements**[9]

Within the Asylum Division, when you have reason to believe that the interviewee has taken part in certain activities listed in Section 3.1.2 Sworn Statements, you must switch your note-taking format to that of a sworn statement. Sworn statements are of greater evidentiary value in a subsequent proceeding. They include having the interviewee initial and sign the statement. Note that not all testimony recorded in a Q&A format is considered a sworn statement. Notes taken in full Q&A format do not constitute a sworn statement unless and until they are reviewed and signed, page by page, by the interviewee.

**Format for Sworn Statements**

Officers should use the full Q&A format when preparing a sworn statement. The interview notes should be as close as possible to a verbatim record of everything said at the interview, and must provide an accurate and detailed record of the specific questions asked and the interviewee's answers. This format leaves less room for misinterpretation or for claims that important information given to an Officer has been omitted or misunderstood.

When you find you have to begin taking notes as a sworn statement, you draw a diagonal line through the remaining page of notes at the point at which you stop taking notes to signify the change of format to a sworn statement. The sworn statement should begin on a separate page from the earlier interview notes and should continue through to the conclusion of the interview.

Each page should include the same information that must be contained in regular interview notes: A-number or other identifying number, date, page number, name of applicant, name and number of Officer.

[9] Information about sworn statements is also available in the Affirmative Asylum Procedures Manual, revised July 2010.

**Content of Sworn Statements**

The sworn statement should generally be developed in chronological and logical sequence with respect to all pertinent details. You should avoid pursuing lines of questioning that are not relevant to the interviewee's eligibility for asylum. It is important that the Officer use the particular phraseology of the interviewee and his or her exact words, to the extent possible, when recording the Q&A statement. This will avoid any implication that the statement was not made freely and voluntarily, or that it does not represent a true record of the exchange between the Officer and the interviewee.

**Proper Execution of Sworn Statements**

At the conclusion of the interview, the Officer should review the sworn statement with the interviewee and representative, if applicable, and make any corrections requested, and the corrections should be initialed by both the Officer and the interviewee. Each page of the Q&A statement should be signed or initialed by the person being interviewed to demonstrate that he or she has reviewed the statement, understood the contents of the statement, and consented to any and all changes to the statement. All pages of the statement should be signed in the presence of the Officer taking the statement. Please see Affirmative Asylum Procedures Manual, Appendix 63 for sample sworn statement.

Both the Officer and the interviewee should print and sign the last page of the Q&A sworn statement and attest that the interviewee acted of his or her own free will and acknowledged the statement to be true and correct. As with the procedure for regular interview notes, the Officer should draw a diagonal line from the end of the testimony to the bottom of the page to prevent any substitutions or alterations to the statement.

Once all these steps are completed, the statement taken by the Officer in Q&A format is considered to be a sworn statement.

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**IO Supplement – Sworn Statements**

Within the International Operations Division, when you have reason to believe that the interviewee has taken part in certain activities listed in Section 3.1.2 Sworn Statements, you must switch your note-taking format to that of a sworn statement.

Note: In addition to the list in section 3.1.2, you must also take a sworn statement in certain I-730 (V9293) cases:

If in the normal course of the interview, the beneficiary's responses to the Officer's questions regarding the beneficiary's own eligibility for derivative asylum or refugee status cause the Officer to have significant concerns about possible fraud having occurred in the adjudication of the principal's case. Often, a sworn statement by the Petitioner or Beneficiary is required to support a Consular Return based on document fraud; and/or

If in the normal course of the interview, the beneficiary admits that he or she is not the person listed as the beneficiary of the I-730 or that the required relationship does not exist.

Please see IO Field Guidance: Overseas Processing of Asylee and Refugee

Derivatives: Form I-730 Beneficiaries (Visas 92/93).

Sworn statements are of greater evidentiary value in a subsequent proceeding. They include having the interviewee initial and sign the statement. Note that not all testimony recorded in a Q&A format is considered a sworn statement. Notes taken in full Q&A format do not constitute a sworn statement unless and until they are reviewed and signed, page by page, by the interviewee.

**Format for Sworn Statements**

Officers should use the full Q&A format when preparing a sworn statement. The interview notes do not have to verbatim but should be as close as possible to a verbatim record of everything said at the interview, and must provide an accurate and detailed record of the specific questions asked and the interviewee's answers. This format leaves less room for misinterpretation or for claims that important information given to an Officer has been omitted or misunderstood.

When you find you have to begin taking notes as a sworn statement, you draw a diagonal line through the remaining page of notes at the point at which you stop taking notes to signify the change of format to a sworn statement. The sworn statement should begin on a separate page from the earlier interview notes and should continue through to the conclusion of the interview.

Each page should include the same information that must be contained in regular interview notes: A-number or other identifying number, date, page number, name of applicant, name and number of Officer.

**Content of Sworn Statements**

The sworn statement should generally be developed in chronological and logical sequence with respect to all pertinent details. You should avoid pursuing lines of questioning that are not relevant to the interviewee's eligibility for the benefit. It is important that the Officer use the particular phraseology of the interviewee and his or her exact words, to the extent possible, when recording the Q&A statement. This will avoid any implication that the statement was not made freely and voluntarily, or that it does not represent a true record of the exchange between the Officer and the interviewee.

**Proper Execution of Sworn Statements**

At the conclusion of the interview, the Officer should review the sworn statement with the interviewee and representative, if applicable, and make any corrections requested, and the corrections should be initialed by both the Officer and the interviewee. Each page of the Q&A statement should be signed or initialed by the person being interviewed to demonstrate that he or she has reviewed the statement, understood the contents of the statement, and consented to any and all changes to the statement. All pages of the statement should be signed in the presence of the

Officer taking the statement.

Both the Officer and the interviewee should print and sign the last page of the Q&A sworn statement and attest that the interviewee acted of his or her own free will and acknowledged the statement to be true and correct. As with the procedure for regular interview notes, the Officer should draw a diagonal line from the end of the testimony to the bottom of the page to prevent any substitutions or alterations to the statement.

Once all these steps are completed, the statement taken by the Officer in Q&A format is considered to be a sworn statement.

U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

*RAIO Combined Training Course*

# INTERNATIONAL RELIGIOUS FREEDOM ACT (IRFA) AND RELIGIOUS PERSECUTION

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# INTERNATIONAL RELIGIOUS FREEDOM ACT (IRFA) AND RELIGIOUS PERSECUTION

Training Module

## MODULE DESCRIPTION:

This module introduces you to the International Religious Freedom Act (IRFA) and the responsibilities that the Act creates for adjudicating protection claims. The training you receive will also be useful in adjudicating immigration benefits, petitions, and other immigration-related requests. Through reading and discussing country conditions information, you will increase your awareness of religious freedom issues around the world. Through discussion and practical exercises, you will learn how to conduct an interview and adjudicate a claim with a religious freedom issue.

## TERMINAL PERFORMANCE OBJECTIVE(S)

Given a request for protection (an asylum or refugee application, or a reasonable fear or credible fear screening[1]) with a religious freedom issue, you will apply IRFA and case law.

## ENABLING LEARNING OBJECTIVES

1. Summarize the IRFA requirements for RAIO officers.
2. Explain the statutory and regulatory requirements for consideration of protection claims and benefits requests involving religious freedom and religious persecution.
3. Summarize legal rulings that must be followed or that provide guidance when making decisions based on religious freedom or religious persecution.
4. Distinguish between appropriate and inappropriate interview questions involving religious freedom issues

[1] Reasonable fear and credible fear screenings are processes in which an Asylum Pre-screening Officer determines if an applicant, who is subject to expedited removal, re-instatement of removal, or administrative removal, and who expresses a fear or concern of being removed, has a credible or reasonable fear of persecution or torture.

5. Explain the broad interpretation of "religion" as a protected ground under IRFA and the refugee definition.

## INSTRUCTIONAL METHODS

- Lecture
- Discussion
- Practical exercises

## METHOD(S) OF EVALUATION

Written test

## REQUIRED READING

1. U.S. Department of State, International Religious Freedom Report for 2013 (July 28, 2014), Executive Summary.
2. *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000).
3. *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011).

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

1. U.S. Department of State, International Religious Freedom Reports.
2. U.S. Commission on International Religious Freedom, Annual Reports.
3. International Religious Freedom Act of 1998, P.L. 105-292, 112 Stat. 2787 (Oct. 27, 1998).
4. UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (28 April 2004).

5. Lawyers Committee for Human Rights. Testing the Faithful: Religion and Asylum Summary Results of Survey, A Briefing Paper Prepared for the Roundtable on Religion-based Persecution Claims (New York: November 2002).

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

| Task/ Skill # | Task Description |
|---|---|
| ILR6 | Knowledge of U.S. case law that impacts RAIO (3) |
| IRL7 | Knowledge of International Religious Freedom Act (3) |
| IRL14 | Knowledge of nexus to a protected characteristic (4) |
| ILR15 | Knowledge of the elements of each protected characteristic (4) |
| ILR22 | Knowledge of criteria for establishing credibility (4) |
| ITK6 | Knowledge of principles of cross-cultural communications (e.g., obstacles, sensitivity, techniques for communication) (4) |
| OK11 | Knowledge of Department functions and responsibilities, as they relate to RAIO (2) |
| RI1 | Skill in identifying issues of claim (4) |
| RI3 | Skill in conducting research (e.g., legal, background, country conditions) (4) |
| RI4 | Skill in integrating information and materials from multiple sources (4) |
| IR3 | Skill in responding to cultural behavior in an appropriate way (e.g., respectful, accepting of cultural differences) (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 applicant's credibility (5) |
| DM5 | Skill in analyzing complex issues to identify appropriate responses or decisions (5) |
| ITS3 | Skill in framing interview questions and requests for information (4) |
| ITS6 | Skill in conducting non-adversarial interviews |
| C3 | Skill in tailoring communications to diverse audiences (3) |

## SCHEDULE OF REVISIONS

| Date | Section (Number and Name) | Brief Description of Changes | Made By |
|---|---|---|---|
| 1/28/15 | Throughout document | Fixed links and citations; added new case law; deleted references to 2011-2012 COI materials | RAIO Trng |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

## Table of Contents

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

## 1 INTRODUCTION

The purpose of this module is to introduce you to the International Religious Freedom Act (IRFA) and the proper way to analyze protection claims involving religious freedom issues with the goal of ensuring that religious freedom is respected during the course of interviews and throughout the adjudication process.

Sections 2 and 3 of this module provide an overview of IRFA and a detailed analysis of Title VI, the section of IRFA that is most relevant to you. Sections 4, 5, 6, and 7 of this module discuss the nature of religion and violations of religious freedom, and explore the issues that you should consider when interviewing, analyzing and adjudicating a protection claim or benefit request where religion may be a factor. Finally, Section 8 of this module lists resources you may find useful when deciding claims based on religious freedom.

## 2 OVERVIEW OF IRFA

In 1998, Congress adopted the International Religious Freedom Act (IRFA) in response to growing concerns about the persecution of various religious groups throughout the world. IRFA was signed into law on October 27, 1998.

While IRFA specifically noted Congressional concern for Christians in the Sudan and China, Tibetan Buddhists and Baha'is in Iran, Congress recognized the importance of protecting religious freedom throughout the world. In its findings, Congress cited, among other reasons, the following as a basis for adopting the Act:

The right to freedom of religion undergirds the very origin and existence of the United States. Many of our Nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established a law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion. From its

birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution.[2]

IRFA seeks to address two different though equally important issues. First, IRFA addresses the issues of religious freedom and religious persecution directly, including a series of diplomatic and foreign policy provisions designed to enhance the ability of the United States to promote religious freedom around the globe. Second, IRFA addresses perceived problems within the Department of State (DOS), the Department of Justice (DOJ), and the former Immigration and Naturalization Service (INS) that may lead to diminished attention to the problems of religious persecution. These latter provisions now apply to the relevant components of the Department of Homeland Security (DHS).

IRFA is divided into seven titles. For this training, Title VI is the most important and will be the focus of this lesson. It is helpful, however, to briefly review the scope of the entire law. The following are the highlights of the provisions in each Title of IRFA. You should read the entire law for a complete understanding of all its provisions.

## 2.1 Title I – Department of State (DOS) Activities

- Establishes within DOS an Office on International Religious Freedom and an Ambassador-at-Large for International Religious Freedom
- Requires DOS to provide specific training and outreach to Foreign Service Officers, including instruction on internationally recognized human rights and religious freedoms
- Requires DOS to set up a website for religious freedom and to maintain country-by-country lists of prisoners of conscience
- Requires DOS to publish various papers on religious freedom and an annual report that documents religious persecution throughout the world[3]

## 2.2 Title II – Commission on International Religious Freedom

- Creates a Commission on International Religious Freedom (USCIRF) comprised of nine members from outside the U.S. Government, to monitor religious freedom in other countries, and to advise the U.S. Government on how best to promote religious freedom

## 2.3 Title III – National Security Council (NSC)

- Creates an NSC Special Advisor to the President on International Religious Freedom

[2] 22 U.S.C. § 6401(a)(1) (1999).

[3] The annual report may be found on the DOS website for international religious freedom

- Special Advisor serves as a resource for executive branch officials and makes policy recommendations

### 2.4 Title IV – Presidential Actions

- Provides the President with the power to sanction violators of religious freedom
- Requires the President to designate "countr[ies] of particular concern for religious freedom" if the countries have engaged in or tolerated certain violations of religious freedom[4]

### 2.5 Title V – Promotion of Religious Freedom

- Requires the United States to promote religious freedom through broadcasts, international exchanges, and foreign service awards

### 2.6 Title VI – Refugee, Asylum, and Consular Matters

This Title is discussed in detail below in Refugee, Asylum, and Consular Matters under IRFA.[5]

### 2.7 Title VII – Miscellaneous Provisions

These provisions note that it is the "sense of Congress that transnational corporations operating overseas" should adopt codes of conduct that encourage respect of employees' religious beliefs and practices.

## 3 REFUGEE, ASYLUM, AND CONSULAR MATTERS UNDER IRFA

Title VI contains five sections, which you must know in order to adjudicate refugee and asylum claims. A description of each section follows.

### 3.1 Section 601 -Use of Annual Report

This section specifically mandates Asylum Officers, Immigration Judges, and Refugee and Consular Officers use the DOS Annual Report on Religious Freedom and other country of origin information when analyzing claims for asylum or refugee status on account of religion.[6]

[4] The President has delegated this authority to the Secretary of State and the countries of particular concern are found on the DOS website.

[5] 22 U.S.C. §§ 6471-6474 (1999). You should read Title VI for the complete provisions in each section. These are just the highlights.

[6] Publication of the annual report is a requirement under Title I.

Furthermore, this section specifically prohibits the denial of a refugee or asylum claim solely because the conditions of religious persecution as stated by an applicant do not appear in the DOS annual report.[7] [ASM Supplement – Use of DOS Annual Report].

### 3.2 Section 602 - Reform of Refugee Policy

This section[8] contains four important components:

1. Mandates training for Refugee Adjudicators that is the same as Asylum Adjudicators' training and that includes country conditions information and information on religious persecution.

2. Mandates training for Consular Officers on refugee law and adjudication, and religious persecution.

3. Requires DOS and DHS to jointly create guidelines to ensure that interpreters and other foreign personnel who come into contact with refugee applicants do not show improper bias on account of an individual's religion, race, nationality, membership in a particular social group, or political opinion.

4. Requires greater scrutiny of the manner in which refugee cases are screened and prepared and interviews are conducted to ensure that the files contain information that is unbiased and accurate.

### 3.3 Section 603 - Reform of Asylum Policy

This section[9] contains three important components:

1. Requires DOS and DHS to jointly create guidelines to ensure that individuals possibly biased against a person's race, religion, nationality, membership in a particular social group, or political opinion are not permitted to act as interpreters between aliens and Inspection or Asylum Officers. This includes interpreters and employees of airlines owned by governments known for persecutory actions.

2. Requires Asylum Officers and any Immigration Officers working in the expedited removal[10] context to receive training on "the nature of religious persecution abroad, including country-specific conditions, instruction on the internationally recognized

[7] *See also* Gaksakuman v. U.S. Att'y Gen., 767 F.3d 1164 (11th Cir. 2014) (holding that State Department reports cannot be found to undercut evidence presented by an applicant simply because they fail to comment on the facts of an individual application).

[8] 22 U.S.C. § 6472 (1999).

[9] 22 U.S.C. § 6473 (1999).

[10] Persons who are in expedited removal proceedings and express a fear or concern of being removed to the country DHS has designated for removal, must be referred to an Asylum Pre-screening Officer for a credible fear determination.

right to freedom of religion, instruction on methods of religious persecution practiced in foreign countries, and applicable distinctions within a country in the treatment of various religious practices and believers."[11]

3. Under Section 602, all training mandated for Asylum Officers, must also be provided to officials adjudicating refugee cases.[12]

### 3.4 Section 604 - Inadmissibility of Foreign Government Officials who Have Engaged in Particularly Serious Violations of Religious Freedom

This section[13] creates a new ground of inadmissibility to prevent religious persecutors from entering the United States. This ground, codified in Section 212(a)(2)(G) of the INA, 8 U.S.C. § 1182(a)(2)(G), and later amended by the Intelligence Reform Act of 2004, makes inadmissible any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section three of IRFA. This inadmissibility ground also includes the spouse and children of any such individual. The inadmissibility ground applies only to aliens seeking admission on or after October 27, 1998, the date of the enactment of IRFA.

In 1999, INS issued a policy memorandum on how to process applications for admission from individuals who may fall within this section of the INA.[14]

### 3.5 Section 605 - Studies on the Effect of Expedited Removal Provisions on Asylum Claims

The U.S. Commission on International Religious Freedom has the ability to request from the Attorney General a study by the Comptroller General on certain aspects of the expedited removal process.[15]

- On September 1, 2000, the General Accounting Office (GAO)[16] released a report on the expedited removal process as required under IRFA; however, it did not

[11] IRFA also requires that immigration judges receive training on religious persecution.

[12] 22 U.S.C. 6472(a).

[13] Intelligence Reform and Terrorism Prevention Act of 2004 § 7119, PL 108-458, 118 Stat. 3638 (2004) (removing a restriction that the particularly severe violations of religious freedom must have taken place within the 24-month period prior to the inadmissibility determination).

[14] For specific instructions, *see* Michael A. Pearson, INS Office of Field Operations, Amendment to the Immigration and Nationality Act adding section 212(a)(2)(G), relating to the inadmissibility of foreign government officials who have engaged in particularly serious violations of religious freedom, Memorandum to Regional and Service Center Directors, (Washington, DC: 9 July 1999), 4 p. Note that if these individuals are in the United States, they are not necessarily precluded from applying for asylum, withholding of removal, or protection under the Convention Against Torture.

[15] 22 U.S.C. § 6474 (1999).

specifically address the issue of how the agency handles the religious-based claims of individuals in the expedited removal process. The GAO report found that the agency was generally in compliance with its expedited removal procedures at selected ports of entry and in compliance with the credible fear process at selected asylum offices.

- The U.S. Commission on International Religious Freedom commissioned a study on asylum seekers in expedited removal, and issued its Report in February 2005. The study sought to answer the following four questions:

1. Are immigration officers, exercising expedited removal authority, improperly encouraging asylum seekers to withdraw applications for admission?

2. Are immigration officers, exercising expedited removal authority, incorrectly failing to refer asylum seekers for a credible fear interview?

3. Are immigration officers, exercising expedited removal authority, incorrectly removing asylum seekers to countries where they may face persecution?

4. Are immigration officers, exercising expedited removal authority, detaining asylum seekers improperly or under inappropriate conditions?

Based on the problems identified in the study, the Report proposed five recommendations to DHS to ensure that asylum seekers are protected under the expedited removal process.[17] The recommendations were:

- Creating an office authorized to address cross cutting issues related to asylum and expedited removal – in response, DHS created a new position of Special Advisor for Refugee and Asylum Affairs in 2006 and appointed Igor Timofeyev to serve.

- Allowing asylum officers to grant asylum at the credible fear stage – in response, after careful consideration DHS rejected this recommendation due to resource constraints and the potential for a negative impact on some asylum-seekers.

- Establishing asylum detention standards – in response, ICE issued a directive in 2007 to its field components designed to ensure transparency, consistency, and quality in parole decisions.

- Facilitating legal assistance to asylum-seekers – in response DHS cited to its collaboration with DOJ on Legal Orientation Programs for detained individuals and

[16] General Accounting Office. *ILLEGAL ALIENS: Opportunities Exist to Improve the Expedited Removal Process.* GAO/GGD-00-176 (Washington, DC: 1 September 2000) 107p. This agency was renamed the Government Accountability Office in 2004.

[17] U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (Washington, DC: 8 Feb. 2005). The USCIRF Report is available on the USCIRF website. Note that the Congress authorized the Commission to examine how expedited removal was affecting asylum seekers, regardless of whether the claim was based on religion, race, nationality, membership in a particular social group, or political opinion.

to its partnerships with NGOs, notably the Capital Area Immigrants' Rights Coalition.

- Implementing quality assurance procedures to ensure asylum-seekers are not turned away in error – in response, DHS implemented robust quality assurance procedures.

For more on DHS's response, *see* Stewart Baker letter to U.S. Commission on International Religious Freedom (Nov. 28, 2008).

# 4 THE NATURE OF RELIGION

## 4.1 Identifying Religious Beliefs and Practices

Religion is explicitly listed as one of the five protected characteristics in the refugee definition, and religion has been broadly understood to include freedom of thought and conscience.[18] In IRFA, Congress invoked the understanding of religion found in international instruments, such as the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, and found that freedom of religious belief and practice is a universal human right and fundamental freedom.[19] Defining "religion" to include an individual's thought, conscience, and belief requires for a broad interpretation of this protected ground in the asylum and refugee adjudications.

### Familiar and Unfamiliar Religions

Religion, as a protected ground, is not limited to familiar, or widely accepted religious beliefs and practices. For purposes of establishing asylum and refugee eligibility, persecution suffered or feared on account of a belief system with which you may not be familiar may be considered persecution "on account of religion." IRFA refers to religious freedom without defining what makes a particular practice or belief a religion, or placing any particular religious group in a position of privilege over any other. While many applicants base their claim to refugee or asylum status on their inclusion in a faith group that is recognizable to the adjudicator (e.g. Hindus, Christians, or Muslims), other individuals may seek protection based upon unfamiliar religious beliefs and practices.[20]

The mere fact that an individual's faith or faith group is not familiar to an adjudicator, or that a particular practice or belief appears to be unusual, does not mean that the particular faith group or set of practices and beliefs are not "religious." "Popularity, as well as verity, are inappropriate criteria."[21] Neither courts nor adjudicators may inquire into the

[18] *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (per curiam) (citing Paragraph 71 of the UNHCR Handbook).

[19] 22 U.S.C. § 6401(a)(1) - (3) (1999).

[20] *See* UNHCR *Guidelines on International Protection: Religion-Based Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*. HCR/GIP/04/06, 28 April 2004, Section II.

[21] *Stevens v. Berger*, 428 F. Supp. 896, 899 (E.D.N.Y. 1977)

truth, validity, or reasonableness of a claimant's religious beliefs. Therefore, your role is not to determine whether a belief system may be considered a "religion," but to determine whether the applicant has suffered or might suffer persecution on account of those beliefs.[22]

**Denial of Religion**

The protected ground of religion also covers an individual's failure or refusal to observe a religion. An individual may also face persecution on account of religion, even if he or she denies that his or her belief, identity or way of life constitutes a "religion."[23]

**Inability to Practice a Religion**

The definition of religion and religious freedom necessarily includes the ability to worship and to otherwise practice one's religion. Courts have held that "it is virtually the definition of religious persecution that the votaries of a religion are forbidden to practice it."[24] The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) states that the fundamental right to religious freedom includes "the freedom of a person to . . . manifest it in public or private, in teaching, practice, worship and observance."[25]

**UNHCR Guidance on Religion-Based Claims**

A useful way to consider this protected ground is to consider the elements UNHCR has identified for claims based on "religion." UNHCR notes that such claims may involve one or more of the following elements:[26]

- religion as a belief (including non-belief)
- religion as identity
- religion as a way of life

---

[22] For example, in the First Amendment context, "a religious belief can appear to every other member of the human race as preposterous, yet merit the protections of the Bill of Rights." *Stevens v. Berger*, 428 F. Supp. at 899; *see also Najafi v. INS*, 104 F.3d 943, 949 (7th Cir. 1997) (stating that "determination of a religious faith by a tribunal is fraught with complexity as true belief is not readily justiciable"); *Callahan v. Woods*, 658 F.2d 679, 685 (9th Cir. 1981).

[23] *See* UNHCR *Guidelines on International Protection: Religion-Based Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees.* HCR/GIP/04/06, 28 April 2004, para. 9. *See Zhang v. Ashcroft*, 388 F.3d 713 (9th Cir. 2004) (per curiam) (holding that Falun Gong practitioner faced persecution on account of his spiritual and religious beliefs, even though Falun Gong does not consider itself a religion).

[24] *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997).

[25] *See* UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (2011), ¶ 71.

[26] *See* UNHCR *Guidelines on International Protection: Religion-Based Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (2004), at para. 5.

### *Belief*

According to UNHCR, a person's "beliefs" may be theistic, non-theistic, and atheistic. They also include a person's convictions or values about "divine," "ultimate reality," or "spiritual destiny." Because of his or her beliefs, a person may be considered a heretic, apostate or a pagan by members of the same religious group.[27]

### *Identity*

A religious persecution claim may also be based on the applicant's ancestry, nationality, ethnicity, traditions and rituals and less on the applicant's actual theological beliefs.[28] Persecutors may target religious groups that are different from theirs because they view such groups as a threat to their own identity.

### *Way of Life*

Religion, for some individuals, may also be a "way of life" characterized by a manner of dress, observance of religious practices and holidays, dietary restrictions, and other requirements. Such practices may be at the core of the religion for the applicant.

### Resources

The following sources are useful reference tools for understanding different faith groups around the world:

- CIA World Factbook: Religions
- Bowker, John (ed.), The Oxford Dictionary of World Religions
- Crim, Keith (ed.), The Perennial Dictionary of World Religions
- Eederman's Handbook to World Religions
- Hinnells, J.R. (ed.), Penguin Dictionary of Religions
- Smith, J.Z., The Harper Collins Dictionary of Religion

## 4.2 Credibility Considerations in Religious Persecution Cases

Credibility determinations can be particularly complex in religious persecution cases. You may need to judge the sincerity of the applicant's claimed religious beliefs, but you cannot judge the validity of the belief system itself. Additionally, you may have certain assumptions or biases about religious issues, which must be put aside in order to render a legally sufficient and unbiased credibility determination. The following considerations should be taken into account:

[27] *Id.* at para. 6.

[28] *Id.* at para. 7.

### 4.2.1 Refrain from Judging the Validity of a Belief System

You should not question the validity of a belief, even if the belief appears to be strange, illogical, or absurd.

**Distinguish between the Sincerity of Belief and the Validity of Belief**

You may evaluate whether a belief is sincerely held. In doing so, you should not make disrespectful or disparaging remarks about the belief or about the applicant's adoption of such a belief. If you suspect that an individual adopted a belief system solely for the purposes of trying to obtain asylum or refugee status, you must still evaluate whether the applicant's belief is sincerely held. In your questioning, you may elicit testimony about the sincerity of the belief, but you may not question whether the belief system itself has merit or has merit in comparison to other religions.

**Refrain from Judging Credibility based on Knowledge of Religious Tenets**

An individual's lack of knowledge of religious tenets does not necessarily mean the individual does not hold the belief or religious identity in question. Just as no individual's personal religious experience could be summed up in the history of his or her church, the words of a few prayers, or a description of his or her place of worship, a religious identity cannot be verified solely on a test of religious tenets.[29]

Furthermore, any inquiry into the applicant's knowledge of the tenets of his or her religion must take into account "individual circumstances, particularly since knowledge of a religion may vary considerably depending on the individual's social, economic or educational background and/or his or her age or sex."[30] In *Ren v. Holder*, for example, the

[29] *See Iao v. Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005) ("many deeply religious people know very little about the origins, doctrines, or even observances of their faith"); *Rizal v. Gonzales*, 442 F.3d 84, 90 (2d Cir. 2006) (reversing an adverse credibility finding based solely on the applicant's lack of detailed knowledge of Christian doctrine where the IJ failed to consider the applicant's self-identification as a religious adherent, his religious activities, and that other Indonesians perceived him to be Christian); *Cosa v. Mukasey*, 543 F.3d 1066, 1069-1070 (9th Cir. 2008) (vacated IJ decision, in part because IJ incorrectly faulted applicant for her inability to explain relationship between Millenism and similar religions, and set up Bible quiz and academic trivia contest); *see also* David Landau, Chief Appellate Counsel, ICE Office of the Principal Legal Advisor, Guidance on Religious Persecution Claims Relating to Unregistered Religious Groups, Memorandum for ICE Chief Counsel, (Washington, DC: February 25, 2008), section VI.

[30] U.N. High Commissioner for Refugees, Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, paras. 28 and 30, U.N. Doc. HCR/GIP/04/06 (Apr. 28, 2004). *See also Yan v. Gonzales*, 438 F.3d 1249, 1252 (10th Cir. 2006) (reversing an adverse credibility finding that relied on the applicant's incorrect responses to a " a mini-catechism" test and failed to consider the applicant's personal experiences with Christianity and his personal circumstances including: "his very personalized notion" of certain doctrinal elements of Christianity, high school level education, that the applicant had only converted to Christianity 5 years earlier, and that the applicant's lack of knowledge regarding when he celebrated Easter could result from the fact that the holiday is celebrated on different days each year.); *Matter of J-Y-C-*, 24 I&N Dec. 260, 265 (BIA 2007) (finding that a Chinese applicant who claimed to be Christian could reasonably have been expected to identify the Bible during an airport interview since the applicant later

Ninth Circuit rejected an adverse credibility determination based, in part, on the applicant's inability to recite The Lord's Prayer.[31] The court held that questioning an applicant on his knowledge of religious doctrine to determine if he is a true believer is "not an appropriate method for determining eligibility for asylum."[32]

1. Recognize that religions are practiced differently around the world

Location, time period, and culture will produce variations in religious beliefs or practices.[33] Religious practices may vary from country to country and even within countries.

***Example***

An officer familiar with the practices of a Protestant church finds unbelievable an applicant's claim that he was baptized in an indoor baptismal font rather than in a natural body of water, as the officer believes is the church custom. However, the applicant lives in a near-Arctic climate in which the temperature of the bodies of water never rises above 45 degrees and baptisms are, therefore, not conducted in natural bodies of water.

2. Recognize that suppression of a religious group affects practice

Many persons who fear harm on account of religion have been forced to practice their faith in secret or not allowed to practice their faith at all. Sometimes these groups have been without a formal leader or religious texts and have simply passed on traditions from one generation to the next. Absent formal religious education, such individuals may not be able to discuss church history or the theological significance of particular practices. Additionally, underground or illegal religious institutions may not adhere to all formal practices of the faith for lack of training, worship or gathering space, materials, or for other reasons.[34]

---

testified before the IJ that his experiences with Christianity before coming to the US and while in China included having been given a Bible by a friend who also told him to read it.)

[31] *Ren v. Holder*, 648 F.3d 1079, 1088 (9th Cir. 2011).

[32] *Id.*

[33] [33] U.N. High Commissioner for Refugees, Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees (2004), para. 28. Note, however, that "[g]reater knowledge may be expected . . . of individuals asserting they are religious leaders or who have undergone substantial religious instruction." *Id.* at para. 32. *See Mezvrishvili v. U.S. Att'y Gen.*, 467 F.3d 1292, 1295-1297 (11th Cir. 2006) )(finding error where an IJ held that the applicant did not demonstrate sufficient knowledge of his religion given that the applicant had been a Jehovah's Witness for only four years and did not represent that he had undertaken active study of the religion for those four years).

[34] *See Huang v. Gonzales*, 403 F.3d 945, 949 (7th Cir. 2005) (rejecting IJ's adverse credibility finding because, among other things, the IJ failed to consider that members of an illegal underground Chinese Catholic church might have to deviate from formal practices); *see also Jiang v. Gonzales*, 485 F.3d 992, 994-995 (7th Cir. 2007)(noting that the IJ had "an exaggerated notion of how much people in China actually should know about Christianity." The court compared the IJ's finding that the applicant could not have been be persecuted for being a Christian because he

*Example*

A 35 year-old woman claiming to be Ukrainian Catholic cannot describe how she would receive the Eucharist. This could be explained by the fact that in her rural town there were very few families who were Catholic and they had not had a priest since 1925.

3. Recognize your personal perceptions of a religion may not be accurate

You are not expected to be a theological scholar. Good research on a particular religion, and how it is practiced in a particular region, is crucial to conduct a thorough interview. Even if you are familiar with a religion through personal study or experience, you must be careful when questioning applicants and making credibility determinations.[35] You must not make assumptions, but should instead attempt to verify the applicant's statements with country of origin information.

This is particularly important when the claimant is a member of the same faith group as you. You may be tempted to rely on your personal experiences in the faith to evaluate the testimony of the applicant. It is unlikely, however, that applicants for asylum or refugee status will practice their religion as it is practiced in the United States.

4. Do not judge sincerity based on the applicant's manner of religious practice

You should not assume that the applicant's religious beliefs are not sincere based solely on the manner in which the applicant engaged in religious worship or the applicant's attendance at religious services. Religious practices can vary from country to country, community to community, and even person to person. You may notice, if you practice a religion, that the way you practice it may be different than other members of your family. How a religion is practiced may not be indicative of religious sincerity.[36] For example, attendance or lack of attendance at religious services may be affected by numerous factors, such as the availability of places for religious observance, personal circumstances that may inhibit or prevent religious attendance, fear of serious harm when attending religious services, or personal preferences. The frequency of or lack of attendance at religious services may not be indicative of religious sincerity.

**Religious Beliefs Can Be Imputed to an Applicant**

---

could not interpret a Biblical passage to a finding that an individual is not "a baseball devotee because he can't explain the intricacies of the balk rule.").

[35] *Cosa v. Mukasey*, 543 F.3d 1066, 1069 (9th Cir. 2008) (reversing adverse credibility finding because IJ wrongly relied on speculation and conjecture regarding how Millenists dress and behave to fault the applicant's dress and demeanor, and used personal opinion to find that it was "preposterous" that applicant was baptized after only a short period of association with the religion).

[36] *See, e.g.*, *Singh v. Holder*, 720 F.3d 635, 643-644 (7th Cir. 2013) (finding "inappropriate" behavior of IJ who doubted that applicant was Sikh because the applicant did not follow all tenets of Sikhism listed in a Wikipedia entry and noting that "Rather than seeking a verbatim recitation of an encyclopedia article, IJs should listen to a petitioner's personal explanation of religious beliefs…Orthodoxy is no substitute for sincerity.")

An applicant's knowledge of her religion, or the depth of her beliefs, may not be relevant if she faces persecution on account of beliefs a persecutor perceives her to hold. An adjudicator must look at the totality of the applicant's circumstances, and country conditions information, when assessing whether an applicant has been or would be persecuted on account of an imputed religious belief.[37] For example, in *Bastanipour v. INS*, the court found that "[w]hether Bastanipour believes the tenets of Christianity in his heart of hearts or . . . is acting opportunistically (though at great risk to himself) in the hope of staving off deportation would not, we imagine, matter to an Iranian religious judge."[38]

## 5 RIGHT TO RELIGIOUS FREEDOM

In Section 2 of IRFA, Congress acknowledged that freedom of religious belief and practice is a universal human right and a fundamental freedom articulated in numerous international instruments. A review of these international instruments is important background information, given IRFA's training requirements for Refugee and Asylum Officers, which includes instruction on the internationally recognized right to freedom of religion. Some of the relevant provisions in the listed international instruments are below.[39]

### 5.1 United Nations Charter

Article 1 of the *United Nations Charter* provides that one of the purposes of the United Nations is to achieve international cooperation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[40]

### 5.2 Universal Declaration of Human Rights

Article 18 of the *Universal Declaration of Human Rights* states that "[e]veryone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance." The text of this Article is quoted in IRFA.[41]

### 5.3 International Covenant on Civil and Political Rights

[37] For additional information, see RAIO Training module, *Nexus and the Five Protected Grounds*.

[38] *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992).

[39] 22 U.S.C. § 6401(a)(2) (1999).

[40] *Charter of the United Nations*. (San Francisco: 26 June 1945).

[41] *Universal Declaration of Human Rights*. G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

Article 18 of the *International Covenant on Civil and Political Rights*[42] provides that:

1. Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in a community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.

2. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

## 5.4 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* reaffirms the provisions in Article 18 of the *International Covenant on Civil and Political Rights.*[43]

### Religious Discrimination and Intolerance

Article 2 addresses issues of discrimination based on religion or other beliefs and defines religious discrimination and intolerance as follows:

1. No one shall be subject to discrimination by any State, institution, or group of persons on the grounds of religion or other belief.

2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

### Parents' Right to Choose Religion

Article 5 addresses the rights of parents to choose the belief or religion in which they desire their children to be raised and the rights of children to have access to education in that belief.

---

[42] *International Covenant on Civil and Political Rights*. G.A. Res. 2200A (XXI), UN GAOR, Dec. 16, 1966. The text of Article 18(1) is quoted in IRFA.

[43] *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A.. Res. 36/55, UN GAOR, Nov. 25, 1981.

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child serving as the guiding principle.

3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of others to practice a religion or belief, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

4. In the case of a child who is not under the care of either of his parents or legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes regarding the religion or belief in which they would have wished their child to be raised, the best interests of the child serving as the guiding principle.

5. Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account Article 1, paragraph 3, of the present Declaration.

**Freedom of Thought, Conscience, Religion, or Belief**

Article 6 states that the right to freedom of thought, conscience, religion, or belief shall include, among others, the following:

1. To worship or assemble in connection with a religion or a belief, and to establish and maintain places for these purposes

2. To establish and maintain appropriate charitable or humanitarian institutions

3. To make, acquire and use to an adequate extent the necessary articles and materials related to the rites and customs of a religion or belief

4. To write, issue and disseminate relevant publications in these areas

5. To teach a religion or belief in places suitable for these purposes

6. To solicit and receive voluntary financial and other contributions from individuals and institutions

7. To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief

8. To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief

9. To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels

### 5.5 Other International Instruments

Other international instruments that promote the right to religious freedom include the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter of Human and People's Rights, the American Convention on Human Rights, and the Final Act of the Conference on Security and Cooperation in Europe (the "Helsinki Accords").

## 6 VIOLATIONS OF RELIGIOUS FREEDOM ACCORDING TO IRFA

IRFA highlights the wide range of actions that persecuting regimes take to violate religious freedoms, and provides a *non-exclusive* list of actions that constitute "violations of religious freedom" and a separate list of violations that constitute "particularly severe violations of religious freedom."[44] The range of violations listed in IRFA is instructive for determining persecution under the INA given IRFA's training requirements for asylum and refugee adjudicators on the nature and methods of religious persecution practiced in foreign countries.

The codification of this categorical framework, however, does not mandate a particular result in an individual case. As discussed below in the Religious Persecution section, these violations may or may not constitute persecution, depending upon whether the harm the applicant experienced or fears is sufficiently serious to amount to persecution.

This categorical framework also gives the President a vehicle for identifying and sanctioning violations of religious freedom in other countries.[45]

These categories generally reflect the rights enshrined in the international instruments discussed above, and compose the framework used to determine if countries will be designated as "countries of particular concern for religious freedom."[46]

### 6.1 Particularly Severe Violations of Religious Freedom

[44] *See* 22 U.S.C. §§ 6204 (11) and (13).

[45] *See* section on Religious Freedoms, above.

[46] 22 U.S.C § 6441,

*Particularly severe violations* are systematic, ongoing, egregious violations of religious freedom, including violations such as:

- Torture or cruel, inhuman, or degrading treatment or punishment
- Prolonged detention without charges
- Causing the disappearance of persons by the abduction or clandestine detention of those persons
- Other flagrant denial of the right to life, liberty, or the security of person

## 6.2 Violations of Religious Freedom

*Violations of religious freedom* are violations of the internationally recognized right to freedom of religion and religious belief and practice, including violations such as:

Arbitrary prohibitions on, restrictions of, or punishment for:

- Assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements
- Speaking freely about one's religious beliefs
- Changing one's religious beliefs and affiliation
- Possession and distribution of religious literature, including Bibles
- Raising one's children in the religious teachings and practices of one's choice

***Example***

The government of China requires that unofficial house churches register with the government. Those that refuse to register, on either theological or political grounds, are subject to intimidation, extortion, harassment, detention, and closure of their churches. See 2011 USCIRF Annual Report, "China."

Any of the following acts are violations of religious freedom if committed on account of an individual's religious belief or practice:

- Detention
- Interrogation
- Imposition of an onerous financial penalty
- Forced labor
- Forced mass resettlement
- Imprisonment

- Forced religious conversion[47]
- Beating
- Torture
- Mutilation
- Rape
- Enslavement
- Murder
- Execution

IRFA also identifies

"state-sponsored slander campaigns, confiscations of property, surveillance by security police, including by special divisions of 'religious police[,'] severe prohibitions against construction and repair of places of worship, denial of the right to assemble and relegation of religious communities to illegal status through arbitrary registration laws, prohibitions against the pursuit of education or public office, . . . prohibitions against publishing, distributing, or possessing religious literature and materials," forcing religious believers to meet secretly, and targeting religious leaders by national security forces and hostile mobs, as additional forms of religious freedom violations.[48]

# 7 RELIGIOUS PERSECUTION

## 7.1 Persecution Generally

A variety of harms, ranging from physical abuse to mental suffering may rise to the level of persecution. In certain cases, severe forms of discrimination may constitute persecution.[49] The difference between persecution and discrimination is one of degree, which makes a hard and fast line difficult to draw.[50] Moreover, the Board of Immigration Appeals (BIA) has held that harms and abuses that might not individually rise to the level of persecution may, in the aggregate, constitute persecution.[51] For example, in *Shi v. U.S. Att'y Gen.*, the Eleventh Circuit held that the evidence compelled the conclusion that a Chinese Christian applicant had suffered persecution where he had been arrested during an underground church service, interrogated, detained for a week, and chained to an iron

[47] Being forced to change one's religion and being prohibited from voluntarily changing one's religion are both considered violations of religious freedom.

[48] 22 U.S.C. § 6401(a)(4) and (5).

[49] *See Kovac v. INS*, 407 F.2d 102, 105-07 (9th Cir. 1969) (holding that persecution is not limited to physical suffering).

[50] *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997).

[51] *Matter of O-Z- and I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998)

bar outside in the rain for a night; the Court found it especially significant that the police had confiscated the applicant's religious group's bibles and attempted to force him to abandon his religious principles.[52]

In *Sumolang v. Holder*, the Ninth Circuit found that "[h]arm to a child can amount to past persecution of the parent when that harm is, at least in part, directed against the parent 'on account of' or 'because of' *the parent's* race, religion, nationality, membership in a particular social group, or political opinion" in the context of a religious persecution claim. It noted that, where a child is so young that she lacks the capacity to have a religious belief of her own, harm to the child on account of religion must be understood as intended to punish the parent for the parent's religious belief.[53]

When determining whether particular harm or abuses constitute persecution, you must consider their impact on the individual applicant. *See* RAIO Training modules, *Refugee Definition* and *Persecution*.

## 7.2 Religious Persecution

IRFA lists a wide array of actions that persecuting regimes may take to violate religious freedoms, ranging from severe physical abuse and torture, to various forms of psychological harm. These violations may or may not constitute persecution, depending upon the severity of the harm imposed, and the applicant's individual circumstances.

1. Relevance of inclusion on IRFA list of violations

As noted in "Violations of Religious Freedom According to IRFA," above, the range of violations listed in IRFA is instructive for determining persecution, given IRFA's training requirements on the nature and methods of religious persecution practiced abroad.[54] That a particular type of harm is listed in IRFA as a violation of religious freedom does not necessarily mean that the violation rises to the level of persecution. Similarly, the omission from IRFA of a type of harm does not mean that the harm cannot amount to religious persecution under the INA.

In most instances, the serious forms of mistreatment categorized in IRFA as "particularly severe violations of religious freedom," such as torture or cruel, inhuman, or degrading treatment or punishment; prolonged detention without charges; disappearance by abduction, and other flagrant denial of the right to life, liberty, or the security of persons, will constitute persecution.[55]

[52] *Shi v. U.S. Att'y Gen.*, 707 F.3d 1231, 1236-1237 (11th Cir. 2013).

[53] *Sumolang v. Holder*, 723 F.3d 1080, 1084 (9th Cir. 2013).

[54] *See* 22 U.S.C. § 6473(b) & (c).

[55] 22 U.S.C. § 6402(11).

IRFA states that other "severe and violent forms of religious persecution," include "detention, torture, beatings, forced marriage, rape, imprisonment, enslavement, mass resettlement, and death merely for the peaceful belief in, change of, or practice of their faith."[56] Additional violations of religious freedom listed in IRFA, including arbitrary prohibitions on, restrictions of, or punishment for various religious activities, may constitute persecution, depending on the circumstances.[57]

2. Restrictions on practicing religion

   As noted above, prohibitions on or restrictions of religious beliefs and practices may rise to the level of persecution, even without physical mistreatment. The Seventh Circuit has held that "[i]f a person is forbidden to practice his religion, the fact that he is not imprisoned, tortured, or banished, and is even allowed to attend school, does not mean that he is not a victim of religious persecution."[58]

   Where religious beliefs or practices have been restricted or banned, and the individual has not been physically harmed, the adjudicator must determine the degree of suffering or psychological harm caused by the religious freedom violation. In these cases it will be useful to determine the importance or centrality of the particular practice in the religion or to the individual applicant, in order to assess whether the suffering caused by the restriction amounts to persecution.[59]

3. Forced compliance with religious laws or practices that are abhorrent to an applicant's beliefs

   The U.S. Courts of Appeals for the Third and Seventh Circuits have indicated that forced compliance with laws that are "profoundly" or "deeply" abhorrent to a person may rise to the level of persecution.[60] In *Fatin v. INS*, the Third Circuit upheld the denial of asylum to an Iranian applicant who testified that, although she objected to a law requiring that women wear the chador and she did not want to wear it, she would be willing to do so rather than be punished; therefore, the Court reasoned, she had not demonstrated that compliance with the law would be profoundly abhorrent to her. In *Yadegar-Sargis v. INS*, however, the Seventh Circuit cautioned that the refugee definition does not require "that one be willing to suffer martyrdom to be eligible for asylum."[61]

---

[56] 22 U.S.C. § 6401(a)(5); *see also* § 6402(13)(B) (listing the following additional religious freedom violations: interrogation, imposition of an onerous financial penalty, forced labor, forced religious conversion, and mutilation).

[57] 22 U.S.C. § 6402(13)(A).

[58] *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997); see also Membership in a Religious Community, below.

[59] For additional information on considering the importance of the feelings, opinions, and physical and psychological characteristics of the applicant, see RAIO Training modules, *Refugee Definition* and *Persecution.*

[60] *Fatin v. INS*, 12 F.3d 1233, 1241-42 (3d Cir. 1993); *see also Yadegar-Sargis v. INS*, 297 F.3d 596, 604-05 (7th Cir. 2002).

[61] *Yadegar-Sargis*, 297 F.3d at 603 n.5.

4. Guidance from UNHCR *Handbook*

The UNHCR *Handbook* also provides that various violations of religious freedom, even without physical mistreatment or abuse, can constitute persecution.[62] Religious persecution may include:

1. Prohibition of membership in a religious community
2. Prohibition of worship in private or in public
3. Prohibition of religious instruction
4. Serious measures of discrimination imposed on persons because they practice their religion or belong to a religious community

## 7.3 Agents of Persecution

Religious persecution is not limited to government-sponsored violence; it can also include "[d]iscrimination, harassment, and violence by groups that the government is unwilling or unable to control" as well as acts of persecution by private entities that are either tolerated or outright sponsored by the government.[63]

An applicant may meet the burden of proving that the government is "unable or unwilling" to control nongovernmental entities by specific evidence of government inaction and evidence that generally the government is complicit in, or tacitly approves of the private persecution.[64] *See* RAIO Training Modules, *Persecution* and *Well-Founded Fear*.

## 7.4 No Requirement to Conceal Religious Beliefs

Recognizing that "[o]ne aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population," you cannot require applicants to conceal their religion upon return in order to avoid persecution.[65] In *Muhur v. Ashcroft*, the Seventh Circuit rejected an Immigration Judge's determination that a Jehovah's Witness could not establish a well-founded fear of persecution in Eritrea because she was "not a religious zealot."[66] The court held that the IJ improperly assumed that one is not entitled to asylum on the basis of religious

[62] *See* UNHCR *Handbook*, para. 72.

[63] *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir.1996)

[64] *Ivanov v. Holder*, 736 F.3d 5 (1st Cir. 2013); *see also Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998).

[65] *Muhur v. Ashcroft*, 355 F.3d 958, 961 (7th Cir. 2004).

[66] *Muhur v. Ashcroft*, 355 F.3d 958, 960-961 (7th Cir. 2004);

persecution if one can escape the notice of persecutors by concealing one's religion.[67] The Ninth Circuit has also held that forcing an individual to practice his or her religion in hiding is contrary to our basic principles of religious freedom and the protection of religious refugees.[68] In *Kazemzadeh v. U.S. Att'y Gen.*, the Eleventh Circuit adopted a similar approach, finding that being forced to practice a religion underground to avoid punishment is itself a form of persecution.[69]

Cases in which applicants are forced to conceal their religion in order to avoid persecution are distinct from those in which the evidence indicates that the applicant **voluntarily** practices his or her religion in such a way that it is not reasonably likely to come to the attention of the feared persecutors. In such cases, the applicant may not have a well-founded fear of persecution. For example, in *Yi Xian Chen v. Holder*, the Seventh Circuit upheld a determination that an applicant who began practicing Falun Gong in the United States, had never had any problems with the Chinese government, and testified that he planned to practice Falun Gong inside his house or on a nearby farm outside rather than in public did not have a well-founded fear because he was not reasonably likely to draw the Chinese government's attention.[70]

## 7.5 Religious Discrimination

Although serious forms of religious discrimination may constitute persecution, lesser forms of religious discrimination, without more, may not rise to the level of persecution. For example, in *Sofinet v. INS*, a Romanian Seventh Day Adventist claimed that he suffered religious persecution because he was reprimanded for not working on his Sabbath.[71] The U.S. Court of Appeals for the Seventh Circuit held that although the applicant was occasionally reprimanded for failing to work as a police officer on Saturdays, he enjoyed steady employment for the five years between his conversion and his departure from Romania, and he failed to provide any evidence that he sought work that did not require Saturday hours. The Court further added that the totality of the evidence Sofinet presented was insufficient to demonstrate his claimed religious persecution. The Court noted that the evidence highlights only that Sofinet, at worst,

[67] *Id.*; *Antipova v. U.S. Att'y Gen.*, 392 F.3d 1259, 1263-1265 (11th Cir. 2004)(overturning an IJ decision noting with disfavor that the applicant had been subjected to acts of persecution because she "advertised" that she was a practitioner of Judaism by displaying her menorah on a window. The court noted that neither the INA provision on withholding of removal nor the related regulations required the applicant to avoid "signaling" her religious affiliation.).

[68] See *Zhang*, 388 F.3d at 719 (rejecting IJ's finding that petitioner could avoid persecution by practicing Falun Gong in secret); see also *Iao v. Gonzales*, 400 F.3d 530, 532 (7th Cir. 2005) ("[T]he fact that a person might avoid persecution through concealment of the activity that places her at risk of being persecuted is in no wise inconsistent with her having a well-founded fear of persecution.").

[69] *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1354-55 (11th Cir. 2009).

[70] *Yi Xian Chen v. Holder*, 705 F.3d 624, 630 (7th Cir. 2013).

[71] *Sofinet v. INS*, 196 F.3d 742, 744 (7th Cir. 1999).

experienced ridicule, harassment and self-initiated job termination because of his religious beliefs."[72]

Similarly, in *Nagoulko v. INS*, the Ninth Circuit held that occasional disruptions in worship services and other church activities, where the applicant was not prevented from practicing her religion and did not suffer physical violence, did not amount to treatment so extreme as to compel a finding of past persecution.[73]

On the other hand, discrimination or harassment, especially in combination with other harms, may be sufficient to establish persecution if the adverse practices or treatment accumulates or increases in severity to the extent that it leads to consequences of a substantially prejudicial nature. Discriminatory measures that lead to serious restrictions on an individual's right to practice his or her religion could amount to persecution.[74]

In *Krotova v. Gonzales*, a Russian Jewish family presented evidence of sustained economic discrimination and pressure, physical violence and threats against the principal applicant and her close associates, and serious restrictions on the applicant's ability to practice her religion.[75] The court rejected the BIA's determination that the family experienced discrimination, and held that the cumulative impact of the anti-Semitic harms amounted to persecution. The *Krotova* opinion includes a useful discussion comparing cases finding discrimination with cases where the harm constitutes persecution.[76]

## 7.6 Reduced Evidentiary Burden: Lautenberg-Specter Cases in the Refugee Program

Under the Lautenberg Amendment,[77] certain categories of overseas refugee applicants – largely religious minorities from the former Soviet Union, Southeast Asia, and Iran – may establish a well-founded fear of persecution under a reduced evidentiary burden. Specifically, a category member may show a well-founded fear by establishing a "credible basis for concern about the possibility of persecution." Applicants generally establish a credible basis of concern by showing multiple instances of discrimination in one or more of the following areas:

---

[72] *Id.* at 747.

[73] *Nagoulko v. INS*, 333 F.3d 1012, 1016-1017 (9th Cir. 2003); *see also Matter of V-F-D-*, 23 I&N Dec 859, 863 (BIA 2006) (holding that discrimination in school, neighborhood and employment opportunities on account of religion did not amount to past persecution).

[74] For additional information on discrimination and harassment, see RAIO Training modules, Refugee *Definition* and *Definition of Persecution and Eligibility Based on Past Persecution.* See also *UNHCR Handbook, para. 54.*

[75] *Krotova v. Gonzales*, 416 F.3d 1080, 1082 (9th Cir. 2005); *see also Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998) (holding that Ukrainian father and son who experienced anti-Semitic attacks, vandalism, threats and a humiliating incident suffered persecution).

[76] *Krotova*, 416 F.3d at 1084-1087.

[77] The Lautenberg Amendment amended the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. No.101-167. For a list of Lautenberg category members, please see the Lautenberg Lesson Plan.

- Inability to study or practice religion or cultural heritage
- Denial of access to educational, vocational or technical institutions
- Adverse treatment in the workplace
- Loss of home, job or educational opportunities

Lautenberg-Specter applicants may also establish a credible basis of concern by showing mistreatment against similarly situated individuals or by showing that they suffered harm on account of their request to emigrate. There is no provision in the law for asylum applicants to be covered by the reduced evidentiary burden set forth in the Lautenberg Amendment.

## 7.7 Membership in a Religious Community

Generally, mere membership in a religious community will not be sufficient to establish eligibility for asylum or refugee status on the basis of religious persecution.[78] Each case requires an analysis of whether the individual suffered or may suffer harm amounting to persecution. Of course, an individual need not show that she will be singled out individually for persecution if she shows that she is included in a group that suffers a pattern or practice of persecution.[79]

## 7.8 Issues with "on Account of" in Religious Persecution Cases

In many countries, politics and religion are intertwined, making the analysis of nexus more complex. In such cases, you must determine whether the applicant was targeted on account of his or her religious beliefs, political opinion, in the course of legitimate government investigation of crimes, or some combination of all three. Motivation of the persecutor is a critical element in the analysis of nexus.[80]

In two separate cases before the BIA, *Matter of R-*[81] and *Matter of K-S-*,[82] each respondent based his asylum claim, in part, upon the premise that the Indian authorities persecute Sikhs on account of religion. In *Matter of R-*, the BIA held that harm suffered incidental to the government's pursuit of Sikh militant separatists was not persecution on account of religion. Likewise in *Matter of K-S-*, the BIA relied heavily on a State Department opinion which stated that the government of India does not take action against individuals solely on account of their membership in the Sikh faith, but against those accused of committing acts of violence.

---

[78] UNHCR Handbook, para. 73.

[79] *See* 8 C.F.R. 208.13(b)(2)(iii). For additional information, see also RAIO Training module, *Well-Founded Fear*, section on *Pattern or Practice of Persecution.*

[80] For additional information, see RAIO Training module, *Nexus and the Five Protected Grounds.*

[81] *Matter of R-*, 20 I&N Dec. 621, 623-625 (BIA 1992).

[82] *Matter of K-S-*, 20 I&N Dec. 715, 722 (BIA 1993).

In both cases the BIA rejected the notion that the respondents' membership in the Sikh faith was the reason ("on account of") for the harm suffered, because they presented no direct or circumstantial evidence that the authorities were motivated by the respondents' religious beliefs.

### 7.8.1 Conversion

It may be illegal in some countries to convert from one religion to another and the penalties may be severe. In some countries, for example, conversion from Islam to another religion is considered apostasy (renunciation of faith) and may be punishable by imprisonment or death. Punishment for conversion may be considered persecution on account of religion, depending on the degree of the harm threatened or imposed.

### 7.8.2 Prosecution v. Persecution

Cases involving forced compliance with laws of general applicability raise challenging questions of nexus and motive. In general, prosecution for a criminal offense is not persecution, and a government has the right to investigate and punish individuals for violations of legitimate laws. In *Matter of H-M-*, the BIA held that the applicant's prosecution for foreign currency speculation, black market sales, and conspiracy to possess illegal weapons did not constitute persecution.[83] However where a law of "general applicability" punishes individuals because of a protected ground and the punishment for violations of the law rises to the level of persecution, an applicant who has been punished for violating the law may be able to establish past persecution, and an applicant who is reasonably likely to violate the law may have a well-founded fear. For example, in *Karouni v. Gonzales*, the Ninth Circuit Court of Appeals noted that the applicant's feared arrest and detention for violating a law prohibiting same-sex acts would constitute persecution on account of membership in a particular social group defined by his sexual orientation.[84]

#### General Considerations

To determine whether punishment for violation of a generally applicable law constitutes religious persecution, you should consider:

- Is the law neutral in intent?
- Is the law neutrally or unequally enforced?
- How does the persecutor view those who violate the law?

[83] *See Matter of H-M-*, 20 I&N Dec. 683 (BIA 1993); *Abedini v. INS*, 971 F.2d 188 (9th Cir. 1992) (holding that prosecution for violation of generally applicable anti-propaganda and conscription laws is not persecution on account of protected ground). For additional information, see also RAIO Training module, *Nexus and the Five Protected Grounds*.

[84] *Karouni v. Gonzales*, 399 F.3d 1163, 1174 (9th Cir. 2005).

### Laws Based on Religious Principles

Laws that target particular religious beliefs and practices generally are not neutral in intent. When a law criminalizes a particular religious practice, punishment for violation of the law may amount to persecution on account of religion.

*Examples*

Prosecution for the crime of attending religious services, or for providing "illegal" religious instruction to a child, could constitute persecution on account of religion.[85]

Punishment for refusal to comply with religious norms or laws (such as dress codes or gender roles based on religious principles) may, in some cases, constitute persecution on account of religion or another protected ground.[86]

> Punishment for violation of a law that is designed to prevent the commingling of individuals of different faiths, such as laws against interfaith dating or marriage, could amount to persecution on account of religion.[87]

When a civil or criminal law is itself based on religious laws or principles in a country where there is little separation between church and state, the evaluation of the persecutor's intent may be complex. A thorough understanding of country conditions will help you evaluate how the authorities view individuals who violate religious laws. Keep in mind that Section 601 of IRFA requires Immigration Judges, Asylum, Refugee, and Consular Officers to use the Department of State Annual Report on International Religious Freedom, and other country conditions reports, when analyzing claims of religious persecution.

### Laws of Neutral Intent that Affect Religious Practices

While laws that require punishment for holding a particular belief would almost always be considered a violation of religious freedom, punishment for violation of laws that proscribe particular actions or practices associated with a religion may or may not be linked to the protected ground of religion.

*Example*

---

[85] UNHCR Handbook, para. 57

[86] *See, e.g.*, *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000)(granting asylum to a woman with liberal Muslim beliefs who was persecuted by her father who had more orthodox Muslim beliefs); *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011)(although this is a particular social group case, the court noted that "[s]ociety as a whole brands women who flout its norms as outcasts, and it delegates to family members the task of meting out the appropriate punishment—in this case, death.").

[87] *Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000)(finding applicant suffered persecution for interfaith dating), citing with approval *Maini v. INS*, 212 F.3d 1167 (9th Cir. 2000)(finding applicants suffered persecution for interfaith marriage).

In *Romeike v. Holder*, the Sixth Circuit Court of Appeals held that prosecution for violating a truancy law by a couple who homeschooled their children in accordance with their religious values did not constitute persecution on account of religion because the law applies equally to all parents, is not intended to target the applicant's religion, and does not impose disproportionately harsh treatment on parents who homeschool for religious reasons.[88]

Some state restrictions on religious practice can be legitimate. It is important, therefore, to focus on the intent or the purpose of the law. Article 18 of the International Covenant on Civil and Political Rights provides that the "freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights of others."[89]

*Example*

A curfew imposed during a period of civil strife may prevent individuals from attending evening religious services. Because the law was not intended to overcome a characteristic, but rather to protect public safety, no nexus to religion would be established.[90]

**Unequal or Pretextual Enforcement of the Law or Disproportionately Severe Punishment**

Unequal enforcement of a law that appears neutral may be evidence of persecutory intent. Prosecution that is used as a pretext to harm an individual on account of any of the five protected grounds may constitute persecution. Punishment that is unduly harsh or disproportionately severe, given the nature of the offense committed, may be evidence of pretext.[91]

*Examples*

A law that prohibits public gatherings on public property without a permit is enforced only against members of one particular religion, but not against other groups. The unequal enforcement is evidence that the persecutor's intent is to punish members of a particular religious group because of their religious beliefs.

In *Ghebremedhin v. Ashcroft*, the Seventh Circuit overturned an Immigration Judge's finding that a Jehovah's Witness who feared that he would be harmed because of his failure to perform national service would not be targeted on

[88] *Romeike v. Holder*, 718 F.3d 528, 533-534 (6th Cir. 2013).

[89] Art. 18 of *International Covenant on Civil and Political Rights (ICCPR)* (16 December 1966).

[90] *See also* UNHCR Religion Guidelines, para. 15 (discussing examples of permissible restrictions, including, for example, prohibition on ritual killings).

[91] *Matter of A-G-*, 19 I&N Dec. 502, 506 (BIA 1987); *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996); *UNHCR Handbook*, para. 57-59.

account of his religion because all Eritreans are required to. According to the Court, the IJ failed to consider evidence both from the applicant's testimony and from country conditions reports that Jehovah's Witnesses are singled out for disproportionately severe treatment, such as extended detention and extreme physical punishment, for their failure to serve.[92]

The Ninth Circuit, in *Bandari v. INS*, considered the claim of an Iranian Christian who had been arrested by police for violating a law that prohibited public displays of affection when he kissed a Muslim girl. The initial stop of the applicant by the police may have been characterized as equal enforcement of a neutral law. The police, however, detained the applicant for several days, beat him, insulted his religion, and sentenced him for violation of a law that prevented interfaith dating. These actions by police demonstrated that the harm the applicant suffered was persecution on account of his religion, rather than prosecution.[93]

**The Persecutor's View of Violators**

Where an individual is punished for his or her refusal to comply with a religious law, the persecutor may view the individual as both a law-breaker and as an individual with "improper" religious values. You must, therefore, explore all possible motives, as well as the possibility that the persecutor had mixed motives, when assessing whether the harm the applicant suffered or fears is on account of a protected ground. *See* Mixed Motives section, below.

### 7.8.3 Refusal to Comply with or Alleged Flouting of Religious Norms

Harm resulting from an applicant's refusal to comply with religious norms may constitute persecution on account of religion. In *Matter of S-A-*, a woman with liberal Muslim beliefs differed from her father's orthodox Muslim views concerning the proper role of women in Moroccan society. As a result of her refusal to share or submit to her father's religion-inspired restrictions and demands, her father subjected her (but not her brothers) to repeated physical assaults, imposed isolation, and deprivation of education. The BIA held that harm inflicted on the applicant by her father because she refused to comply with religious norms amounted to past persecution on account of religion.[94]

Harm to a person who is alleged to have flouted repressive moral norms may also constitute persecution on account of the person's membership in a particular social group. In *Sarhan v. Holder*, the Seventh Circuit noted that honor killings occur where a woman commits the "sin" of going for a walk with a man who is not her husband or relative.[95] The applicant in *Sarhan* was falsely accused of adultery by her sister-in-law and was

[92] *Ghebremedhin v. Ashcroft*, 385 F.3d 1116, 1120 (7th Cir. 2004).

[93] *Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000).

[94] *Matter of S-A-*, 22 I&N Dec. 1328, 1336 (BIA 2000).

[95] *Sarhan v. Holder*, 658 F.3d 649, 654 (7th Cir. 2011).

threatened with death by her brother for bringing dishonor to her family. The court found that Jordanian society as a whole brands women who flout its norms as outcasts, and it delegates to family members the task of meting out the punishment.[96] The court rejected the BIA's conclusion and the government's argument that this was merely a "personal dispute" between the applicant and her brother. The court held that the dispute is a "piece of complex cultural construct that entitles male members of families dishonored by perceived bad acts of female relatives to kill those women."[97]

### 7.8.4 Mixed Motives

A persecutor may have more than one motive in seeking to harm an individual. One or more of the persecutor's motives may be a protected ground. There is no requirement that the applicant demonstrate that the protected characteristic is or was the **only** factor motivating the persecutor to harm the applicant.

For example, organized criminal groups may be motivated to harm religious people both to further their criminal goals and because of their religious beliefs. In *Ivanov v. Holder*, the First Circuit Court of Appeals considered the case of a Russian applicant who practiced the Pentecostal faith and volunteered at a drug rehabilitation center run by his church. One night, while the applicant was leaving the center, a group of skinheads involved in drug trafficking beat him, kidnapped him, and detained him for three days in a basement without food and water. The Court rejected the Board's conclusion that the group was motivated solely by the applicant's interference with its drug trade, holding that it failed to consider the possibility that the group had mixed motives given that it also had an "overarching mission" of intolerance toward adherents of "foreign" religions and specifically expressed opposition to the center's religious methods.[98]

A mixed motive analysis for asylum applications filed on or after May 11, 2005 is governed by the REAL ID Act of 2005, which amended INA § 208. Under the amendment, an asylum 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."[99] *See* ASM Supplement – Mixed Motives at the end of this module.

Refugee adjudications are governed by case law interpreting the refugee definition, prior to the 2005 amendment. In *Matter of Fuentes*, for example, the BIA held that an applicant does not need to establish the exact motivation of his persecutor, but he does need to establish that a reasonable person would fear the danger arises on account of a protected

[96] *Id.* at 655.

[97] *Id.* at 656.

[98] *Ivanov v. Holder*, 736 F.3d 5, 15 (1st Cir. 2013).

[99] INA §208(b)(1)(B)(i).

ground.[100] *See* RAD Supplement – Mixed Motives at the end of this module. *See* RAIO Training module, *Nexus the Five Protected Grounds*.

### 7.9 Persecution by Members of Applicant's Religion

You may encounter cases in which the persecutor belongs to the same religious group as the applicant. This may occur, for example, when the persecutor believes that the applicant is not sufficiently complying with religious tenets. In *Matter of S-A-* (see above, *Refusal to Comply with Religious Norms*), the BIA found that the applicant had been persecuted by her father because her beliefs regarding the proper role of Muslim women differed from his. Both the applicant and her father practiced Islam.[101] Similarly, in *Maini v. INS*, the petitioners argued that despite the fact that the Communist Party Marxist (CPM) of India is comprised of both Sikhs and Hindus, *Maini* and his wife were persecuted on account of their interfaith marriage. The U.S. Court of Appeals for the Ninth Circuit held that "if an applicant can establish that others in his group persecuted him because they found him insufficiently loyal or authentic to the religious, political, national, racial, or ethnic ideal they espouse, he has shown persecution on account of a protected ground. Simply put, persecution aimed at stamping out an interfaith marriage is without question persecution on account of religion."[102]

## 8 RESOURCE MATERIALS

Title VI of IRFA requires Asylum and Refugee Officers and other immigration officials to consult the Department of State annual report on religious freedom, as well as other country conditions reports, when analyzing claims for asylum or refugee status based on religion. A body of resource materials is available to document the status of religious freedom in the world.

### 8.1 Countries of Particular Concern

The President is required to designate as "countries of particular concern" those countries that have engaged in or tolerated violations of religious freedom. The United States uses sanctions against these countries to encourage them to improve their treatment of religious groups.[103]

### 8.2 The US Department of State Annual Report on International Religious Freedom

[100] *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988).

[101] *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000).

[102] *Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000) ("That a person shares an identity with a persecutor does not foreclose a claim of persecution on account of a protected ground.").

[103] *See* U.S. Dep't of State, "Countries of Particular Concern."

Each year the Department of State publishes an annual report which provides information on the treatment of religious groups in most countries of the world, much in the same way as the annual *Country Reports on Human Rights Practices.*[104]

## 8.3 U.S. Commission on International Religious Freedom Reports

Established by the International Religious Freedom Act, the U.S. Commission on International Religious Freedom (USCIRF) monitors the status of religious freedom in other countries and advises the President and Congress on how best to promote religious freedom.

### Annual Reports

Each year the U.S. Commission on International Religious Freedom issues its Annual Report.[105] Mindful of its mandate to make recommendations on how to combat violations of religious freedom in the world, its reports focus on particular countries that it sees as "priorities" in the fight for global religious freedom.

In its annual report, the Commission summarizes its activities over the course of the past year and recommends policies to the United States Government that would promote and protect religious freedom around the world. The Commission also recommends that the State Department designate certain "Tier 1" countries as Countries of Particular Concern and has a "Tier 2" list of countries where the Commission believes that religious freedom conditions do not rise to the statutory level requiring designation as Countries of Particular Concern, but which require close monitoring of the situation.

### Individual Country Reports, Hearings, and Testimony

In addition to its annual report, the Commission periodically publishes reports dealing with particular countries. Quite often, these reports are issued in response to particular issues or violations of religious freedom in a given country.

The Commission also organizes hearings on issues of religious freedom when it determines that greater examination of the situation in a country is required. Human rights monitors, religious scholars, and other interested parties have presented their views to the Commission in such fora.

Finally, Commission members occasionally testify before Congress on issues of religious freedom and concerns regarding threats to that freedom around the world.

## 8.4 Comments on the DOS Annual Report on International Religious Freedom

[104] *See* U.S. Dep't of State, "Annual Reports to Congress on International Religious Freedom."

[105] USCIRF, *Frequently Asked Questions.*

Each year the U.S. Commission on International Religious Freedom responds to the statements made by the Department of State in its *Annual Report.* These comments may be published in a separate report or as part of the USCIRF *Annual Report.*The comments intend to balance the body of material on international religious freedom by pointing out omissions of information and to critique the implementation of policy on international religious freedom.

# 9 SUMMARY

## 9.1 Overview of IRFA

IRFA, the International Religious Freedom Act, was enacted on October 27, 1998, to promote religious freedom and call attention to its abuse worldwide. IRFA also created new foreign policy mechanisms for use by the United States to act against religious persecution abroad.

## 9.2 Title VI of IRFA

Title VI of IRFA speaks directly to the role of Asylum, Refugee, and Consular officers in improving the U.S. government response to religious persecution.

1. Section 601 mandates that immigration judges, asylum officers, and immigration officers refer to the Department of State Annual Report on International Religious Freedom when adjudicating requests for asylum or refugee status.

2. Section 602 requires greater attention to issues of refugee law and religious persecution by those involved in the processing of refugees overseas, including DOS consular officers, immigration officers, and interpreters.

3. Section 603 requires greater scrutiny of the potential biases of those individuals used as interpreters during inspection or interviews. The section also requires training on religious persecution for all those involved in the expedited removal process.

4. Section 604 creates a new ground of inadmissibility for any foreign government official who has been responsible for or has directly carried out severe violations of religious freedom.

5. Section 605 provides the U.S. Commission on International Religious Freedom with the authority to request studies by the Comptroller General on certain aspects of the expedited removal process.

## 9.3 The Nature of Religion

1. The protected ground of religion is broadly understood, and protects familiar as well as unfamiliar belief systems.

2. The definition of religion includes religious beliefs (and non-belief) and religious practices.

3. Religious beliefs and practices may vary by sect, region, country, and culture, and you must put aside preconceived notions of what can be considered a religion and how religions are practiced across the globe.

4. An individual's religious identity generally cannot be verified by "testing" the applicant on his or her knowledge of the tenets of the religion.

## 9.4 Right to Religious Freedom

Internationally-recognized standards regarding religious freedom are codified in various international instruments and cited in IRFA. These instruments, such as the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, provide invaluable guidance in determining what actions may be considered violations of religious freedom.

## 9.5 Violations of Religious Freedom

IRFA highlights the wide range of actions that persecuting regimes take to violate religious freedoms, and provides a non-exclusive list of actions that constitute "violations of religious freedom" and a separate list of violations that constitute "particularly severe violations of religious freedom." The range of violations listed in IRFA is instructive for determining persecution under the INA given IRFA's training requirements for asylum and refugee adjudicators on the nature and methods of religious persecution practiced in foreign countries.

Whether or not a particular violation of religious freedom (either particularly severe or not) could be considered persecution on account of religion depends upon the degree of harm threatened or imposed, and the applicant's individual circumstances.

## 9.6 Religious Persecution – General Considerations

1. Prohibitions or restrictions on religious beliefs and activities can, without physical mistreatment, rise to the level of persecution.

2. Forced compliance with religious laws or practices that are fundamentally abhorrent to a person's deeply held religious convictions may constitute persecution.

3. Persecution by government, as well as by private individuals whom the government is unable or unwilling to control, may establish a religious persecution claim.

4. Adjudicators cannot require an applicant to conceal his religious beliefs upon return in order to avoid persecution.

5. Serious measures of discrimination on account of religion may be sufficient to establish persecution if the adverse practices accumulate or increase in severity leading to consequences of a substantially prejudicial nature. Other forms of religious discrimination, without more, may not be sufficient to establish persecution.

6. Generally, mere membership in a religious community will not be sufficient to establish eligibility for asylum or refugee status on the basis of religious persecution.

7. The motivation of the persecutor must be examined to determine if:

    i. the applicant has been targeted or could be targeted

    ii. the applicant's religion is the targeted characteristic

8. Laws that impose harsh penalties for conversion from one religion to another may constitute persecution on account of religion.

9. Punishment for violation of a generally applicable law affecting religious beliefs or practices may constitute persecution on account of religion. You must analyze the intent and purpose of the law, whether the law is unequally enforced, and how the persecutor views those who violate the law.

10. It is possible for individuals to establish that they have been persecuted on account of their religion by members of the same faith community. For example, an individual could be harmed because he or she is perceived by others to be failing in the faith or to have violated moral norms.

## 9.7 Resource Materials

You have at your disposal a number of tools to aid in the adjudication of cases of claimed religious persecution. IRFA requires you to consider the information contained in the Department of State *Annual Report on International Religious Freedom* when adjudicating asylum and refugee cases. In addition, you may consult other resources, such as the reports and press releases issued by the U.S. Commission on International Religious Freedom.

You must not assume that a religious persecution claim is unfounded because of the absence of information on persecution of a particular group in either of the above-mentioned reports, or the fact that a refugee-producing country is not designated as a country of particular concern.[106]

[106] *Gaksakuman v. U.S. Att'y Gen.*, 767 F.3d 1164 (11th Cir. 2014).

## PRACTICAL EXERCISES

[NOTE: Practical Exercises for this module to be added later.]

**Practical Exercise # 1**

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

## OTHER MATERIALS

There are no Other Materials for this module.

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

None

### ADDITIONAL RESOURCES

1. *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996).
2. *Maini v. INS*, 212 F.3d 1167, 1176 n.1 (9th Cir. 2000).

### SUPPLEMENTS

**RAD Supplement – Mixed Motives**

As mentioned in the Mixed Motives section of the module, refugee resettlement adjudications are not governed by the 2005 amendments to the asylum statute. As with asylum adjudications, however, you must explore all possible motives, including mixed motives, when assessing a claim based on an applicant's religious beliefs or practices. An applicant bears the burden of establishing that "a reasonable person would fear that the danger arises on account of" a protected ground.[107] In *Maini v. INS*, for example, the court found that the applicants suffered past persecution, at least in part, on account of religion, in addition to non-protected economic grounds.[108]

[107] *Matter of S-P-*, 21 I&N Dec. 486, 490, 497 (BIA 1996).

[108] *Maini v. INS*, 212 F.3d 1167, 1176 n.1 (9th Cir. 2000).

## SUPPLEMENT B – ASYLUM DIVISION

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

### REQUIRED READING

INA §208(b)(1)(B)(i) – REAL ID Act amendment regarding mixed motives for persecution.

### ADDITIONAL RESOURCES

1. *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007).
2. *Ndayshimiye v. Att'y Gen. of U.S.*, 557 F.3d 124 (3d Cir. 2009).
3. *Rizal v. Gonzales*, 442 F.3d 84 (2d Cir. 2006).
4. *Huang v. Gonzales*, 403 F.3d 945 (7th Cir. 2005).
5. Elwood, Kenneth J., Deputy Executive Associate Commissioner, INS Office of Field Operations. Implementation of the International Religious Freedom Act of 1998, Memorandum for Jeffrey L. Weiss, Acting Director, Office of International Affairs. (Washington, DC: 5 April 1999), 3 p.
6. Langlois, Joseph E., Deputy Director, Asylum Division. Religious Persecution, [with two attachments: letter to William Bartlett, Office of Asylum Affairs, Department of State, concerning training conducted for Asylum Officers on religious persecution; list of documentation distributed by the Resource Information Center on religious persecution, 1992-1998] Memorandum for Asylum Office Directors. (Washington, DC 5 May, 1998), 12 p.
7. Pearson, Michael A., Executive Associate Commissioner, INS Office of Field Operations. Amendment to the Immigration and Nationality Act (the Act) adding section 212(a)(2)(G), relating to the inadmissibility of foreign government officials who have engaged in particularly serious violations of religious freedom, Memorandum to Regional and Service Center Directors, (Washington, DC: 9 July 1999), 4 p.
8. Landau, David, Chief Appellate Counsel, ICE Office of the Principal Legal Advisor, Guidance on Religious Persecution Claims Relating to Unregistered Religious

Groups, Memorandum for ICE Chief Counsel, (Washington, DC: February 25, 2008), 12 pp.

## SUPPLEMENTS

**ASM Supplement - Mixed Motives**

Under INA section 208, as amended by the REAL ID Act of 2005, the applicant must establish that religion, or any other protected ground, was or will be "at least one central reason for the persecution."[109] In *Matter of J-B-N- & S-M-*,[110] the Board found that amendments added by the REAL ID Act did not radically alter the BIA's mixed motive analysis. This decision was modified by the Third Circuit in *Ndayshimiye v. Att'y Gen. of U.S.*,[111] which held that the BIA's interpretation of the "one central reason" standard is in error only to the extent that it would require an asylum applicant to show that a protected ground for persecution was not "subordinate" to any unprotected motivation.

The REAL ID Act changes only apply to asylum applications filed on or after May 11, 2005. For applications filed prior to the REAL ID Act, the applicant bears the burden of establishing that "a reasonable person would fear that the danger arises on account of" a protected ground.[112] In *Maini v. INS*, for example, the court found that the applicants suffered past persecution, at least in part, on account of religion, in addition to non-protected economic grounds.[113]

**ASM Supplement – Use of DOS Annual Report**

Although section 101(a)(3) of the REAL ID Act of 2005, codified at 8 U.S.C. §1158(b)(1)(B)(iii), states that credibility determinations may be based on the consistency of an applicant's statements with DOS country reports, IRFA prohibits Adjudicators from making an adverse determination based solely on the fact that an applicant's claims are not mentioned in the DOS annual report.

Section 601 of IRFA requires immigration judges, asylum officers, and refugee and

[109] INA § 208(b)(1)(B)(i). For additional information, see also RAIO Training module, *Nexus the Five Protected Grounds*.

[110] *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007).

[111] *Ndayshimiye v. Att'y Gen. of U.S.*, 557 F.3d 124 (3d Cir. 2009).

[112] *Matter of S-P-*, 21 I&N Dec. 486, 490 (BIA 1996).

[113] *Maini v. INS*, 212 F.3d 1167, 1176 n.1 (9th Cir. 2000).

consular officers to use the US Department of State Annual Report on International Religious Freedom, and other country conditions reports, when analyzing claims of religious persecution. Asylum Officers are required to cite the Department of State's Annual Report On Religious Freedom and other reliable country of origin information during the adjudication of an affirmative asylum claim.

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**IO Supplement**

**Module Section Subheading**

U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

*RAIO Combined Training Course*

# GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS

Training Module

## MODULE DESCRIPTION:

This module provides guidelines for adjudicating and considering immigration benefits, petitions, protections, or other immigration-related requests by lesbian, gay, bisexual, transgender, and intersex, (LGBTI) individuals. The module addresses the legal analysis of claims that involve LGBTI applicants as well as related interviewing considerations.

## FIELD PERFORMANCE OBJECTIVE(S)

When interviewing in the field, you (the Officer) will elicit all relevant information from an LGBTI applicant to properly adjudicate and consider the immigration benefit, petition, protection, or other immigration-related request before you.

## INTERIM PERFORMANCE OBJECTIVES

1. Summarize the developments in U.S. law that focus on LGBTI applicants.
2. Describe the types of harm that may be present in refugee and asylum claims involving LGBTI issues.
3. Describe how membership in a particular social group is analyzed when looking at the refugee or asylum claims involving LGBTI issues.

   Identify factors to consider when evaluating evidence presented by LGBTI applicants.

5. Identify factors that may hinder an interview of an LGBTI applicant.
6. Identify methods and techniques to put an LGBTI applicant at ease during an interview.

   Use sensitive questioning and listening techniques that aid in eliciting information from LGBTI applicants.

## INSTRUCTIONAL METHODS

- Interactive presentation
- Discussion
- Practical exercises

## METHOD(S) OF EVALUATION

- Multiple-choice exam
- Observed practical exercises

## REQUIRED READING

1. *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990).

2. UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,* 23 October 2012, HCR/GIP/12/01, available at: http://www.refworld.org/docid/50348afc2.html Legal Memorandum, Stephen H. Legomsky, USCIS Chief Counsel, *General Guidance to the Field in Same-Sex Marriage Cases*, (July 26, 2013).

3. USCIS Policy Memorandum on Adjudication of Immigration Benefits for Transgender Individuals, August 10, 2012, *available at* http://connect.uscis.dhs.gov/workingresources/immigrationpolicy/Documents/PM-602-0061.1.pdf.

   Memorandum from William R. Yates, Associate Director for Operations, USCIS, *Adjudication of Petitions and Applications Filed by or On Behalf Of, or Document Requests by, Transsexual Individuals* (April 16, 2004).

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

1. LGBTI-related Case Law

Immigration Equality, *Immigration Equality Asylum Manual, available at* http://immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/.

3. Immigration Equality, *Immigration Equality Draft Model LGBT Asylum Guidance*, (2010), *available at* http://www.immigrationequality.org/wp-content/uploads/2011/07/ImEq-Draft-Model-LGBT-Asylum-Guidance-2004.pdf.

4. International Lesbian, Gay, Bisexual, Trans and Intersex Association-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2015*, May 2015, *available at*: http://www.ilga-europe.org/sites/default/files/Attachments/01_full_annual_review_updated.pdf.

5. Amnesty International, *Making Love a Crime: Criminalization of Same-Sex Conduct in Sub-Saharan Africa*, June 24, 2013, *available at*: http://www.amnestyusa.org/research/reports/making-love-a-crime-criminalization-of-same-sex-conduct-in-sub-saharan-africa?page=show.

6. International Gay and Lesbian Human Rights Commission, *When Coming Out is a Death Sentence: Exposing Persecution of LGBT Individuals in Iraq*, November 19, 2014, *available at*: http://iglhrc.org/content/exposing-persecution-lgbt-individuals-iraq.

7. *Statement by the President on the UN Human Rights Council Resolution on Human Rights, Sexual Orientation, and Gender Identity*. The White House, Office of the Press Secretary, June 17, 2011, *available at* http://www.whitehouse.gov/the-press-office/2011/06/17/statement-president-un-human-rights-council-resolution-human-rights-sexu.

8. Memorandum from David A. Martin, INS General Counsel, *Seropositivity for HIV and Relief From Deportation*, (Feb. 16, 1996).

9. International Gay and Lesbian Human Rights Commission (IGLHRC), *Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa* (2011), *available at* http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/484-1.pdf.

10. Aengus Carroll and Lucas Paoli Itaborahy, International Lesbian, Gay Bisexual, Trans and Intersex Association, *State Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults*, May 2015, *available at:* http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf.

American Psychiatric Association, *Therapies Focused on Attempts to Change Sexual Orientation: Reparative or Conversion Therapies Position Statement*, March 2000, *available at* http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/

PositionStatements/200001.aspx. [scroll down the page and click on the year-2000, then click on "Therapies focused on attempts to change sexual orientation."]

12. Victoria Neilson, *Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 Stanford Law & Policy Review 417 (2005), *available at* http://www.immigrationequality.org/wp-content/uploads/2011/08/Neilson-Website-Version-Lesbian-article.pdf.

13. Ellen A. Jenkins, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 Golden Gate U.L. Rev. (2009), *available at* http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=2008&context=ggulrev.

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

SOURCE: The Tasks listed below are from the Asylum Division's 2001 Revalidation. These tasks will need to be modified to reflect the results of the RAIO Directorate – Officer Training Validation study.

| Task/ Skill # | Task Description |
|---|---|
| ILR6 | Knowledge of U.S. case law that impacts RAIO (3) |
| ILR9 | Knowledge of policies and procedures for processing lesbian, gay, bisexual, transgender, and intersex (LGBTI) claims (3) |
| ILR14 | Knowledge of nexus to a protected characteristic (4) |
| ILR15 | Knowledge of the elements of each protected characteristic (4) |
| ILR20 | Knowledge of the criteria for refugee classification (4) |
| ILR21 | Knowledge of the criteria for establishing a well-founded fear (WFF) (4) |
| ILR22 | Knowledge of the criteria for establishing credibility (4) |
| ITK4 | Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4) |
| ITK5 | Knowledge of strategies and techniques for communicating with survivors of torture and other severe trauma (4) |
| ITK6 | Knowledge of principles of cross-cultural communication (e.g., obstacles, sensitivity, techniques for communication) (4) |
| ITK8 | Knowledge of policies, procedures and guidelines for working with an interpreter (4) |
| RI1 | Skill in identifying issues of claim (4) |

| | |
|---|---|
| RI2 | Skill in identifying the information required to establish eligibility (4) |
| RI3 | Skill in conducting research (e.g. legal, background, country conditions) (4) |
| ITS3 | Skill in framing interview questions and requests for information (4) |
| ITS4 | Skill in asking appropriate follow-up questions (4) |
| ITS6 | Skill in conducting non-adversarial interviews (4) |
| ITS8 | Skill in confronting applicant with credibility issues (4) |

## SCHEDULE OF REVISIONS

| Date | Section (Number and Name) | Brief Description of Changes | Made By |
|---|---|---|---|
| 11/06/2015 | Throughout document | Added some discussion of recent cases; fixed links | RAIO Training |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

## Table of Contents

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

# 1 INTRODUCTION

It has been over 25 years since Fidel Armando Toboso Alfonso, a gay man from Cuba, was granted withholding of deportation in the United States based on his sexual orientation.[1] The *Toboso-Alfonso* decision paved the way for hundreds of lesbian, gay, bisexual, and transgender individuals as well as individuals with intersex conditions (LGBTI) to obtain refugee and asylum status in the United States. In 2011, the United Nations marked another "significant milestone in the long struggle for equality, and the beginning of a universal recognition that LGBT[I] persons are endowed with the same inalienable rights – and entitled to the same protections – as all human beings"[2] by passing a Resolution on Human Rights, Sexual Orientation, and Gender Identity.

In 2013, the Supreme Court held that section 3 of the Defense of Marriage Act, which had limited the terms "marriage" and "spouse" to opposite-sex marriage for purposes of federal law, was unconstitutional.[3] Then, in 2015, the Supreme Court struck down state laws denying marriage licenses to couples of the same sex, legalizing same-sex marriage throughout the United States.[4] Legally valid marriages between couples of the same sex are now treated the same as all other marriages under the Immigration and Nationality Act (INA) for all purposes, including the processing of derivative refugees and asylees under INA 207 and 208.[5]

[1] *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990).

[2] *Statement by the President on the UN Human Rights Council Resolution on Human Rights, Sexual Orientation, and Gender Identity*, The White House, Office of the Press Secretary, June 17, 2011.

[3] *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

[4] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[5] *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013), reversing a DOMA-based denial of a Petition for Alien Relative because the "Supreme Court's ruling in *Windsor* has therefore removed section 3 of the DOMA as an impediment to the recognition of lawful same-sex marriages and spouses of the marriage is valid under the laws of the State

The increasing number of refugee and asylum (protection) claims related to LGBTI and HIV-positive status has resulted in the need for greater awareness of the issues involved in these claims and training on their adjudication.[6] Interviews with LGBTI or HIV-positive refugee and asylum applicants require the individual "to discuss some of the most sensitive and private aspects of human identity and behavior"[7] – sexual orientation, gender identity, and life-threatening illness. These topics may be particularly difficult for applicants to discuss with government officials, where the applicant may have previously had negative encounters with government officials and as a result have a fear of authority.[8]

All officers in the RAIO Directorate should be familiar with the contents of this training module as it constitutes primary field guidance for interviewing LGBTI applicants and analyzing their claims. This module seeks to: 1) increase awareness about the issues sexual minorities face; 2) foster discussion about LGBTI issues; and, 3) provide consistent legal and interview guidance regarding these issues.

The RAIO LGBTI Training Module is the result of a collaborative effort between USCIS and non-governmental organizations (NGOs).

The module first addresses the legal issues you, the interviewing officer, must consider when analyzing cases and making protection determinations. Second, because establishing eligibility for refugee and asylum status presents its own challenges, the module covers the factors you must take into account when interviewing LGBTI individuals. Third, the module addresses proper techniques for assessing credibility.

### *A Note about Terminology*

The terminology involving LGBTI issues is still evolving. For purposes of this module, the term "sexual minorities" and the acronym "LGBTI" are used interchangeably as umbrella terms to refer to issues involving sexual orientation, gender identity, and intersex conditions. The following are some essential LGBTI definitions. For a more comprehensive set of definitions, please click the hyperlink to the LGBTI Glossary located in the "Other Materials" section of this module.

---

where it was celebrated."; Legal Memorandum, Stephen H. Legomsky, USCIS Chief Counsel, *General Guidance to the Field in Same-Sex Marriage Cases* (July 26, 2013).

[6] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraph 1.

[7] *Immigration Equality Draft Model LGBT Asylum Guidance*, Immigration Equality 2010.

[8] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

The use of the term homosexual is limited in this module. It has a somewhat derogatory connotation within the LGBTI community as it has historically been used in a medical context to describe being gay or lesbian as an illness.[9]

Sexual orientation is the emotional, physical, and romantic attraction a person feels towards another person.[10] The term gay is used to mean men who are attracted to men. The term lesbian is used to mean women who are attracted to women, although homosexual women also sometimes use the term gay to describe themselves. The term gay people or gay community is often used to include both men and women who are attracted to members of the same sex. The term heterosexual or straight is used to mean men or women who are attracted to the opposite sex. The term bisexual is used to mean men or women who are attracted to both sexes.

Gender is what society values as the roles and identities of being male or female. Sex is the assignment of one's maleness or femaleness on the basis of anatomy and reproductive organs. Gender and sex are assigned to every individual at birth. Gender identity is an individual's internal sense of being male, female, or something else. Since gender identity is internal, one's gender identity is not necessarily visible to others. Gender expression is how a person expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice, or body characteristics.[11] Transgender is a term used for people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth. Some transgender people dress in the clothes of the opposite gender; others undergo medical treatment, which may include taking hormones and/or having surgery to alter their gender characteristics.

Intersex refers to a condition in which an individual is born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. The conditions that cause these variations are sometimes grouped under the terms "intersex" or "DSD" (Differences of Sex Development). Individuals with these conditions were previously referred to as "hermaphrodites," but this term is considered outmoded and should not be used unless the applicant uses it. These conditions may be apparent at birth, may appear at puberty, or may be discovered in a medical examination. Intersex is not the same as transgender, although an intersex person may identify themselves as transgender. Keep in mind that an intersex person may identify as male or female, and as lesbian, gay, bisexual, or heterosexual.[12]

---

[9] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[10] For more information about sexual orientation, see American Psychological Association (APA), *Answers to Your Questions: A Better Understanding of Sexual Orientation and Homosexuality*, (2008), *available at* http://www.apa.org/pubinfo/answers.html.

[11] For more information on transgender identity, see http://transequality.org/Resources/NCTE_TransTerminology.pdf and http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf (National Center for Transgender Equality.)

[12] For more information on intersex conditions, see the Advocates for Informed Choice website at www.aiclegal.org.

> Transgender is a gender identity, not a sexual orientation. Therefore, a transgender person may have a heterosexual, bisexual, gay, or lesbian sexual orientation.

It is also important to be familiar with the issues and terminology related to the Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS). USCIS has encountered claims from applicants who fear persecution because they were incorrectly perceived as gay, based on the fact that they were HIV-positive. We have also encountered claims where the persecutor incorrectly assumed that the applicant was HIV-positive based on the fact that the applicant was gay or was perceived to be gay. Because such claims involve overlapping and related issues, they are being addressed within the same module.

A person who was exposed to HIV and developed anti-bodies to the virus is HIV-positive.[13] AIDS describes people with HIV who have either experienced certain infections or whose T-cells (infection fighting blood cells) have dropped below 200. Not everyone who is HIV-positive has AIDS, but everyone who has AIDS is HIV-positive.[14] HIV is not spread by casual contact. It is only spread through contact with bodily fluids primarily through sex or sharing intravenous needles.

> An applicant may prefer to use other terminology regarding their HIV status such as "person living with HIV." You should use the term most preferable to the applicant.

## 2 LEGAL ANALYSIS – OVERVIEW

This module does not expand the statutory definition of a refugee. The legal criteria used to evaluate an LGBTI applicant's eligibility for asylum or refugee status are the same criteria used in all other protection adjudications. However, because LGBTI applicants' experiences are often different from those of others, it is useful to discuss how these experiences fit into the legal framework of established refugee and asylum law.

## 3 LEGAL ANALYSIS – NEXUS AND THE FIVE PROTECTED GROUNDS

As explained in greater detail in the RAIO training module, *Nexus and the Five Protected Grounds*, to be eligible for asylum or refugee status, the applicant must establish that the

[13] For more information about HIV see http://www.gmhc.org/learn/hivaids-basics, (Gay Men's Health Crisis website).

[14] *See Immigration Equality Draft Model LGBT Asylum Guidance*, Immigration Equality 2004.

persecution suffered or feared was or will be motivated "on account of" his or her actual or imputed possession of a protected characteristic. This is known as the nexus requirement and it applies equally to LGBTI applicants. The type of harm that may constitute persecution in the context of LGBTI claims will be discussed later in this module.

Depending on the facts of the case, claims relating to sexual orientation and gender identity are primarily recognized under membership in a particular social group but may overlap with other grounds, in particular religion and political opinion.[15]

The nexus analysis first requires consideration of whether the persecutor perceives the applicant as possessing a protected characteristic (either because the applicant does possess it or because the persecutor imputes it to the applicant); then whether the persecutor acted or would act against the applicant because of the persecutor's perception of that protected characteristic.

## 3.1 Membership in a Particular Social Group – Defining the Group

When deciding if the persecutor perceives in an applicant an actual or imputed characteristic that can define a cognizable particular social group (PSG), you must first identify the characteristics that define the group of which the applicant claims to be a member; then explain why that group does or does not form a PSG within the meaning of the refugee definition.

### 3.1.1 Possession or Imputed Possession of a Protected Characteristic

Particular social groups based on sexual minority status are well-recognized in case law as providing a valid basis for a protection claim. As mentioned previously, in 1990, the Board of Immigration Appeals (BIA) in *Matter of Toboso-Alfonso*, recognized persons identified as homosexuals by the Cuban Government as a cognizable particular social group.[16] Toboso-Alfonso was a gay man who was subjected to detention and forced labor by the Cuban government for being gay.

Four years later, the U.S. Attorney General designated *Toboso-Alfonso* "as precedent in all proceedings involving the same issue or issues."[17]

---

[15] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraphs 42-43; 50.

[16] *See Toboso-Alfonso*.

[17] Attorney General, Order number 1895 (June 19, 1994).

While the BIA has not specifically issued a precedential decision on claims by other sexual minorities, many U.S. Circuit Courts of Appeals have. Claims involving actual or imputed sexual minority status may qualify under the particular social group category and may involve applicants who:

- identify as gay or lesbian[18]
- are viewed as a sexual minority, regardless of whether the persecutor or society involved distinguishes between sexual orientation, gender, and sex.
- are transgender[19] (note that even if a transgender applicant identifies as heterosexual, he or she may be perceived as gay or lesbian)
- are "closeted" gays and lesbians
- test positive for HIV, regardless of their sexual orientation[20]
- are viewed as "effeminate" or "masculine" but identify as heterosexual
- are not actually gay but are thought to be gay by others[21]
- are from throughout the world, not just Cuba[22]
- are not subject to the kind of government registration requirements that were involved in *Toboso-Alfonso*

For a comprehensive list of court cases involving LGBTI asylum and refugee issues, click LGBTI-Related Case Law found in the "Other Materials" section of this module.

### 3.1.2 Particular Social Group – Common Immutable Characteristic

To determine if an applicant is a member of a PSG, you must decide whether:

The applicant is a member of a group individuals who share a common, immutable characteristic, meaning it is one that members of the group either cannot change or should not be required to change because it is fundamental to the member's identity or conscience. The defining characteristic can be a shared innate characteristic or a shared past experience.[23]

---

[18] *See, e.g.,* *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir 2005); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997); *Nabulawala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007).

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

[20] *Seropositivity for HIV and Relief From Deportation*, Memorandum, David A. Martin, INS General Counsel. (Feb. 16, 1996).

[21] *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003).

[22] This will depend on country of origin information. LGBTI claims are put forward from all over the world.

[23] *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

Sexual orientation, gender identity, and having an intersex condition can be classified as immutable. They are characteristics that an individual cannot change about him or herself or should not be required to change.[24] Even if these traits can be changed, they are traits that are so fundamental to a person's identity that he or she should not be required to change them.

Harm imposed because an applicant was imputed to belong to a sexual minority may also qualify as "on account of" a protected ground, whether that imputation is correct or not.

### 3.1.3 Particular Social Group – Social Distinction

When analyzing whether or not the particular social group is cognizable, you must also determine whether the group is socially distinct, i.e., whether the actual or imputed characteristic is "easily recognizable and understood by others to constitute a social group."[25]

Some adjudicators mistakenly believe that social distinction requires that the applicant "look gay or act gay." *See* Section 7.1.1, *Evidence Assessment, Credibility Considerations, Plausibility* below. In *Matter of M-E-V-G-* and *Matter of W-G-R-*, a pair of precedent decisions issued in 2014, the BIA clarified that the "social distinction" requirement does not require literal or ocular visibility. Rather, it means that the society in question distinguishes individuals who share this trait from individuals who do not.[26] It is not necessary for the group to identify explicitly and outwardly in order for the social distinction requirement to be met. For example, the fact that the LGBTI community in a country exists mainly in hiding does not prevent such a group for establishing social distinction in the society.

For purposes of the "social distinction" analysis, you must examine the evidence, including country conditions. For social distinction, an examination of the relevant evidence is necessary to determine whether the society in question distinguishes sexual minorities from other individuals in a meaningful way. In *Toboso-Alfonso*, for example, the record established that the Cuban government registered and maintained files on homosexuals, the applicant suffered harm because of his homosexual status, and suspected homosexuals were subjected to physical examinations, interrogations, and beatings. As the BIA noted in *Matter of M-E-V-G-*, this evidence was sufficient to demonstrate that the group was distinct within Cuban society.[27] While government registration of individuals as "homosexuals" would, in general, establish social distinction, it is not required. Information about discriminatory attitudes or behavior toward sexual minorities would also be an example of evidence of social distinction.

[24] *See Matter of Toboso-Alfonso*, 20 I&N Dec. at 822.

[25] *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).

[26] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 234 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208, 216 (BIA 2014).

[27] *M-E-V-G-*, 26 I&N at 234.

### 3.1.4 Particular Social Group – Particularity

Applicants seeking to establish membership in a particular social group must also establish that the group is defined with sufficient particularity. This requirement relates to the group's boundaries. The group must be discrete and have definable boundaries. The group should not be defined so broadly so as to make it difficult to distinguish group members from others in society and should not be outlined so narrowly so that it does not constitute a meaningful grouping. In *Matter of M-E-V-G-*, the BIA noted that the proposed group in *Toboso-Alfonso*, "homosexuals in Cuba," was sufficiently particular because it was a discrete group with well-defined boundaries.

**Possible Social Group Formulations**

It is important to remember that, in order to conduct an accurate assessment of nexus, a particular social group should not be formulated too broadly or too narrowly. Rather, it should refer to the trait that the persecutor perceives the applicant to possess.

Because LGBTI claims involve individuals with a variety of characteristics, and because the persecutors in given cases may perceive the applicants' traits in a variety of ways, the appropriate formulation will depend on the facts of the case, including evidence about how the persecutor and the society in question view the applicant and people like the applicant.

Consider the following as possible ways to formulate the group:

- Sexual minorities in Country X. This may be an appropriate particular social group in cases where the persecutor in question perceives any sexual minority as "outside the norm" but does not necessarily distinguish between orientation, gender, and sex. It might also be appropriate where there are a variety of traits involved in the claim, but the persecutor's animus toward those different traits stems from a more general animus toward all sexual minorities. This might be the case, for example, in a situation where an applicant has an intersex condition or has undergone Sex Reassignment Surgery (SRS) in the United States after having been harmed in the past for simply being perceived as gay. This prevents the need to analyze past and future harm for two separate groups when past and future harm are both based on the applicant's sexual minority status. (Example: "sexual minorities in Mexico" in lieu of "transgender Mexican women perceived as homosexual Mexican men cross-dressing as women.");
- Gay, lesbian, transgender, or HIV-positive (choose one) / men or women

(choose one) / from Country X (choose one) (Example: "Lesbian women from Uganda."); or

- Men or women (choose one) / from Country X (choose one) / imputed to be gay, lesbian, transgender, or HIV-positive (choose one) (Example: "men from Ghana imputed to be gay.")

## 3.2 "On Account Of"/Nexus

### 3.2.1 The Persecutor's Motive and the Applicant's Experience

The "on account of" requirement focuses on the motivation of the persecutor. The persecutor in most LGBTI cases seeks to harm the individual based on the individual's perceived or actual sexual orientation, on the persecutor's belief that the applicant transgresses traditional gender boundaries, or on the persecutor's more general animus toward sexual minorities of any kind. In some situations, the persecutor may have been trying to "cure" the applicant of his or her sexual orientation or gender identity.[28] Most persecutors may not have been making the distinction between gay, lesbian, bisexual, transgender, intersex, or HIV-positive. They may simply have harmed or want to harm the applicant based on their perception that the applicant is gay or a sexual minority that is "outside the norm."

The applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to act against the applicant because he or she possesses or is believed to possess one or more of the protected characteristics in the refugee definition.[29] For example, in an LGBTI claim, you would consider evidence that the persecutor harmed or tried to change the applicant because the persecutor knows or believes the applicant belongs to a sexual minority.

This evidence may include the applicant's testimony regarding:

- what the persecutor said or did to the applicant
- what the persecutor said or did to others similar to the applicant
- the context of the act of persecution (for example, if the applicant was attacked in a gay bar or while holding hands with a same-sex partner)
- reliable Country of Origin Information (COI) that corroborates such testimony

[28] *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Pitcherskaia v. INS*.

[29] *Elias-Zacarias v. INS*, 502 U.S. 478 (1992).

> It is critical that you ask the applicant questions about what the persecutor may have said to him or her when the harm was inflicted or when the threats were made.

As with other types of refugee or asylum claims, there is no malignant intent required on the part of the persecutor, as long as the applicant experiences the abuse as harm.[30] State and non-state actors may inflict harm on LGBTI persons with the intention of curing or treating them, for example, through what is effectively medical abuse or forced marriage.[31] (*See Types of Harm That May Befall Sexual Minorities, Forced Psychiatric or Other Efforts to "Cure" Homosexuality* below.)

### 3.2.2 Prosecution vs. Persecution

The U.S. Supreme Court has made it clear that intimate sexual activity between consenting adults is a constitutionally protected activity.[32] This constitutional principle, while not directly applicable to the analysis of an asylum or refugee claim, is consistent with the recognition that punishing conduct or sexual activity between consenting adults of the same sex is tantamount to punishing a person simply for being gay. If a law exists in another country that prohibits intimate sexual activity between consenting adults, enforcement of the law itself may constitute persecution and not simply prosecution.[33]

## 4 LEGAL ANALYSIS – PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

In evaluating whether harm constitutes persecution in an LGBTI-related case, you should consider the same factors as in any other protection case. The relevant considerations are: 1) does the harm rise to the level of persecution; 2) is the harm inflicted on account of a protected ground; and 3) is the persecutor the government or an individual or entity from which the government is unable or unwilling to provide reasonable protection?

Because the amount of harm that rises to the level of persecution is discussed in detail in the RAIO Training module, *Definition of Persecution and Eligibility Based on Past Persecution*, this section focuses on the types of harm directed at sexual minorities.

### 4.1 Types of Harm That May Befall Sexual Minorities

[30] *Kasinga*.

[31] *Pitcherskaia*.

[32] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[33] *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005).

The types of harm directed at LGBTI applicants vary and include the same types of harm that are directed at other applicants. LGBTI individuals, however, may face unique harm or may be more vulnerable to specific types of harm than other applicants.[34]

When considering whether harm will amount to persecution, you must not only consider the objective degree of harm or whether the harm rises to the level of persecution, but also whether the applicant personally experienced or would experience the act(s) as serious harm.[35] You must evaluate the opinions and feelings of each applicant individually. Because each case is unique and each applicant has his or her own psychological makeup, interpretations of what amounts to persecution vary widely.[36]

While discrimination is often a fundamental part of claims made by LGBTI individuals, applicants also frequently reveal having experienced serious physical and sexual violence. These incidents of harm must be assessed in their totality. They must be analyzed in light of prevailing attitudes with regard to sexual orientation and gender identity in the country of origin.

### Violation of Fundamental Rights

Being compelled to abandon or conceal one's sexual orientation or gender identity may cause significant psychological and other harms that may amount to persecution.[37] LGBTI persons who live in fear of being publicly identified often conceal their sexual orientation in order to avoid the severe consequences of such exposure - including the risk of incurring harsh criminal penalties, arbitrary arrests, physical and sexual violence, dismissal from employment, and societal disapproval.

### Criminal Penalties

[34] *See* UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraphs 20-25.-

[35] *See* RAIO Training odule, *Definition of Persecution and Eligibility Based on Past Persecution*, "Whether the Harm Experienced Amounts to Persecution, General Considerations, Individual Circumstances."

[36] *Id* and UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, paragraphs 40, 51, and 52, reedited Geneva, January 1992.

[37] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraph 33.

In some countries, homosexuality is criminalized and, if discovered by the authorities, a lesbian or gay man may be arrested or imprisoned based on her or his sexual orientation.[38]

In some countries, individuals accused of consensual sex with a member of the same sex may be subject to prosecution and even death.[39] For example, in Mauritania any Muslim male who engages in a sexual act with another male is subject to death by stoning; in Kenya, the Penal Code explicitly states that engaging in a consensual sexual act between two men is a felony and punishable by up to imprisonment for five years.[40]

In other countries, there may not be laws that actually prohibit homosexuality, but authorities may still persecute people because of their sexual orientation.[41] Thus, applicants have been arrested, detained, beaten, sexually assaulted, and/or forced to pay bribes by police or army officials because of their sexual orientation, even if a non-discriminatory legal basis is used as a pretext for the action.[42]

### Rape and Sexual Violence

Because LGBTI people are often perceived as undermining gender norms, they are at heightened risk for sexual violence in many countries.[43] Rape and sexual assault are types of harm that rise to the level of persecution.[44] Other types of sexual violence, for example being forced to perform sexual acts upon another, may also constitute persecution.[45] Some applicants may have been raped as a measure to "correct" their behavior or status or as a means of punishing them for being gay or "outside the norm."

### Beatings, Torture, and Inhumane Treatment

Many LGBTI people are subjected to severe forms of physical violence. An applicant may have been the victim of repeated physical violence that the police never investigated

---

[38] Aengus Carroll and Lucas Paoli Itaborahy, International Lesbian, Gay Bisexual, Trans and Intersex Association, *State Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults*, May 2015, *available at:* http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf.

[39] *Id.*

[40] *Id.*

[41] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[42] *Maldonado v. Att'y Gen. of U.S.*, 188 F. App'x 101, 103 (3d Cir. 2006). *See also Nowhere to Turn: Blackmail and Extortion Of LGBT People in Sub-Saharan Africa*. International Gay and Lesbian Human Rights Commission IGLHRC.

[43] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[44] *See, e.g.*, *Haider v. Holder*, 595 F.3d 276, 287-288 (6th Cir. 2010); *Ndonyi v. Mukasey*, 541 F.3d 702, 710 (7th Cir. 2008); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005).

[45] *Ayala v. U.S. Atty Gen.*, 605 F.3d 941 (11th Cir. 2010).

or that the police themselves perpetrated.[46] Many applicants have been seriously harmed by members of their own family.[47]

Claims made by LGBTI persons often reveal exposure to physical and sexual violence, extended periods of detention, medical abuse, the threat of execution, and honor killing. Generally, these are acts of harm that would rise to the level of persecution.

LGBTI individuals can also experience other forms of physical and psychological harm, including harassment, threats of harm, vilification, intimidation, and psychological violence that can rise to the level of persecution, depending on the individual circumstances of the case and the impact on the particular applicant.

### Forced Medical Treatment

The case of an individual with an intersex condition may involve the applicant's fear or history of non-consensual surgery and other non-consensual medical treatment. In other cases, the applicant's fear may involve the lack of medical care in their home country.

### Forced Psychiatric Treatment or Other Efforts to "Cure" Homosexuality

Many cultures see homosexuality as a disease, a mental illness, or a severe moral failing. Forced efforts to change an individual's fundamental sexual orientation or gender identity may rise to the level of persecution; for example, such "treatments" as forced institutionalization, electroshock therapy, and forced drug injections could cause harm serious enough to constitute persecution. It is important to remember that there is no requirement that harm be inflicted with the intent to harm the victim.[48] Rather, you should assess whether it is objectively serious harm and was experienced as serious harm by the applicant.

### Discrimination, Harassment, and Economic Harm

Many LGBTI people are disowned by their families if their sexual orientation or transgender identity becomes known.[49] It is important to consider such mistreatment within the context of the applicant's culture. In many countries, it is virtually impossible for an unmarried person to find housing outside of his or her family home. Likewise, in many cultures, it would be impossible for a woman to find employment on her own. In such cultures, being disowned by one's family in and of itself could be found to rise to the level of persecution, since it would have such severe consequences.

---

[46] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[47] *Gonzalez-Posadas v. Att'y Gen. of the U.S.*, 781 F.3d 677, 680 (3d Cir. 2015); *Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007).

[48] *See Kasinga* and *Pitcherskaia*.

[49] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

Some applicants may have been threatened by neighbors or had their property vandalized. Others may have been repeatedly fired from jobs and found it impossible to engage in any form of employment once their sexual orientation became known. While being fired from a job generally is not considered persecution, if an individual can demonstrate that his or her LGBTI status would make it impossible to engage in any kind of gainful employment, this may constitute persecution. For example, in many countries transgender people face such severe discrimination that the only way they can survive is by engaging in prostitution.

Discrimination and harassment may amount to persecution if cumulatively they are sufficiently severe.[50] This may be the case, for example, where an LGBTI person is consistently denied access to normally available services in his or her private life or workplace, such as education, welfare, health, and access to the courts.

### Forced Marriage

LGBTI persons may be unable to engage in meaningful relationships, be forced into arranged marriages, or experience extreme pressure to marry.[51] They may fear that failure to marry will reveal them to be LGBTI to their family and to the public at large. Societal and cultural restrictions that require them to marry individuals in contravention of their sexual orientation may violate their fundamental right to marry and may rise to the level of persecution.[52] For instance, a lesbian who has no physical or emotional attraction to men and is forced to marry a man may experience this as persecution. Likewise, a gay man who is in no way attracted to women who is forced to marry a woman may experience this as persecution.

### Gender-Based Mistreatment

Any LGBTI individual may experience gender-based mistreatment. For instance, lesbians often experience harm as a result of their gender as well as their sexual orientation. The types of harm that a lesbian may suffer will frequently parallel the harms in claims filed by women in general more closely than the harms in gay male asylum claims.[53] Likewise, before "coming out," transgender men are generally raised as girls and may experience the same types of harm. In many parts of the world persecution faced by lesbians may be

[50] *See* Kadri v. Mukasey, 543 F.3d 16 (1st Cir. 2008); *Matter of T-Z-*, 24 I&N Dec. 163, 169-71 (BIA 2007) (adopting the standard applied in *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983), rev'd on other grounds, 750 F.2d 1427 (9th Cir. 1985);*but see* Lopez-Amador v. Holder, 649 F.3d 880, 885 (8th Cir. 2011) (officer's verbal harassment of alien [perceived to be a lesbian] was not persecution).

[51] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraph 23.

[52] *Id.*

[53] *See* Victoria Neilson, *Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 Stanford Law & Policy Review 417 (2005).

less visible than that encountered by gay men. Lesbians and transgender women may be particularly vulnerable to rape by attackers who wish to punish them for their sexual identity. This can include retaliation by former partners or husbands. In addition, gay men may experience harm as a result of their gender or sexual orientation.

Transgender individuals may be more visible and may be viewed as transgressing societal norms more than gay men or lesbians. Therefore, they may be subject to increased discrimination and persecution and may be vulnerable even in regions where lesbians and gay men may have greater protections.[54]

## 4.2 Agents of Persecution

The second step in the analysis of whether harm constitutes persecution is to determine if the agent of persecution is the government or a nongovernment actor. It is well established that an applicant can qualify for refugee or asylum status whether the persecutor is the government or an individual or entity from whom the government is unable or unwilling to provide reasonable protection. While the applicant must show a nexus between the harm and a protected ground, he or she is not required to show that the government was unwilling to control those actors because of the applicant's protected characteristic, such as being LGBTI.[55]

In LGBTI cases governmental agents of persecution may include the police, military, or militias. Family, relatives, neighbors, and other community members are examples of non-governmental agents of persecution.

> In asylum processing, if the applicant establishes past persecution on account of one of the five protected grounds, he or she is presumed to have a well-founded fear of persecution in the future. The burden then shifts to USCIS to show that there has been a fundamental change in circumstances or that the applicant can reasonably relocate within the country of origin. If USCIS does not meet this burden, it must be concluded that the applicant's fear is well-founded.
>
> To be eligible for resettlement as a refugee in the United States, an applicant must establish either past persecution or well-founded fear of persecution on account of a protected ground. Therefore, in general, a refugee applicant who is found to have suffered past persecution but who does not have a well-founded fear of future persecution is still able to establish that he or she meets the refugee definition. There is no rebuttable presumption or burden shifting as there is in asylum

[54] *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015); Ellen A. Jenkins, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers,* 40 Golden Gate U.L. Rev. (2009).

[55] *Doe v. Holder*, 736 F.3d 872 (9th Cir. 2013).

processing.

## 4.3 Internal Relocation and Fundamental Change of Circumstances

The issue of internal relocation arises when determining whether an applicant has established a well-founded fear or, in the context of asylum, whether the presumption of a well-founded fear is rebutted by the reasonable possibility of internal relocation. In the asylum context, once an applicant has established past persecution, the burden then shifts to the Government to show that internal relocation is reasonable. In cases where the persecutor is a government or government sponsored, there is a presumption that internal relocation is not reasonable. In some cases there may be evidence to rebut that presumption, such as, for example, evidence that the government's authority is limited to certain parts of the country.[56] Homophobia, "whether expressed in laws or people's attitudes and behavior, often tends to exist nationwide."[57] A law of general applicability, such as a penal code that criminalizes homosexual conduct, which is enforceable in the place of persecution, would normally also be enforceable in other parts of the country of origin.[58]

Where a nongovernmental actor is the persecutor, the government's inability or unwillingness to protect the applicant in one part of the country may also be evidence that it is unwilling or unable to do so in other parts of the country.[59] He or she should not have to depend on anonymity to avoid the reach of the persecutor. While a major capital city "in some cases may offer a more tolerant and anonymous environment, the place of relocation must be more than a 'safe haven.'" The applicant must also be able to access a minimum level of political, civil, and socioeconomic rights.[60] Thus, he or she must be able to access the protection in a genuine and meaningful way. The existence of LGBTI-related nongovernmental organizations does not in itself provide protection from persecution.

In the asylum context, the presumption of a well-founded fear of future persecution also can be rebutted by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of

[56] Ellen A. Jenkins, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 Golden Gate U.L. Rev. (2009).

[57] UNHCR *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* at paragraph 33.

[58] *Id.*

[59] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraph 54.

[60] *Id.* at paragraph 56.

persecution. In making this determination, you must weigh all available evidence, including current country conditions and the circumstances of the individual applicant. Country condition reports can be particularly useful in examining whether there has been a fundamental change after a long absence from a country. For example, in *Neri-Garcia v. Holder*, the Tenth Circuit affirmed an immigration judge's determination of a fundamental change in circumstances based on country reports for 2009 and 2010 of a "growing social acceptance in Mexico" toward sexual minorities, even with continued discrimination.[61] The court, in applying a deferential standard of review that was limited to the record evidence, took into account that the petitioner failed to introduce evidence to counter these country reports, other than his and a witness's assertions that conditions had not changed in nearly twenty years.[62] In contrast, with a different record of evidence, the Seventh Circuit in *Rosiles-Camarena v. Holder*, suggested that both case-specific facts and country-wide conditions should be taken into account in examining the risk of a sexual minority applicant returning to Mexico.[63] In that case, the court noted the petitioner's contention of greater risk of harm to him than "a statistical risk of death for homosexuals as a group," due to such factors as his planning to live openly with his same-sex partner if returned to Mexico, being HIV-positive, not benefiting from familial support in Mexico, and being unfamiliar with the country's contemporary customs as he had spent the bulk of his life in the United States.[64] Further, on a somewhat separate point, in *Avendano-Hernandez v. Lynch*, in examining country conditions information as it related to a fear of torture by a transgender woman from Mexico, the Ninth Circuit ruled that the Board "erred in assuming that recent anti-discrimination laws in Mexico have made life safer for transgender individuals while ignoring significant record evidence of violence targeting them."[65]

# 5 LEGAL ANALYSIS – WELL FOUNDED FEAR

LGBTI-specific issues may also arise in cases where the applicant has not experienced past persecution, but may nevertheless have a well-founded fear of persecution. Because well-founded fear is discussed in detail in the ADOTC and RDOTC *Well-Founded Fear* lessons, this section focuses on common well-founded fear issues raised in LGBTI claims.

## 5.1 Objective Elements

[61] *Neri-Garcia v. Holder*, 696 F.3d 1003, 1007 (10th Cir. 2012).

[62] *See id.* at 1008.

[63] *Rosiles-Camarena v. Holder*, 735 F.3d 534, 539 (7th Cir. 2013) (examining facts related to the likelihood of future persecution, rather than a fundamental change in circumstances).

[64] *Id.*

[65] *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015).

An applicant may qualify for asylum or refugee status even if he or she was not persecuted in the past but has a well-founded fear of future persecution. To establish well-founded fear, the applicant must have a subjectively genuine fear and an objectively reasonable fear of return.

The existence of certain objective elements in a particular claim will not necessarily undermine the applicant's subjective fear or credibility. For example, just because a country permits an LGBTI organization to exist or allows an annual public LGBTI event does not mean that LGBTI people are free from ongoing violence and harm in that country.

Some countries with laws that state that their citizens and nationals are guaranteed religious, political, or other freedoms often do not enforce these protections. Similarly, some countries have anti-discrimination laws that seemingly protect LGBTI individuals, but in reality the laws are not enforced or are openly disregarded.

## 5.2 Fear of Future Persecution

An applicant should not be expected to suppress his or her sexual orientation or gender identity in order to avoid future persecution.[66] Conversely, LGBTI applicants who have concealed their sexual minority status in their home countries might not have experienced harm that rises to the level of persecution.[67] These applicants need not show that the persecutor knew about their sexual orientation before leaving, only that the persecutor may become aware of it if they return. In addition, it is not reasonable to expect an applicant to conceal his or her sexual minority status.

## 5.3 Refugees *Sur Place*

A *sur place* claim for refugee status may arise as a consequence of events that have occurred in the applicant's country of origin since his or her departure, or as a consequence of the applicant's activities since leaving his or her country of origin. This may also occur where he or she has been "outed" to members of his or her family back home or where his or her LGBTI status or views on sexual orientation have been publicly

[66] *Karouni v. Gonzales*, at 1173 (reasoning that to require the respondent to abstain from future homosexual acts if he wished to avoid persecution would effectively force him "to change a fundamental aspect of his human identity" …. and forsake the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that 'ha[ve] been accepted as an integral part of human freedom in many other counties."")

[67] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraphs 30, 57.

expressed, for example by taking part in advocacy campaigns, demonstrations, or other human rights activism on behalf of LGBTI individuals.

Additionally, LGBTI applicants might have left the country of origin for a reason other than their sexual orientation, for example to pursue employment and educational opportunities in the United States and have "come out" after arrival in the country of asylum or first refuge. These applicants may qualify for refugee or asylum status if they can demonstrate a well-founded fear of future persecution.

You should carefully consider whether the applicant's sexual orientation or gender identity may come to the attention of the authorities or relatives in the country of origin and the ensuing risk of persecution. Keep in mind that in making this analysis, it is not appropriate to assume that an individual who is lesbian, gay, or bisexual could "go back in the closet" or that a transgender individual who is living in their "corrected gender" could go back to living in the gender he or she was assigned at birth.[68]

As with all claims based solely on a fear of future persecution, the claim must meet the four elements in the *Mogharrabi* test. *See RAIO training module Well-Founded Fear.*

In the asylum context, there are some one-year filing deadline issues that may arise specifically in the context of LGBTI *sur place* claims. *See Asylum Supplement - One-Year Filing Deadline* below.

## 6 INTERVIEW CONSIDERATIONS

It is important to create an interview environment that allows applicants to freely discuss the elements and details of their claims and to identify issues that may be related to sexual orientation or imputed sexual orientation. Like most gender-based claims, LGBTI claims involve very private topics that are difficult for applicants to talk about openly. LGBTI applicants may hesitate to talk about past experiences and may be afraid they will be harmed again because of their actual or perceived sexual orientation or gender identity. For many, it will be very difficult to talk about something as private as sexual orientation, gender identity, or HIV-positive status. Furthermore, discussing some of these issues may also be challenging for you. It is therefore especially important for you to create an interview environment that is open and non-judgmental so that the applicant feels comfortable explaining the details of his or her claim.[69]
This section should be considered along with the guidance contained in the RAIO *Interviewing* modules, which also address issues related to sexual minorities.

The following may help you interact more meaningfully with LGBTI applicants during an interview.

[68] *Id*; *see also* *Karouni v. Gonzales*, 399 F.3d at 1173.

[69] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

## 6.1 Pre-Interview Considerations

### 6.1.1 File Review

Before the interview, when you review each file, be mindful of any LGBTI-related issues in the claim. Due to the delicate and personal issues that surround sexual abuse, sexual orientation, and gender identity, some applicants may have inhibitions about disclosing past experiences to an interviewer of a particular sex. Some LGBTI applicants may be more comfortable discussing their experiences with officers of a particular gender, particularly in cases involving rape, sexual abuse, or other sexual violence.

To the extent that personnel resources permit, an applicant's request for an interviewer of a particular sex should be honored. If a pre-interview review of the file indicates that the case may involve sensitive LGBTI-related issues, you may consult with your supervisor or team leader prior to the interview to evaluate whether it would be more appropriate for an officer of a particular sex to conduct the interview. You may also wish to confirm at the beginning of the interview that the applicant feels comfortable discussing all aspects of the claim with you.

### 6.1.2 How the Presence of Family and Relatives May Affect the Interview

For a variety of reasons, the presence of relatives may help or impede an applicant's willingness to discuss LGBTI-related persecutory acts or fears. For example:

- The applicant's relatives may not be aware of the harm he or she experienced. He or she may wish that the relative remain unaware of those experiences or may be ashamed to say what he or she has experienced or fears in front of a relative. In addition, the applicant's claim may be based, in part, on fear of the relative who is present.

- Or, the applicant may want a family member or significant other present during the interview. Sometimes having a loved one present can provide support to the applicant when recounting traumatic events.[70]

Therefore, to the extent possible, the choice of whether to be interviewed alone or with a relative present should be left to the applicant. The applicant should be asked his or her preference, when possible, in private, prior to the interview.

If the applicant elects for the relative to be present at the interview, you should exercise sound judgment during the interview, determining whether the presence of the relative is impeding communication. If it appears that relative's presence is interfering with open communication, the relative should be asked to wait in the waiting room.

[70] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

In some cases, an applicant will bring a partner to the interview to testify as corroboration of the applicant's sexual orientation or gender identity. If you feel that this corroboration would be helpful, the partner should be permitted to testify. You may exercise discretion and request that the witness's testimony be submitted in writing.

### 6.1.3 How the Presence of Interpreters May Affect the Interview

Interpreters play a critical role in ensuring clear communication between you and an LGBTI applicant. The actions of an interpreter can affect the interview as much as those of the interviewing Officer. As in all interviews, you should confirm that the applicant and the interpreter fully understand each other.

As explained in greater detail in the RAIO training module *Working with an Interpreter,* an applicant's testimony on sensitive issues such as sexual abuse may be diluted when received through the filter of an interpreter. The applicant may not feel comfortable discussing such LGBTI issues with an interpreter of the same nationality, ethnicity, or clan, etc.

The same holds true for the interpreter; even if the applicant feels comfortable using a particular interpreter, the interpreter may be inhibited about discussing LGBTI-related issues or using certain terms. For example, the interpreter may substitute the word "harm" for "rape" because the interpreter is not comfortable discussing rape due to cultural taboos.[71]

### 6.1.4 Reviewing Biographical Information with the Applicant

For transgender applicants, it is best to ask at the beginning of the interview what pronoun the applicant feels more comfortable with and to ask if there is a name he or she prefers using. For example, if an individual with a female appearance who has described her claim as based on transgender identity, has filled in the biographical information of the application form with an obviously male name, you should ask if there is a name she would prefer that you use.

One of the biographical information questions on the forms is "gender." Since this issue may be sensitive and go to the heart of the applicant's claim, it may be better to come back to this question at the end of the interview after the applicant has described the steps he or she has taken to "transition," rather than at the beginning of the interview. The early part of the interview should be devoted, in part, to putting the applicant at ease. If you immediately question the legitimacy of the "gender" box that he or she has checked off, the applicant may be uncomfortable for the rest of the interview.

[71] *See Immigration Equality Draft Model LGBT Asylum Guidance,* 2010.

USCIS has issued guidance explaining the process for issuing initial or amended documentation reflecting the applicant's post-transition gender.[72] It is important to note that proof of sex reassignment surgery is *not* required and USCIS will not ask for records relating to any such surgery.[73]

When going through the biographical information on the application form at the beginning of the interview, it is appropriate for you to inquire whether the applicant has legally changed his or her name. If yes, you can request the legal name change documents. If no, you should explain why it is necessary to use the legal name on the form, but that during the interview you will refer to the applicant by the name that the applicant feels most comfortable using.[74]

**Note**: If the applicant provides any new name or gender information, additional database systems may need to be updated and further security checks may be required. Please refer to USCIS and division procedures for updating name and gender information.

## 6.2 Suggested Techniques for Eliciting Testimony

### 6.2.1 Setting the Tone and Putting the Applicant at Ease

While you must conduct all of your interviews in a non-adversarial manner, it is crucial when interviewing LGBTI applicants that you set a tone that allows the applicant to testify comfortably and that promotes a full discussion of the applicant's past experiences. You must conduct the interview in an open and nonjudgmental atmosphere designed to elicit the most information from the applicant.

You should be mindful that for many people there is no topic more difficult to discuss with a stranger than matters relating to sexual orientation, gender identity, and serious illness.[75] Furthermore, many applicants have been physically and sexually abused, harassed, tormented, and humiliated over many years because of their actual or perceived sexual orientation or gender identity.

Asking questions about difficult or private issues is a sensitive balancing act you face in all interviews. On the one hand, you need to obtain detailed testimony from the applicant. On the other hand, you do not want to badger or traumatize the applicant. The most important thing to understand is that this may be a difficult

[72] USCIS Policy Memorandum on *Adjudication of Immigration Benefits for Transgender Individuals*, August 10, 2012.

[73] *Id.*

[74] *Id.*

[75] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

topic for the applicant to talk about and to be respectful in discussing sexual orientation, gender identity, and serious illness.[76]

You can help alleviate some of the applicant's reluctance to discuss some of these issues by incorporating the following suggestions into your interviews:

**Remind the applicant that the interview is confidential.** It can also help to ease the applicant's nervousness if you explain confidentiality to the interpreter in the presence of the applicant.

**Be particularly sensitive when questioning the applicant about past sexual assault.** Applicants may be reluctant to talk about actual or perceived sexual orientation or to disclose experiences of sexual violence. This may be especially true for LGBTI applicants who are not "out of the closet" or where the applicant was sexually assaulted. In many societies, sexual assault is seen as a violation of community or family morality for which the victim is held responsible. The combination of shame and feelings of responsibility and blame for having been victimized in this way can seriously limit an LGBTI applicant's ability to discuss or even to mention such experiences.[77]

**Explore all relevant aspects of the claim, even if they may be difficult to discuss.** While you must be sensitive as you interview an applicant regarding such delicate topics, at the same time you must not shy away from your duty to elicit sufficient testimony to make an informed adjudication. This may include instances involving sexual violence. It is critical that you ask all necessary and relevant follow-up questions to help the applicant develop his or her claim.[78]

It is important to remember that in the nexus analysis, the relevant inquiry is not whether the applicant actually possesses the protected trait. Rather, it is whether the persecutor believes the applicant possesses the trait (either because the applicant does possess it or because the persecutor imputes it to the applicant). Thus, the issue is not whether the applicant actually is LGBTI, but whether the persecutor believes that he or she is, either because the applicant possesses the characteristic or because the persecutor imputes it to the applicant.

It is not necessary to probe the details of the applicant's personal life beyond what is necessary to make this specific determination. So, once you have established that the persecutor perceives the applicant to have a protected trait, further inquiry into the specific nature of the applicant's LGBTI status is not necessary to establish

[76] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[77] *See* RAIO Training Module, *Gender Related Claims.*

[78] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

inclusion in a particular social group.

**Try to use the same language that the applicant has used in his or her own application.** If an applicant refers to himself as "gay," you should use this term, rather than "homosexual" and vice versa. The most important thing is to understand what a difficult topic this may be for the applicant to discuss and to be respectful.[79]

**Do not assume that being a sexual minority is a lifestyle or a choice**. This will help you avoid asking questions in a way that may put the applicant on the defensive and result in the applicant holding back information rather than imparting it.[80]

**Become familiar with the legal issues, terminology, and questioning techniques specific to the LGBTI community.** You can use this information to help the applicant tell his or her own story.

**Be mindful that the applicant and the interpreter may not be familiar with many of these issues or terms.** While many LGBTI individuals in the United States embrace their LGBTI identity and have a language to talk about these issues, for many LGBTI individuals who come from countries where topics of sexuality are taboo, the way that applicants express themselves may be different from what an interviewer would expect from an LGBTI person in the United States.[81]

The fact that an applicant may be uncomfortable with these terms may be a result of the fact that he or she comes from a culture where there is no word for homosexuality or transgender identity. It may be a result of his or her own ingrained homophobia from growing up in a culture where such terms were the equivalent of insults.[82]

**Become well-versed in country of origin information.** This allows you to ask relevant follow-up questions. The more you know about the applicant's country of origin, the less likely you will be to miss important facts. Additionally, awareness of country conditions may also assist you in conducting the interview with cultural sensitivity and may help you put the applicant at ease during the interview. If the applicant notices that you took the time to try to understand the situation he or she faces in the country of origin as an LGBTI individual, he or she may be more inclined to talk in detail about his or her experiences and fears.

### 6.2.2 Explore all possible grounds

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

Many LGBTI applicants may not know that their sexual orientation, gender identity, HIV-positive status, or intersex condition is the basis for a protection claim and may be reluctant to talk about these topics because they are so private. This is especially true where applicants are not represented. They may only put forward the elements of their past experiences that their family or members of their communities recommend.

For example, an applicant from Colombia appears before you for an interview. The majority of claims you have adjudicated from Colombia involve fear of the FARC. The applicant tells you about all of the instances when he has had contact with the FARC. At the end of the interview you have already begun to analyze the case and despite being credible, your assessment is that the applicant has not established nexus, past persecution, or well-founded fear.

When you ask the applicant if there is any other reason he fears returning to Colombia, he appears to have something more to say, but hesitates. You suspect that there may be an issue that the applicant has not put forward. In this situation it would be appropriate to try to explain to the applicant that there is more than one ground for asylum or refugee status.

> "Refugee (or asylum) status is a case-by-case determination made based on an individual's unique circumstances and is not just for people fleeing because of political opinion. Individuals who are afraid to return because of their religion, sexual orientation, clan membership, or because of domestic violence may also be eligible. Are there any other circumstances affecting you that you would like to tell me about?"

It is important to remember that the applicant would still be required to provide credible testimony regarding past harm and/or fear of future harm on account of one of the five protected grounds.

### 6.2.3 Sample Questions

The following are appropriate types of questions to elicit testimony and assess credibility in LGBTI cases. Please note that these questions are intended as starting points and should not be used as a substitute for all necessary lines of inquiry and follow-up questions during your adjudication. In other words, it is good to have a general outline of questions you need to ask or questions you need the answers to, but not a script. Remember, credible testimony alone may be enough and, other than reliable country of origin information, is often the only other evidence the applicant submits to you.

***Sexual Orientation***

## Appropriate Lines of Inquiry

The most common LGBTI claims are based on sexual orientation and involve gay men, and to a lesser extent lesbian women. If the applicant was aware that he or she was lesbian, gay, or bisexual while in the country of origin, it is important to ask about his or her personal experience and his or her awareness of any similarly situated people.[83] The applicant should be able to describe what it was like identifying with his or her sexual orientation. Likewise, the applicant should be able to describe his or her first relationship, and the harm he or she suffered or fears in the home country. Keep in mind that this might only be true if the person is "out."

These questions focus on the possession or perceived possession of a protected characteristic. You must also ask about past harm and fear of future harm.

The following are some suggested questions when adjudicating claims that involve the applicant's sexual orientation:[84]

- When did you first realize you were gay (or lesbian or bisexual)?
- Did you tell anyone?
- Why/why not?
- If yes, when?
- How did they react?
- Did you know other gay people in your home country?
- If yes, how were they treated?
- Did you hear about other gay people in your home country?
- If yes, how were they treated?
- Have you met any other gay people?
- Where?
- Does your family know you're gay?
- If yes, what was their reaction when they found out?
- Have you ever been in a relationship?
- How did you and your partner meet?
- Are you still together/ in touch?
- How do lesbian [or gay, or bisexual] people meet one another in your

[83] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[84] *Id.*

country?

- Were you involved in any LGBTI organizations in your country?
- Are you involved in any LGBTI organizations here?
- When you say people in your country want to kill people like you, can you explain what you mean by "people like you?"

**Inappropriate Lines of Inquiry**

The applicant's specific sexual practices are not relevant to the claim for asylum or refugee status. Therefore, asking questions about "what he or she does in bed" is never appropriate.[85] If the applicant begins to volunteer such information, you should politely tell him or her that you do not need to hear these intimate details in order to fairly evaluate the claim.

### *Gender Identity*[86]

**Appropriate Lines of Inquiry**

A transgender applicant may identify as straight, lesbian, gay, or bisexual, and that gender identity has to do with the person's inner feelings about his or her sexual identity.[87] Most transgender people consider themselves to be male or female. Therefore, do not think of "transgender" as a gender.

Male to female (M to F) transgender individuals were assigned the male gender at birth and consider themselves to be female. They are called transgender women.[88] Female to male (F to M) transgender individuals were assigned the female gender at birth and consider themselves to be male. They are called transgender men.[89]

Some individuals do not subscribe to the male/female gender binary. They may identify with neither gender, with a third gender, or with a combination of both genders. These individuals may or may not identify with the broader transgender community but may also face harm because of their gender identity.

When interviewing an applicant who is transgender or has another claim based on gender identity, start off with easy questions and gradually ease into asking the more sensitive ones; be cognizant not to put words in the applicant's mouth. It is important to remember

---

[85] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[86] For further reading see *Immigration Law and the Transgender Client, available at* http://www.immigrationequality.org/issues/law-library/trans-manual/

[87] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[88] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[89] *Id.*

that being transgender involves an overall dissatisfaction with the gender assigned at birth; it is not about having one particular surgery. In many cases it will be appropriate to ask the applicant about the steps he or she has taken to transition gender.[90] This question should be framed as one question among many that elicits the applicant's expression of his or her gender identity, such that it is perceived by the persecutor and the society in which the applicant lived.[91]

The most important thing to remember is to be respectful and nonjudgmental. If you feel that it is necessary to ask a question that the applicant may perceive as intrusive, you should explain why the answer to the question is legally necessary. If you are confused about the applicant's self-identification, you should respectfully admit to feeling confused and ask the applicant to explain in his or her own words.[92]

The following are some suggested questions that, depending on the facts, may be appropriate when adjudicating a claim that involves the applicant's gender identity:[93]

- When did you first realize you were transgender? Or: When did you first realize that although you were born as a male (female) you felt more like a female (male)?
- How did you realize this?
- Did you know other transgender people in your country? Or: Did you know other people who felt like you in your country?
- If yes, how were they treated?
- Did you hear about other transgender people in your country?
- If yes, how were they treated?
- When did you begin to transition from a man to a woman or woman to a man?
- What steps have you taken to transition?
- Do you now live full-time as a man (or woman?) When did you begin to live full-time as a man (or woman)?
- Does your family know you're transgender?
- If yes, how did they react when they found out?

Many transgender applicants will not have begun to live full-time in their corrected gender until they have come to the United States.[94] In many cases, a person may discuss past mistreatment in terms of perceived sexual orientation. In these cases, it is appropriate to ask questions that pertain to sexual orientation as well as gender identity.

[90] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[91] *Id.*

[92] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[93] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[94] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

### Inappropriate Lines of Inquiry

If an applicant testifies that he or she was not accepted in his or her home country because "people think I look like a girl, but I'm a guy," do not follow up by asking "So, what are you?" Furthermore, do not put words in the applicant's mouth by asking such questions as: "You haven't had any surgery or anything like that, right? So you're a male who looks effeminate?"[95]

If the applicant has not indicated that he or she was harmed or fears being harmed for being gay, do not begin by asking the applicant if he or she is gay. It is important to remember that gender identity and sexual orientation are two different issues. A transgender applicant may also be gay, lesbian, or bisexual, but that is not necessarily the case. It is also important to remember that even if the applicant is heterosexual, he or she may be perceived as homosexual because he or she does not fit the societal norms for his or her gender. Instead, focus on the problems the applicant experienced in the country of origin and address the issue of sexual orientation later, if necessary.

This approach also ensures that your questioning is tailored to eliciting information that allows you to determine what trait the persecutor, and the society in question, perceives in the applicant. Since this is the evidence required to analyze the nexus requirement and the social distinction of the relevant social group, lines of questioning that focus on what the applicant experienced and how he or she was or would be viewed will likely be the most effective.

## *HIV Status*

### Appropriate Lines of Questioning

You should be mindful that HIV is a very serious illness and that many individuals, especially those from countries with fewer treatment options, see an HIV diagnosis as a death sentence. It is therefore imperative for you to be extremely sensitive in asking about the applicant's HIV status.[96]

If an applicant's case is based in whole or in part on his or her HIV-positive status, you will need to ask questions about this. It is appropriate to ask about the applicant's state of health, current treatment regimen, and the availability of treatment in the home country.[97]

In some cases, the applicant's HIV status may be directly related to the persecution, for example, where a lesbian was raped and believes this was her only possible risk for HIV exposure. If the applicant's HIV status is related to the harm the applicant suffered, it will be relevant for you to ask questions about this as well.

---

[95] *Id.*

[96] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[97] *Id.*

Many cases involve an applicant's fear of harm based on the fact that his or her HIV-positive status may lead community members to assume, whether correctly or not, that he or she is gay.[98] If a claim is not based on the applicant's sexual orientation or gender identity and HIV status is not mentioned, it is not appropriate for you to ask the applicant if he or she is HIV-positive.

Some cases will involve an applicant's fear of violence, stigma, and extreme discrimination based on his or her HIV-positive status. In other instances, the applicant's primary fear may be the lack of medical care in his or her home country.

It is important to keep in mind that if an applicant's case is based on sexual orientation or gender identity and is not based on his or her HIV status, that you should not presume that he or she is HIV-positive.

**Inappropriate Lines of Questioning**

Generally, the risk factor for HIV infection is not relevant to the applicant's claim, so it is not appropriate to ask the applicant how he or she thinks that he or she contracted HIV.[99]

In some asylum cases, an applicant's HIV status may also be relevant to a one-year filing deadline exception, for example, if the applicant was extremely ill during his or her first year in the United States or the applicant may not have been diagnosed until several years after entering the United States. (*See Asylum Supplement One-Year Filing Deadline*, below).

### *Intersex Conditions*

**Appropriate Lines of Inquiry**

When questioning applicants with intersex conditions, use the same type of sensitive questioning techniques suggested for sexual orientation, gender identity, and HIV-positive status claims.

Some intersex people will never have heard of anyone else like themselves, but others will. There are some intersex conditions that run in families or are more common in certain populations. Where the condition is known in a given culture, an applicant should be able to describe how people like them are treated. Where the condition is known to run in a family (but not throughout the culture), the entire family may face stigma, or family members may be on the lookout for signs of the condition in order to keep the family secret. For example, Androgen Insensitivity Syndrome (AIS) is an inherited condition. People with this condition will have a typical-looking female body, but will be infertile and will have only a shallow vaginal opening or none at all. Female relatives of an

[98] *Id.*

[99] *Id.*

affected woman may be carriers and can pass it on to their children. Normally it is not discovered until puberty when the girl does not menstruate.

Many persons with intersex conditions may have difficulty understanding and articulating their own physical conditions and medical history. Therefore, some of these questions may be more appropriate for parents or families of young intersex children who face persecution.

The following are some suggested questions that, depending on the facts, may be appropriate when adjudicating a claim that involves the applicant's intersex condition:

- When did you first learn about your condition?
- How did you learn about it?
- Did you tell anyone?
- Why/why not?
- If yes, when?
- How did they react?
- Does your family know about your condition?
- If yes, how did they react when they found out?
- Did you go to a doctor or other medical professional?
- Have you ever received medical treatment for your condition?
- What were you told about your condition?
- How much do you understand about your condition?
- Did you know other people with similar conditions in your country? Or did you know other people like you in your country?
- If yes, how were they treated?

## 7 EVIDENCE ASSESSMENT

As explained in greater detail in the RAIO training modules *Eliciting Testimony* and *Evidence,* while the burden of proof is on the applicant to establish eligibility, equally important is your duty to elicit all relevant testimony. Establishing eligibility means the applicant must establish past persecution or a well-founded fear of future persecution based on actual or imputed (perceived) sexual orientation or gender identity. Your duty includes always recognizing the non-adversarial nature of the adjudication, applying interviewing techniques that best allow you to elicit detailed testimony from an LGBTI applicant, and diligently conducting relevant country of origin information research.

In addition to the applicant's testimony, reliable country of origin information may be the only other type of evidence available to you when you make your decision in a case involving LGBTI applicants. It is important to remember that reliable information regarding the treatment of LGBTI individuals may sometimes be difficult to obtain and that the absence of such information should not lead you to presume that LGBTI individuals are not at risk of mistreatment.

## 7.1 Credibility Considerations During the Interview

If an applicant is seeking refugee or asylum status based on his or her sexual orientation, gender identity, intersex condition, or HIV-positive status, he or she will be expected to establish that the persecutor views the applicant as a sexual minority or HIV-positive, either because the applicant actually has such status or because the persecutor imputes it to him or her. Under either basis, the critical point to establish is what trait the persecutor perceived in the applicant.

Credible testimony alone may be enough to satisfy the applicant's burden. Sexual minority or imputed sexual minority claims tend to rely heavily on the applicant's own testimony to establish all of the elements of the claim. Therefore, your job will be to fully and fairly elicit all testimony with regard to the harm the applicant suffered or fears based on his or her actual status as a sexual minority or perceived status as a sexual minority.

### 7.1.1 Plausibility

The fact that an applicant testifies about events that may appear unlikely or unreasonable does not mean it is implausible that the events actually occurred. You must take care not to rely on your views of what is plausible based on your own experiences, which are likely to be quite different from the applicant's.

#### What if the Applicant is Married or Has Children?

An applicant may have gotten married in his/her home country and/or have children.[100] This, by itself, does not mean that the applicant is not gay. "Many applicants describe enormous social pressure to marry and being forced into a marriage by their family or society. Other applicants, while grappling with their sexual identity, have tried to lead a heterosexual life and 'fit in' within their society."[101]

Even in the United States, it is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to societal norms.[102] While some lesbians and gay

[100] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[101] *Id.*

[102] *Id.*

men may feel that they have always known their sexual orientation, many others do not come to terms with their sexual identity until much later in life.[103]

If you have concerns about the credibility of an LGBTI applicant who is married, it may be appropriate to ask the applicant a few questions surrounding the reasons for marriage. If the applicant is able to provide a consistent and reasonable explanation of why he or she is married and/or has children, that portion of the testimony should be found credible.

### What if the Applicant Does Not Appear to be Familiar With LGBTI Terminology?

While most Americans are accustomed to reading and hearing about LGBTI issues in the news, these terms may be unfamiliar to applicants from other cultures. "Some countries do not even have words for different sexual orientations other than homophobic slurs. The fact that an applicant may be uncomfortable with these terms may be a result of his or her own ingrained homophobia from growing up in a country where such terms were the equivalent of vile curses."[104] Therefore, you should not assume that it is implausible for an applicant to be gay, lesbian, or transgender if he or she is not familiar with LGBTI terms.

### What if The Applicant Does Not "Look" or "Act" Gay?

Some applicants with LGBTI-related claims will not "look" or "act" gay.[105] If an applicant provides detailed testimony about his or her experiences in the country of origin,[106] it would be inappropriate to expect the applicant to fit a stereotypical notion for how LGBTI people should look or behave.

While there are some individuals who identify as gay who may also consider themselves effeminate and some individuals who identify as lesbian who may also consider themselves masculine, many men who identify as gay will not consider themselves effeminate and many women who identify as lesbians will not consider themselves masculine.

For some LGBTI people, the harm they suffer, especially in their youth before accepting their LGBTI identity, may be related to their feminine characteristics (for males) or their masculine characteristics (for females). Regardless of whether the applicant was "out" at

---

[103] *Id.*

[104] *Id.*

[105] *Shahinaj v. Gonzales*, 481 F.3d 1027 (8th Cir. 2007) (remanding case to new Immigration Judge in part because IJ had improperly relied on his own stereotypes and found an Albanian applicant's claim to be gay not credible because he did not exhibit gay "mannerisms," "dress" or "speech"); *Razkane v. Holder*, 562 F.3d 128 (10th Cir. 2008) (rejecting IJ's finding that applicant's appearance was not gay enough for persecution to be likely to occur). *See also Ali v. Mukasey*, 529 F.3d 478 (2d Cir. 2008) (rejecting IJ's conclusion that a "dangerous criminal" could not be identified as a "feminine . . .homosexual" in his native Guyana).

[106] (See Credibility-Detail below for appropriate credibility considerations).

the time he or she was harmed, this harm may, in many cases, be considered related to his or her LGBTI status.[107]

In some cases, an applicant will testify that he or she was harmed or fears future harm because his or her appearance makes his or her LGBTI identity apparent, that is, he or she fits the accepted stereotype for LGBTI people in his or her culture. Cultural signals about a person's sexual orientation or gender identity may vary between individuals from other countries and your own. Thus, if an applicant tells you that he or she appears obviously LGBTI, it is necessary to ask the applicant appropriate follow-up questions to explore what the applicant means.

Whether or not an applicant claims that his or her LGBTI identity is apparent, it is appropriate for you to elicit testimony about why the applicant fears harm. For example, in many countries, the fact that a person is unmarried or childless after young adulthood may result in others questioning his or her sexual orientation. In other countries, the only way for LGBTI people to meet other LGBTI people is to go to gay clubs, or parks, which may put them at higher risk of being identified as a sexual minority. For transgender applicants, having identity documents that do not match their name or outward gender appearance may put them at risk. (See *Interviewing Considerations* above for appropriate lines of questioning to determine credibility.)

As discussed above, it is important to remember that gender identity and sexual orientation are distinct concepts. While it may be obvious from the appearance of some transgender individuals that they are transgender, other transgender individuals may "pass," or blend in quite well as their corrected gender. By way of contrast, transgender people who are at the beginning of their transition also may not "look transgender."[108] In these cases, as in other categories of protection cases, you should not base your decision on the applicant's outward appearance. Instead, you should elicit relevant testimony about the applicant's identity and, if appropriate, request corroborating evidence.

#### What if Country of Origin Information Does Not Address LGBTI Issues?

The fact that little or no corroboration of mistreatment against LGBTI individuals is included in reports that generally address human rights violations does not render the applicant's claim of past harm or fear of future harm implausible in light of or inconsistent with country of origin information.[109] The weight to be given to the fact that country conditions information fails to corroborate a claim will depend on the specific allegations, the country, and the context of the claim.

### 7.1.2 Consistency

[107] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[108] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[109] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

### Claims Not Initially Put Forth

An LGBTI individual may initially assert a claim based on another protected ground such as political opinion or religion and later reveal that he or she was harmed or fears harm based on his or her sexual orientation. This may be because the applicant was reluctant to talk about his or her sexual orientation or gender identity or because he or she was unable to articulate a connection to a particular protected ground.

There may be situations where the applicant does not initially put forward a claim based on sexual orientation or gender identity but does so later on. For example, a newly arrived applicant may not feel comfortable or safe revealing his or her sexual orientation or gender identity to an Immigration Officer during primary or secondary inspection or an Asylum Officer during a Credible Fear interview at the Port of Entry. Then, he or she may subsequently reveal this information on his or her asylum application.

In the case of Dominic Moab, a gay asylum seeker from Liberia, the IJ denied the case and the BIA affirmed, in part because Mr. Moab "failed to mention his homosexuality to the immigration officers at the airport or to the examining official during his credible fear interview."[110] The Seventh Circuit remanded the case, finding that the BIA had not considered the fact that, for several reasons, "airport interviews… are not always reliable indicators of credibility" including that "it is unclear, what if any follow-up questions were posed" and he may "not have wanted to mention his sexual orientation for fear that revealing this information could cause further persecution…."[111]

In overseas refugee processing, an applicant may not initially tell the referring agency, such as UNHCR or the Resettlement Support Center (RSC) about being gay or transgender, but then subsequently tell the USCIS Interviewing Officer about his or her LGBTI status. If you are confronted with such a scenario, do not automatically assume the applicant is not credible but follow the guidance above about what information the application should generally be able to relay.

It is important to take into account all of the factors mentioned in this module in assessing the applicant's ability to articulate his or her claim. When exploring these claims, remember that the applicant may have other grounds upon which he or she may qualify for refugee status or asylum. If a claim can clearly be established on another ground, that may form the basis for the decision.

As with all other credibility determinations, you must give the applicant the opportunity to explain any inconsistencies or omissions in his or her case. In a situation where an applicant does not initially mention his or her sexual orientation or gender identity and later does as a basis for protection, you would ask for an explanation:

[110] *Moab v. Gonzales*, 500 F. 3d 656, 657 (7th Cir. 2007).

[111] *Id.* at 660 (citing *Dong v. Gonzales*, 421 F.3d 573, 579 (7th Cir. 2005).

"Help me understand. Why are you telling me this now, but did not mention it to the officer at the airport? Or to UNHCR or the RSC?"

#### Seemingly Inconsistent Use of LGBTI Terms

If the application form states in one place that the applicant is bisexual, but he or she testifies that he or she is homosexual, do not assume this is a contradiction. It is appropriate to provide the applicant with an opportunity to explain the apparent inconsistency, but do not pursue an adversarial line of questioning such as: "Homosexual? Your application says bisexual. Well, which is it – homosexual or bisexual?"

### 7.1.3 Detail

An essential component of an LGBTI claim is that the applicant must establish that the persecutor perceived him or her to be a sexual minority. This perception can be based on the applicant's actual status, or on a status imputed to the applicant. Where the persecutor's perception is based on a status that the applicant in fact has, appropriate details about the applicant's experience as LGBTI may help to substantiate the claim.

It is important to remember however, that the ultimate legal question is whether the persecutor targets the victim because the persecutor perceives a protected trait in the victim. Questions about the applicant's sexual orientation should be filtered through that lens. The purpose of establishing LGBTI status is to show why the persecutor perceived this trait in the individual. In a claim based on imputation of the protected trait, the reasons why the persecutor viewed the applicant as having that trait will be different, and it would be those different reasons that the applicant would have to establish.

As with any other type of refugee or asylum case, an applicant's detailed, consistent, credible testimony may be sufficient to prove his or her sexual orientation.

The applicant should be able to describe his or her experiences identifying as LGBTI. He or she should be able to explain when he or she first began to feel attracted to members of the same sex, if and when he or she first engaged in a romantic or sexual relationship with a member of the same sex, how this made him or her feel, whether he or she told other people or kept this aspect of his or her identity secret, etc.[112]

Acceptable lines of questioning to develop the applicant's claim and to test credibility are listed above in *Sample Questions*.

## 7.2 Country of Origin Information

[112] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

Country of origin information on LGBTI issues can sometimes be more difficult to find than on other issues.[113] You should not conclude that if these issues are not mentioned that no problems exist. Many organizations that report on human rights issues lack sufficient contacts within local LGBTI communities to know what LGBTI individuals experience in their countries, or do not have the resources to investigate and/or monitor all types of human rights violations in a particular country.

Often the countries where homosexuality is most taboo have the least country conditions information available. In many countries, for example those with conservative, religious governments, there is little or no mention of the existence of LGBTI citizens in any media. This may also be true in countries with antidemocratic, authoritarian governments, where LGBTI groups may not be allowed to exist.

Where there is a lack of sufficiently specific country of origin information, you may have to rely on the applicant's testimony alone to make your decision.[114]

Useful resources in gathering information LGBTI claims include:

- The AsylumLaw.org Sexual Minorities and HIV status website at http://www.asylumlaw.org/legal_tools/index.cfm?category=116&countryID=233
- The *International Gay and Lesbian Human Rights Commission* at http://iglhrc.org/
- The Amnesty International *Out Front* program at www.amnestyusa.org/outfront
- The International Lesbian and Gay Association (http://ilga.org/) website, which contains a legal survey where you can search legal codes and country conditions.
- The Human Rights Watch LGBT division and HIV division at www.hrw.org/en/category/topic/lgbt-rights
- Refugee, Asylum, and International Operations Directorate (RAIO)Library at https://u95026.eos-intl.net/U95026/OPAC/Index.aspx
- Council on Global Equality at http://www.globalequality.org/
- UNHCR's Ref World at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain

## 7.3 Corroborating Evidence

[113] *See Id.*

[114] UNHCR *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity.*

In some situations, where it is necessary to establish that the persecutor perceived a protected trait in the applicant, you may ask the applicant to provide evidence that corroborates his or her sexual orientation, gender identity, or HIV-positive status. Pursuant to amendments to INA section 208 made by the REAL ID Act of 2005, an applicant for asylum must provide this evidence unless he or she does not have the evidence and cannot reasonably obtain the evidence. The REAL ID Act amendments to INA section 208 do not apply to overseas refugee processing, which is governed by INA section 207.

It is very important to remember that because of the different ways overseas refugee and asylum applicants obtain interviews with USCIS, the evidence that refugee applicants can reasonably obtain compared with the corroborating evidence some asylum seekers can reasonably obtain varies greatly.

## Corroborating Sexual Orientation

You may ask the applicant to provide evidence that corroborates his or her sexual orientation as a means of establishing that the persecutor perceived or would perceive the protected trait in the applicant. The applicant's detailed, consistent, credible testimony may be sufficient to establish this status. For asylum cases, the applicant must provide this evidence unless he or she does not have the evidence and cannot reasonably obtain the evidence.[115] Again, it is important to remember that the evidence refugee applicants can reasonably obtain varies greatly compared with the evidence some asylum applicants can reasonably obtain. Examples include a letter from a current or ex-partner; a letter from a friend with whom the applicant has discussed his or her sexual orientation; a letter from a family member; proof that he or she is involved in an LGBTI political or social organization; or a psychological evaluation, etc.[116]

There may be situations where the applicant will not be able to provide any corroboration, for example, if he or she is no longer in contact with an ex-partner in his or her country, where his or her family has disowned him or her, and where he or she does not yet know any LGBTI people in the United States or the country of first asylum. As in any other case, the applicant should not automatically be denied for lack of corroboration. Rather, it is appropriate for you to question the applicant about why corroboration is unavailable, and factor this explanation into your decision-making process.

[115] *See Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008)(holding that the BIA did not err in requiring alien to corroborate his claim of persecution based on membership in social group of homosexual men.) In *Eke v. Mukasey*, the respondent argued that the Immigration Judge and the Board erred "by requiring him to corroborate his claim of persecution based on his membership in the social group of homosexual men." *Id.* at 381. The court rejected this argument, reasoning that there "is nothing in the nature of [applicant's] claims that would compel us to find that corroborating evidence was unavailable to him." *Id.*

[116] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

## Corroborating Transgender Identity

Again you may ask the applicant to provide evidence that corroborates his or her transgender identity as a means of establishing that the persecutor perceived or would perceive the protected trait in the applicant. The applicant's detailed, consistent, credible testimony may be sufficient to establish this status. The applicant should be able to describe his or her experience identifying as a transgender individual. That is he or she should be able to explain when he or she first started to feel "different" or uncomfortable with the gender he or she was assigned at birth; ways in which his or her behavior and feelings differed from gender norms; steps he or she has taken to express the gender that he or she feels comfortable with, etc.

It may be appropriate to elicit information about what steps the applicant has taken in his or her transition but remember how personal and difficult it will be for the applicant to talk about these issues.

A number of transgender individuals receive necessary medical treatment to help their outward appearance correspond with their internal identity. Bear in mind, however, that the treatment plan for every transgender person is different. There is not a single surgery which transforms a transsexual from one gender to another. If a transgender applicant is receiving treatment from a medical doctor or mental health professional (such as counseling, hormones, implants, or other surgeries), it is reasonable to expect corroboration of this treatment.[117]

Many transgender individuals do not receive ongoing treatment, however. Some transgender individuals self-administer hormones, while others identify with their chosen gender without undergoing any medical treatment as part of their transition. Many others would like to access transition-related medical care but cannot, because of immigration status or lack of financial resources. In any event, an applicant should be able to corroborate any treatment he or she has received from a medical professional or explain why such corroboration is not available.[118]

## Corroborating HIV-Positive Status

An applicant who is requesting refugee or asylum status in whole or in part based on being HIV-positive, should generally be able to provide some external corroboration that he or she is HIV-positive, such as a letter from a doctor or the results of an HIV test. You may ask for such corroboration as a means of determining that the persecutor did or would perceive this trait in the applicant. Again, this expectation may vary in the context of overseas refugee processing.

[117] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[118] *Id.*

# 8 CONCLUSION

Adjudicating LGBTI refugee and asylum claims presents certain unique challenges. It is important to remember to be sensitive to the issues, familiar with the terminology, and familiar with relevant country of origin information. By definition, these claims involve the most private of matters – sexual orientation, gender identity, and sometimes serious illness. Always remain respectful and nonjudgmental, and do not be afraid to acknowledge to yourself and to the applicant that these are sensitive topics that are difficult to discuss. Familiarize yourself with the legal nuances involved in these types of cases and do your best to elicit all relevant details without re-traumatizing the applicant or being insensitive.

# 9 SUMMARY

## 9.1 LGBTI and HIV Terminology

Becoming familiar with relevant terminology helps you become more aware of the nuances involved in adjudicating LGBTI claims. It is important to be familiar with the terminology but also to keep in mind that the applicant may come from a culture where sensitivity to these issues is not as high as in other countries and may not be familiar with the terms himself or herself. The terms "sexual minorities" and LGBTI are used in this module interchangeably to refer to both sexual orientation and gender identity.

## 9.2 Legal Analysis – Nexus and the Five Protected Characteristics

LGBTI refugee and asylum claims are primarily analyzed under the ground membership in a particular social group. Sexual orientation, gender identity (or the right to live in one's "corrected gender"), and having an intersex condition can be classified as a common immutable characteristic that the individual should not be required to change. Social distinction does not require that the trait be literally visible to the eye. Where there are clear benchmarks for delineating the group, the group is defined with sufficient particularity.

Ways to formulate the PSG have included "sexual minority from Russia," "gay man from Columbia," "lesbian from Iran," or "transgender female from Mexico." Ask questions about what the persecutor may have said to him or her and about the circumstances surrounding the harm inflicted on or threats made against the applicant.

## 9.3 Legal Analysis – Types of Persecution

The two questions you must ask yourself to determine whether the applicant suffered or fears persecution are: 1) did the harm rise to the level of persecution; and, 2) did the applicant experience the incident as harm? Examples of harm that LGBTI applicants may

have faced or fear and that may rise to level of persecution include: physical and sexual violence; execution; imprisonment; forced marriage; long-term, systemic discrimination; threats of violence and to "out" the applicant; and forced psychiatric treatment.

Lesbians may have suffered the harms that befall many women in addition to harms that befall members of the LGBTI community. Transgender individuals may be more visible and may be more commonly viewed as transgressing societal norms than gay men or lesbians. They may be subjected to increased discrimination and persecution.

## 9.4 Legal Analysis – Well-Founded Fear

The fact that LGBTI organizations are permitted to hold a parade once a year or the mere existence of LGBTI organizations does not mean that LGBTI people are free from ongoing violence and harm in that country.

An applicant who was forced to conceal his or her sexual orientation or gender identity in the home country in order to avoid harm and did not suffer harm that rose to the level of persecution may still qualify for refugee or asylum status if he or she has a well-founded fear of future persecution. In some cases, the experience of having to conceal sexual orientation or gender identity may itself result in suffering severe enough to constitute persecution. Some LGBTI applicants come to the United States for work or study and subsequently “come out” to themselves and to others.

## 9.5 Legal Analysis – One-Year Filing Deadline (asylum only)

In many instances an individual does not “come out” as lesbian, gay, bisexual, or transgender until he or she is in the country where he or she sees that it is possible to live an open life as an LGBTI person. If an individual has recently ”come out,” this may qualify as an exception to the one-year filing deadline based on changed circumstances.

An individual may qualify for a one-year exception based upon serious illness, for example being diagnosed as HIV-positive.

LGBTI individuals who suffer from internalized homophobia and transphobia or who may have been subjected to coercive mental health treatment to “cure” them in their home countries may find it especially difficult to seek the mental health treatment they may need to proceed with their applications. Also, many LGBTI asylum-seekers in the United States live with extended family members or with members of the very community they fear.

## 9.6 Interviewing Considerations

It is important to create an interview environment that allows applicants to freely discuss the elements and details of their claims. LGBTI claims involve very private topics that are difficult for the applicants to talk openly about and may be difficult to discuss.

You may help to set the applicant at ease by reminding him or her that the interview is confidential. You may also specifically remind the interpreter, in the presence of the applicant, that the interpreter must also keep all information confidential.

The early part of the interview should be devoted, in part, to putting the applicant at ease, while reviewing the biographical information on the application. For transgender applicants, it may be better to come back to the question about "gender" at the end of the interview as this issue may be sensitive and go to the heart of the claim.

It is important to conduct the interview in an open and nonjudgmental atmosphere. Try to use the same language that the applicant has used. For example if the applicant refers to himself as gay, you should use this term rather than homosexual and vice versa. Become familiar with the legal issues, terminology, and country of origin information to help the applicant to tell his or her own story.

Keep in mind that while you have familiarized yourself with LGBTI-related terms, neither the applicant nor the interpreter may be as familiar with them as you are. You may then have to adjust the formulation of your questions accordingly.

It is never appropriate to ask questions about the applicant's specific sexual practices or about “what he or she does in bed.” If the applicant begins to testify graphically about sexual practices, you should politely tell him or her that you do not need to hear these intimate details in order to fairly evaluate the claim.

If the applicant was “out” as lesbian, gay, or bisexual in the home country, he or she should be able to provide details about his or her experiences there; what it was like coming to terms with his or her sexual orientation; and, if relevant, to describe his or her first relationship. The applicant may also be able to provide details as to his or her awareness of people who are similarly situated in the home country.

Keep in mind that sexual orientation and gender identity are two different concepts. A transgender applicant may identify as straight, lesbian, gay, or bisexual. Being transgender involves an overall dissatisfaction with the gender assigned at birth; it is not about having one particular surgery. If you were confused about an applicant's self-identification, you should respectfully admit to feeling confused and ask the applicant to explain in his or her own words.

When interviewing an applicant who is HIV-positive, be mindful that it may be appropriate to ask about the applicant's state of health, current treatment regimen, and the availability of treatment in the home country. DO NOT ask the applicant where he or she may have contracted HIV.

## 9.7 Burden of Proof and Evidence – Credibility

An applicant's credible testimony may be the only evidence available for you to take into consideration when adjudicating LGBTI-related refugee and asylum claims. If the applicant is seeking refugee status or asylum based on his or her sexual orientation, gender identity, or HIV-positive status, he or she will be expected to establish that the persecutor perceived this protected trait in him or her. In some cases, the reason for the persecutor's perception is that the applicant is actually gay, lesbian, or bisexual, transgender, or HIV-positive. In other cases, where the applicant does not identify as LGBTI but is only imputed to be, he or she will need to establish the other reasons why he or she was perceived that way.

The fact that an applicant was married or has children does not mean that it is impossible that the applicant is gay. Even in the United States, it is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to societal norms.

Do not assume that an applicant must conform to a particular stereotype in order to be lesbian or gay. A man may identify as gay and not appear or consider himself effeminate. A woman may identify as lesbian and not appear or consider herself masculine. This does not mean that it is not plausible that he or she is gay or lesbian.

If an applicant does not initially tell the first official he or she comes into contact with about his or her sexual orientation or gender identity and subsequently reveals this in his or her claim, do not automatically assume that the applicant is not credible. Instead follow the guidance about what testimony such an applicant should reasonably be expected to provide and try to elicit that information.

## 9.8 Burden of Proof and Evidence – Country of Origin Information

For various reasons, detailed, reliable country of origin information may be difficult to obtain. This does not render the applicant's claim of past harm or fear future harm implausible in light of or inconsistent with country of origin information.

# PRACTICAL EXERCISES

NOTE: Practical Exercises will be added at a later date.

**Practical Exercise # 1**

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

## OTHER MATERIALS

## LGBTI Terminology/Glossary[119]

There are a number of terms that may be used by LGBTI applicants in their protection claims. Although not all LGBTI applicants will use these terms, it will be important for you to be familiar with these terms prior to conducting an interview. The glossary is divided into sections that distinguish between sexual orientation terms and gender identity terms, and also includes medical and legal terms. This glossary is comprised of terms generally used by the LGBTI community and others in the United States.

Please note: The definition of the term intersex sometimes overlaps with sexual orientation, gender identity, and medical issues and is therefore found in its own separate section.

### Sexual Orientation Terms[120]

**Bisexual** – (noun or adjective) a man or woman who has an enduring emotional and/or physical attraction to both sexes. It is important to understand that although bisexual individuals may feel attraction to members of either sex, they cannot "choose" whom (or which gender) to feel attracted to any more so than a heterosexual or homosexual individual can.

**"Closeted"** – (adjective) describes a person who keeps his or her sexual orientation secret. Also, "living in the closet."

**"Come Out"** – (verb) the process by which an individual comes to terms with his or her sexual orientation. For most people this process first involves self-acceptance ("coming out" to one's self) and then may involve telling other people ("coming out" to others.) It is important to remember, however, that some people choose not to "come out" to others for fear of their safety. Some people realize as children that they are lesbian or gay, whereas others may not come out to themselves until they are adults. Many lesbian and gay people enter into opposite sex marriages before coming to terms with their sexual orientation.

**Gay** – (adjective) a man who has an enduring emotional and/or physical attraction to men. Some women who are attracted to women use the term gay to describe themselves as well.

---

[119] Immigration Equality and HIAS Refugee Trust of Kenya.

[120] For more general information about sexual orientation, see http://www.apa.org/pubinfo/answers.html on the American Psychological Association website.

**Heterosexual** – see "Straight" below

**Homosexual** – (noun or adjective) an individual who has an enduring emotional or physical attraction to members of the same sex. This term is often considered clinical with a slightly derogatory connotation within the LGBTI community.

**Homophobia** – (noun) deeply ingrained feelings of prejudice toward lesbian, gay and bisexual people; the irrational fear, based upon myths and stereotypes, of homosexuals or those perceived to be homosexual.

**Lesbian** – (noun or adjective) a woman who has an enduring emotional or physical attraction to women; homosexual women also sometimes use the term "gay" to describe themselves.

**"Outed"** – (verb) the involuntary disclosure of a person's lesbian or gay sexual orientation. For example, an applicant may say, "My cousin saw me with my partner and then he 'outed' me to the whole community."

**Sexual Orientation** – (noun) an umbrella term that describes an individual's enduring romantic and/or physical attraction to those of a particular sex; an aspect of human identity developed in the early stages of a person's life that is highly resistant to change.

**Straight** – (noun) (also heterosexual) or an individual's enduring romantic and/or physical attraction to individuals of the opposite sex.

## Gender Identity Terms[121]

**Birth Sex** – (noun) the gender that an individual was assigned at birth which is usually indicated on his or her original birth certificate.

**"Corrected Gender"** – (noun) the gender with which a transgender individual identifies. For example, for an MTF transgender woman, female would be her "corrected gender."

**FTM** – (noun) a female to male transsexual; that is, an individual assigned the female gender at birth who now identifies as male. Also referred to as a transgender man or transman.

**Gender** – (noun) the social construction of what society values as the roles and identities of being male or female; assigned at birth to every person; does not always align with gender identity.

[121] For more information about transition see the World Professional Association for Transgender Health website http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1352&pk_association_webpage=3947

**Gender Identity** – (noun) a person's inner sense of being male or female, both, or neither, resulting from a combination of genetic and environmental influences.

**Gender Roles** – (noun) what a given society considers "masculine" or "feminine" behaviors and attitudes; how individuals express their assigned gender or the gender they identify with. For example, a traditional gender role for a man is to be competitive, athletic, and aggressive. A traditional gender role for a woman is to want to have and take care of children. Gender roles in many societies have expanded in recent years for both men and women.

**Heterosexism** – (noun) the assumption that everyone is or ought to be heterosexual and that a person's gender identity will be fixed at birth in accordance to his or her birth sex.

**Hormone Therapy** – (noun) one medical step that a transgender person may take to transition. For transgender men this involves taking testosterone. For transgender women this involves taking estrogen.

**MTF** – (noun) a male to female transsexual, that is an individual assigned the male gender at birth who now identifies as female. Also referred to as a transgender woman or transwoman.

**"Passing"** – (verb) a transgender person living in his or her corrected gender without it being readily apparent that he or she is transgender.

**Sex** (noun) – biological maleness or femaleness; the division of male and female on the basis of reproductive organs.

**Sex Reassignment Surgery (SRS)** – (noun) refers to any of more than two dozen potential surgeries that a transgender person may undergo. Not all transsexuals choose or can afford SRS. This is a preferred term to "sex change operation."

**Transgender**[122] – (adjective) an umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth or the stereotypes associated with that sex. The term may include transsexuals and others who do not conform to gender stereotypes. Many people who fit the definition of "transsexual" below, continue to refer to themselves as transgender. Transgender is a gender identity, not a sexual orientation. Thus, like any other man or woman, a transgender person may have a heterosexual, bisexual, or homosexual orientation.

**Transition** – (noun or verb) the process of changing a gender expression from one gender to another. This process may be very different for different people. It may involve

[122] National Center for Transgender Equality, *Teaching Transgender*, January 2009, *available at* http://transequality.org/Resources/NCTE_Teaching_Transgender.pdf.

"coming out" as transgender to one's self and to others; living in one's chosen gender; changing legal documents; and/or accessing necessary medical treatment.

The medical treatment that transgender people receive is specific to each individual. There is no one specific procedure that changes a person's gender. Rather, medical transition is a process which may include any number of possible treatments such as: hormone therapy, electrolysis, and surgeries such as, hysterectomy, mastectomy, and genital reconstruction.

**Transsexual** – (adjective) is a term used for people who seek to live in a gender different from the one assigned to them at birth. They may seek medical treatment to "transition." It is important to note, however, that being "transsexual" does not necessarily mean that a person has undergone any particular surgery or treatment.

**Transvestite or "Cross-Dresser"** (noun) - means an individual who chooses to wear clothes generally associated with the opposite sex. Sometimes this is related to transgender identity, and sometimes it is not. Note, however, that Spanish language articles often refer to transgender people as "travestis" which translates to "transvestites." "Transvestite" is considered an outmoded term and should not be used by the interviewer unless the applicant himself or herself uses it.

**Transphobia** (noun) – deeply ingrained feelings of prejudice toward transgender people; the irrational fear, based on myths and stereotypes, of people who are transgender or are perceived to be a transgender person.

### Intersex Terms

**Intersex**[123] (noun, adjective) – Intersex refers to a condition in which an individual is born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. The conditions that cause these variations are sometimes grouped under the terms "intersex" or "DSD" (Differences of Sex Development). These conditions include androgen insensitivity syndrome, some forms of congenital adrenal hyperplasia, Klinefelter's syndrome, Turner's syndrome, hypospadias, and many others. Individuals with this condition were previously referred to as "hermaphrodites," but this term is considered outmoded and should not be used unless the applicant uses it.

## Legal Terms

**Civil Union** – formal recognition of committed same-sex relationships recognized by some states and foreign countries. Similar to but not the same as marriage. Civil unions confer many of the same rights, benefits, and privileges enjoyed by opposite sex marriages such as estate planning or medical decisions.

[123] For more information on intersex issues, see the Advocates for Informed Choice website, www.aiclegal.org

**Domestic Partnership** – A civil or legal contract recognizing a partnership or a relationship between two people which confers limited benefits to them by their employer.

**Sodomy Laws** – laws that prohibit consensual, adult, private, noncommercial sex. Used mostly against gays and lesbians.

## Medical Terms Related to HIV

**AIDS or Acquired Immunodeficiency Syndrome** - is the medical term used for people with the HIV virus who have either experienced certain opportunistic infections (such as PCP pneumonia or Kaposi's Sarcoma), or whose T-cells (infection fighting blood cells) have dropped below 200.

**CD4 Count or T-Cell Count** – this is a test used to measure the well-being of the immune system of an individual who is HIV-positive. People with healthy immune systems generally have between 800-1200 T-cells. If T-cells drop below 200, a person is considered to have AIDS.

**HIV-Positive** [124] – means that a person has been exposed to the Human Immunodeficiency Virus (HIV) and developed anti-bodies to the virus. Once a person has tested positive for HIV, he or she will always test positive for HIV, regardless of his or her health.

Not everyone who is HIV-positive has AIDS, but everyone who has AIDS is HIV-positive. HIV is transmitted through the transfer of bodily fluids from an infected individual to an uninfected individual. People are primarily infected with HIV through sexual contact which involves the exchange of bodily fluids; from sharing intravenous drug paraphernalia; during childbirth and breast-feeding; and from receiving contaminated blood transfusions. There is no risk of HIV transmission from casual contact, such as shaking hands or sharing a drinking glass.

[124] For more information about HIV see http://www.gmhc.org/ on the Gay Men's Health Crisis website.

## LGBTI-Related Case Law[125]

### 2015

*Avendano-Hernandez v. Lynch*, --- F.3d ----, (9th Cir. 2015) (transgender woman from Mexico)

*Gonzalez-Posadas v. Att'y Gen. of the U.S.*, 781 F.3d 677 (3d Cir. 2015) (gay man from Honduras)

### 2014

*Malu v. U.S. Att'y Gen.*, 764 F.3d 1282 (11th Cir. 2014) (lesbian from Democratic Republic of the Congo)

*Konou v. Holder*, 750 F.3d 1120 (9th Cir. 2014) (gay man from the Marshall Islands)

### 2013

*Doe v. Holder*, 736 F.3d 871 (9th Cir. 2013) (gay man from Russia)

*Rosiles-Camarena v. Holder*, 735 F.3d 534 (7th Cir. 2013) (HIV positive man from Mexico)

*Vitug v. Holder*, 723 F.3d 1056 (9th Cir. 2013) (gay man from Philippines)

### 2012

*R.K.N. v. Holder*, 701 F.3d 535 (8th Cir. 2012) (HIV positive man from Kenya)

*Vrljicak v. Holder*, 700 F.3d 1060 (7th Cir. 2012) (gay man from Serbia)

*Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012) (gay man from Pakistan)

*Neri-Garcia v. Holder*, 696 F.3d 1003 (10th Cir. 2012) (gay man from Mexico)

*Desai v. Attorney Gen. of U.S.*, 695 F.3d 267 (3rd Cir. 2012) (HIV positive man from India)

*Omondi v. Holder*, 674 F.3d 793 (8th Cir. 2012) (gay man from Kenya)

### 2011

[125] In descending order by year.

*Lopez-Amador v. Holder*, 649 F.3d 880 (8th Cir. 2011) (lesbian from Venezuela)

*Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011) (amended by *Castro-Martinez v. Holder*, WL 6016162, Dec. 5, 2011 (9th Cir. 2011) (gay man from Mexico)

## 2010

*Todorovic v. Att'y Gen. of the U.S.*, 621 F.3d 1318 (11th Cir. 2010) (gay man from Serbia)

*Ayala v. Att'y Gen. of the U.S.*, 605 F.3d 941 (11th Cir. 2010) (gay, HIV+ man from Venezuela)

*Eneh v. Holder*, 601 F.3d 943 (9th Cir. 2010) (man living with AIDS from Nigeria)

*Aguilar-Mejia v. Holder*, 616 F.3d 699 (7th Cir. August 6, 2010) (HIV+ man from Mex./Guatemala)

## 2009

*N-A-M- v. Holder*, 587 F.3d 1052 (10th Cir. 2009) (M to F transsexual woman from El Salvador)

*Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009) (gay man from Guatemala)

*Pangilinan v Holder*, 568 F.3d 708 (9th Cir. 2009) (transsexual woman from the Philippines)

*Manani v. Filip*, 552 F.3d 894 (8th Cir. 2009) (HIV+ woman from Kenya)

## 2008

*Razkane v. Holder*, 562 F.3d 1283 (10th Cir. 2008) (gay man from Morocco)

*Bromfield v. Mukasey*, 543 F.3d 1071 (9th Cir. 2008) (gay man from Jamaica)

*Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008) (gay man from Nigeria)

*Bosede v. Mukasey*, 512 F.3d 946 (7th Cir. 2008) (HIV+ man from Nigeria)

*Ali v. Mukasey*, 529 F.3d 478 (2nd Cir. 2008) (gay man from Guyana)

*Kadri v. Mukasey*, 543 F.3d 16 (1st Cir. 2008) (gay man from Indonesia)

## 2007

*Jean-Pierre v. Att'y Gen. of the U.S.*, 500 F.3d 1315 (11th Cir. 2007) (HIV+ man from Haiti)

*Morales v. Gonzales*, 478 F.3d 972 (9th Cir. 2007) (transgender woman from Mexico)

*Nabulwala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007) (lesbian woman from Uganda)

*Shahinaj v. Gonzales*, 481 F.3d 1027 (8th Cir. 2007) (gay man from Albania)

*Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007) (gay man from Mexico)

*Moab v. Gonzales*, 500 F.3d 656 (7th Cir. 2007) (gay man from Liberia)

*Lavira v. Att'y Gen. of the U.S.*, 478 F.3d 158 (3d. Cir. 2007) (HIV+ man from Haiti) *overruled by Pierre v. Attorney Gen. of U.S.*, 528 F.3d 180 (3d Cir. 2008).

*Joaquin-Porras v. Gonzales*, 435 F.3d 172 (2d. Cir. 2006) (gay man from Costa Rica)

## 2006

*Ornelas Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006) (transgender woman from Mexico)

## 2005

*Salkeld v. Gonzales*, 420 F.3d 804 (8th Cir. 2005) (gay man from Peru)

*Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005) (gay man with AIDS from Mexico)

*Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005) (gay, HIV+ man from Lebanon)

*Kimumwe v. Gonzales*, 431 F.3d 319 (8th Cir. 2005) (gay man from Zimbabwe)

*Galicia v. Ashcroft*, 396 F.3d 446 (1st Cir. 2005) (gay man from Guatemala)

## 2004

*Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004) (gay man with female sexual identity from El Salvador)

*Gebremaria v. Ashcroft*, 378 F.3d 734 (8th Cir. 2004) (HIV+ woman from Ethiopia)

*Molathwa v. Ashcroft*, 390 F.3d 551 (8th Cir. 2004) (gay man Botswana)

## 2003

*Amanfi v. Ashcroft*, 328 F.3d 719 (3rd Cir. 2003) (man imputed to be gay from Ghana)

## 1990-2000

*Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (gay man with female sexual identity from Mexico) overruled by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005)

*Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) (lesbian woman from Russia)

*Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (gay man from Cuba)

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

*Medical Examination of Aliens – Removal of Human Immunodeficiency Virus (HIV) Infection from Definition of Communicable Disease of Public Health Significance*. Centers for Disease Control and Prevention (CDC) and U.S. Department of Health and Human Services (HHS). 74 FR 56547-62 (Nov. 2, 2009). Final rule, January 4, 2010, *available at* http://www.cdc.gov/immigrantrefugeehealth/laws-regs/hiv-ban-removal/final-rule.html.

### ADDITIONAL RESOURCES

See Additional Resources listed at the beginning of this module.

### SUPPLEMENTS

There are no RAD supplements for this training module.

## SUPPLEMENT B – ASYLUM DIVISION

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

## REQUIRED READING

See Required Reading listed at the beginning of this module.

## ADDITIONAL RESOURCES

See Additional Resources listed at the beginning of this module.

## SUPPLEMENTS

### ASM Supplement – 1

### Legal Analysis – One-Year Filing Deadline

This module does not alter the legal criteria used to evaluate the one-year filing deadline. There are, however, some factual scenarios that may arise specifically in the context of LGBTI claims that are useful to discuss within the legal framework of established guidance on the one-year filing deadline.

**Changed Circumstances Specific to LGBTI Applicants**

**Changed Country Conditions**

As with any other type of asylum claim, if conditions in the applicant's country of origin have changed substantially, the applicant may be able to establish a changed circumstances exception to the one year filing deadline.[126] For example, after the applicant came to the U.S., a fundamentalist government may have come to power and instituted criminal sanctions for consensual homosexual activity.

**"Coming Out" as LGBTI**

[126] *See* Victoria Neilson and Aaron Morris, The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal, 8 New York City Law Review 233 (Summer 2005), *available at* http://www.asylumlaw.org/docs/sexualminorities/GayBar091798.pdf.

In many instances an individual does not feel comfortable accepting himself or herself as LGBTI until he or she is in a country where the applicant can see that it is possible to live an open life as an LGBTI person. If an individual has "come out" as lesbian, gay, bisexual, or transgender, the applicant may be able to establish a changed circumstances exception.

### Recent Steps in Gender Transitioning

As noted above, transitioning from the gender assigned at birth to the gender with which the applicant identifies is a process which may involve many steps. At some point during this process, the applicant may realize that he or she could no longer "pass" as his or her birth gender and therefore may become more fearful of returning to his or her country of origin. For example, a transgender woman (MTF) may have recently had breast implants which would now make it impossible to "pass" as male.

### Recent HIV Diagnosis

Some individuals will apply for asylum only after they have been diagnosed with HIV. For some applicants, the claim will be based wholly on his or her HIV status and the fear of persecution upon return to the country of origin. For other individuals who may also be LGBTI, the HIV diagnosis may materially affect their eligibility for asylum. Many countries do not have confidentiality laws protecting HIV status, so some LGBTI people fear that their HIV status could become widely known. In many countries, being HIV-positive is equated with being LGBTI, and so their LGBTI identity would become known.

In *Manini v. Filip* 552 F.3d 894, (8th Cir. 2009), a Kenyan woman entered the U.S. in October 2001, was diagnosed with HIV in January 2003, and filed affirmatively for asylum in May 2004. The Asylum Office accepted her recent HIV diagnosis as a "changed circumstance," but found that the 16 month delay in filing after the diagnosis fell outside the "reasonable period of time" required by law. The BIA upheld the decision and the Eight Circuit found that it lacked jurisdiction to review the one year issue. *See also Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007), where the Eight Circuit also accepted the applicant's recent HIV diagnosis as a changed circumstance but upheld the BIA and IJ decisions to deny the case on other grounds.

The following are some suggested lines of questioning when adjudicating a claim that involves the applicant's HIV status:[127]

- When did you learn that you are HIV-positive?
- How did you feel when you received your diagnosis?

[127] *Id.*

- Does your family know that you're HIV-positive?
- How did they react?
- Have you experienced any HIV-related symptoms?
- Have you ever been hospitalized because of HIV?
- Are you taking any HIV-related medications?
- When did you begin taking them?
- Do you experience any side effects from the medications?
- Have you ever seen a mental health provider because of your diagnosis?

**Extraordinary Circumstances Specific to LGBTI**

**HIV-Positive Status**

Applicants who are HIV-positive may exhibit life-threatening symptoms and require hospitalization. An individual may be able to establish an extraordinary circumstances exception based upon serious illness, if the illness was present during the first year following arrival into the United States. Additionally, many individuals living with HIV experience extreme depression and other mental health issues as a result of their diagnosis which may affect the applicant's ability to timely file and/or may affect what period of time is "reasonable" to file after an HIV diagnosis.

**PTSD or Other Mental Health Issues**

As with any other asylum seekers, LGBTI applicants may suffer from Post Traumatic Stress Disorder (PTSD) or other mental health issues which make it difficult to file within a year of entry into the United States. LGBTI individuals who suffer from internalized homophobia and transphobia, or who have been subjected to coercive mental health treatment to "cure" them in their home countries, may find it especially difficult to access the mental health treatment that they may need to proceed with their applications.

Example: The applicant, a transgender male from Honduras, suffered severe and continuous sexual and other physical abuse for many years as well as familial and societal discrimination and ostracism on account of his sexual orientation. He last entered the US in 2003 but did not file for asylum until 2009. The applicant credibly explained that he felt isolated and was afraid to come forward sooner because he was ashamed and fearful of ostracism by friends and colleagues and society in general. According to medical reports he submitted, he suffered from PTSD as a result of the years of trauma he suffered in Honduras. His PTSD can be seen as an extraordinary circumstance related to the delay in filing during the year

after he arrived; the 5-year delay afterwards may also be considered reasonable based on that medical condition.[128]

LGBTI individuals may have fled to the United States leaving behind a partner. This may result in emotional or psychological distress that could affect their ability to file in a timely manner. With the repeal of DOMA, if the applicant is legally married, he or she would be able to sponsor a same-sex partner for immigration benefits. Given, however, that many countries do not permit same sex marriage the applicant may also be dealing with the possible permanent separation from a partner by coming to the United States.[129]

### Severe Family or Community Opposition or Isolation

LGBTI people who arrive in the United States may stay with extended family members or with other members of their community. Being surrounded by family or community members may make it impossible for the LGBTI applicant to timely file for fear that if the family member learns of the applicant's LGBTI identity, he or she will be thrown out of the home, the applicant's family at home will be told, and/or the applicant and his or her family will be disgraced.

Extreme isolation within a particular immigrant community may qualify as an exception. Foreign nationals who have newly arrived in the United States may be steered to immigration attorneys from within their own cultural community. While some applicants may be aware that they can seek asylum in the United States based on their political beliefs or religion, many foreign nationals are not aware that sexual orientation or transgender identity might form the basis of an asylum claim.[130] This problem may be compounded for LGBTI individuals who come to the U.S. and immediately take up residence in an immigrant community with people from their own country. An LGBTI applicant could be fearful of disclosing his or her LGBTI status to any community member, and might be informed by members of his community that his or her only option to legalize would be to marry.

For example, a gay Tunisian man who was admitted to the United States on a non-immigrant visa is helped by men from Egypt and other Arab immigrant communities to find housing and employment. These men are not aware that the applicant is gay and tell him that asylum is generally not a means for legalizing one's status in the United States. It is not until the applicant meets a gay man from

[128] See Asylum Division Officer Training Course Lesson Plan *One-Year Filing Deadline lesson plan, Section VII, Credibility, Subsection B, Totality of the Circumstances, Subsection c, Extraordinary Circumstances.*

[129] See: AAPM section III.E. "Dependents."

[130] *See Explore All Possible Grounds* in Section 6, *Interview Considerations*, and *Claims Not Initially Put Forward* in Section 7, *Burden of Proof and Evidence* above.

the United States that he becomes aware that he may be a refugee under U.S. law.

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

See Required Reading listed at the beginning of this module and Required Reading in the RAD Supplement.

### ADDITIONAL RESOURCES

See Additional Resources listed at the beginning of this module.

### SUPPLEMENTS

There are no IO supplements for this module.

U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

*RAIO Combined Training Course*

# NATIONAL SECURITY

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# NATIONAL SECURITY

## TRAINING MODULE

### MODULE DESCRIPTION:

This module provides guidance on the proper adjudication and processing of cases for status-conferring immigration benefits on matters related to national security through legal analysis, including terrorism-related inadmissibility grounds (TRIG), and through the agency's Controlled Application Review and Resolution Program (CARRP). The module provides the context, definitions, explanations of available exemptions, and other tools that will guide in the proper analysis of cases involving national security issues.

### TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing, you (the officer) will conduct appropriate pre-interview preparation to identify national security (NS) indicators and elicit all relevant information from an applicant with regard to national security issues. You will recognize when an applicant's activities or associations render him or her an NS concern, including when NS indicators may establish an articulable link to a TRIG or other security-related inadmissibility grounds or bars. You will be able to properly adjudicate and process the case by identifying the specific TRIG, any exceptions, and available exemptions. You will also recognize non-TRIG NS indicators that may establish an articulable link to an NS concern that requires CARRP vetting. As part of the CARRP process, you will be able to recognize the four stages of CARRP and when deconfliction is necessary and appropriate.

### ENABLING PERFORMANCE OBJECTIVE(S)

1. Analyze the general elements of INA § 212(a)(3)(B) TRIG inadmissibilities and bars
2. Explain the appropriate INA ground under which the alien is inadmissible/barred from the immigration benefit being sought
3. Analyze whether a group could be identified as an undesignated terrorist organization ("Tier III")

4. Explain statutory exceptions to TRIG
5. Explain the exemptions available for TRIG inadmissibilities
6. Analyze in a written assessment, notes, and/or a § 212(a)(3)(B) Exemption Worksheet, a proper discretionary determination for an exemption on a case involving TRIG
7. Apply the appropriate exemption to the case, if eligibility for an exemption has been established
8. Explain when a TRIG case needs to be placed on hold, recorded, and/or submitted to Headquarters
9. Explain the purpose of the CARRP process
10. Explain the steps involved in processing national security cases
11. Analyze fact patterns to determine if a national security concern exists

## 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).
2. "Policy for Vetting and Adjudicating Cases with National Security Concerns" Memo, Jonathan R. Scharfen, Deputy Director (April 11, 2008) and accompanying Attachment A - Guidance for Identifying National Security Concerns".

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

1. See ECN TRIG site under "Guidance" for memos, legal guidance, legislation and other national security-related resources.

2. See TRIG ECN Home Page for TRIG Exemption Worksheet.

3. "Handling Potential National Security Concerns with No Identifiable Records" Memo, Steve Bucher, Associate Director of Refugee, Asylum and International Operations (August 29, 2012).

4. "Updated Instructions for Handling TECS B10 Records" Memo, Office of the Director (May 23, 2012).

5. "Revised Guidance on the Adjudication of Cases Involving Terrorism-Related Inadmissibility Grounds (TRIG) and Further Amendment to the Hold Policy for Such Cases" Memo, Office of the Director (November 20, 2011).

6. "Revision of Responsibilities for CARRP Cases Involving Known or Suspected Terrorists" Memo, Office of the Director (July 26, 2011).

7. Revised Guidance on the Adjudication of Cases involving Terrorist-Related Inadmissibility Grounds and Amendment to the Hold Policy for such Cases" Memo, Michael Aytes, Acting Deputy Director (February 13, 2009).

8. "Additional Guidance on Issues Concerning the Vetting and Adjudication of Cases Involving National Security Concerns" Memo, Michael Aytes, Acting Deputy Director (February 6, 2009).

9. "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" Memo, Michael L. Aytes, Acting Deputy Director (July 28, 2008).

10. "Operational Guidance for Vetting and Adjudicating Cases with National Security Concerns" Memo, Donald Neufeld, Acting Associate Director of Domestic Operations (April 24, 2008) and accompanying Operational Guidance.

11. "Withholding Adjudication and Review of Prior Denials of Certain Categories of Cases Involving Association with, or Provision of Material Support to, Certain Terrorist Organizations or Other Groups" Memo, Jonathan Scharfen, Deputy Director (March 26, 2008).

12. "Collecting Funds from Others to Pay Ransom to a Terrorist Organization" Memo, Dea Carpenter, Deputy Chief Counsel (February 6, 2008).

13. "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations" Memo, Jonathan Scharfen, Deputy Director (May 24, 2007).

14. *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006).

**15.** Nicholas J. Perry, "The Breadth and Impact of the Terrorism-Related Grounds of Inadmissibility of the INA," Immigration Briefings (October 2006).

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

| Task/ Skill # | Task Description |
|---|---|
| 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) |
| ILR26 | Knowledge of the Controlled Application Review and resolution Program (CARRP) procedures (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) |
| IRK11 | Knowledge of the policies and procedures for reporting national security concerns and/or risks (3) |
| IRK13 | Knowledge of internal and external resources for conducting research (4) |
| TIS2 | Knowledge of the ECN/RAIO Virtual Library (4) |
| TIS3 | Knowledge of Customs and Border Protection TECS database (3) |
| AK14 | Knowledge of policies and procedures for preparing summary documents (e.g., fraud or national security leads, research, assessments) (3) |
| RI3 | Skill in conducting research (e.g., legal, background, country conditions) (4) |
| RI6 | Skill in identifying information trends and patterns (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) |

| | |
|---|---|
| T2 | Skill in accessing and navigating ECN/RAIO VL (4) |
| ITK4 | Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4) |
| AK14 | Knowledge of policies and procedures for preparing summary documents (e.g., fraud or national security leads, research, assessments) (3) |
| RI3 | Skill in conducting research (e.g., legal, background, country conditions) (4) |
| RI6 | Skill in identifying information trends and patterns (4) |
| RI9 | Skill in identifying inadmissibilities and bars (4) |
| OK9 | Knowledge of Fraud Detection and National Security (FDNS) functions and responsibilities (2) |
| RI11 | Skill in handling, protecting, and disseminating information (e.g., sensitive and confidential information) (4) |

## SCHEDULE OF REVISIONS

| Date | Section (Number and Name) | Brief Description of Changes | Made By |
|---|---|---|---|
| 10/26/15 | Throughout document | Updated broken links and citations; added new TRIG exemptions; minor formatting changes; added new case law | RAIO Training, RAIO TRIG Program |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

TABLE OF CONTENTS

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

## 1 INTRODUCTION

Since the events of September 11, 2001, the national security landscape has changed significantly. With it, the statutory definitions of terrorist activity and those who engage in such activities broadened to include acts that the general public may not necessarily associate with terrorism.[1] These changes affect the way immigration benefits are processed.

This lesson plan covers the relevant law regarding national security and introduces USCIS's Controlled Application Review and Resolution Program (CARRP), which is the agency's policy for vetting and adjudicating cases with "national security concerns" (a term of art that will be explained below). This lesson plan will delve into some of the most common statutory national security (NS) indicators (also a term of art), including cases involving terrorism-related inadmissibility grounds (TRIG), as well as non-statutory indicators of an NS concern. In doing so, this lesson plan will give you the information you need to understand the CARRP process and, within that process, how to identify cases with NS concerns so that they may be properly adjudicated and processed.

## 2 NATIONAL SECURITY OVERVIEW

Protecting national security is woven into both the mission and vision of the agency and the RAIO Directorate. In the context of the RAIO mission and overall USCIS values, we are mandated to adjudicate immigration benefits in an accurate, timely manner, always

[1] Perry, Nicholas J., *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, Journal of Legislation 30 J. Legis. 249, (2004).

with attention to and emphasis on preserving the integrity of our immigration system and minimizing national security risks and vulnerabilities.

**RAIO Mission**

RAIO leverages its domestic and overseas presence to provide protection, humanitarian, and other immigrant benefits and services throughout the world, while combating fraud and protecting national security.

**RAIO Vision**

With a highly dedicated and flexible workforce deployed worldwide, the Refugee, Asylum and International Operations Directorate will excel in advancing U.S. national security and humanitarian interests by providing immigration benefits and services with integrity and vigilance and by leading effective responses to humanitarian and protection needs throughout the world.

The INA contains provisions that prohibit granting most immigration benefits (through either an inadmissibility ground (as adjudicated by Refugee and Overseas Adjudications Officers) or a security/terrorism bar (as adjudicated by Asylum Officers (See also ASM – Supplement 1)) to individuals based on national security reasons. While many immigration statutes at least touch on security concerns, the primary security-related provisions this lesson plan focuses on are found at INA §§ 212(a)(3)(A), (B), and (F) (inadmissibility grounds), and 237(a)(4)(A), (B) (describing classes of deportable aliens).

**Security and Terrorism-Related Bars to Asylum**

Although asylum applicants do not need to be admissible to be eligible to receive asylum, since INA § 208(b)(2)(A) (listing the bars to asylum) refers to an alien described by certain provisions of the terrorism-related inadmissibility grounds or the terrorist related deportability ground (which in turn refers to all terrorism-related grounds of inadmissibility), all of the terrorism-related inadmissibility grounds are bars to asylum under the terrorist bar.[2] Additionally, 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 under the security risk bar.[3]

Since a central mission of USCIS is to protect the integrity of the U.S. immigration system, national security matters are a primary consideration in USCIS adjudications. As part of the determination of statutory eligibility for an immigration benefit, you must examine each case for NS concerns and determine whether a bar or inadmissibility applies.

## 3 TYPES OF NATIONAL SECURITY CONCERNS

For the purposes of handling national security issues in USCIS adjudications, the agency categorizes two types of NS concerns:

- Known or Suspected Terrorists (KSTs)
- Non-Known or Suspected Terrorists (non-KSTs)

### 3.1 KSTs

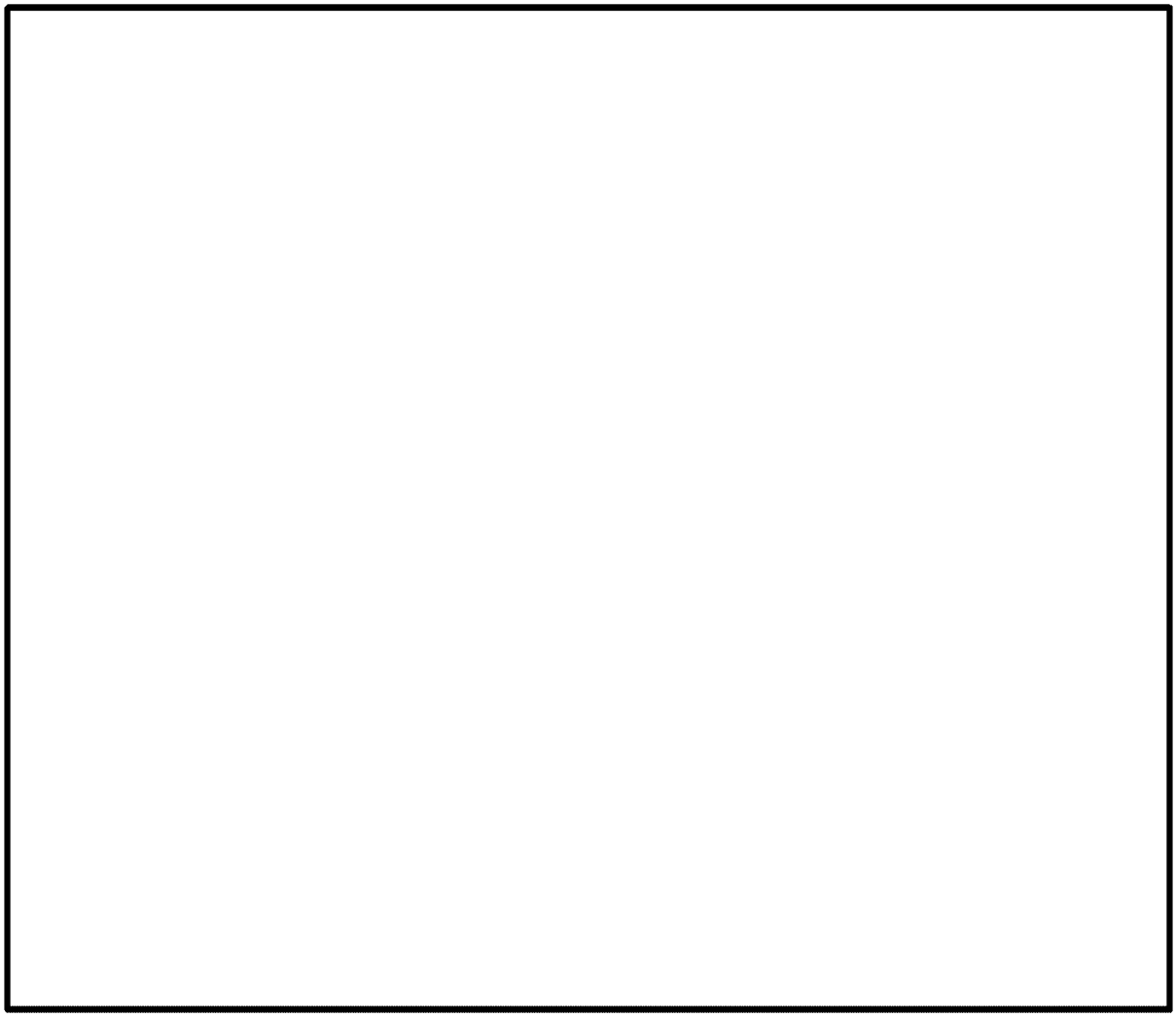
(b)(7)(e)

[redacted]

[2] INA § 208(b)(2)(A)(v).

[3] INA § 208(b)(2)(A)(iv); *see also* *Matter of R-S-H-*, 23 I&N Dec. 629, 640 (BIA 2003) (holding that substantial evidence supported the immigration judge's determination that an applicant who co-founded an organization later named as a "Specially Designated Global Terrorist" organization pursuant to Executive Order 13224 was barred from asylum as a security risk).

(b)(7)(e)

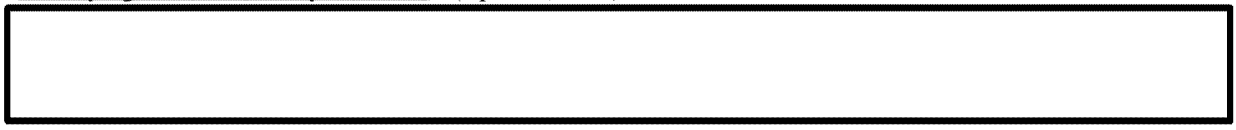


[4] Formerly known as the Treasury Enforcement Communications System (TECS)/Interagency Border Inspection System (IBIS), this system is currently known as just TECS. *See* "Policy for Vetting and Adjudicating Cases with National Security Concerns: Attachment A - Guidance for Identifying National Security Concerns," (April 11, 2008).

[5] *Id.*

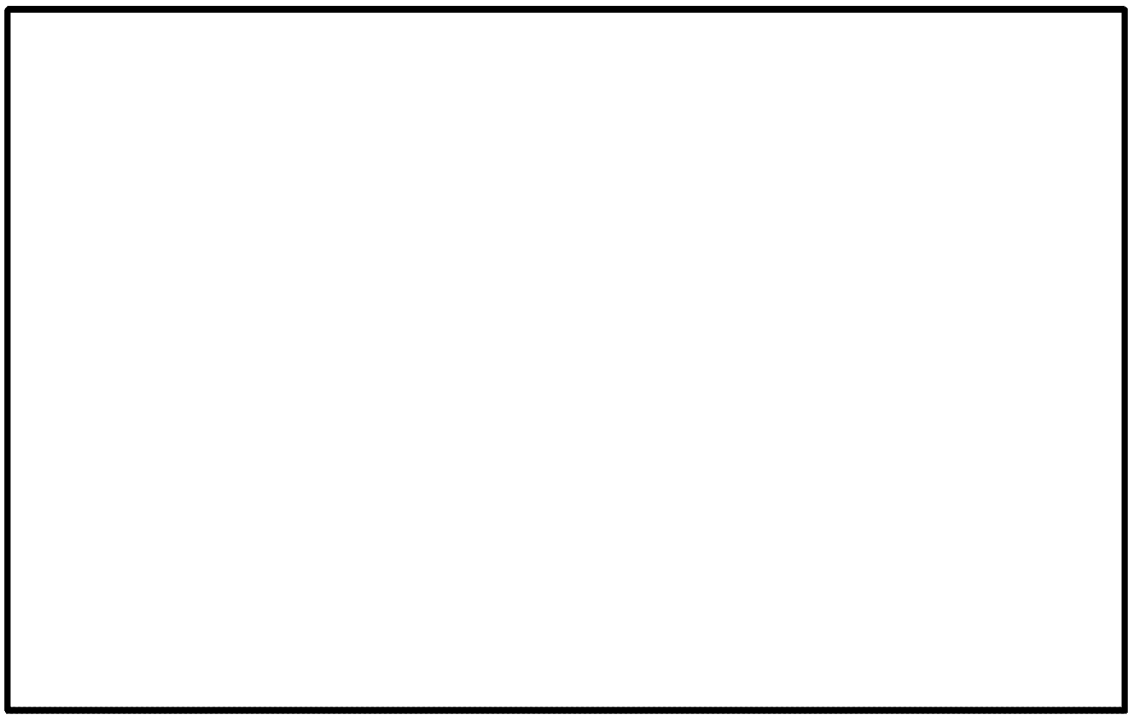
(b)(7)(e)

[7] "Policy for Vetting and Adjudicating Cases with National Security Concerns: Attachment A - Guidance for Identifying National Security Concerns," (April 11, 2008).



### 3.2 Non-KSTs

(b)(7)(e)



## 4 IDENTIFYING NATIONAL SECURITY CONCERNS

(b)(7)(e)

[9] "Policy for Vetting and Adjudicating Cases with National Security Concerns: Attachment A - Guidance for Identifying National Security Concerns," (April 11, 2008).

[10] "Policy for Vetting and Adjudicating Cases with National Security Concerns: Attachment A - Guidance for Identifying National Security Concerns," (April 11, 2008).

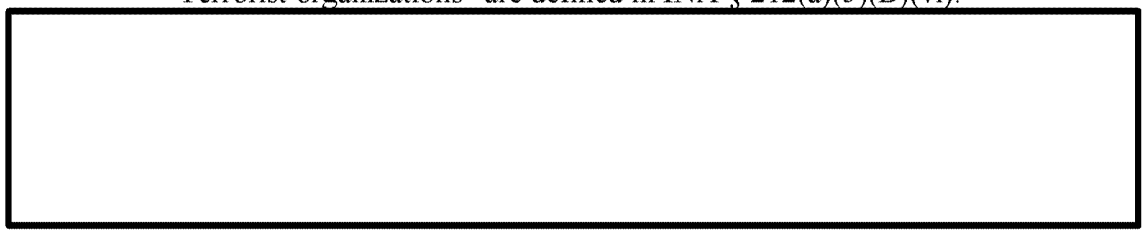
(b)(7)(e)

## 4.1 Indicators of National Security Concerns: Statutory

The statutes that describe activities, individuals and organizations to which an articulable link would render an individual a national security concern are INA §§ 212(a)(3)(A), (B), and (F), and §§ 237(a)(4)(A) and (B). These statutes contain comprehensive definitions of activities, associations, and organizations that indicate an applicant is an NS concern, for example:

- "Terrorist activity" is defined in INA § 212(a)(3)(B)(iii)[13]
- Conduct that constitutes "engaging" in terrorist activity is defined under INA § 212(a)(3)(B)(iv)[14]; and
- "Terrorist organizations" are defined in INA § 212(a)(3)(B)(vi).[15]

(b)(7)(e)



Other sections of the INA which may describe activities that are indicators of NS concerns include:

208(b)(2)(A) Exceptions to Asylum Eligibility
212(a)(2)(I) Inadmissible Aliens – Money Laundering
221(i) Issuance of visas – Revocation of visas or other documents
235(c) Removal of aliens inadmissible on security and related grounds

[11] "Refugee Adjudication Standard Operating Procedure: Cases Involving National Security Concerns," (May 14, 2008).

[12] *Id. See also* "Policy for Vetting and Adjudicating Cases with National Security Concerns: Attachment A - Guidance for Identifying National Security Concerns," (April 11, 2008).

[13] For definition, see also section below, "Terrorist Activity" Defined.

[14] For definition, see also section below, "Engage in Terrorist Activity" Defined.

[15] For expanded definition, see also section below, TRIG – "Terrorist Organization" Defined.

[16] The vetting of NS cases through CARRP is a shared responsibility between the adjudicator and FDNS, which varies upon your division.

## 4.2 Indicators of National Security Concerns: Non-Statutory

In addition to statutory indicators as noted above, there are non-statutory indicators of national security concerns. These non-statutory indicators may not fall squarely under one of the security or terrorism-related inadmissibility grounds, but still may lead to an articulable link with such a ground.

(b)(7)(e)

## 4.3 Where You May Encounter NS Indicators

(b)(7)(e)

(b)(7)(e)

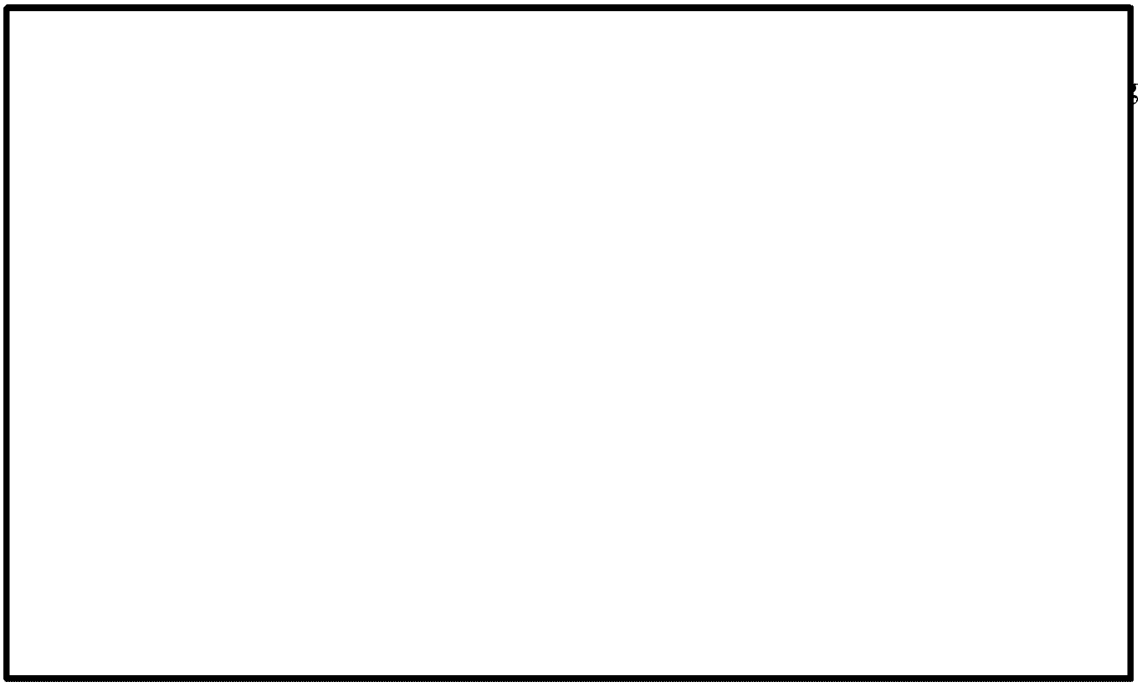
## 5 INTERVIEWING CONSIDERATIONS AND PREPARATION

(b)(7)(e)

### 5.1 Issues for Examination in the Interview/Analysis

(b)(7)(e)

[18] Many examples of these indicators come from past presentations to asylum officers by the ICE National Security Integration Center (NSIC), Office of Investigations.



(b)(7)(e)

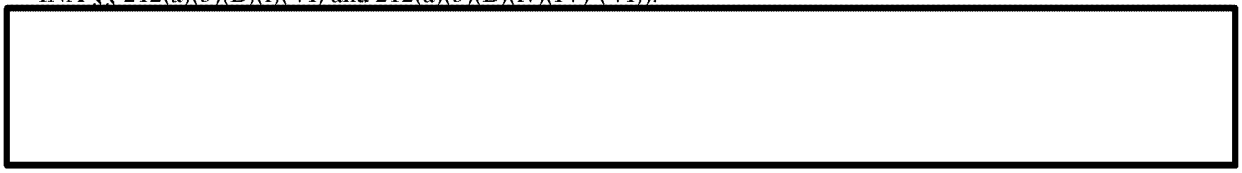
### 5.1.1 Certain Training/Technical Skills

### 5.1.2 Engaged in Certain Types of Employment

[19] Officers should elicit information that speaks to whether the action was taken voluntarily or under some form of duress or sub-duress pressure (see Exemption Requirements).

[20] INA §§ 212(a)(3)(B)(i)(VI) and 212(a)(3)(B)(iv)(IV)-(VI)).

(b)(7)(e)



### 5.1.3 Association with People/Organizations of Concern

### 5.1.4 Engaged, or Suspected of Engaging, in Criminal or Terrorist Activities

(b)(7)(e)

### 5.1.5 Possession of Documents

### 5.1.6 Connection to Areas Known to Have Terrorist Activity

(b)(7)(e)

[23] The Department of State's Annual Country Reports on Terrorism (*see* Other Materials, Section 7.1.4 Department of State) should be reviewed for information about where terrorist activities have taken place.

### 5.1.7 Unaccounted-for Gaps of Time

[redacted]

(b)(7)(e)

## 5.2 Fraudulent Documents

[redacted]

# 6 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

(b)(7)(e)

[redacted]

The statute consists of four basic areas: the inadmissibility grounds themselves (INA § 212(a)(3)(B)(i)); the definition of "terrorist activity" (INA § 212(a)(3)(B)(iii)); the definition of "engaging in terrorist activity" (INA § 212(a)(3)(B)(iv)); and the definition of "terrorist organization" (INA § 212(a)(3)(B)(vi)).

This lesson plan will first explore the INA definition of a "terrorist organization."

## 7 TRIG – "TERRORIST ORGANIZATION" DEFINED

Many of the general terrorism-related grounds of inadmissibility refer to "terrorist organizations." There are three categories, or "tiers," of terrorist organizations defined in the INA.[24] These three tiers are explained below.

### 7.1 Categories or "Tiers" of terrorist organizations

- **Tier I (Foreign Terrorist Organizations (FTO))**[25]: 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);
- **Tier II (Terrorist Exclusion List (TEL))**[26]: 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)**[27]: a group of two or more individuals, whether organized or not, that engages in, or has a subgroup[28] 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)

[redacted]

[24] INA § 212(a)(3)(B)(vi).

[25] INA § 212(a)(3)(B)(vi)(I). *See also* § 7.2, "Foreign Terrorist Organization Designation under INA § 219 (Tier I)" below for more information.

[26] INA § 212(a)(3)(B)(vi)(II). *See also* § 7.3 "Terrorist Exclusion List (Tier II)" below for more information.

[27] INA § 212(a)(3)(B)(vi)(III). *See also* § 7.4, "Undesignated Terrorist Organizations," below, for more information.

[28] See Department of State guidance on what constitutes a subgroup, 9 FAM 40.32 N2.7.

## 7.2 Foreign Terrorist Organization Designation under INA § 219 (Tier I)

### 7.2.1 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.[29]

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.

### 7.2.2 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[30]; and
- The terrorist activity or terrorism of the organization threatens the security of U.S. nationals or the national security of the United States.[31]

### 7.2.3 Organizations Currently Designated as Foreign Terrorist Organizations (FTOs)[32]

On October 8, 1997, the Secretary of State published in the *Federal Register* the first list of Tier I terrorist organizations. 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.

---

[29] INA § 219(a)(2)(A)(i).

[30] *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")

[31] INA § 219(a)(1).

[32] See US Department of State, Office of Counterterrorism, Fact Sheet: Foreign Terrorist Organization Designation (Washington, DC, September 1, 2010).

Foreign terrorist organizations designated by the Secretary of State include, among others, al-Qaeda, Boko Haram, Communist Party of the Philippines/New People's Army (CPP/NPA), Basque Homeland and Freedom (ETA), Hamas, Hezbollah, 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 http://www.state.gov/g/ct/list/index.htm. This site should be checked on a regular basis for the most current version of the list as additional organizations may be designated at any time.

Although the Taliban is not currently included on the State Department's list of FTOs (because this group was not designated by the State Department under INA § 219), per § 691(b) of Consolidated Appropriations Act, 2008, the Taliban is considered a Tier I terrorist organization.[33]

## 7.3 Terrorist Exclusion List (Tier II)

### 7.3.1 Authority

The USA PATRIOT Act added, and the REAL ID Act amended, two additional categories of "terrorist organizations" to INA § 212.[34] 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).

### 7.3.2 Definition

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."

> *Unlike Tier I organizations, there is no requirement that the organization endangers U.S. nationals or U.S. national security.*

There are 58 organizations designated as terrorist organizations under INA § 212(a)(3)(B)(vi)(II).

---

[33] Note: The Taliban is the only group to date that Congress has designated as a Tier I terrorist organization and the only one that does not appear on the FTO list.

[34] 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).

The Department of State lists the Terrorist Exclusion List at: http://www.state.gov/g/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.

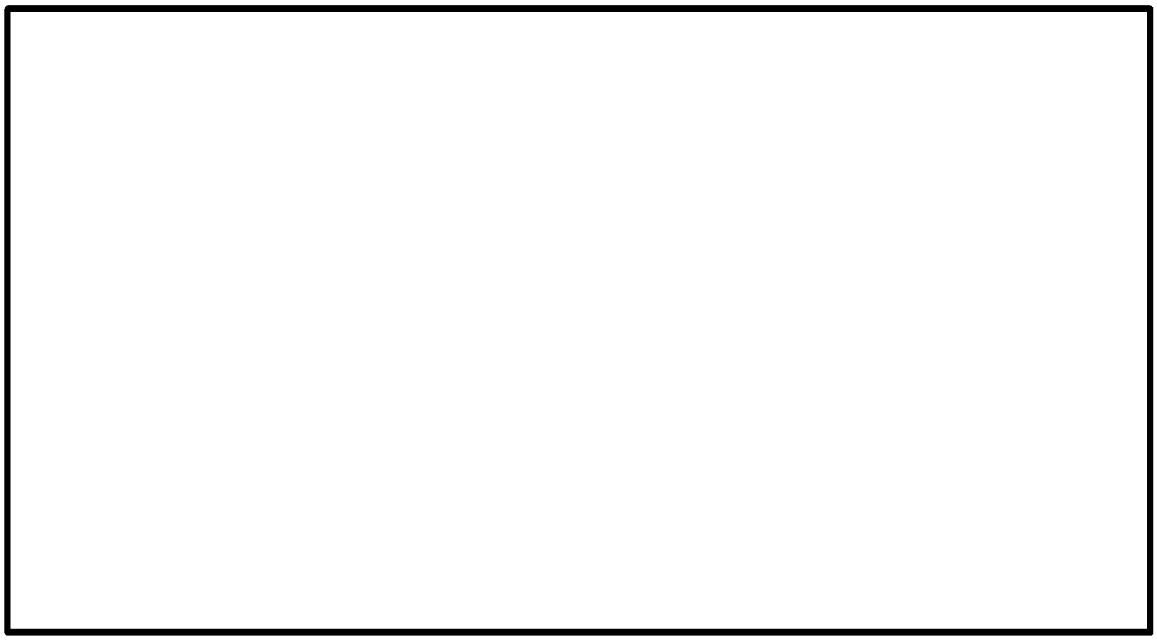
## 7.4 Undesignated Terrorist Organizations (Tier III)

Any group of 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.

### 7.4.1 Definition

A group of two or more individuals, whether organized or not, is a "terrorist organization" under the INA if the group engages in terrorist activity, or has a subgroupthat engages in terrorist activity.[35]

(b)(7)(e)

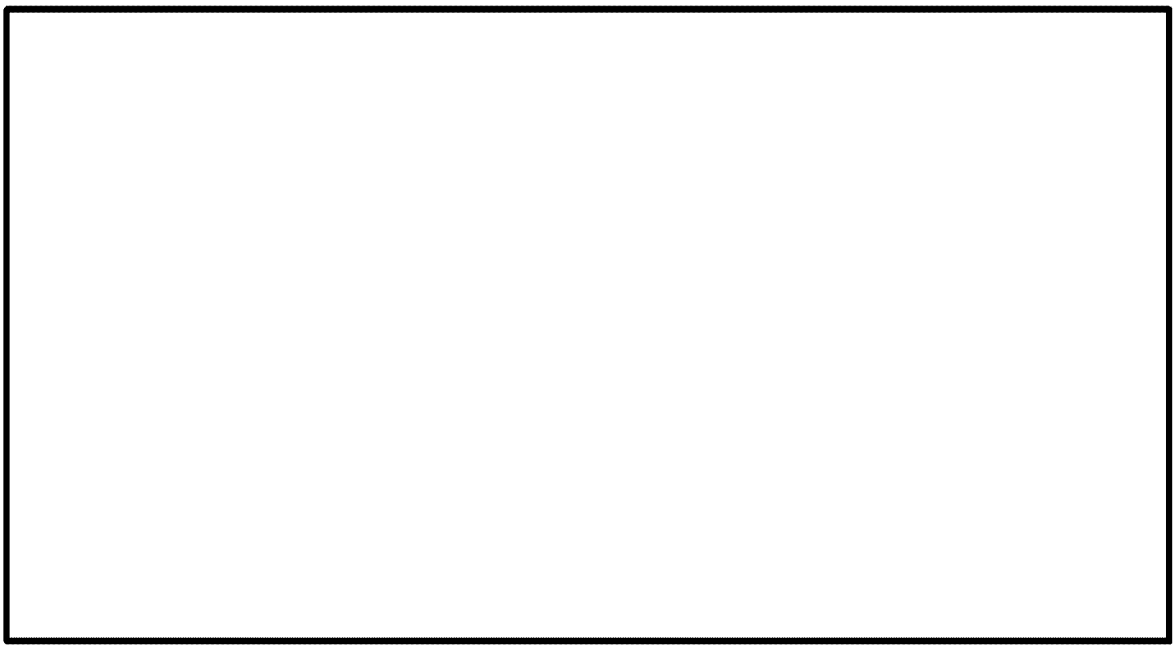


[35] INA § 212(a)(3)(B)(vi)(III).

[36] INA §§ 212(a)(3)(B)(iii) & (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* sections below "Terrorist Activity" Defined and "Engaging in Terrorist Activity" Defined.

[37] *Matter of S-K-*, 23 I&N Dec. 936, 941(BIA 2006) (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).

(b)(7)(e)



The Seventh Circuit Court of Appeals has noted, however, that an organization is not a terrorist organization simply because some of its members have engaged in terrorist activity "without direct or indirect authorization." 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.[41]

## 7.5 Groups Excluded from the Tier III Definition by Statute

As a result of the broad reach of the statute and its application to groups either to which the United States is sympathetic or who have assisted the United States in the past, Congress enacted section 691(b) of the Consolidated Appropriations Act (CAA), 2008, which 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[42]:

- Karen National Union/Karen Liberation Army (KNU/KNLA)
- Chin National Front/Chin National Army (CNF/CNA)
- Chin National League for Democracy (CNLD)

[38] *Khan v. Holder*, 584 F.3d 774, 784-785 (9th Cir. 2009).

[39] INA §212(a)(3)(B)(iii)(II).

[40] *See* 9 FAM 40.32 N2.7.

[41] *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008).

[42] Section 691(b) Consolidated Appropriations Act, 2008, Pub. L. no. 110-161 (2008).

- Kayan New Land Party (KNLP)
- Arakan Liberation Party (ALP)
- Tibetan Mustangs
- the Cuban Alzados (groups opposed to the Communist government of Cuba)
- Karenni National Progressive Party (KNPP)
- appropriate[43] groups affiliated with the Hmong[44]
- appropriate groups affiliated with the Montagnards (includes the Front Unifié de Lutte des Races Opprimées (FULRO)[45])
- African National Congress (ANC)[46]

(Hereafter, 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 for Fiscal Year 2015, which provides that the following groups, the two major Kurdish political parties in Iraq, are excluded from the definition of "terrorist organization"[47]:

- Kurdish Democratic Party (KDP)
- Patriotic Union of Kurdistan (PUK)

This provision is not time-limited. Unlike the CAA groups, the KDP and the PUK are not considered to be terrorist organizations for activities occurring at any time.

### 7.5.1 Discretionary Exemption Provision for Groups

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 unreviewable discretion, that an organization should not be considered a terrorist organization under this section.[48] The Secretary of Homeland Security **may not** exempt a group from the definition of an undesignated terrorist organization if the group:

- engaged in terrorist activity against the United States;

[43] Appropriate groups may be established through country condition reports to show that a subgroup is affiliated with the Hmong or Montagnards.

[44] See also Exercises of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, October 5, 2007 (FULRO and Hmong).

[45] Effective Oct. 5, 2007.

[46] On July 1, 2008, Congress amended the CAA to add the African National Congress. Pub. L. no. 110-257.

[47] Section 1264(a)(1) National Defense Authorization Act for Fiscal Year 2015, Pub. L. no. 113-291 (2014)

[48] INA § 212(d)(3)(B)(i).

- 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 10.4 below, the Secretary of Homeland Security *has* exercised the authority not to apply certain provisions of INA § 212(a)(3)(B) to individual aliens with specific activities or associations with certain groups.

### 7.5.2 Recognized Foreign Governments not Considered Tier III Organizations

As a general matter, INA § 212(a)(3)(B) does not include 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 generally are not considered synonymous with the government of a country for purposes of this determination.

Also, entities in *de facto* control of an area may not be recognized as the government of that area.

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 point of contact (POC) for TRIG-related issues for your Division.

## 8 TERRORISM-RELATED INADMISSIBILITY GROUNDS

### 8.1 Statute – INA §212(a)(3)(B)(i) – The Inadmissibility Grounds

The inadmissibility grounds themselves related to terrorist activity are found at INA § 212(a)(3)(B)(i) and are described in detail below. The terrorist activity deportability ground at INA § 237(a)(4)(B), as amended by the REAL ID Act of 2005, encompasses all of the inadmissibility provisions in INA § 212(a)(3)(B) (related to terrorist activities) and INA § 212(a)(3)(F) (related to association with terrorist organizations and activities intended to engage in while in the United States).[49]

Therefore, these grounds of inadmissibility are also grounds of deportability.[50] It is important to note that the actual grounds of inadmissibility are only included in INA §

[49] 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.

[50] 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)).

212(a)(3)(B)(i). Providing material support, for example, 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." 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."

The terrorism-related grounds of inadmissibility under INA § 212(a)(3)(B) apply to an alien who:

- Has engaged in terrorist activity – INA § 212(a)(3)(B)(i)(I);[51]
- 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);
- Has, under any circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity – INA § 212(a)(3)(B)(i)(III);
- Is a (current) representative[52] of – INA § 212(a)(3)(B)(i)(IV):
    - A terrorist organization (as defined in INA §212(a)(3)(B)(vi)) – INA § 212(a)(3)(B)(i)(IV)(aa);[53] or
    - a political, social, or other group that endorses or espouses terrorist activity – INA § 212(a)(3)(B)(i)(IV)(bb);[54]
- Is a (current) member of a Tier I or II terrorist organization – INA § 212(a)(3)(B)(i)(V);[55]
- 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

[51] *See* sections below "Terrorist Activity" Defined and "Engaging in Terrorist Activity" Defined.

[52] 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).

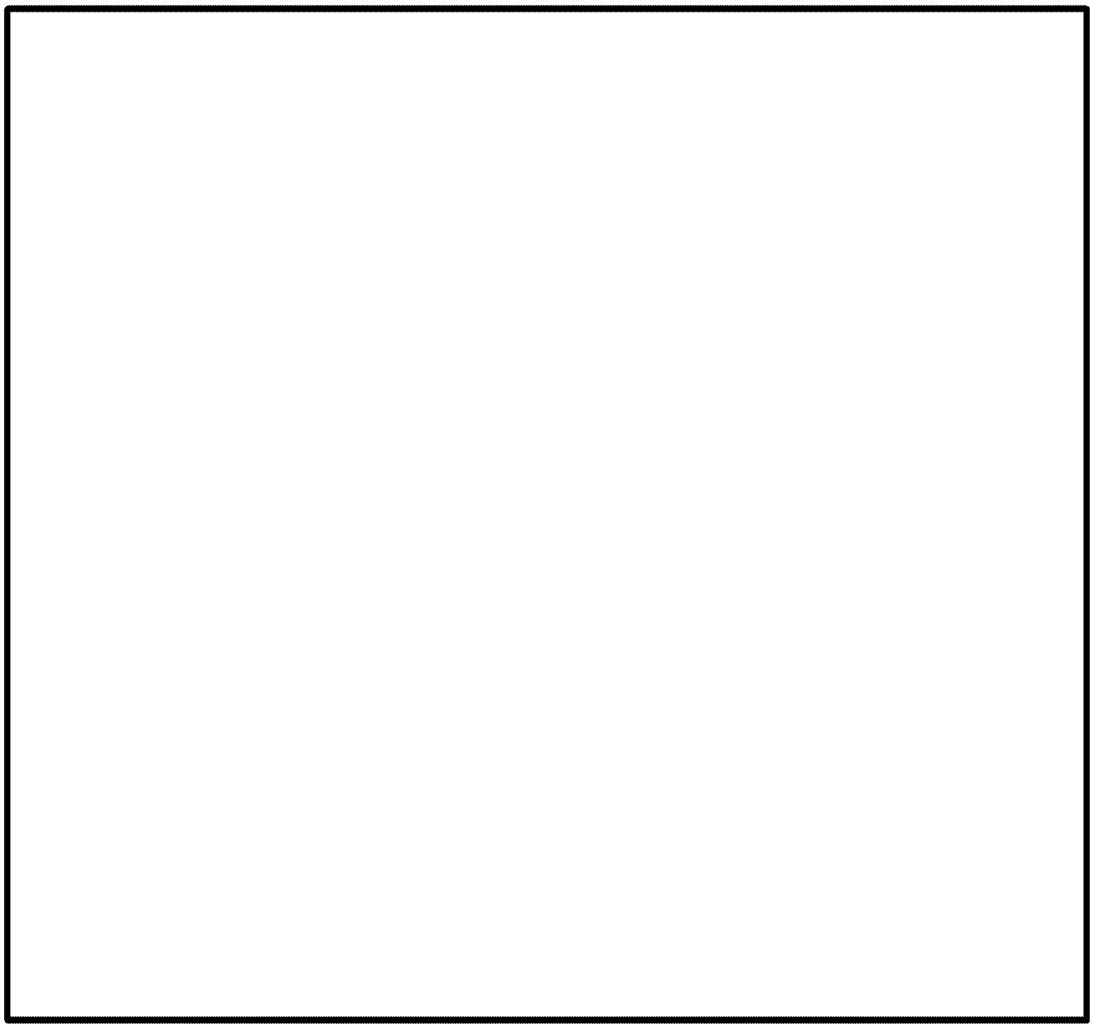
[53] *See* "Terrorist Organization" Defined above.

[54] 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.

[55] INA § 237(a)(4)(B); *see* "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.

should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(i)(VI).[56]

(b)(7)(e)



- 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)[60];
- 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);

[56] *See* "Terrorist Organization" Defined.

[57] 9 FAM 40.32 n2.4.

[58] *Id.*

[59] *Id.*; *see also Viegas v. Holder*, 699 F.3d 798, 804 (4th Cir. 2012).

[60] Note that this ground, unlike INA § 212(a)(3)(B)(i)(III), (see subpoint 3 – INA § 212(a)(3)(B)(i)(III), above) *does not* require that the statements be made under circumstances indicating an intention to cause death or serious bodily harm.

"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 . . ."[61]

**NOTE**: On January 7, 2011, the Secretary exercised her exemption authority under INA § 212(d)(3)(B)(i) for individuals who have received military-type training ***under duress***.[62]

- 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);

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.

**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

## 8.2 "Terrorist Activity" Defined

Many of the general terrorism-related grounds of inadmissibility 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 in the INA, the former at INA § 212(a)(3)(B)(iii) and the latter at INA § 212(a)(3)(B)(iv).

"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:

[61] 18 U.S.C. § 2339D(c)(1).

[62] See 76 Fed. Reg .14418-01 (March 16, 2011) and Duress-Based Exemptions.

- 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 at 18 U.S.C. § 116(b)(4) as a:

  - head of state or a foreign minister and accompanying family members when outside of own country;

  - any other representative, officer, employee, or agent of the U.S. or other government, or international organization or family member when protected by international law (usually when out of own country);[63]

- An assassination – INA § 212(a)(3)(B)(iii)(IV);

- The use of any
  - Biological, chemical, or nuclear weapons – 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 – INA § 212(a)(3)(B)(iii)(V)

- A threat, attempt, or conspiracy to do any of the above – INA § 212(a)(3)(B)(iii)(VI)

## 8.3 "Engage in Terrorist Activity" Defined

"Engaging in terrorist activity" means, in an individual capacity or as a member of an organization:

[63] 18 U.S.C. § 1116(b)(4).

- 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)[64]; or

  - a Tier III (undesignated) terrorist organization that is a group of two or more individuals which engages in or has a subgroup that engages in terrorist activity, 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)[65];

  **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 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).[66]

- 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

[64] Referring to terrorist organizations described in INA § 212(a)(3)(B)(vi)(I) and (II).

[65] Referring to terrorist organizations described in INA § 212(a)(3)(B)(vi)(III).

[66] Memorandum from Dea Carpenter, Deputy Chief Counsel USCIS to Lori Scialabba on Collecting Funds from Others to Pay Ransom to a Terrorist Organization (February 6, 2008).

- for membership in 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), 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:

  - 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).

By statute, an alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization (PLO) is considered to be engaged in terrorist activity.[67]

**Additional Guidance: 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. and states' laws. The analysis is complicated and requires research of foreign laws. If you have a case in which the self-defense exception may apply, please contact your Division POC for TRIG-related issues. If this issue arises at interview, you should elicit as much detail as possible about the

[67] INA § 212(a)(3)(B)(i).

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 and include that information in your query to your Division POC, who will work with the TRIG Working Group to provide further guidance.

## 9 TRIG - MATERIAL SUPPORT

The terrorism-related ground of inadmissibility you will encounter most often in your adjudications is engaging in terrorist activity through the provision of material support to an individual who has committed or will commit a terrorist activity, or to a terrorist organization.

### 9.1 Statutory Examples of Material Support

The INA provides the following non-exhaustive list of examples which would constitute "material support"[68]:

- 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.[69]

[68] INA § 212(a)(3)(B)(iv)(VI).

[69] *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.").

## 9.2 Factors Relating to "Material Support"

### 9.2.1 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).[70]

The court looked to the plain meaning of the terms "material" ("[h]aving some logical connection with the consequential facts;" "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.[71]

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 is whether Viegas's activities qualify as "material."[72] 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 FLEC to accomplish its goals.[73]

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, 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 reasonably concluded that

[70] *Singh-Kaur*, 385 F.3d at 300-301.

[71] *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.* at 298.

[72] *Viegas*, 699 F.3d at 803..

[73] *Id.*

annual payments of $300 over a period of six years was not so insignificant as to fall outside that definition."[74]

Although the courts that have considered the issue have generally agreed with the government's position that there is no exception for insignificant 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 10.5.5, Situational Exemptions – Certain Limited Material Support and Insignificant Material Support.

### 9.2.2 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.[75]

### 9.2.3 Use of Support

How the terrorist organization uses the support provided by the applicant is irrelevant to the determination as to 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.[76] It may, however, be relevant to the application of an exemption.

### 9.2.4 Applicant's Intent

The applicant's intent in providing the material support to an individual or terrorist organization is irrelevant to the determination as to whether the support is material.[77] It may, however, be relevant to the application of an exemption.

---

[74] *Alturo v. U.S. Att'y Gen.*, 716 F.3d 1310, 1314 (11th Cir. 2013).

[75] *See Singh-Kaur*, 385 F.3d at 298 (3d Cir. 2004); INA § 212 (a)(3)(B)(iv)(VI)(aa) – (dd)).

[76] *Matter of S-K-*, 23 I&N Dec. 936, 944 (BIA 2006).

[77] *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).

### 9.2.5 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.[78] 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.

### 9.2.6 Household Chores

(b)(7)(e)

### 9.2.7 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. Since early 2007, though, an exemption has been available for certain applicants who have provided material

[78] INA §§ 212(a)(3)(B)(i)(V)-(VI).

support under duress – that is, these applicants are inadmissible, but DHS may decide to exempt the ground of inadmissibility that applies to them.[79]

Four circuit courts of appeals have upheld BIA decisions holding that the statute does not contain a 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.[80] Likewise, the Third, Fourth and Eleventh Circuit Courts of Appeals have found that the BIA's construction of the statute to include material support provided under duress was permissible and deferred to its interpretation.[81]

In *Ay v. Holder*, however, the U.S. Court of Appeals for the Second Circuit declined to defer to an unpublished BIA decision holding that the statute does not contain an implicit duress exception. The Second Circuit found that the statute was silent on this issue and therefore, as the Supreme Court had held when considering the "persecutor bar" provision in *Negusie v. Holder*, ambiguous. It therefore remanded the case to the BIA for consideration of the issue.[82]

No court has determined that the statute does contain a duress exception. 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 exemption. For more information, *see* Section 10.5.1, Situational Exemptions – Duress-Based.

## 9.3 Lack of Knowledge Exceptions

### 9.3.1 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,

[79] Exemptions are also available for military-type training under duress and solicitation under duress. *See* SectionSection 10.5.1, Situational Exemptions – Duress-Based, below.

[80] *Annachamy v. Holder*, 733 F.3d 254, 260-261 (9th Cir. 2012).

[81] *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).

[82] *Ay v. Holder*, 743 F.3d 317, 320 (2d Cir. 2014).

and reasonably should not have known, that the organization was a terrorist organization."[83] 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).[84]

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 (undesignated) 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[85], these grounds of inadmissibility do not apply.

"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. [86] It is higher than the preponderance of the evidence, and lower than beyond a reasonable doubt.[87]

This exception does not apply to Tier I or Tier II organizations. This exception also does not apply to "representatives" of undesignated terrorist organizations.[88]

---

[83] INA § 212(a)(3)(B)(i)(VI), (B)(iv)(IV)(cc), (B)(iv)(V)(cc), (B)(iv)(VI)(dd).

[84] *American Academy of Religion v. Napolitano*, 573 F.3d 115, 132 (2d. Cir. 2009).

[85] INA § 212 (a)(3)(B)(iv)(VI)(dd); *See* Section 7.4 Undesignated Terrorist Organization (Tier III); *see also Matter of S-K-*, 23 I&N Dec. 936, 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 that 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).

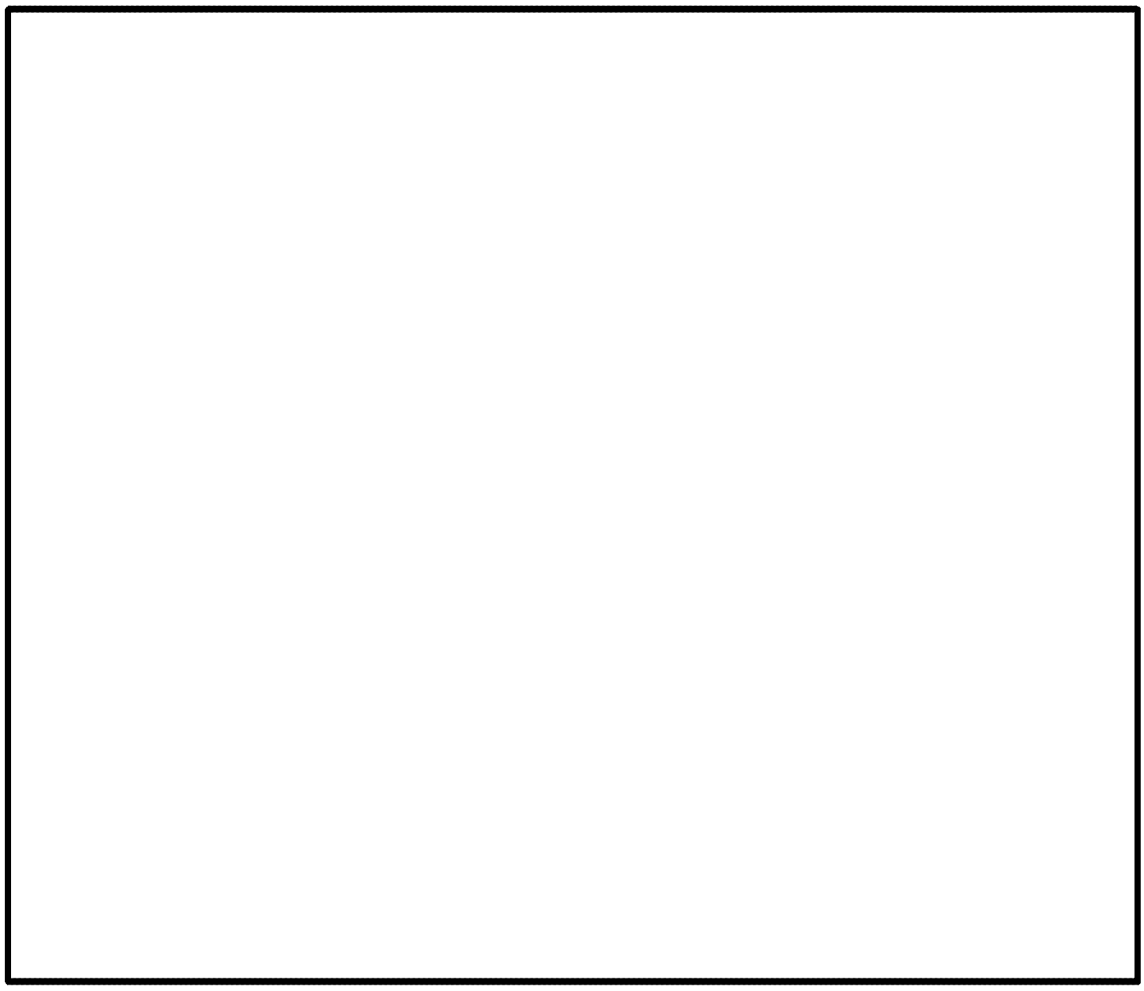
[86] *Matter of Carrubba*, 11 I&N Dec. 914, 917-18 (BIA 1966); *see also Matter of Patel*, 19 I&N Dec. 774, 783 (BIA 1988).

[87] Note that there is both a subjective (did not know) and an objective (should not reasonably have known) component to this exception.

[88] INA § 212(a)(3)(B)(v) – "Representative" defined.

In order to determine whether a lack of knowledge is reasonable, you must consider:

(b)(7)(e)

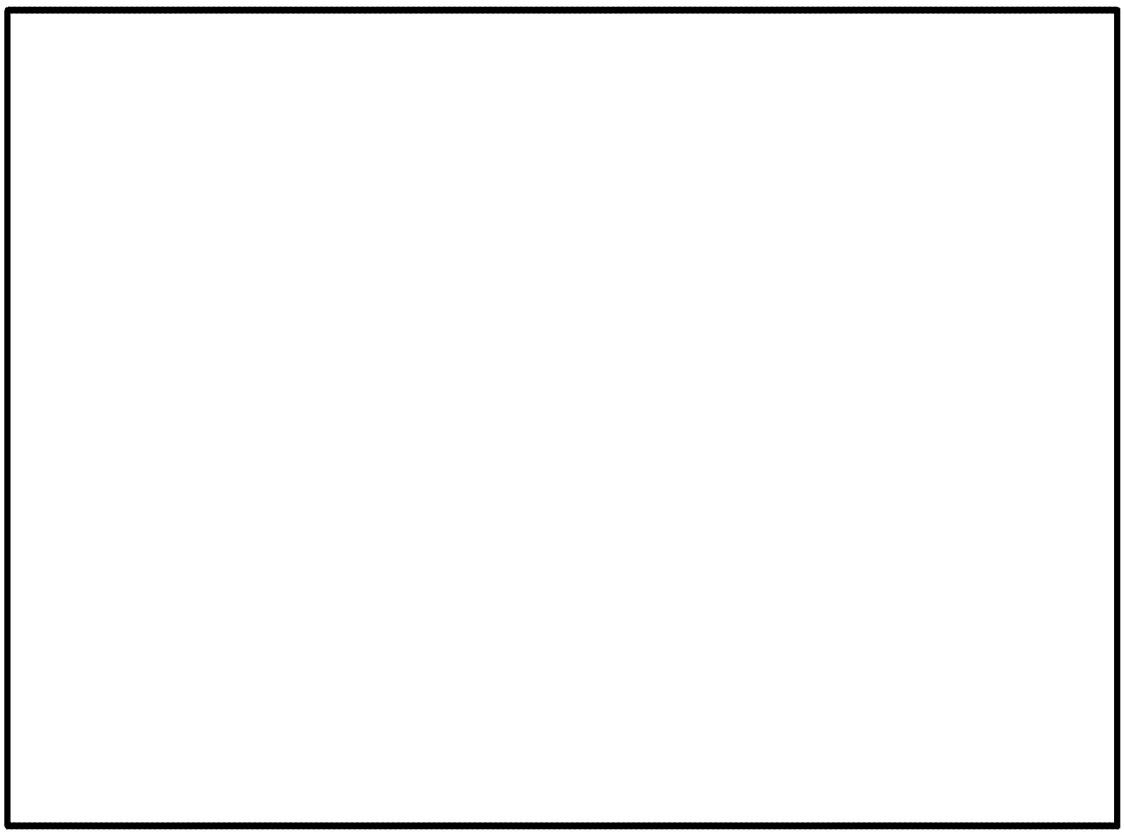


### 9.3.2 Exception for All Tiers (material support only)

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.

(b)(7)(e)

(b)(7)(e)



# 10 TRIG EXEMPTION AUTHORITY

## 10.1 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 grounds of inadmissibility 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.[89]

Exemptions 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 (via email and on the USCIS Intranet) the exemption document along with a corresponding

[89] INA §212(d)(3)(B)(i). For some specific examples of the Secretary's exercise of discretion under this provision, see USCIS Fact Sheets.

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 apply to more than one individual, 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.

**10.2**

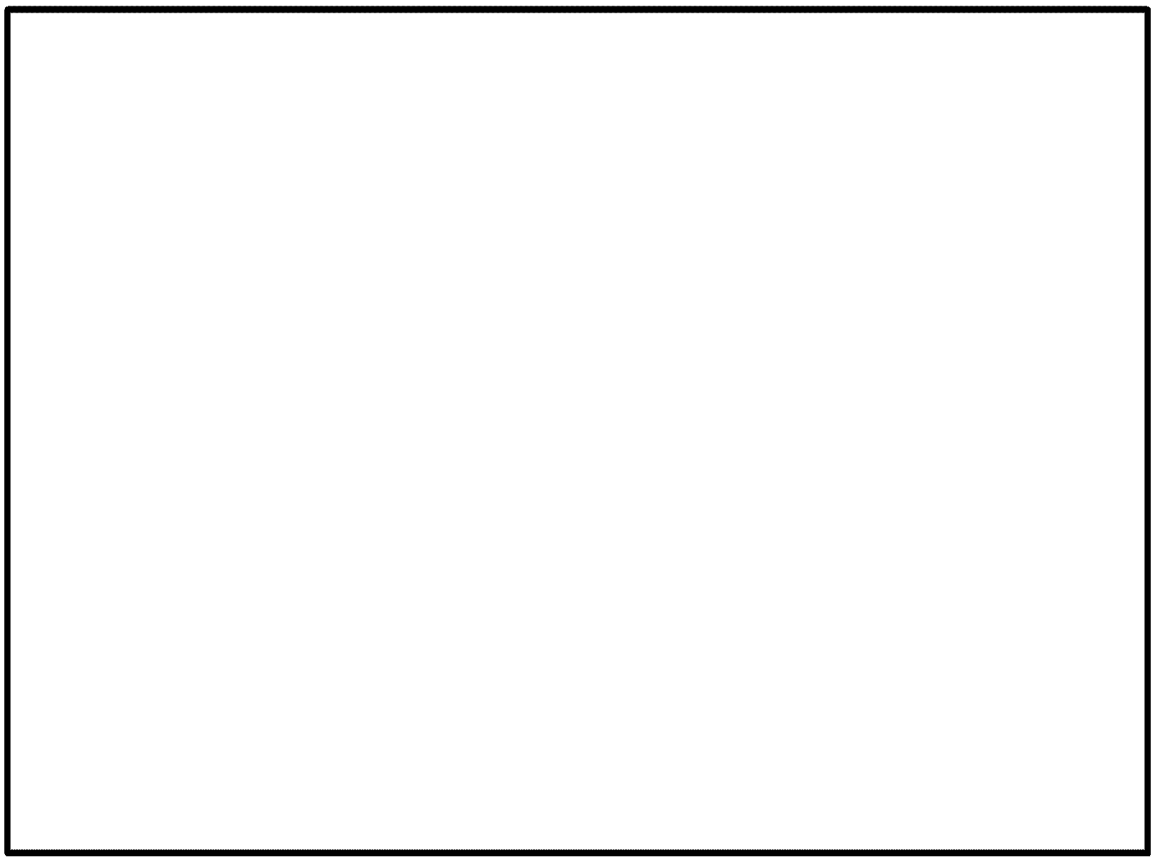
**10.2.1**

(b)(7)(e)

**10.2.2**

10.2.3

(b)(7)(e)



## 10.3 Restrictions on Exemptions

No exemption is possible, regardless of the circumstances, for an individual who is inadmissible under INA § 212(a)(3)(B)(i)(II) (relating to aliens known or reasonably believed to be engaged in or likely to engage after entry in any terrorist activity) or for an alien who is a member or representative of, has voluntarily and knowingly engaged in or endorsed or espoused or persuaded others to endorse or espouse or support terrorist activity on behalf of, or has voluntarily and knowingly received military-type training from a Tier I or Tier II terrorist organization.[91]

## 10.4 Group-Based Exemptions

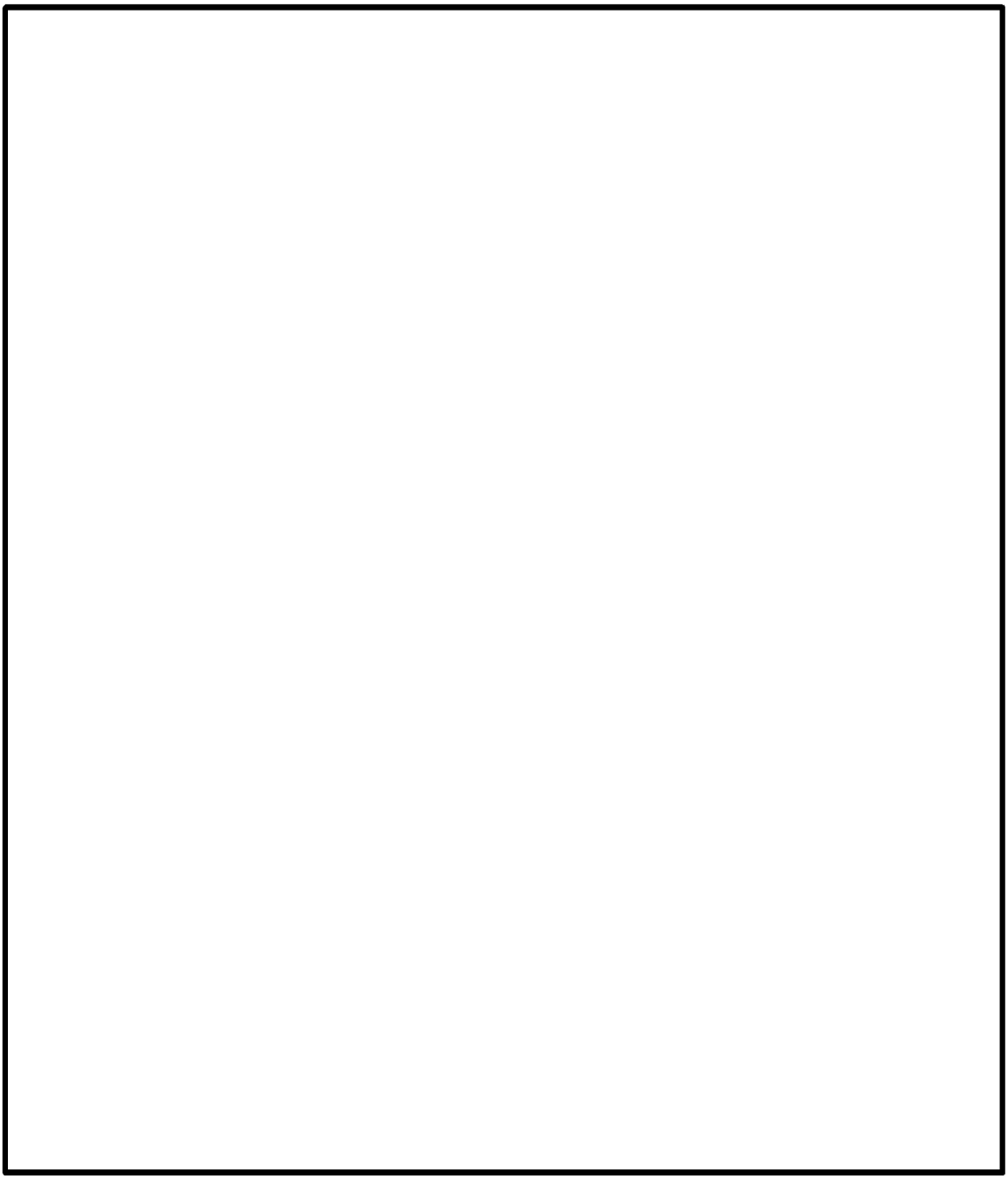
### 10.4.1 CAA Groups (2008) and NDAA Groups (2014)

Aliens encountered in connection with the organizations covered in the CAA receive "automatic relief" for activities described in INA § 212(a)(3)(B) in which "terrorist

[91] INA § 212(d)(3)(B)(i).

organization" is a part, and thus are not inadmissible under INA § 212(a)(3)(B) for activities or associations prior to December 26, 2007. This is because under the CAA the groups are not considered "terrorist organizations" with regard to activities occurring before this date. Likewise, groups listed under NDAA are not considered to be terrorist

(b)(7)(e)



[92] See 73 Fed. Reg. 34770-34777 (June 18, 2008); see also Michael L. Aytes, Acting Deputy Director, USCIS. 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, Memorandum to Associate Directors, et al. (July 28, 2008).

[93] The KNU/KNLA and KNPP have re-engaged in terrorist activity after December 26, 2007.

(b)(7)(e)

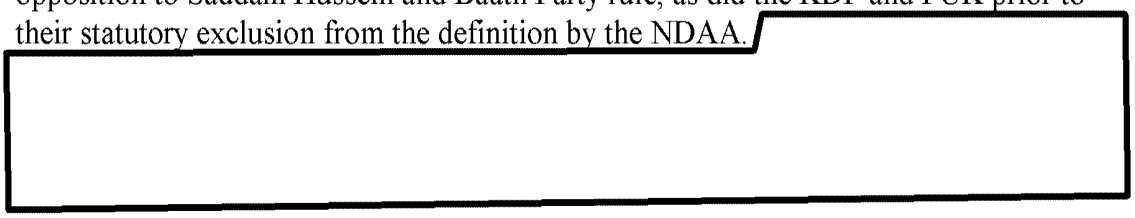
### 10.4.2 Iraqi Groups

On September 21, 2009, the Secretary of Homeland Security and the Secretary of State, in consultation with each other and the Attorney General, authorized an exemption for all activities and associations (except for future intent to engage) involving the:

- Iraqi National Congress (INC)
- Kurdish Democratic Party (KDP)
- Patriotic Union of Kurdistan (PUK)[96]

(b)(7)(e)

The INC meets the definition of Tier III terrorist organizations 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.



[94] *See* Exercise of Authority Under INA § 212(d)(3)(B)(i), 73 Fed. Reg. 34770-34776 (June 18, 2008).

[95] "Implementation of Section 1264(a)(1), Subtitle E, Title XII, of the National Defense Authorization Act for Fiscal Year 2015, and Updated Processing Requirements for Discretionary Exemptions to Terrorism-Related Inadmissibility Grounds for Activities and Associations Relating to the Kurdistan Democratic Party and the Patriotic Union of Kurdistan," USCIS Policy Memorandum (March 13, 2015).

[96] *See* "Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities Related to the INC, KDP, and PUK" Memorandum to USCIS Field Leadership, Lauren Kielsmeier, Acting Deputy Director, USCIS (January 2010).

[97] "Implementation of Section 1264(a)(1), Subtitle E, Title XII, of the National Defense Authorization Act for Fiscal Year 2015, and Updated Processing Requirements for Discretionary Exemptions to Terrorism-Related Inadmissibility Grounds for Activities and Associations Relating to the Kurdistan Democratic Party and the Patriotic Union of Kurdistan," USCIS Policy Memorandum (March 13, 2015).

In addition to the threshold requirements listed in Section 10.2.1, this exemption also has an additional threshold requirement that the applicant not thave participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons.

### 10.4.3 All Burma Students' Democratic Front (ABSDF)

On December 16, 2010, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, authorized an exemption for all activities and/or associations (except for current engagement or future intent to engage in terrorist activity) with the All Burma Students' Democratic Front (ABSDF).[98]

The ABSDF has operated for many years in defiance of Burma's military government by armed rebellion. Due to activities carried out by the organization, the ABSDF meets the definition of a Tier III organization.

In addition to the threshold requirements listed in Section 10.2.1, this exemption also requires that he or she has not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.

### 10.4.4 Kosovo Liberation Army (KLA)

On June 4, 2012, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, authorized an exemption for aliens who have certain voluntary, non-violent associations or activities with the Kosovo Liberation Army (KLA) as described in INA § 212(a)(3)(B).

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 Tier III terrorist organization.

(b)(7)(e)

In addition to the threshold requirements listed in Section 10.2.1, this exemption also has two additional threshold requirements: first, that the applicant not have not participated in, or knowingly provided material support to, terrorist activities that targeted

[98] Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, December 16, 2010 (All Burma Students' Democratic Front, 76 Fed. Reg. 2131-01 (January 12, 2011); see also "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 Policy Memorandum (December 29, 2010).

noncombatant persons or U.S. interests; and second, that the applicant not have been subject to an indictment by an international tribunal.

### 10.4.5 AISSF-Bittu Faction

On October 18, 2010, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, authorized an exemption for individuals who provided material support to All India Sikh Students Federation-Bittu Faction (AISSF-Bittu Faction).

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 organization.

(b)(7)(e)

In addition to the threshold requirements listed in Section 10.2.1, this exemption also has an additional threshold requirement that the applicant not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.[99]

### 10.4.6 Farabundo Marti National Liberation Front (FMLN) and Nationalist Republican Alliance (ARENA)

On April 3, 2013, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, authorized an exemption for all activities and/or associations (except for current engagement or future intent to engage in terrorist activity) with the Farabundo Marti National Liberation Front (FMLN) and Nationalist Republican Alliance (ARENA).

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 Tier III organizations during that time.

[99] *See* Exercise of Authority Under INA § 212(d)(3)(B)(i), 76 Fed. Reg. 2130-02 (January 12, 2011).

In addition to the threshold requirements listed in Section 10.2.1, this exemption also requires that the applicant not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests and that he or she not have engaged in terrorist activity outside the context of civil war activities directed against military, intelligence, or related forces of the Salvadoran government.[100]

### 10.4.7 Oromo Liberation Front (OLF)

On October 2, 2013, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, authorized an exemption for aliens with existing or pending benefits who have certain voluntary, non-violent associations or activities with the Oromo Liberation Front (OLF).

The OLF is an opposition group founded in 1973 engaged in violent conflict with the Ethiopian government. It falls within the definition of a Tier III organization because of its violent activities.

This exemption applies to solicitation, material support, and military-type training.

This exemption is only available to an applicant who was admitted as a refugee, granted asylum, or had an asylum or refugee application pending on or before October 2, 2013, or is the beneficiary of an I-730 Refugee/Asylum Refugee Petition filed at any time by a petitioner who was an asylee or refugee on or before October 2, 2013.

In addition to the threshold requirements listed in Section 10.2.1, this exemption also requires that the applicant not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests and that he or she not have engaged in terrorist activity outside the context of civil war activities directed against military, intelligence, or related forces of the Ethiopian government.[101]

### 10.4.8 Tigray People's Liberation Front (TPLF)

On October 17, 2013, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, authorized an exemption for aliens with existing or pending benefits who have certain voluntary, non-violent associations or activities with the Tigray People's Liberation Front (TPLF).

[100] *See* Exercise of Authority Under INA § 212(d)(3)(B)(i), 78 Fed Reg. 24225-01, 02 (April 24, 2013).

[101] *See* 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 Policy Memorandum (December 31, 2013).

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.

(b)(7)(e)

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 may not be required. Officers should consult COI to verify if this is the case..

In addition to the threshold requirements listed in Section 10.2.1, this exemption also requires that the applicant not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.[102]

### 10.4.9 Ethiopian People's Revolutionary Party (EPRP)

On October 17, 2013, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, authorized an exemption for aliens with existing or pending benefits who have certain voluntary, non-violent associations or activities with the Ethiopian People's Revolutionary Party (EPRP).

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.

(b)(7)(e)

[102] *See* 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 Policy Memorandum (June 15, 2014).

In addition to the threshold requirements listed in Section 10.2.1, this exemption also requires that the applicant not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.[103]

### 10.4.10Eritrean Liberation Front (ELF)

On October 17, 2013, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, authorized an exemption for aliens with existing or pending benefits who have certain voluntary, non-violent associations or activities with the Eritrean Liberation Front (ELF).[104]

The ELF is a leftist political party founded in 1960 in Ethiopia with the goal of achieving independence for 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. [105]

(b)(7)(e)

In addition to the threshold requirements listed in Section 10.2.1, this exemption also requires that the applicant not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests. Furthermore, if the applicant's activity or association with the ELF occurred prior to January 1, 1980, the applicant must have been admitted as a refugee, been granted asylum, or had an asylum or refugee application pending on or before October 17, 2013, or be the beneficiary of an I-730 Refugee/Asylum Refugee Petition filed at any time by a petitioner who was an asylee or refugee on or before October 17, 2013.[106]

[103] *See* 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) (June 15, 2014).

[104] *See* 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 Policy Memorandum (June 15, 2014).

[105] *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.

[106] *See* Exercise of Authority Under INA § 212(d)(3)(B)(i), 78 Fed. Reg. 66037-01 (November 4, 2013).

### 10.4.11 Democratic Movement for the Liberation of Eritrean Kunama (DMLEK)

On October 17, 2013, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, authorized an exemption for aliens with existing or pending benefits who have certain voluntary, non-violent associations or activities with the Democratic Movement for the Liberation of Eritrean Kunama (DMLEK).[107]

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.

(b)(7)(e)

In addition to the threshold requirements listed in Section 10.2.1, this exemption also requires that the applicant not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.[108]

## 10.5 Situational Exemptions

"Situational" exemptions apply to specified activities with a terrorist organization.

### 10.5.1 Duress-Based

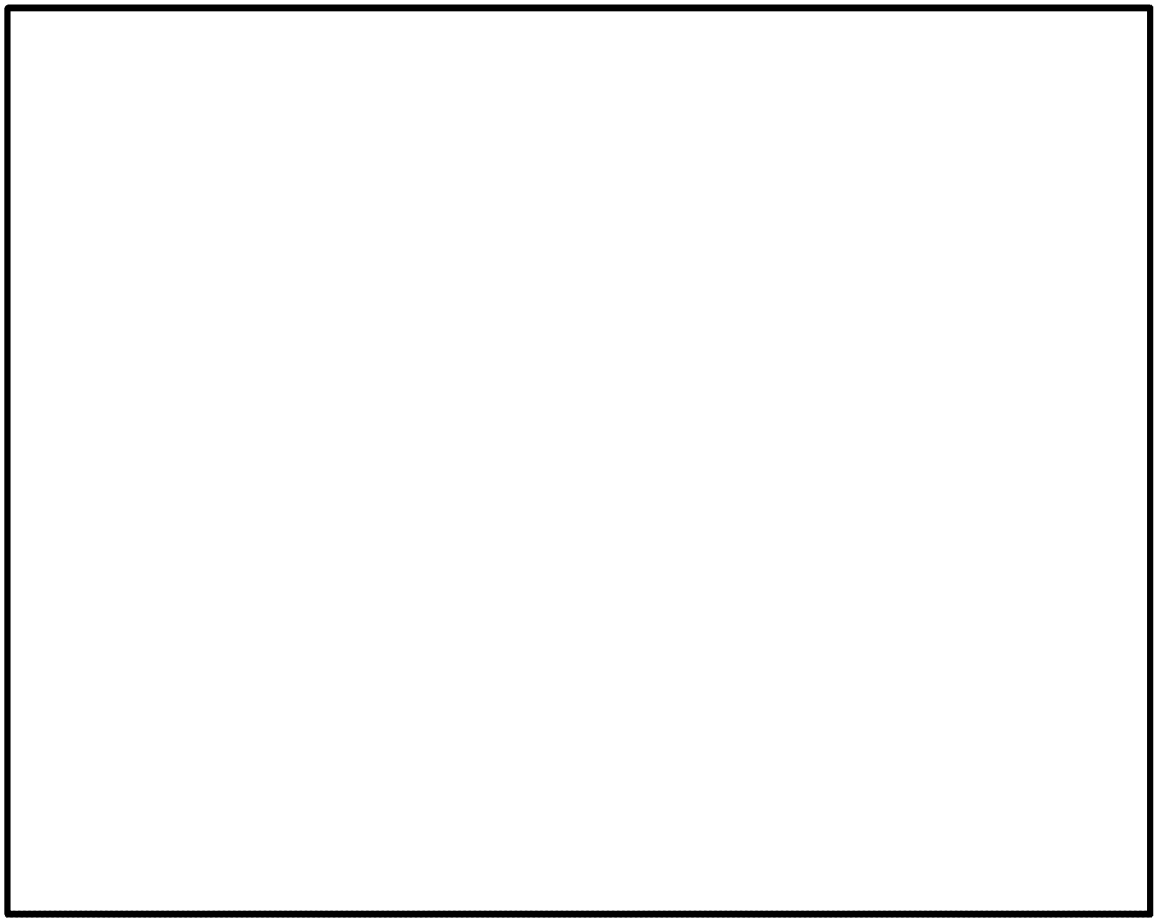
Some situational exemptions require that the activity have taken place under duress and require an examination into the duress factors to determine eligibility for the exemption.

If duress is required for exemption eligibility, then all duress factors will be elicited and analyzed. Duress has been defined, at minimum, as a reasonably-perceived threat of serious harm under which the material support was provided.[109] In general, the duress factors require consideration of the following issues:

(b)(7)(e)

[107] *See* 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 Policy Memorandum (June 15, 2014).
[108] *See* Exercise of Authority Under INA § 212(d)(3)(B)(i), 78 Fed. Reg. 66037-02 (November 4, 2013).
[109] "Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations" Memo, Jonathan Scharfen, Deputy Director (May 24, 2007).

(b)(7)(e)



There are now three types of duress-based exemptions available to applicants who meet their particular criteria:

**Material Support under Duress – INA § 212(a)(3)(B)(VI)**

The material support under duress exemption is by far the most commonly encountered exemption in USCIS adjudications. As noted above, material support is defined broadly and even small amounts of food, supplies, etc. constitute material support.[110]

The Secretary of Homeland Security signed this exemption authority with respect to material support provided under duress to Tier III terrorist organizations on February 26, 2007, and with respect to Tier I and II terrorist organizations on April 27, 2007.[111] Therefore, material support under duress to Tier I, II or III terrorist organizations may be exempted.

[110] *See* Section 9, TRIG – Material Support.

[111] *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); Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26138-02 (April 27, 2007).

**Military-Type Training under Duress – INA § 212(a)(3)(B)(i)(VIII)**

An exemption is available for applicants who received military-type training under duress from or on behalf of any organization that, at the time the training was received, was a terrorist organization. The Secretary of Homeland Security signed this exemption authority on January 7, 2011. Military-type training under duress may be exempted if it is from or on behalf of a Tier I, II or III terrorist organizations. You must analyze the organization's activities to determine whether it was a terrorist organization at the time the alien received the training.[112]

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 formation and physical exercising do not meet the statutory definition.

(b)(7)(e)

**Solicitation under Duress – INA § 212(a)(3)(B)(iv)(IV)(bb) and (cc) only and INA 212(a)(3)(B)(iv)(V)(cc) and (dd) only**

Activities under this exemption category are limited to solicitation of funds or other things of value for a terrorist organization and/or for solicitation of any individual for membership in a terrorist organization. These activities must be conducted under duress.

### 10.5.2 Voluntary Activity

**Medical Care**

[112] "Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) for the Receipt of Military-Type Training Under Duress" USCIS Memo, Office of the Director (Feb. 23, 2011).

Medical care provided to individuals engaged in terrorist activities or to terrorist organizations or members of such organizations is a form of material support. As such, those who provided medical care to members of a terrorist organization, to a terrorist organization, or to an individual the alien knows or reasonably should have known[113] has committed or plans to commit a terrorist activity, would be inadmissible in spite of the oaths of commitment to serve patients that are often taken by medical professionals. (For

(b)(7)(e) [redacted]

To address this situation, on October 13, 2011, the Secretary of Homeland Security signed this exercise of exemption authority to allow USCIS to not apply the material support inadmissibility grounds to certain aliens who provided medical care to persons associated with terrorist organizations or the members of such organizations. This exemption is specifically for 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 medical supplies provided independent of medical care. Provision of medical supplies would fall under the provision of material support.

**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 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.

This statutory restriction would not apply to an alien who provided medical care on

(b)(7)(e) behalf of an undesignated, Tier III terrorist organization. [redacted]

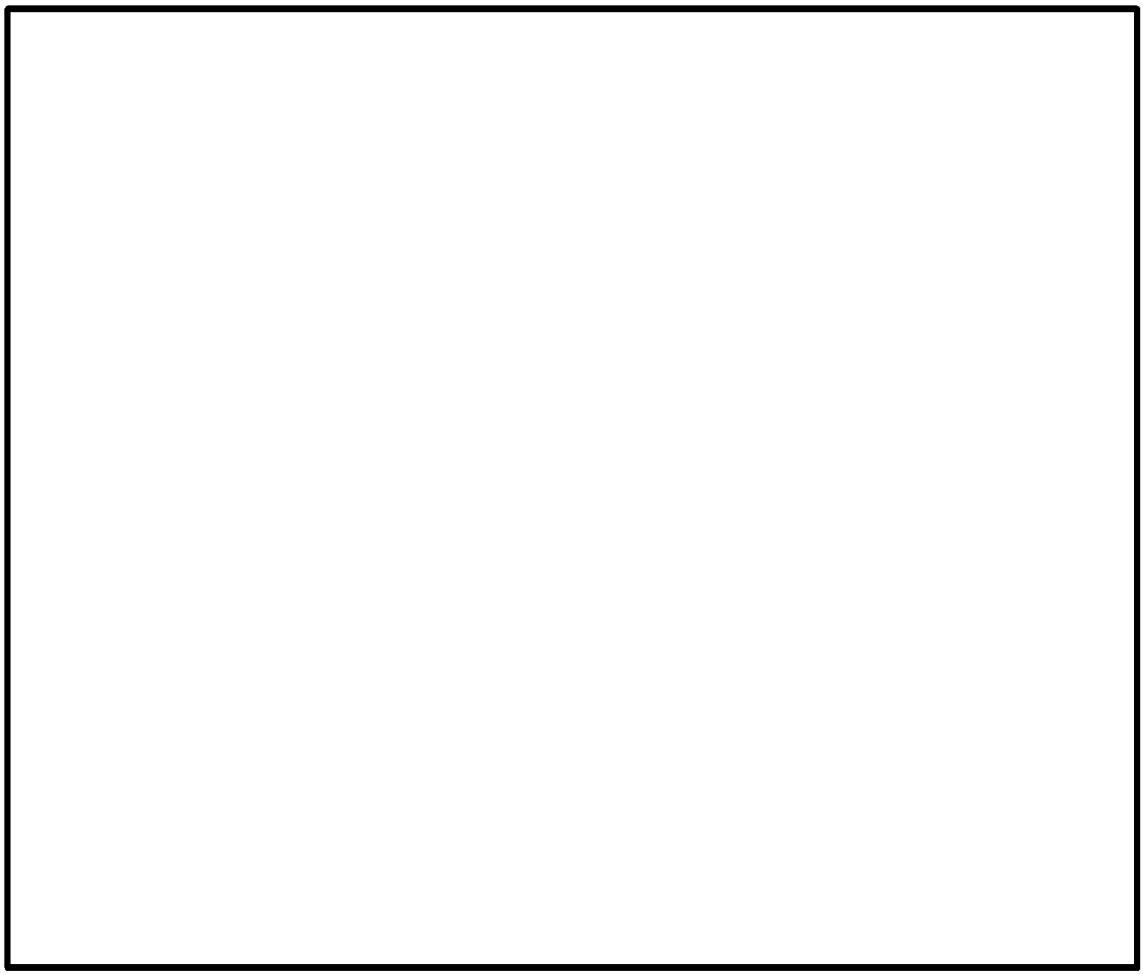
[113] If the medical professional did not and reasonably should not have known that the patient he or she was treating was a member of a terrorist organization or involved in terrorist activities, then the inadmissibility/bar would not arise.

(b)(7)(e)

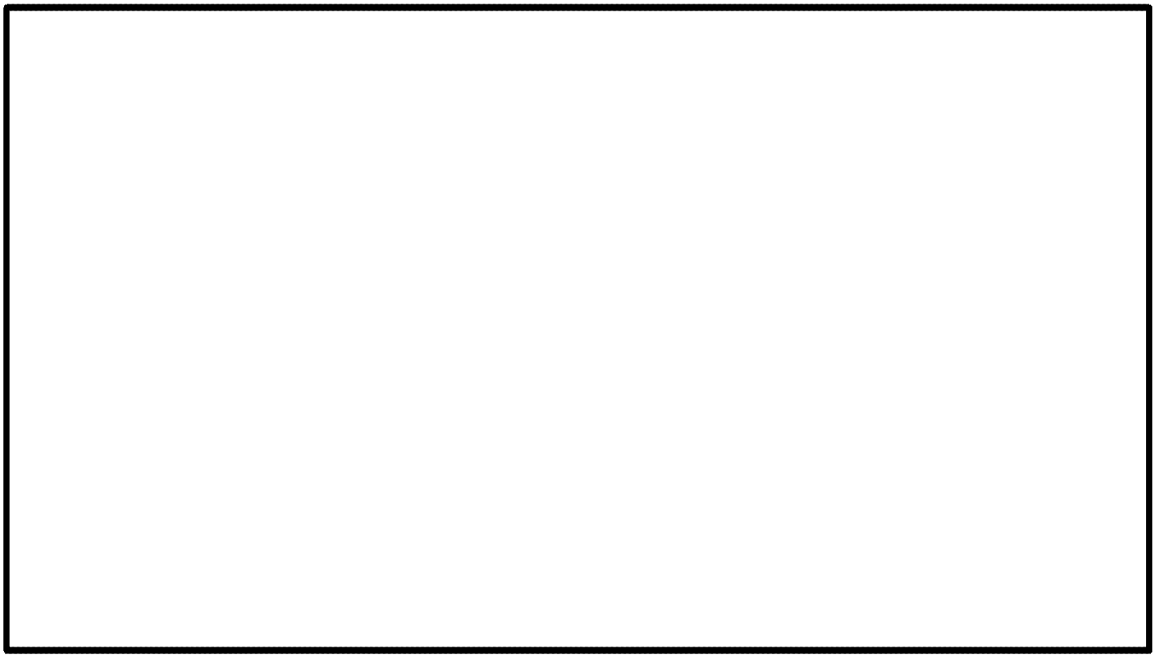
### 10.5.3 Limited General Exemption

On August 10, 2012, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, authorized an exemption for certain aliens with existing immigration benefits who are currently inadmissible under INA section 212(a)(3)(B)(i). Applicants eligible for this exemption must have only select voluntary, non-violent, associations or activities with certain undesignated terrorist organizations. This exemption applies to certain aliens who have already been granted an immigration benefit in the United States (i.e., asylee or refugee status, temporary protected status, or adjustment of status under the Nicaraguan Adjustment and Central American Relief Act or Haitian Refugee Immigration Fairness Act, or similar immigration benefit other than a non-immigrant visa), and to beneficiaries of an I-730 Refugee/Asylee Relative Petition filed at any time by such an asylee or refugee.

(b)(7)(e)



(b)(7)(e)



### 10.5.4 Iraqi Uprisings

On August 17, 2012, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General authorized an exemption for individuals who participated in the Iraqi uprisings against the government of Saddam Hussein in Iraq from March 1 through April 5, 1991.[115]

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.[116] 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 to the allied forces in the Persian Gulf War.[117] Despite achieving momentary victories, government forces led by the Republican Guard rapidly controlled the rebels.

In addition to the threshold requirements listed in Section 10.2.1, this exemption also requires two additional threshold requirements: first, that he or she has not 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 second, that he or she has not engaged in

[114] Exercise of Authority Under INA § Sec. 212(d)(3)(B)(i), 77 Fed. Reg. 49821-02 (August 17, 2012).

[115] Exercise of Authority Under INA § Sec. 212(d)(3)(B)(i), 77 Fed. Reg. 51545-02 (August 24, 2012).

[116] Human Rights Watch, *Endless Torment: The 1991 Uprising in Iraq and its Aftermath* (1992).

[117] *Id.*

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.

### 10.5.5 Exemptions for Certain Limited Material Support (CLMS) and Insignificant Material Support (IMS)

On February 5, 2014, the Secretary of Homeland Security and the Secretary of State, in consultation with the Attorney General, authorized two new exemptions for certain aliens who have provided material support to Tier III organizations. These exemptions are known as the Certain Limited Material Support (CLMS) exemption and the Insignificant Material Support (IMS) exemption.[118]

Both exemptions contain provisions specifying that the applicant must not have provided material support to activities that he or she knew or reasonably should have known targeted noncombatant persons, U.S. citizens, or U.S. interests or involved the provision, transportation, or concealment of weapons.[119]

Both exemptions also require that the applicant must 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 is 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 such 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.[120]

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 undesignated (Tier III) terrorist organization as defined in INA § 212(a)(3)(B)(vi)(III), 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 response to substantial pressure that does not rise to the level of duress ("sub-duress pressure").**[121]

---

[118] Exercise of Authority Under INA § Sec. 212(d)(3)(B)(i), 79 Fed. Reg. 6914-01 (February 5, 2014); Exercise of Authority Under INA § Sec. 212(d)(3)(B)(i), 79 Fed. Reg. 6913-02 (February 5, 2014).

[119] *Id.*

[120] "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 Policy Memorandum (May 8, 2015); "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 Policy Memorandum (May 8, 2015).

[121] Exercise of Authority Under INA § Sec. 212(d)(3)(B)(i), 79 Fed. Reg. 6914-01 (February 5, 2014).

**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 of 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.[122]

**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.[123]

**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 its 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 infrasturcutre, or underdeveloped health systems.[124]

(b)(7)(e)

**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

[122] "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 Policy Memorandum (May 8, 2015).

[123] *Id.*

[124] *Id.*

her daily life. The pressure must come, either entirely or in combination with other factors, from the organization to which the applicant provided support.[125]

In order for the CLMS exemption to apply, the applicant must not have intended or desired to assist any terrorist organization or terrorist activity.[126]

(b)(7)(e)

**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.[127] 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.[128]

For additional guidance on the application of the CLMS and IMS exemptions, contact your your Division's TRIG POC.

## 10.6 Expanded Exemption Authority under CAA and USCIS Hold Policy

As discussed above, section 691(a) of the CAA broadly amended the Secretary of State and Homeland Security's discretionary exemption authority, now allowing the Secretaries to exempt almost all activities or associations with terrorist organizations. Because additional exemptions are under consideration and may be issued in the future,

[125] "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 Policy Memorandum (May 8, 2015).

[126] Exercise of Authority Under INA § Sec. 212(d)(3)(B)(i), 79 Fed. Reg. 6914-01 (February 5, 2014).

[127] "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 Policy Memorandum (May 8, 2015).

[128] Exercise of Authority Under INA § Sec. 212(d)(3)(B)(i), 79 Fed. Reg. 6913-02 (February 5, 2014).

USCIS, in consultation with DHS, has established a policy to hold the vast majority of applications involving terrorist-related bars in expectation that future exemptions may become available.

Currently, the following categories of cases are subject to this hold policy:

- Category 1: Applicants who are inadmissible under the terrorism-related provisions of the INA based on any activity or association that was *not under duress* relating to any Tier III organization, other than those for which an exemption currently exists;
- Category 2: Applicants who are inadmissible under the terrorism-related provisions of the INA, for activities **other than** material support, military-type training, and solicitation of funds or members, based on any activity or association related to a designated (Tier I or Tier II) or undesignated (Tier III) terrorist organization where the activity or association was *under duress* (i.e., combat by child soldiers);
- Category 3: Applicants who are inadmissible as spouses or children of aliens described in categories 1 or 2, whether or not the inadmissible alien is applying for an immigration benefit.

(b)(7)(e)

## 10.7 Procedures

### 10.7.1 212(a)(3)(B) Exemption Worksheet

(b)(7)(e)

### 10.7.2 Processing Cases

**More than One Terrorism-Related Ground of Inadmissibility**

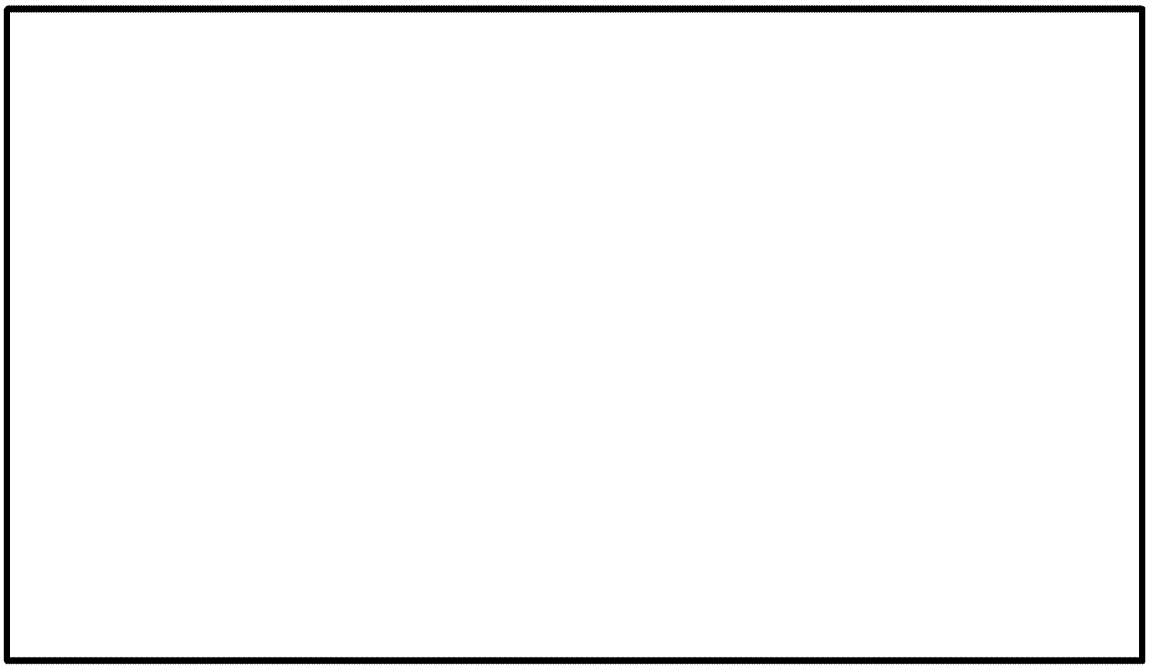
(b)(7)(e)

### Holding Cases[129]

See section 10.6 above.

### Denials / Referrals

(b)(7)(e)



[130] Cases involving such activity merit mandatory denials or referrals.

## 11 OTHER SECURITY-RELATED GROUNDS

INA § 212(a)(3)(A) and (F) are also security-related inadmissibility grounds that apply to refugee applicants and other intending immigrants and non-immigrants.

[129] Memorandum from Jonathan Scharfen to the Associate Directors; Chief, Office of Administrative Appeals; Chief Counsel, "Withholding Adjudication and Review of Prior Denials of Certain Categories of Cases Involving Association with, or Provisions of Material Support to, Certain Terrorist Organizations or Other Groups" (Mar. 26, 2008). See also Memorandum from Michael Aytes to the Field Leadership, "Revised Guidance on the Adjudication of Cases involving Terrorist-Related Inadmissibility Grounds and Amendment to the Hold Policy for such Cases" (Feb. 13, 2009). See also Revised Guidance on the Adjudication of Cases Involving Terrorism-Related Inadmissibility Grounds (TRIG) and Further Amendment to the Hold Policy for Such Cases (November 20, 2011).

[130] See Memorandum from Michael L. Aytes to the Associate Directors; Chief of Administrative Appeals; Chief Counsel, "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" (July 28, 2008).

INA § 212(a)(3)(A) applies to any alien a consular officer or DHS/USCIS[131] knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any of the following proscribed activities. There is no exemption or waiver available for these activities:

Any activity:
To violate any law of the U.S. relating to **espionage**[132] or **sabotage**[133] – INA § 212(a)(3)(A)(i);

To violate or evade any law prohibiting the **export from the U.S. of goods, technology, or sensitive information**[134] – INA § 212(a)(3)(A)(i);

Any other **unlawful activity**[135] – INA § 212(a)(3)(A)(ii);

Any activity a purpose of which is the **opposition to, or the control or overthrow of, the Government of the U.S.** by force, violence, or other unlawful means – INA § 212(a)(3)(A)(iii).

Another security-related inadmissibility ground is found at INA § 212(a)(3)(F).[136] This ground makes inadmissible an alien who either the Secretary of State or Secretary of Homeland Security[137] (in consultation with the other) determines meets **both** of the

---

[131] Although the text of the statute states that this ground (at INA § 212(a)(3)(A)) applies to any alien "a consular officer or Attorney General knows, or has reason to believe seeks to enter the United States to engage solely, principally, or incidentally in any of the following proscribed activities," under the Homeland Security Act of 2002, USCIS (not just a consular officer or Attorney General) has the authority to make this determination although the technical corrections relating to references (to the Attorney General) in the INA have not been made in all places. See Homeland Security Act of 2002. Pub. L. no. 296; 116 Stat. 2135 (2002).

[132] This includes illegally gathering or possessing information and being an unregistered foreign agent.

[133] This includes damage to equipment used to defend the U.S.

[134] This includes trading with the enemy, exporting goods that need permission to export, and releasing sensitive government information.

[135] The Department of State and DHS have interpreted this ground relatively narrowly, to refer to unlawful activity that has an adverse impact on U.S. national security or public safety.

[136] INA § 212(a)(3)(B) & (F) are bars to: refugee status, asylum status, withholding of removal, adjustment of status, cancellation of removal; relief under INA § 212(c) and temporary protected status (TPS). INA § 212(a)(3)(B) & (F) do NOT bar: naturalization, employment authorization, visa petitions, Convention Against Torture (CAT) deferral of removal.

[137] Although a technical correction to the reference in INA § 212(a)(3)(F) (indicating that it is the Secretary of State or Attorney General, in consultation with one another, who would determine that an individual 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 ) has not yet been made, under the Homeland Security Act of 2002, DHS has the authority for purposes of making such a determination. See Homeland Security Act of 2002. Pub. L. no. 296; 116 Stat. 2135 (2002).

following criteria: the alien has been associated with a terrorist organization; and while in the U.S., intends to engage in activities which could endanger the welfare, safety, or security of the U.S. This section requires both an association with a terrorist organization **and** an intention to cause harm.

The harm need not occur in the United States, but it must endanger the welfare, safety or security of the United States. Note that the authority to find an alien inadmissible under this section can only be exercised by the Secretary of State or the Secretary of Homeland Security.

(b)(7)(e)

Although these inadmissibility grounds do not apply to asylum applicants, INA § 208(b)(2)(A)(iv) bars applicants whom there are reasonable grounds for regarding as a danger to the security of the United States from receiving asylum.

In 2005, the Attorney General examined the national security risk bar to asylum in his decision in *Matter of A-H-*, which concerned the application of the exiled leader of an Islamist political party in Algeria who was associated with armed groups that had been involved in persecution and terrorist activities.[138] Relying on the Immigration and Nationality Act's definition of "national security" and noting that the statute does not specify any particular level of risk, the Attorney General held that the bar applies wherever the evidence in the record supports a reasonable belief that the applicant poses "any nontrivial degree of risk" to the national defense, foreign relations, or economic interests to the United States.[139] The Attorney General further clarified that the "reasonable grounds for regarding" standard is consistent with the relatively low "probable cause" standard used in other areas of the law and "is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security."[140]

In *Malkandi v. Holder*, the U.S. Court of Appeals for the Ninth Circuit considered the case of an Iraqi Kurdish applicant who, according to evidence obtained by the government, had facilitated the issuance of medical documentation to a confessed al-Qaeda operative. The Board of Immigration Appeals, applying the Attorney General's framework, found that the applicant was ineligible for asylum based on the national

[138] *Matter of A-H-*, 23 I&N Dec. 774 (AG 2005).

[139] *Id.* at 788.

[140] *Id.* at 788-789.

security risk bar. The Ninth Circuit deferred to the Attorney General's interpretation of the terms of the statute and upheld the Board's determination.[141]

In *Cheema v. Ashcroft*, the Ninth Circuit viewed favorably the BIA's interpretation (in an unpublished BIA decision) that an alien poses a danger to the security of the United States where the alien acts in a way which:

- Endangers the lives, property, or welfare of United States citizens;
- Compromises the national defense of the United States; or
- Materially damages the foreign relations or economic interests of the United States.[142]

(b)(7)(e)

## 12 LEGAL ANALYSIS

### 12.1 Burden and Standard of Proof

You must evaluate the evidence indicating a security-related bar or inadmissibility by the relevant standard of proof as appropriate for your Division's adjudications, as explained in the relevant supplements (see RAD Supplement – 1).

### 12.2 Documentation Relating to NS Concerns

You must properly document[144] your NS concerns, in line with your division's policy and guidance (see RAD Supplement – 2).

### 12.3 Dependents/Derivatives

Inadmissibilities and bars related to national security 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 and his or her dependent/derivative denied or

[141] *Malkandi v. Holder*, 576 F.3d 906, 915-916.
[142] *Cheema v. Ashcroft*, 372 F.3d 1147, 1154 (9th Cir. 2004).

[143] *Ali v. Reno*, 829 F. Supp. 1415 (S.D.N.Y. 1993), affirmed 22 F.3d 442 (2d Cir. 1994).

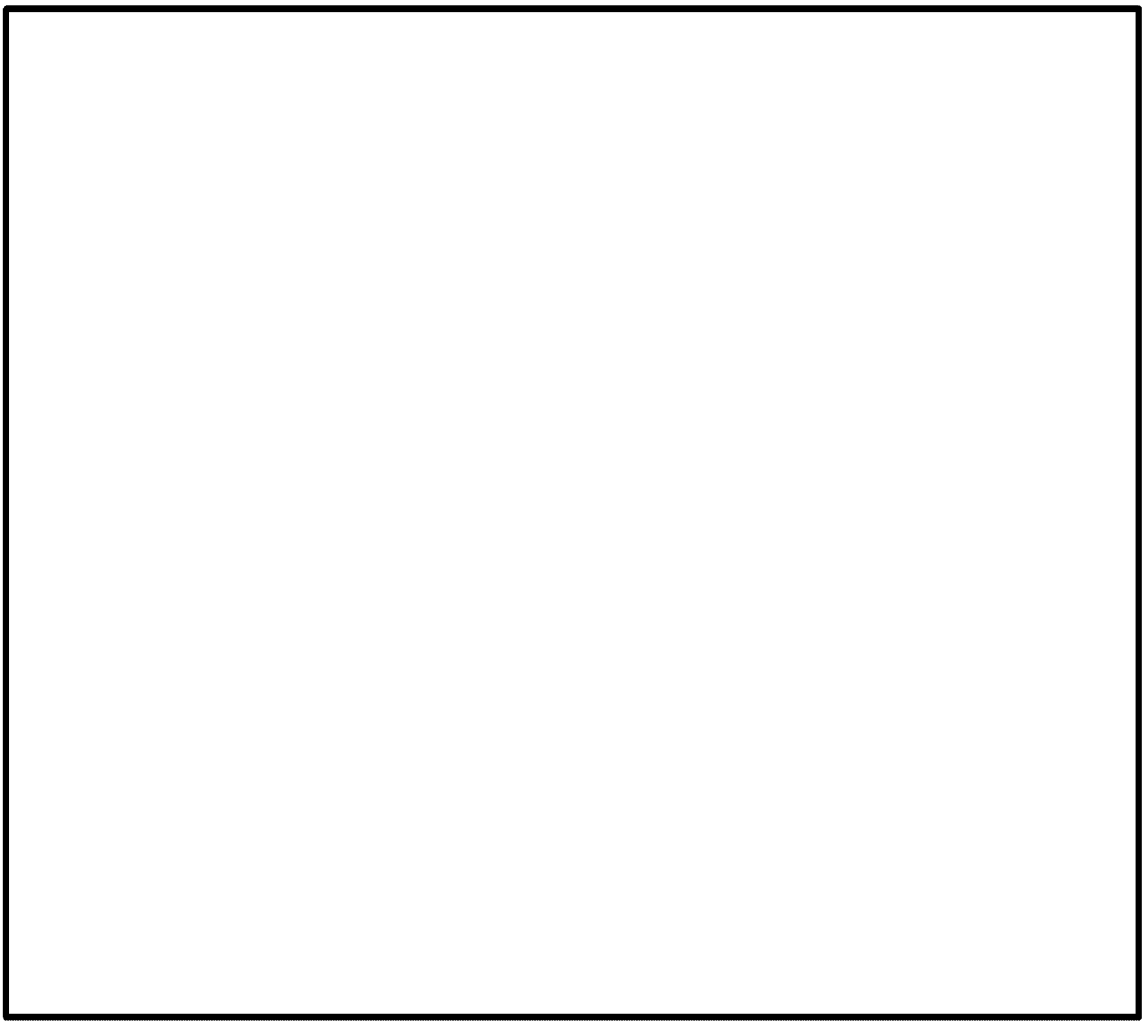
[144] In certain circumstances, NS concerns will be documented in FDNS-DS, a system that is owned by USCIS/FDNS and used by FDNS-IOs. The FDNS-DS SOP can be found on the ECN.

referred because the dependent/derivative is inadmissible or barred for a national security-related reason.[145]

# 13 PROCEDURE FOR PROCESSING CASES WITH NATIONAL SECURITY CONCERNS (THE CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM (CARRP))

## 13.1 The CARRP Process

(b)(7)(e)

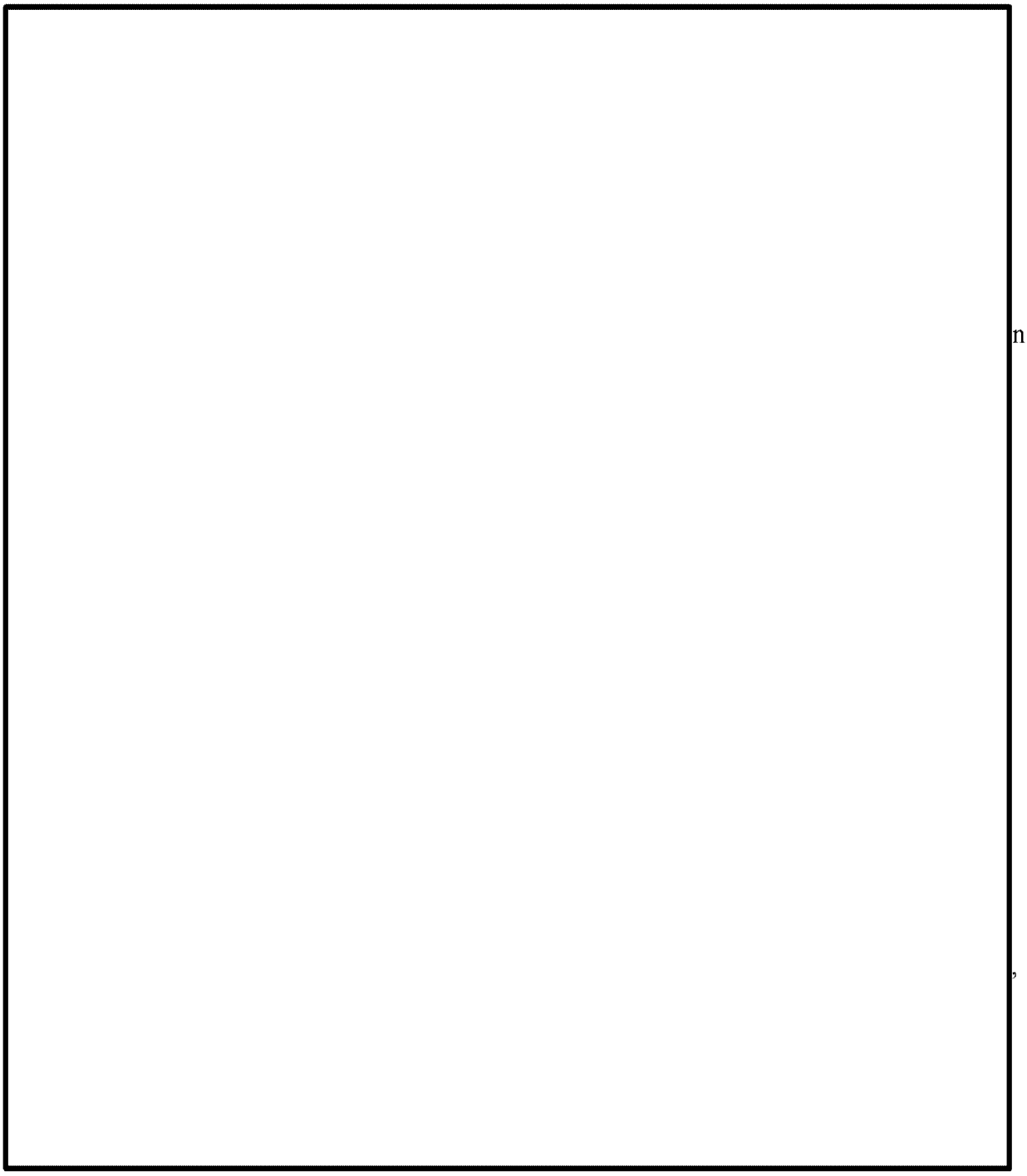


[145] 8 C.F.R. § 208.21(a); INA § 207(c)(2)(A).

[146] "Policy for Vetting and Adjudicating Cases with National Security Concerns" Memo, Deputy Director Jonathan R. Scharfen (April 11, 2008).

[147] "Handling Potential National Security Concerns with No Identifiable Records" Steve Bucher, Associate Director of Refugee, Asylum and International Operations (August 29, 2012).

(b)(7)(e)



n

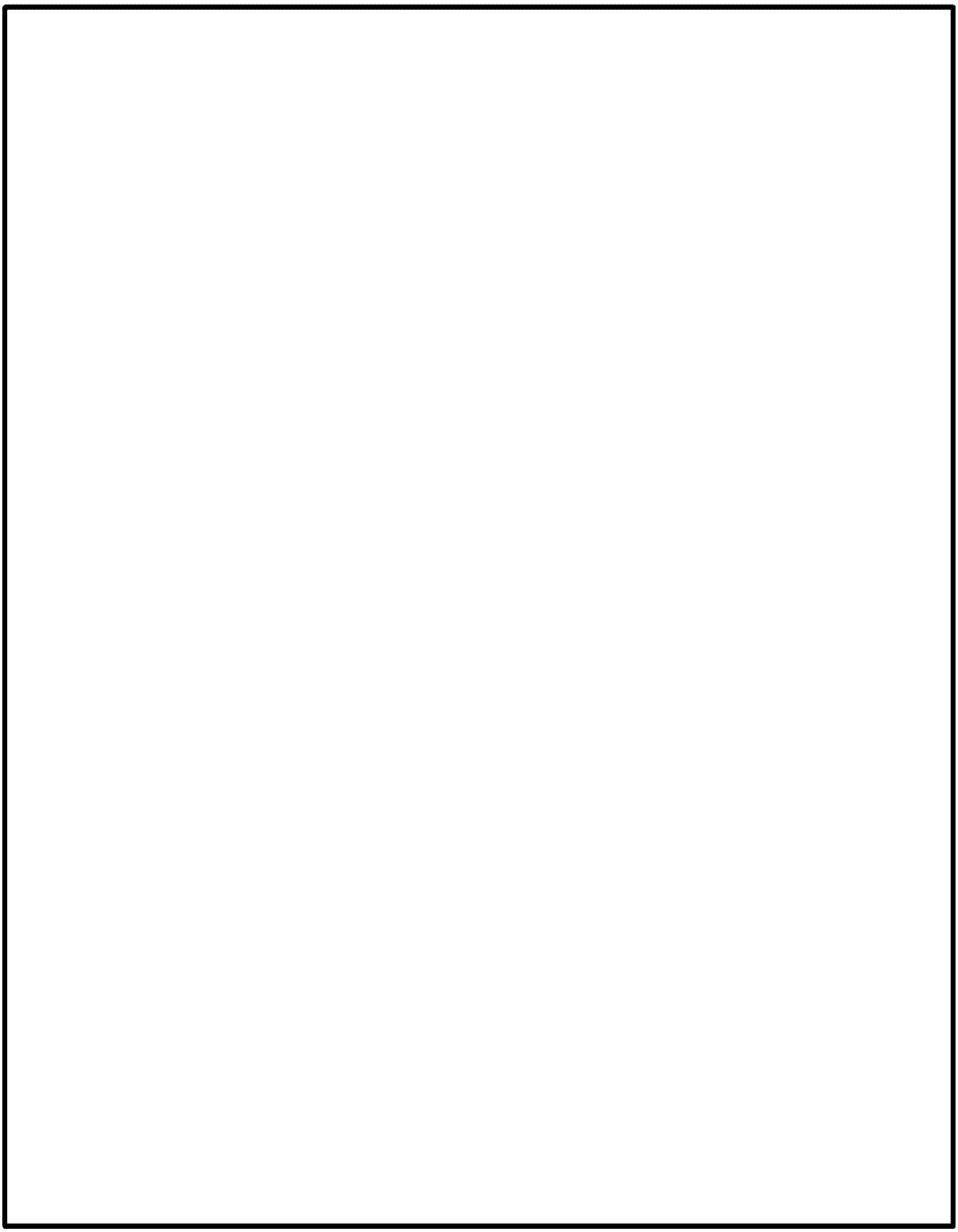
,

[148] "Refugee Adjudication Standard Operating Procedure: Cases Involving National Security Concerns" (May 14, 2008).See also "CARRP Operational Guidance Attachment A - Guidance for Identifying National Security Concerns," (April 11, 2008).

[149] "Refugee Adjudication Standard Operating Procedure: Cases Involving National Security Concerns" (May 14, 2008)

[150] *Id.*

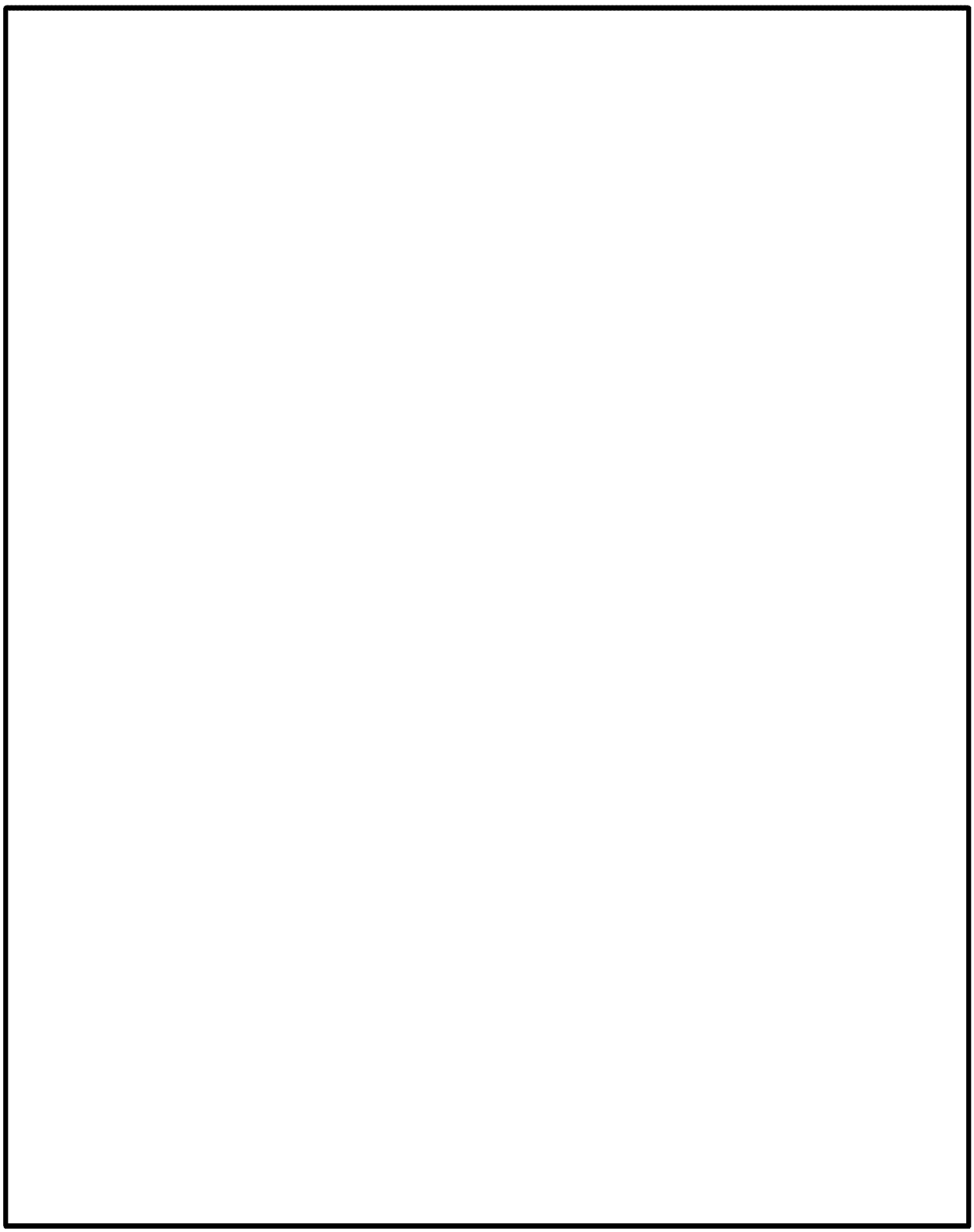
(b)(7)(e)



[153] "Refugee Adjudication Standard Operating Procedure: Cases Involving National Security Concerns" (May 14, 2008)

[154] *Id.* at 6; Asylum Division *Identity and Security Checks Procedures Manual* (ISCPM) (August 2010).at 73;

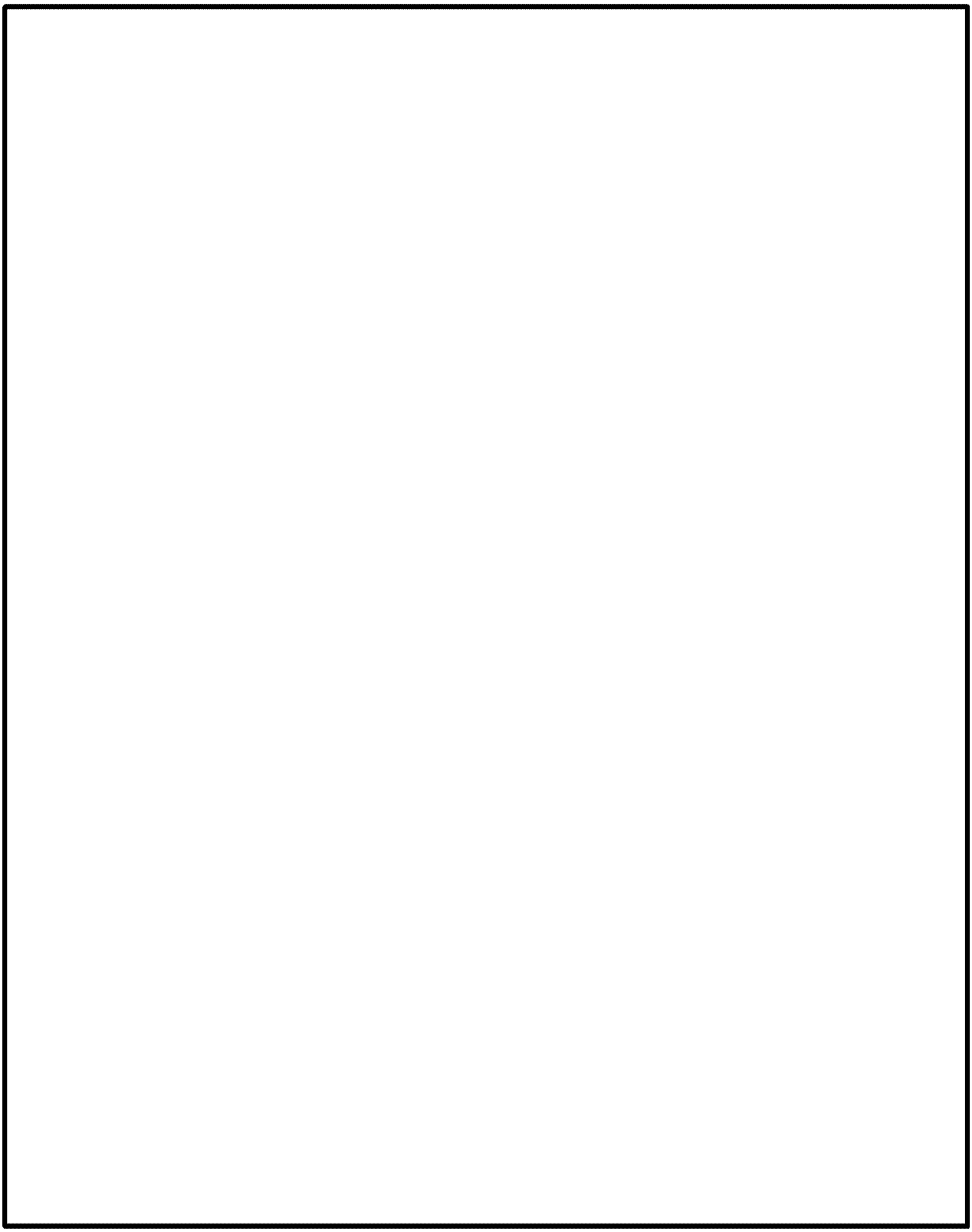
(b)(7)(e)



[158] "Handling Potential National Security Concerns with No Identifiable Records" Steve Bucher, Associate Director of Refugee, Asylum and International Operations (August 29, 2012).

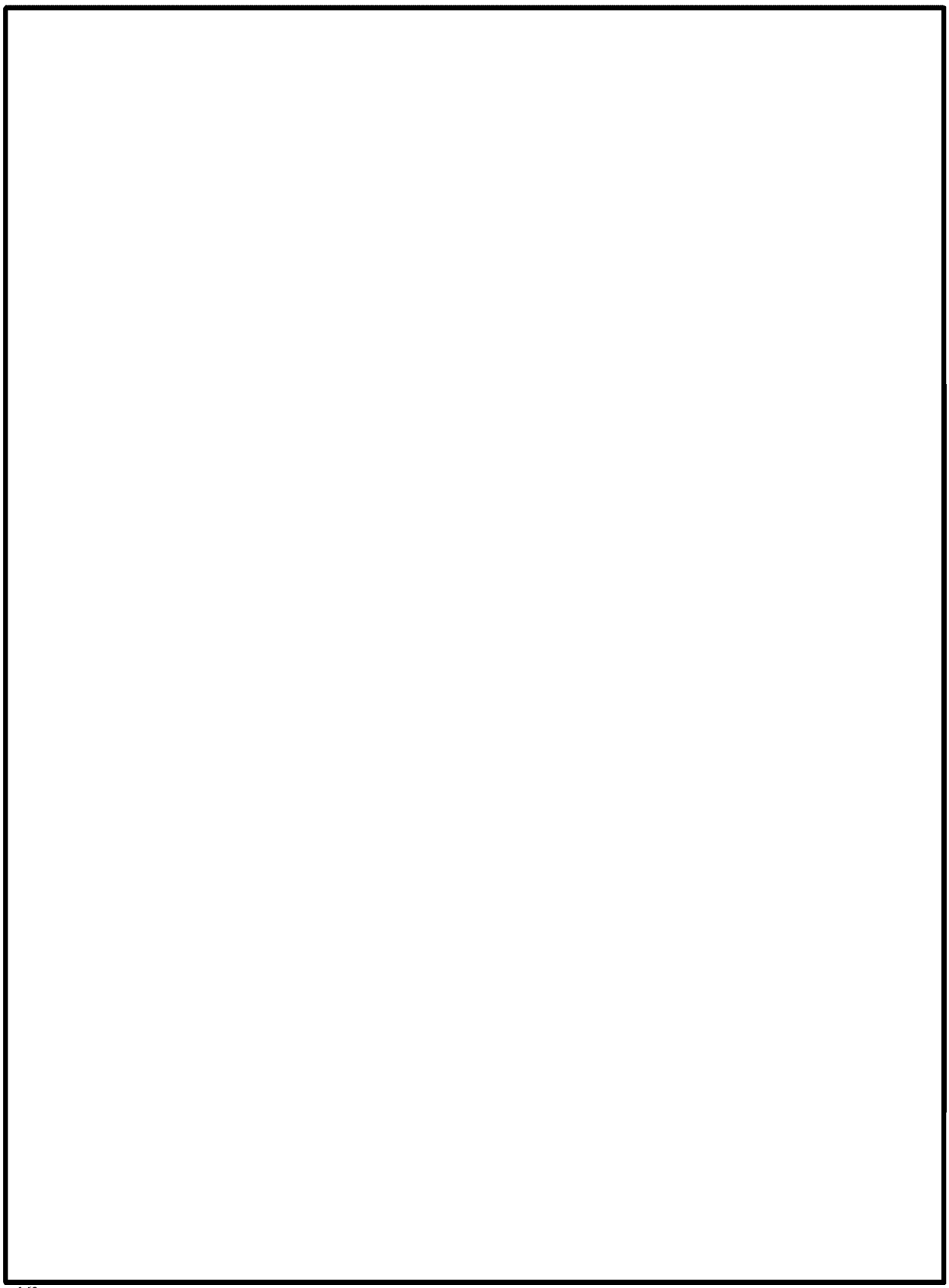
[159] "Refugee Adjudication Standard Operating Procedure: Cases Involving National Security Concerns" (May 14, 2008)

(b)(7)(e)



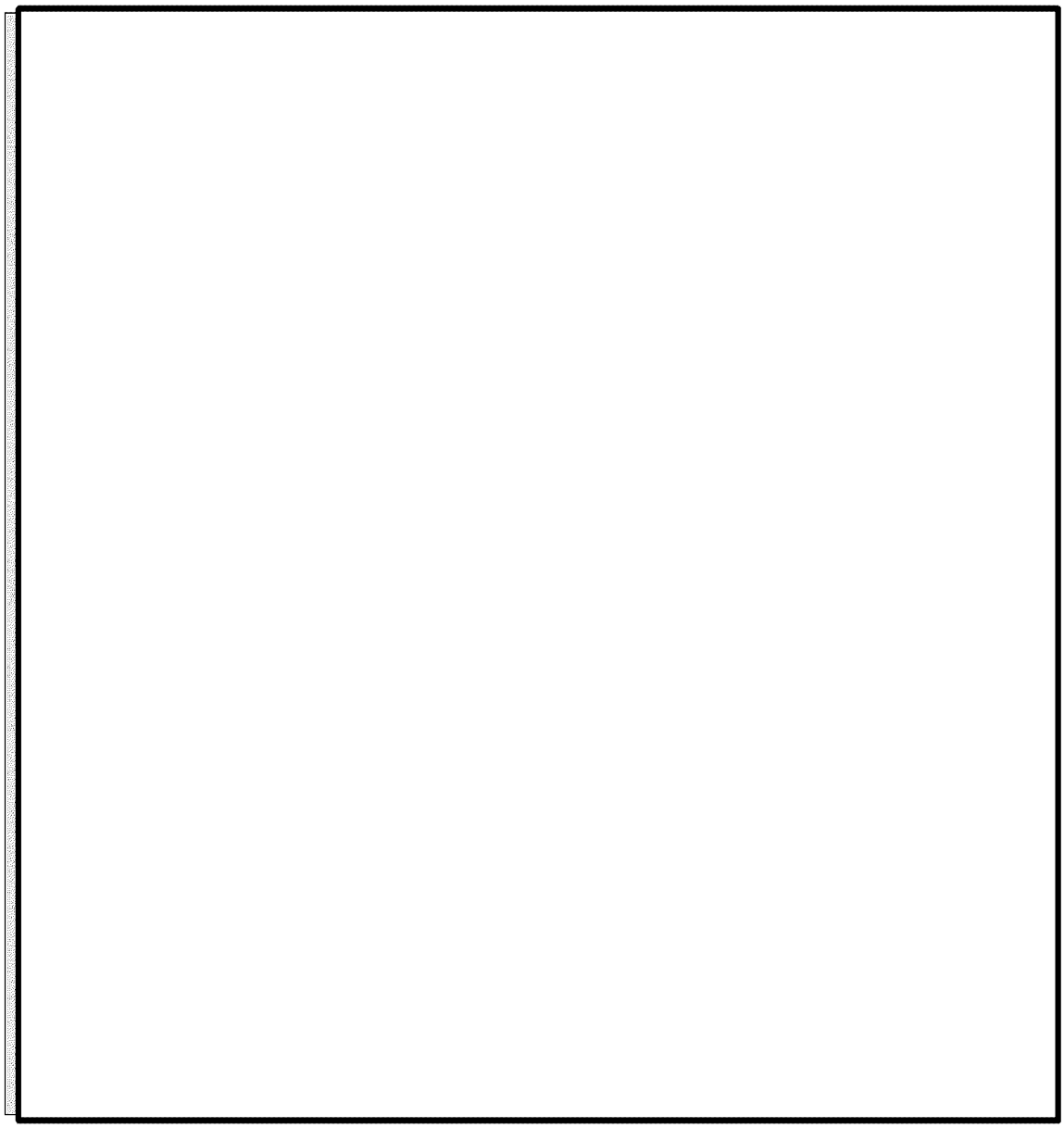
[160] *Id.*

(b)(7)(e)



[163] "Operational Guidance for Vetting and Adjudicating Cases with National Security Concerns" Operational Guidance, Donald Neufeld, Acting Associate Director Of Domestic Operations (April 24, 2008).

(b)(7)(e)



[164] "Operational Guidance for Vetting and Adjudicating Cases with National Security Concerns" Operational Guidance, Donald Neufeld, Acting Associate Director Of Domestic Operations (April 24, 2008)..

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

## 14 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 benefits programs. In this regard, it is critical for you to properly assess each case in consideration of possible national security concerns and to follow your division's procedures for processing these cases through CARRP.

## 15 SUMMARY

U.S. immigration laws contain provisions to prevent individuals who may be threats to national security from receiving immigration benefits. As an adjudicator, you will identify potential NS indicators and concerns and process those cases in accordance with these laws.

### 15.1 National Security Concerns

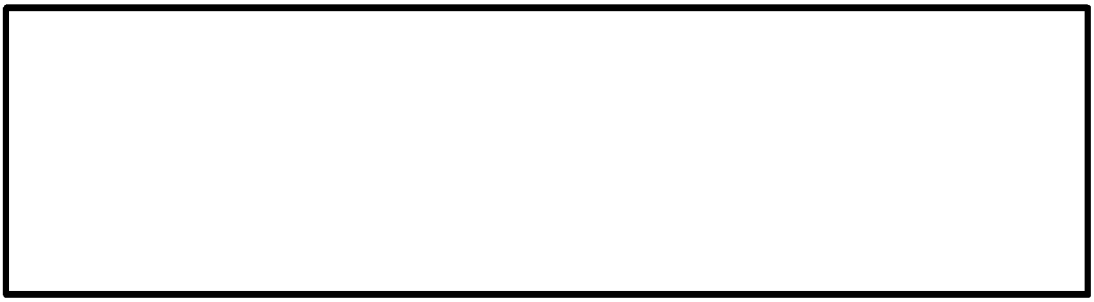
There are two kinds of NS concerns: Known or Suspected Terrorists (KSTs) and Non-Known or Suspected Terrorists (non-KSTs). KSTs are identified by specific systems check results. Non-KSTs are NS concerns identified by any other means, including, but not limited to, applicant testimony, file review or country conditions research.

NS indicators may lead to finding an NS concern. NS indicators can be statutory or non-statutory

An NS concern exists if there is an articulable link between the applicant and the activities, associations described in to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in INA §§ 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) (commonly referred to as TRIG), or other non-TRIG matters relating to national security, as described in the CARRP Operational Guidance, Attachment A, discussed above.

### 15.2 Interviewing National Security Cases

(b)(7)(e)



## 15.3 Terrorism-Related Inadmissibility Issues

(b)(7)(e)

[redacted]

### 15.3.1 Terrorist Organizations

Under the INA, there are three tiers of terrorist organizations. Tier I organizations appear on the Foreign Terrorist Organizations list while Tier II organizations are on the Terrorist Exclusion List (TEL). A Tier III terrorist organization is group of two or more individuals that, whether organized or not, engages in terrorist activity, or has a subgroup[169] that engages in terrorist activity.[170] Depending on the tier of the organization, there are a variety of immigration consequences.

### 15.3.2 Terrorism-Related Inadmissibility Grounds

The inadmissibility grounds related to terrorist activity are listed at INA § 212(a)(3)(B).

### 15.3.3 Material Support

(b)(7)(e)

[redacted]

### 15.3.4 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 grounds of inadmissibility under INA § 212(a)(3)(B). This exemption authority can be exercised by

[169] See Department of State guidance on what constitutes a subgroup, 9 FAM 40.32 N2.7.

[170] INA § 212(a)(3)(B)(vi)(III).

the Secretary of Homeland Security or the Secretary of State after consultation with each other and the Attorney General.[171]

## 15.4 CARRP

The Controlled Application Resolution and Review Program (CARRP) is the 4-step process through which USCIS vets and adjudicates national security cases.

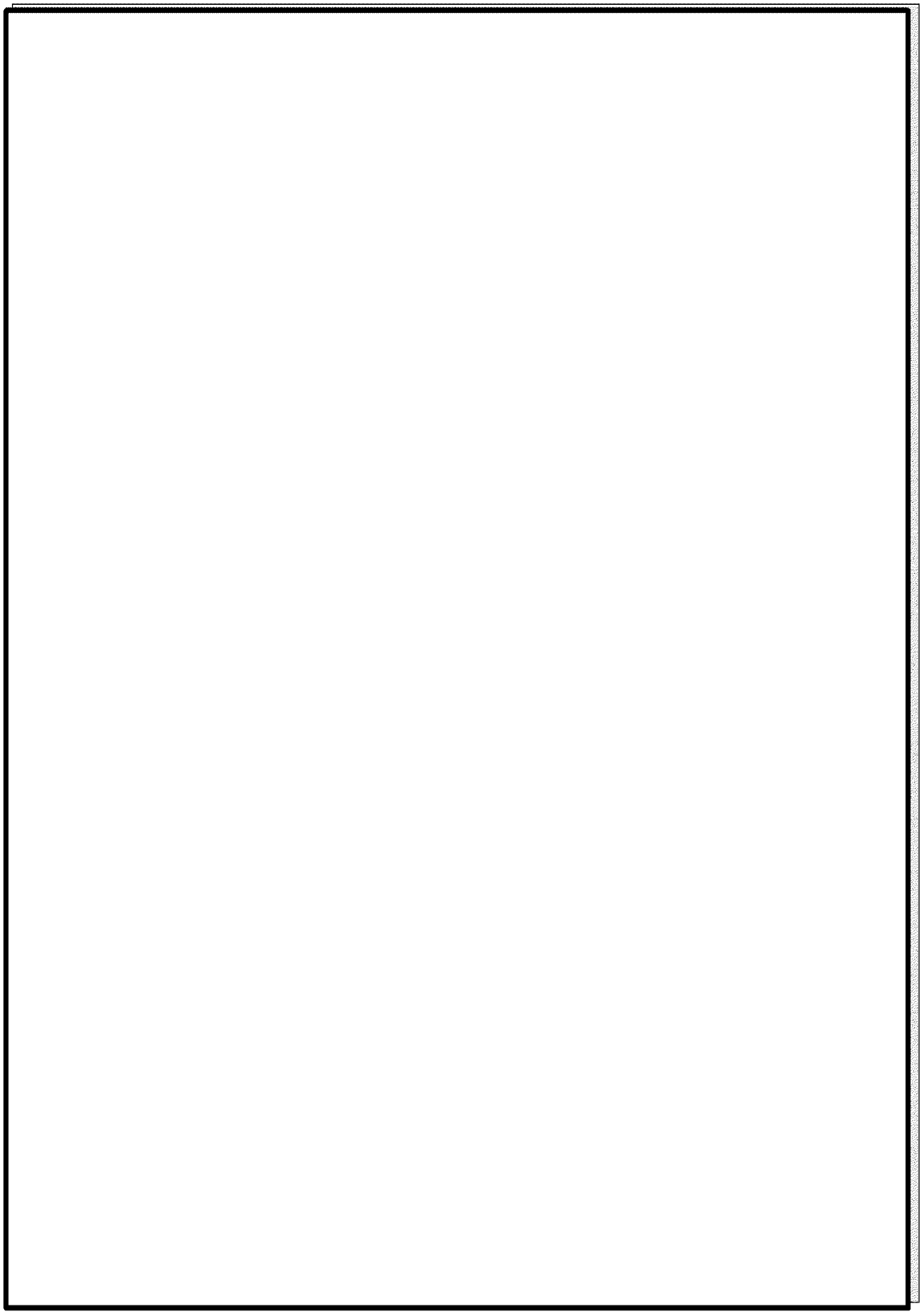
(b)(7)(e)

[171] INA § 212(d)(3)(B)(i). For some specific examples of the Secretary's exercise of discretion under this provision, *see* USCIS Fact Sheets.

## PRACTICAL EXERCISES

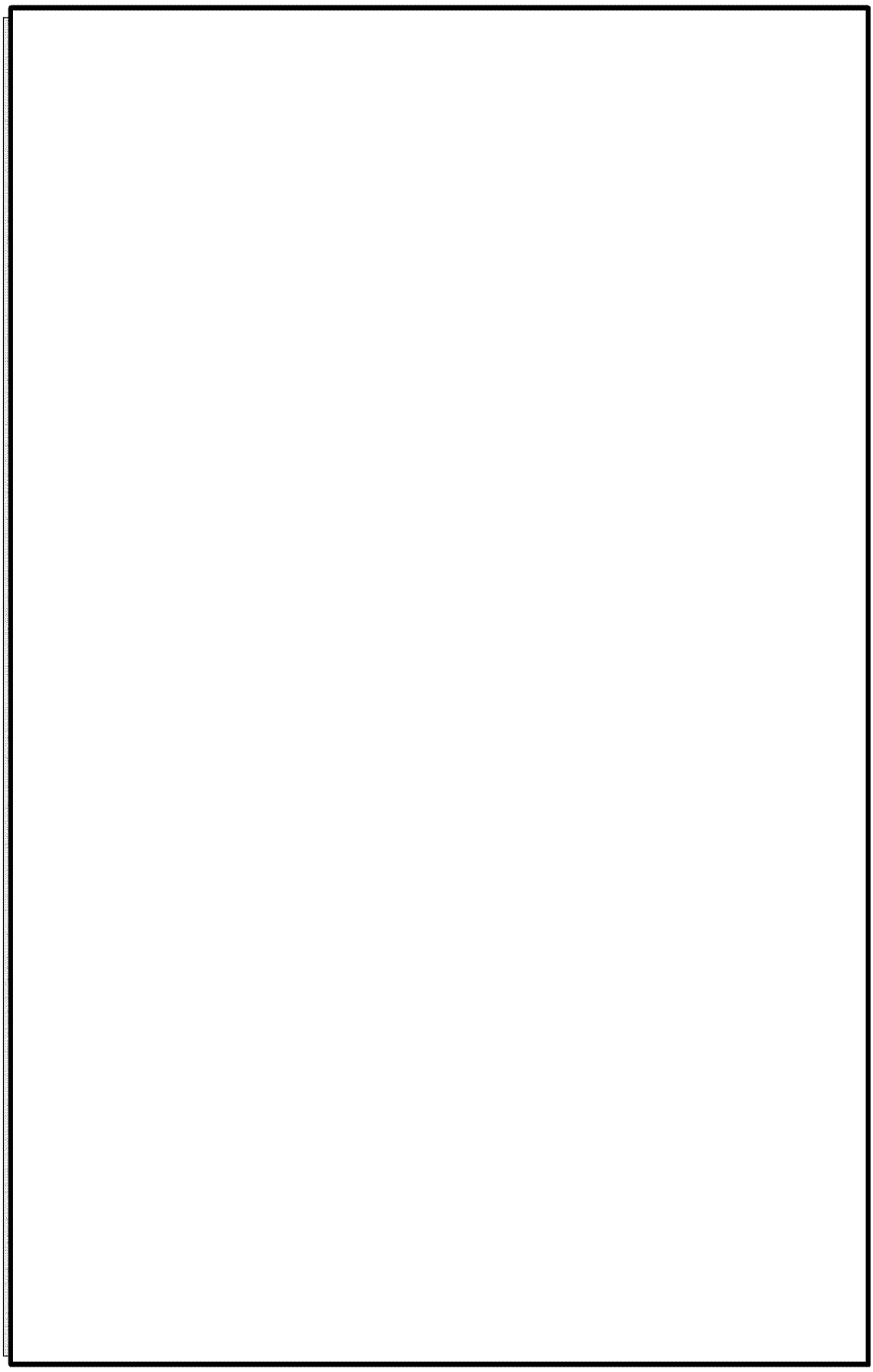
(b)(5)

(b)(7)(e)



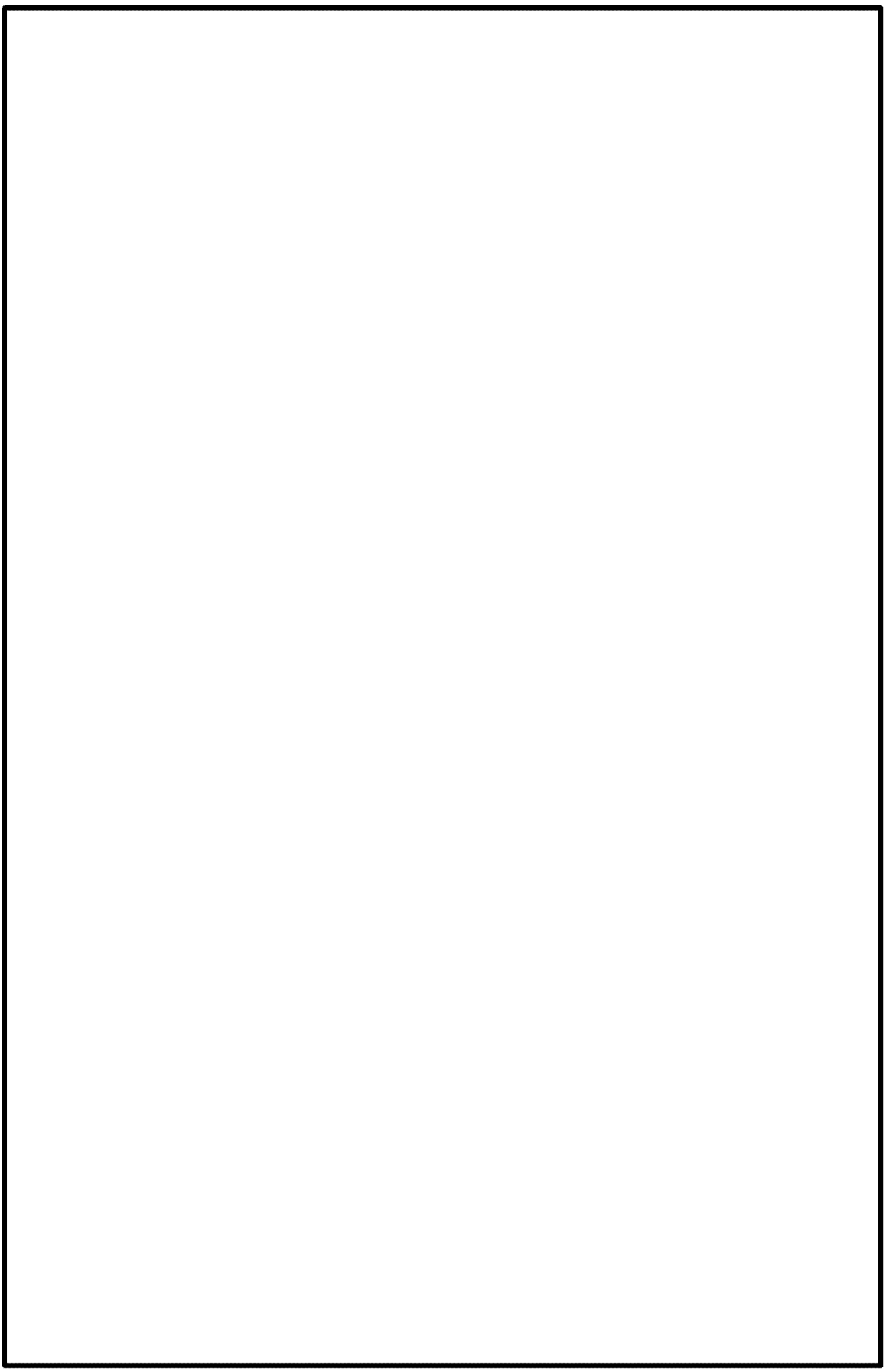
(b)(5)

(b)(7)(e)



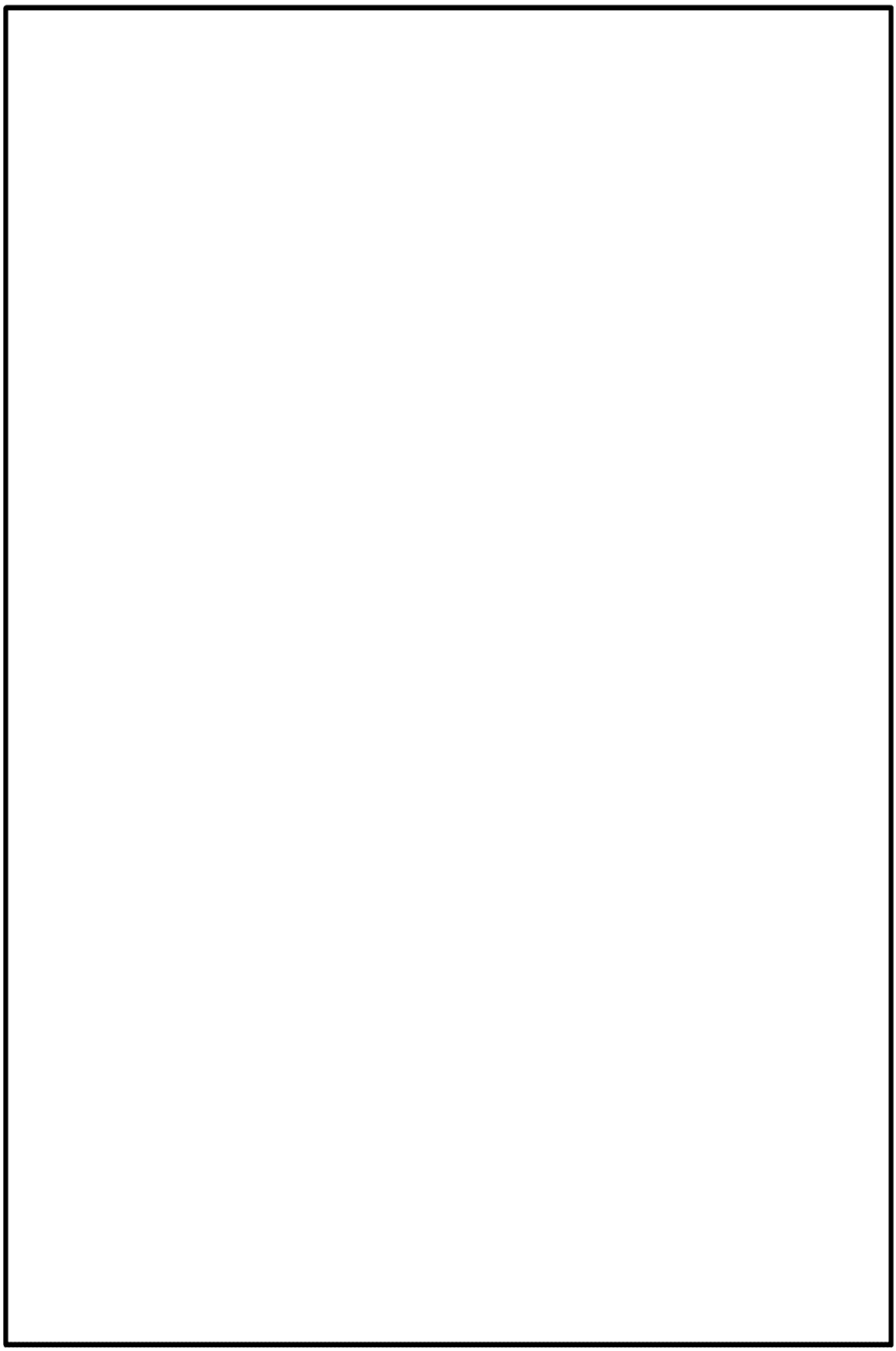
(b)(5)

(b)(7)(e)



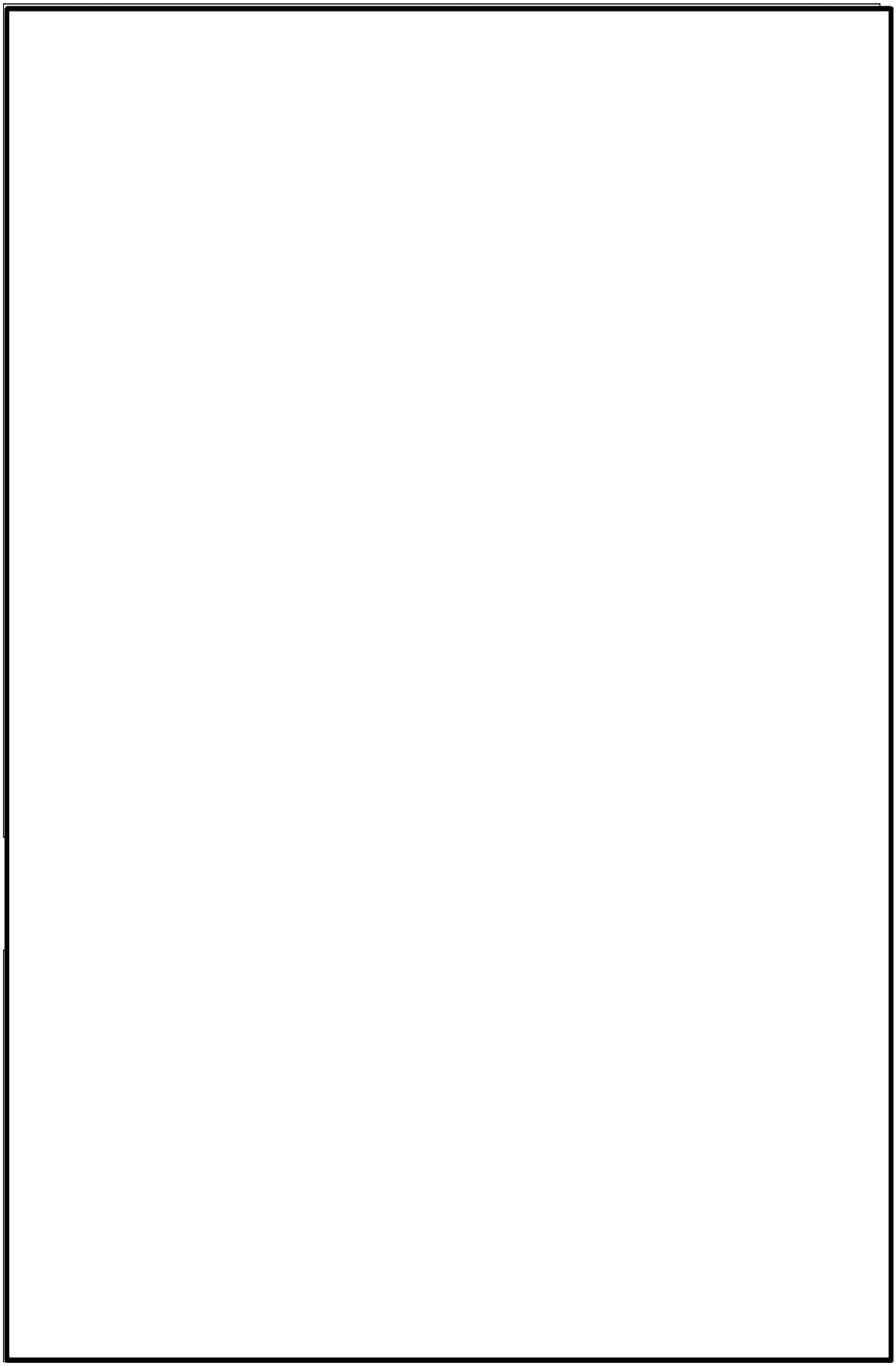
(b)(5)

(b)(7)(e)



(b)(5)

(b)(7)(e)



# OTHER MATERIALS

## 16 RESOURCES

At various points in your interview preparation, red flags may indicate you need to do additional research to make sure you can conduct an informed, thorough interview of a case with potential TRIG or other NS issues. For example, in order to determine if a group is a Tier III organization, you should research the group and assess what kinds of activities it has been involved in. 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 as an NS concern.

### 16.1 USCIS Refugee, Asylum and International Operations Research Unit (Research Unit)

The Research Unit's Country of Origin Information (COI) research documents are a primary source of information for officers at RAIO. Research Unit products include specific COI that could be helpful when adjudicating cases involving national security matters. Research Unit 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 Research Unit (email to RAIOResearch@uscis.dhs.gov) when additional country conditions information is required to reach a decision in a case. Query responses are posted to the RAIO Research Unit ECN page.

### 16.2 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.

FDNS has established a website on the USCIS intranet that includes in the "Department Resources" section links to information on various databases as well as several websites maintained by other organizations. See also RAIO Intro to Fraud materials.

## 16.3 Department of State

The Department of State's Office of Counterterrorism maintains a body of resource information on its website, http://www.state.gov/s/ct/, which addresses issues of terrorism.

Annual Country Reports on Terrorism

The Department of State is required to submit to Congress an annual report on terrorism each year on April 30. The report includes detailed assessments of foreign countries where significant acts of international terrorism have taken place. Also included is information on the activities of those terrorist groups known to be responsible for the kidnapping or death of an American citizen or financed by a state sponsor of terrorism.

The report is typically divided into three main parts: an overview of terrorism in the year covered by the report; a discussion of the activities relating to terrorism (both in support of, and to combat, terrorism) in particular countries arranged by geographical region; and an overview of those countries designated as state sponsors of terrorism. In addition, the report includes a section that provides background information on foreign terrorist organizations designated under INA § 219, and background information on other terrorist groups.

State Sponsors of Terrorism

As an instrument of foreign policy, the President must impose sanctions on those countries designated as state sponsors of terrorism by the Department of State under § 2405(j) of the Appendix to Title 50 of the United States Code.[172] States designated are those that have "repeatedly provided support for acts of international terrorism."[173]

As of the date of this module (November 17, 2015), there are three designated state sponsors of terrorism: Iran, Sudan, and Syria.[174] Cuba, North Korea, and Libya were recently removed from the list. However, North Korea is being closely monitored to consider re-designation as its current activities and political climate is considered.

For each country, the report provides an overview of the manner in which these states have sponsored terrorist activity.

---

[172] 50 App. U.S.C.A 2405 (West 2002)

[173] *Id.*

[174] "Country Reports on Terrorism" Department of State, Bureau of Counterterrorism, 2011*available at* http://www.state.gov/j/ct/rls/crt/2011/index.htm.

## 16.4 Department of the Treasury, Executive Order 13224 – Specially Designated Nationals List

On September 23, 2001, President Bush issued Executive Order 13224, which expands the government's authority to designate individuals or organizations that support financially or otherwise, or associate with, terrorists.[175] The executive order also allows the United States Government to block the designees' assets in any U.S. financial institution or held by any U.S. entity.

The Department of the Treasury Office of Foreign Assets Control maintains on its website a list of individuals and groups designated under this executive order – the Specially Designated Nationals List (SDN). The list includes hundreds of groups, entities, and individuals. A link to the list can be found here (available in pdf, or as listed by program or country), or you can search a specific name or entity under this site: http://sdnsearch.ofac.treas.gov/.

You should check the Department of the Treasury website for the most current version of the list as additional individuals or entities may be designated at any time.

**NOTE:** A designation under this list does not make an organization a designated terrorist organization for immigration purposes under INA § 212(a)(3)(B)(vi)(I)-(II), but it suggests that the organization has engaged in terrorist activity as defined by INA § 212(a)(3)(B)(iv) and therefore may meet the definition of an undesignated terrorist organization under INA § 212(a)(3)(B)(vi)(III).

## 16.5 United Nations – Al-Qaeda Sanctions List[176]

The United Nations Security Council Committee established "the List" in accordance with the UN resolutions 1267 (in 1999) and 1989 (in 2011) that detail individuals, groups, and other entities associated with al Qaeda.

**NOTE:** While many groups on this list may correspond to the Foreign Terrorist Organization (FTO) list ("Tier I") or the Terrorist Exclusion List (TEL) ("Tier II"), a group's being otherwise designated under "the List" does not make the organization a designated terrorist organization for immigration purposes under the INA but may suggest that an organization has engaged in terrorist activity as defined by INA § 212(a)(3)(B)(iv) and therefore may meet the definition of an undesignated terrorist organization under INA § 212(a)(3)(B)(vi)(III), as is true for the SDN noted above.

[175] Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

[176] The United Nations, Security Council Committee, Resolution 1267/1989, Al-Qaeda Sanctions List. http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml.

## 16.6 DHS Intel Fusion

The list of internet links provided by the DHS Office of Operations Intel Fusion website includes links to U.S. Government sites, such as sites for CBP, CIS, and ICE Intelligence, the Central Intelligence Agency, and the Federal Bureau of Investigation, as well as links to international agencies such as Interpol. The main webpage also links to the ICE Forensic Document Laboratory (see below). Under the Reports section on the main page is a link to the Anti-Terrorism site. In it you will find country reports on terrorism, foreign terrorist organizations reports, and other resources that may be valuable for TRIG research. To obtain access to this site, set up your account by following the directions on the sign-in webpage at https://intel.ice.dhs.gov/. You will need a TECS account to access the website.

## 16.7 Homeland Security Investigations Forensic Laboratory (HSIFL)

The mission of the HSIFL is to provide a wide variety of forensic document analysis and law enforcement support services for DHS.[177]

The HSIFL Forensic Section conducts scientific examinations of documentary evidence and its representatives testify to their findings as expert witnesses in judicial proceedings. On a case-by-case basis, forensic examinations are conducted for other Federal, State, and local law enforcement agencies.

The HSIFL maintains a site within the DHS Intel Fusion website noted above. Under the "Alerts" section of the site, the HSIFL posts documents alerting officers to specific trends in the use of fraudulent documents including exemplars to assist in determining the authenticity of documents received in the adjudication process.

## 16.8 Liaison with Other DHS Entities

The adjudication of cases involving national security involves a number of parties outside of RAIO. Other entities within USCIS and DHS provide legal guidance and investigative support for these cases. Much of this interaction occurs at the headquarters level, though local offices also engage their ICE counterparts to coordinate action on cases as needed.

[177] Mission Statement, Homeland Security Investigations Forensic Laboratory, ICE Office of Intelligence, *available at* http://www.ice.gov/hsi-fl/.

### 16.8.1 USCIS Fraud Detection and National Security Directorate (FDNS)

The USCIS Fraud Detection and National Security Directorate coordinates the sharing of information and development of policy on the national level regarding fraud and national security. FDNS-IOs assist in the field with internal and external vetting; FDNS HQ is responsible for vetting certain kinds of NS concerns.

## 16.9 Other Internet Resources

In addition to accessing resources and websites through the U.S. Government sites listed above, other public internet sites provide excellent background information on national security matters.

### 16.9.1 IHS Jane's: Defense & Security Intelligence & Analysis

Through the DHS Library (select "Jane's" from the right-hand column section titled "Resources A-Z"), you have access to two Jane's Defense & Security Intelligence & Analysis (Jane's Intelligence) databases: the "Military and Security Assessments Intelligence Centre" and the "Terrorism and Insurgency Centre."

**NOTE:** These accounts are only available by clicking from the DHS intranet. Otherwise, if you find the site from a separate link, you will only have public (limited) access to these sites.

The Security Assessments database brings together news and country conditions relating to the country's military capabilities to respond to threats. Also included are reports detailing the country's infrastructure and economy.

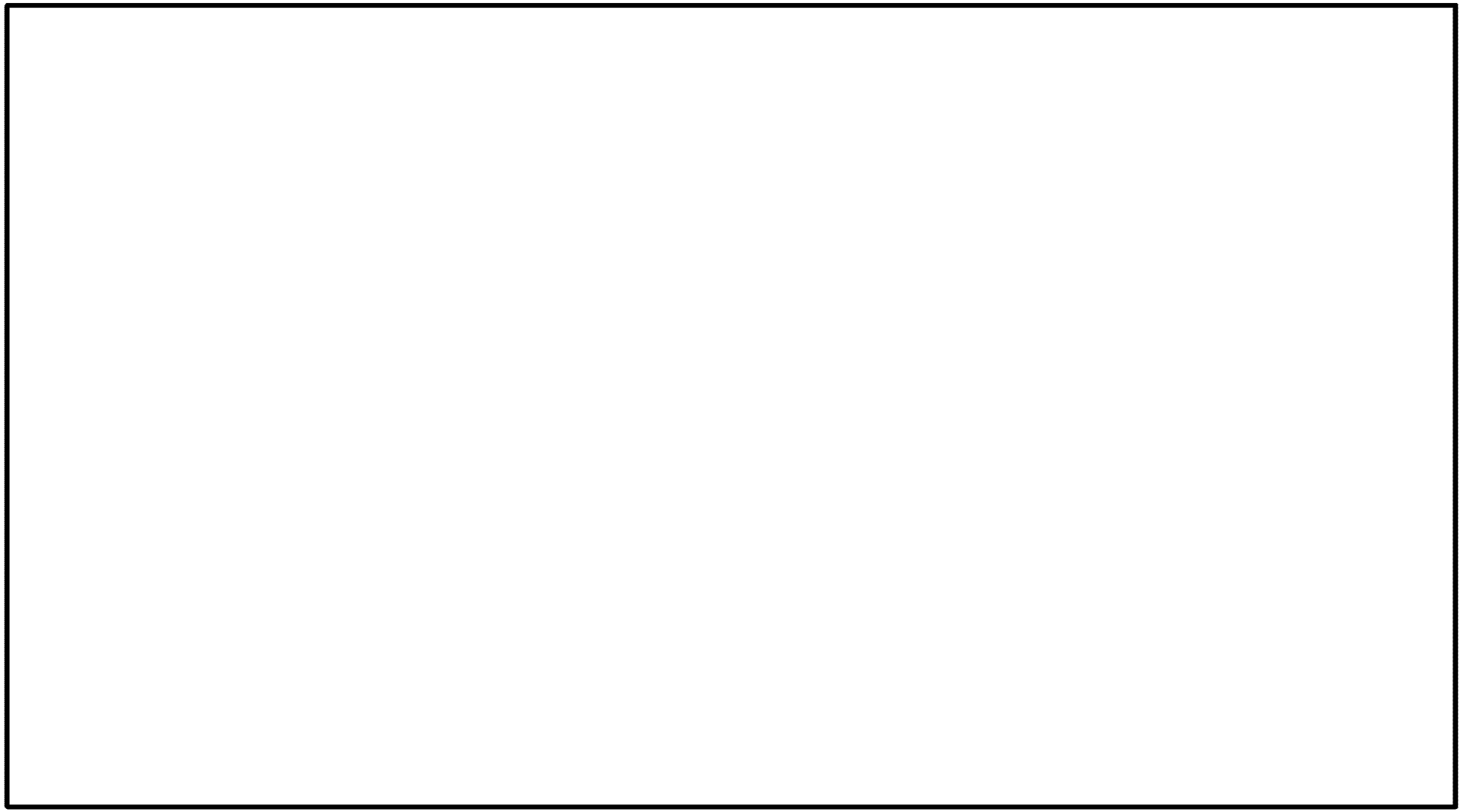
The Terrorism and Insurgency database contains material regarding terrorist activities within a country and analysis of threats to national or regional security.

Both databases will help you make informed determinations as to whether the applicant may be subject to a terrorism-related inadmissibility ground.

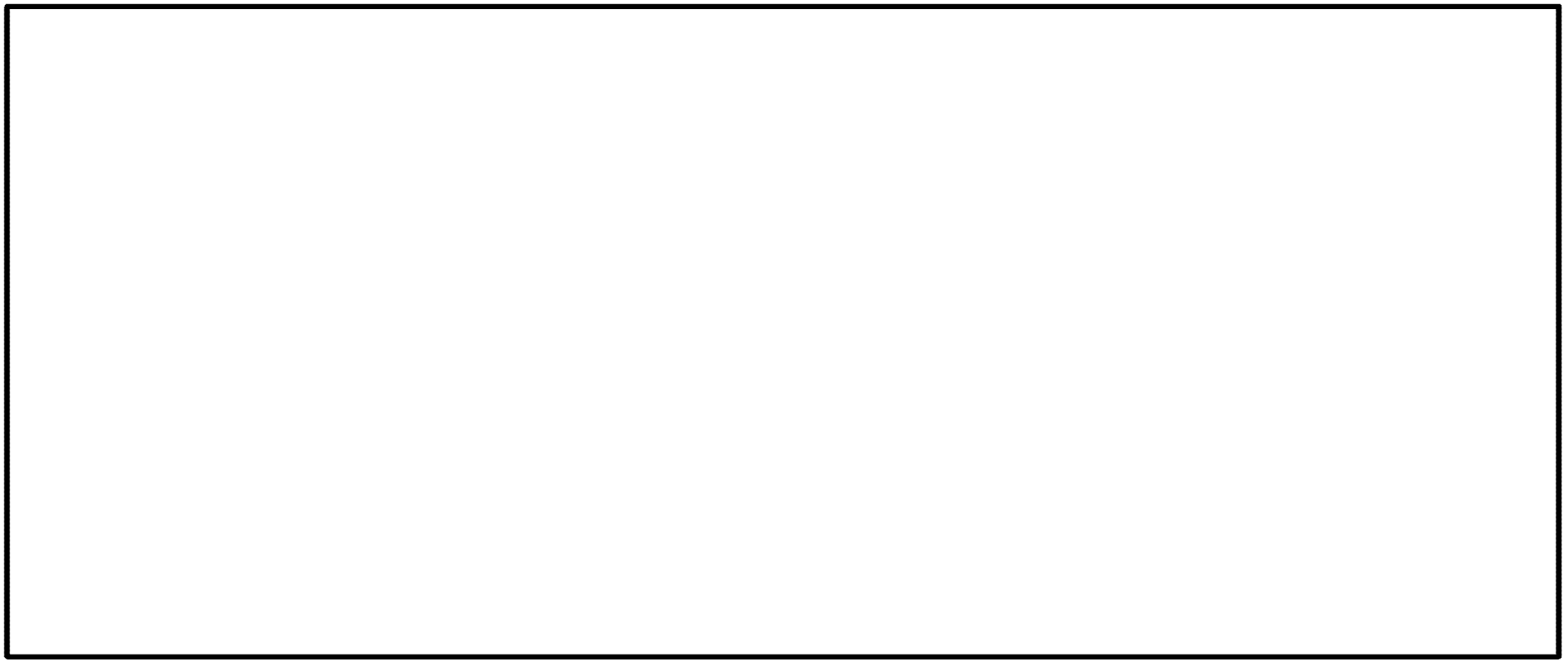
### 16.9.2 Dudley Knox Library of the Naval Postgraduate School

The internet site of the Dudley Knox Library of the Naval Postgraduate School in Monterey, California provides links to internet resource materials organized by topic. The website for the Dudley Knox Library can be accessed at: http://www.nps.edu/Library/Research/SubjectGuides/index.html. Under "Subject Guides," click "Terrorism" under Special Topics and a list of resources are provided – e.g., links to bibliographies on terrorist issues, reports, documents and articles; and government and other NGO websites.

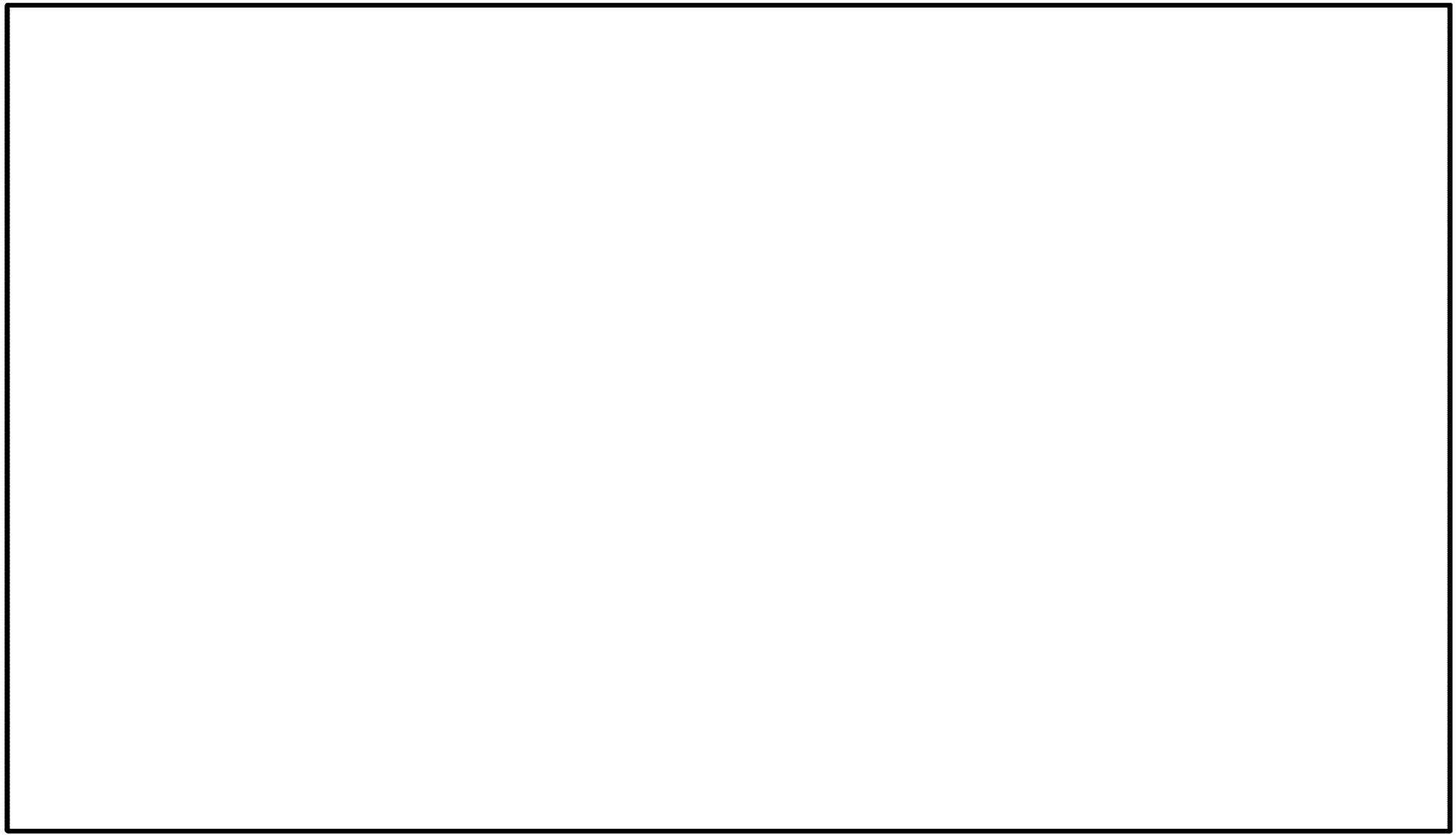
## 16.10 TRIG Exemption Matrices



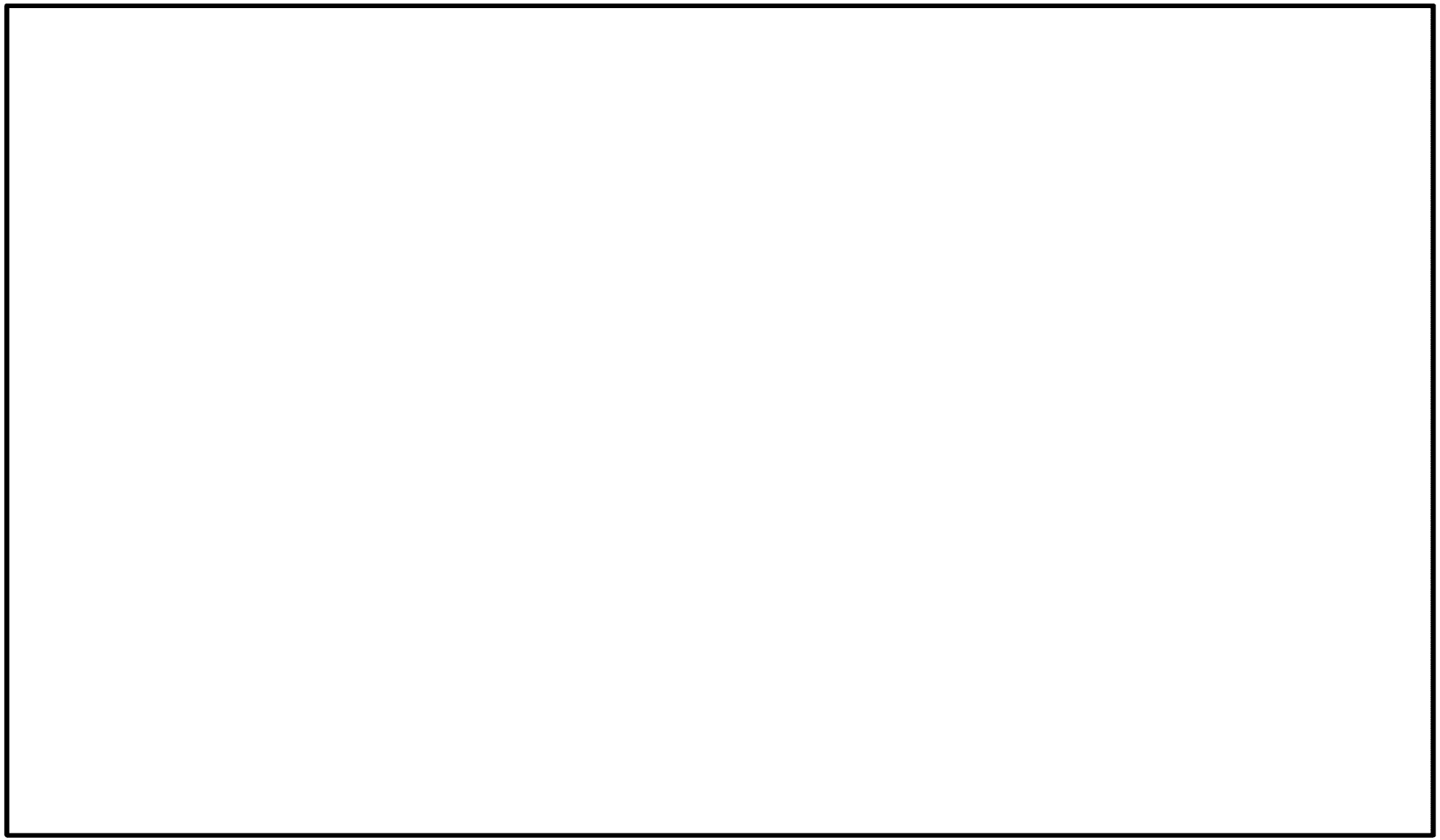
(b)(7)(e)



(b)(7)(e)



(b)(7)(e)



(b)(7)(e)

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

## REQUIRED READING

1. "Processing of Refugee Cases with National Security Concerns" Memo, Barbara Strack (Chief, RAD) and Joanna Ruppel (Chief, IO) (November 19, 2008).

2. "Operational Guidance for Vetting and Adjudicating Refugee Cases with National Security Concerns" Issued along with Attachment – "Refugee Adjudication Standard Operating Procedure: Cases Involving National Security Concerns" Memo and Operational Guidance, Barbara Strack, Chief of Refugee Affairs Division (May 14, 2008).

3. Summary of Terrorism-Related Inadmissibility Provisions

4. CAA Group Exemptions Chart

## ADDITIONAL RESOURCES

1. USCIS Connect, RAD page (contains links to guidance and memos on TRIG, TRIGFAQs and CARRP).

## SUPPLEMENTS

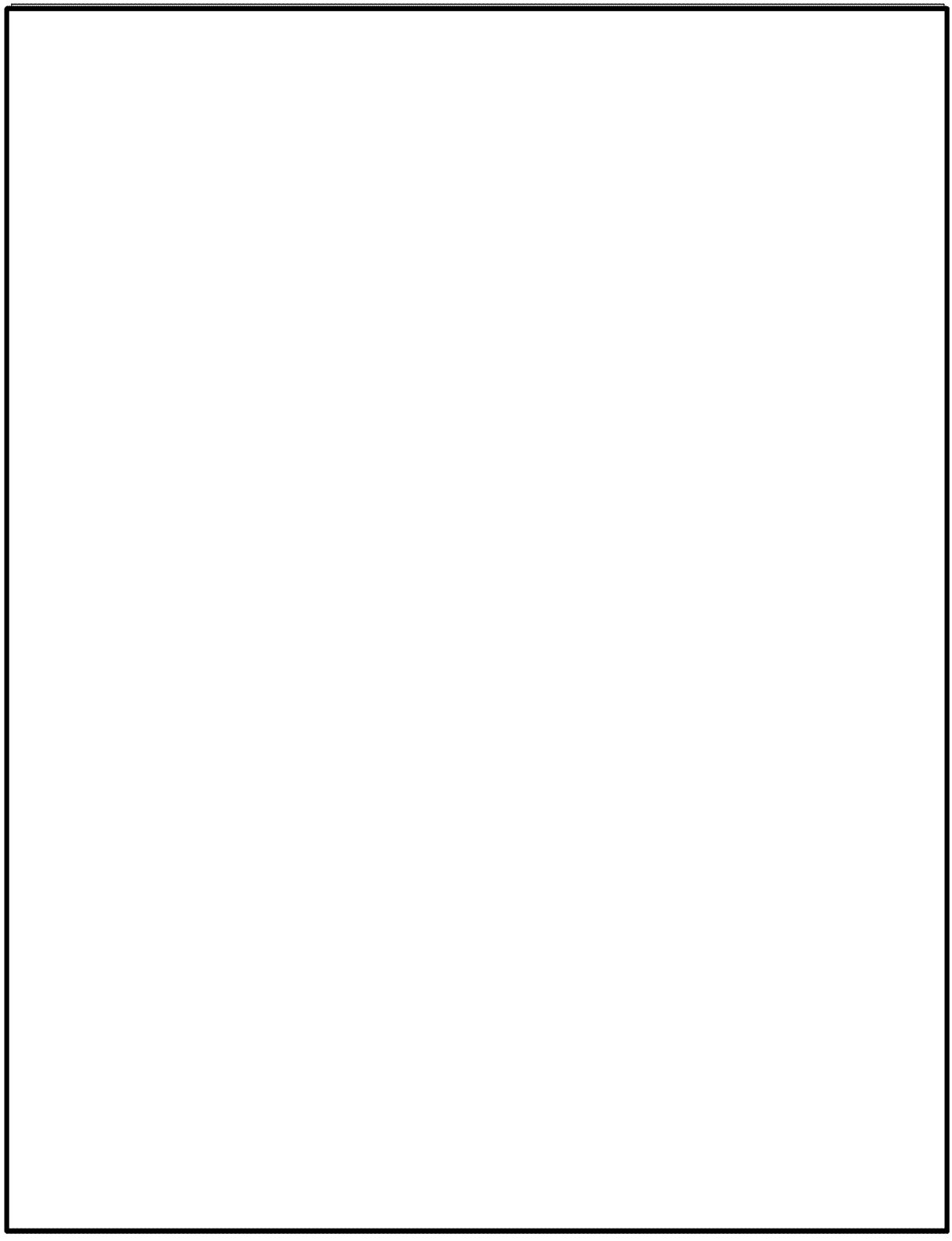
**RAD Supplement – 1**

**12.1 Burden and Standard of Proof for TRIG Inadmissibility Grounds**

If the evidence indicates that the applicant may be inadmissible to the United States pursuant to INA § 212(a), then the applicant must establish clearly and beyond doubt that the disqualifying issue does not apply in order to be eligible for resettlement in the U.S. as a refugee pursuant to INA § 207(c).[178]

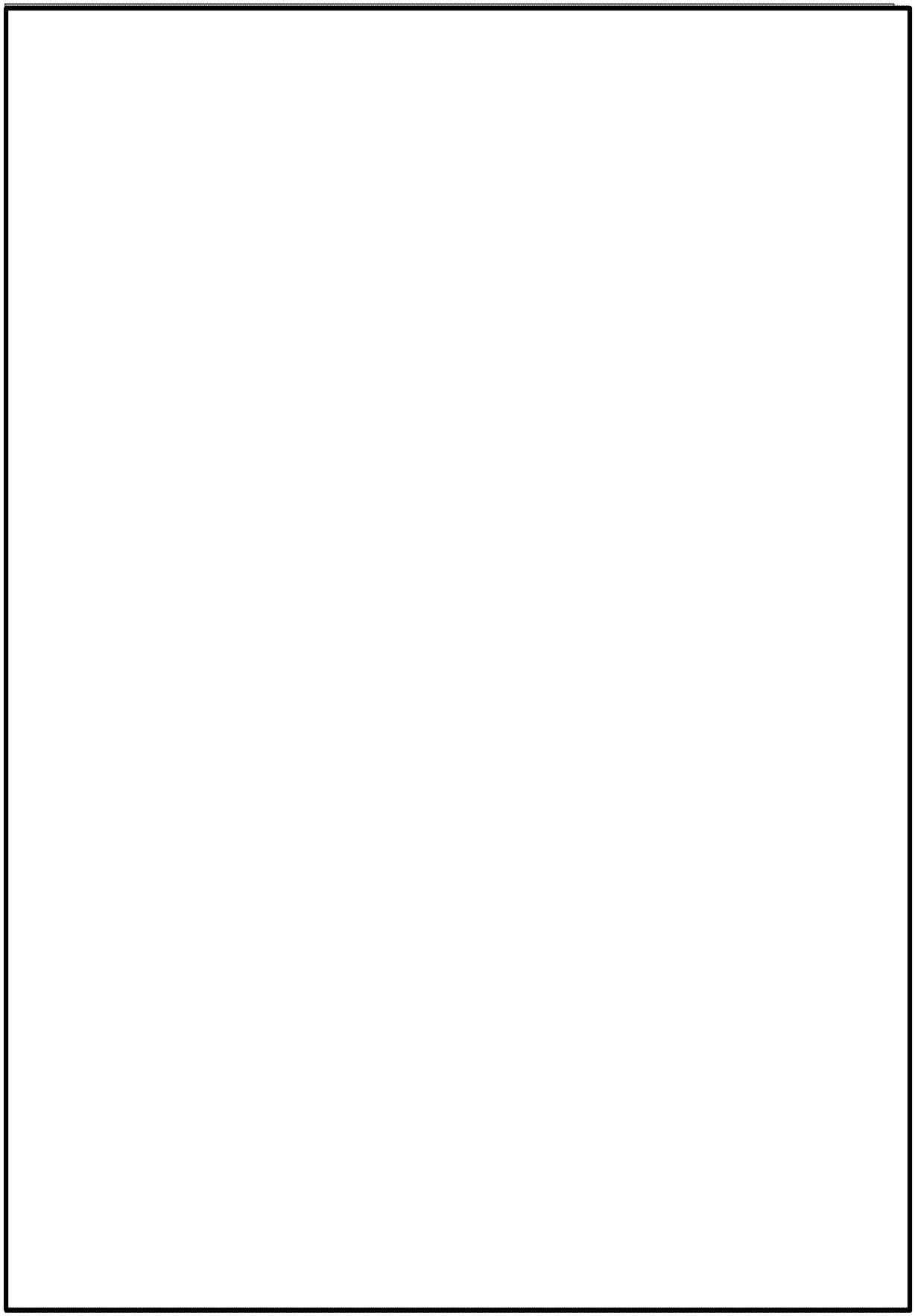
[178] INA § 235(b)(2)(A).

(b)(7)(e)

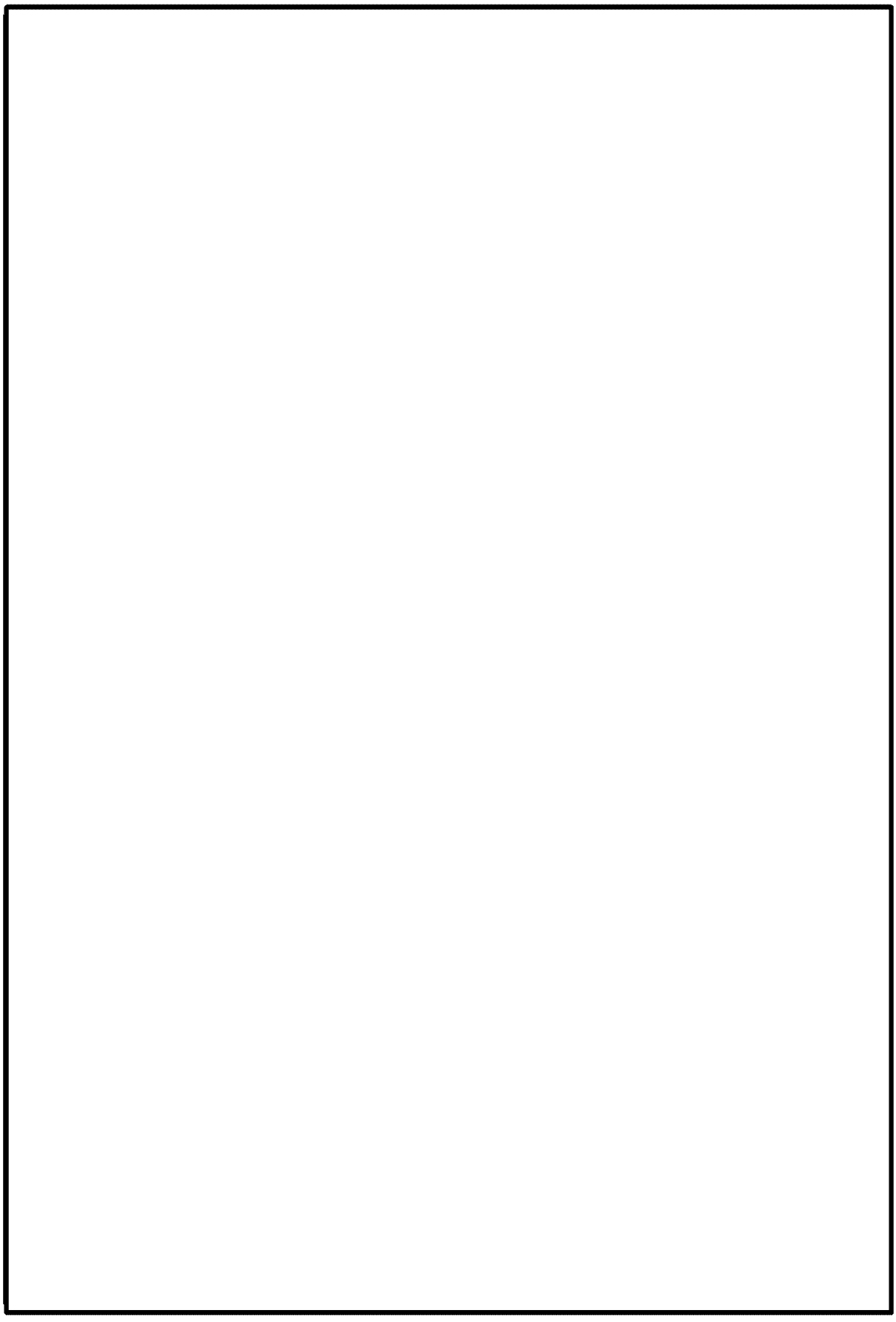


[179] See Refugee Adjudication Standard Operating Procedures: Cases Involving National Security Concerns, (May 14, 2008) for a full discussion of national security policy and procedures.

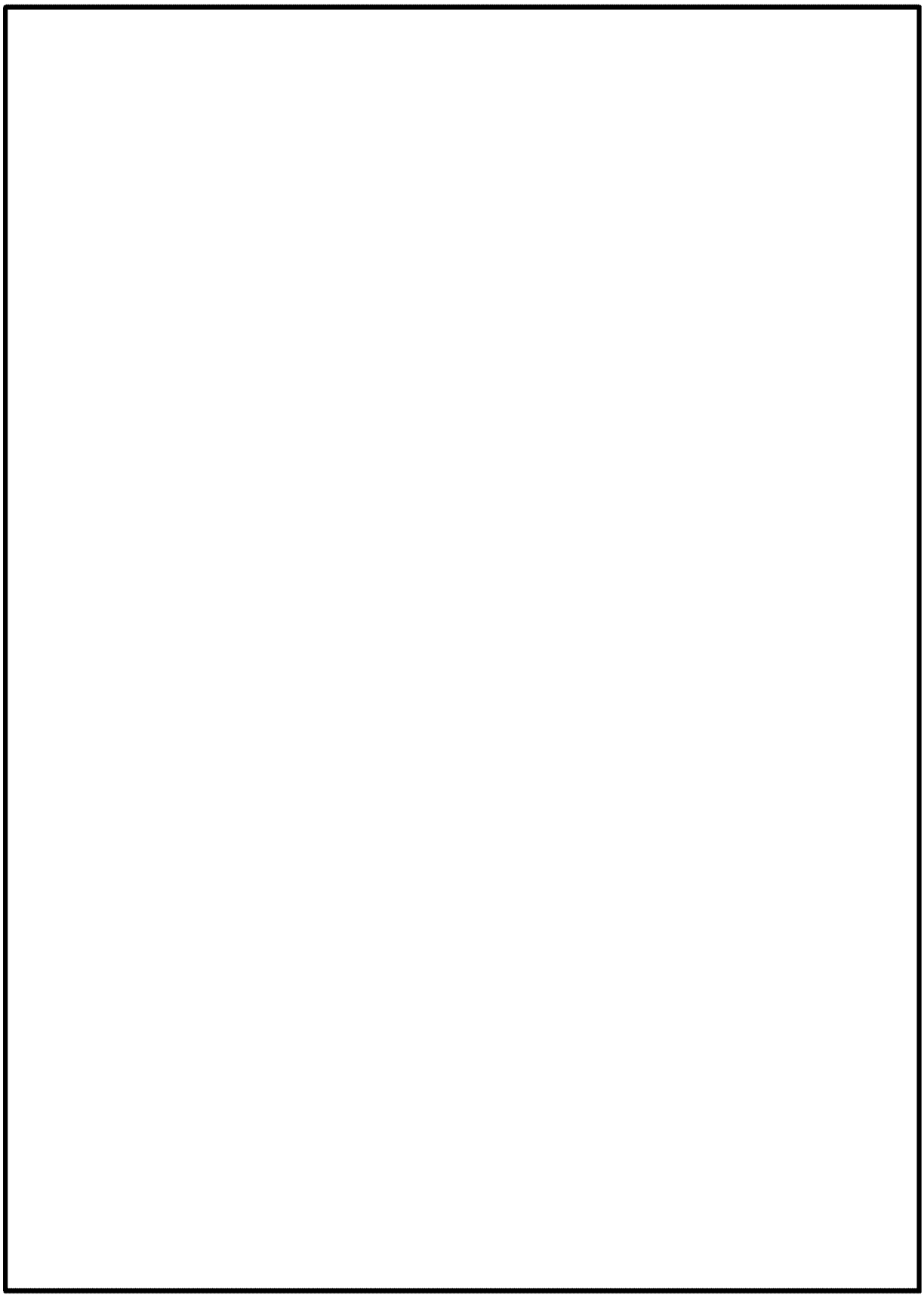
(b)(7)(e)



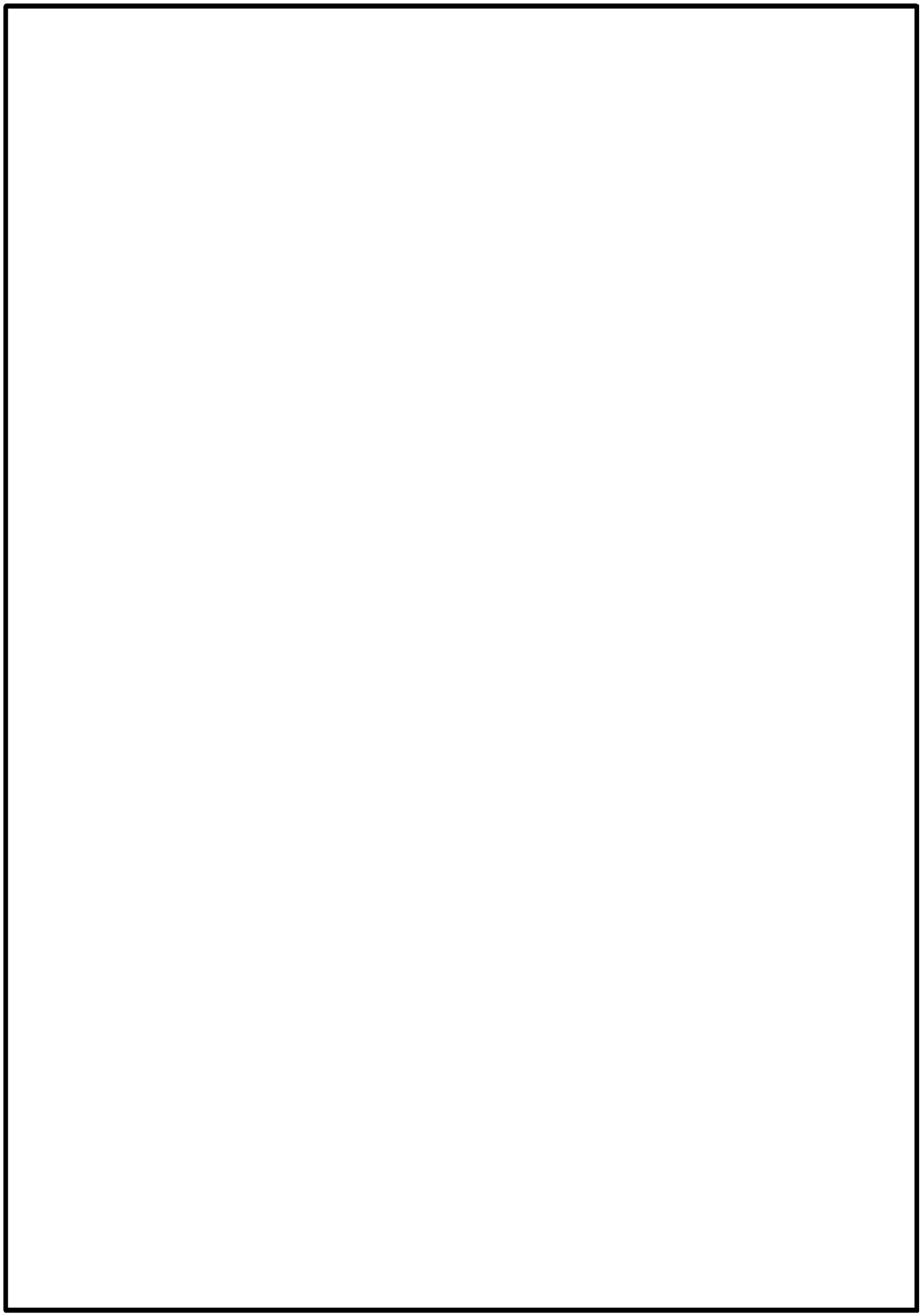
(b)(7)(e)



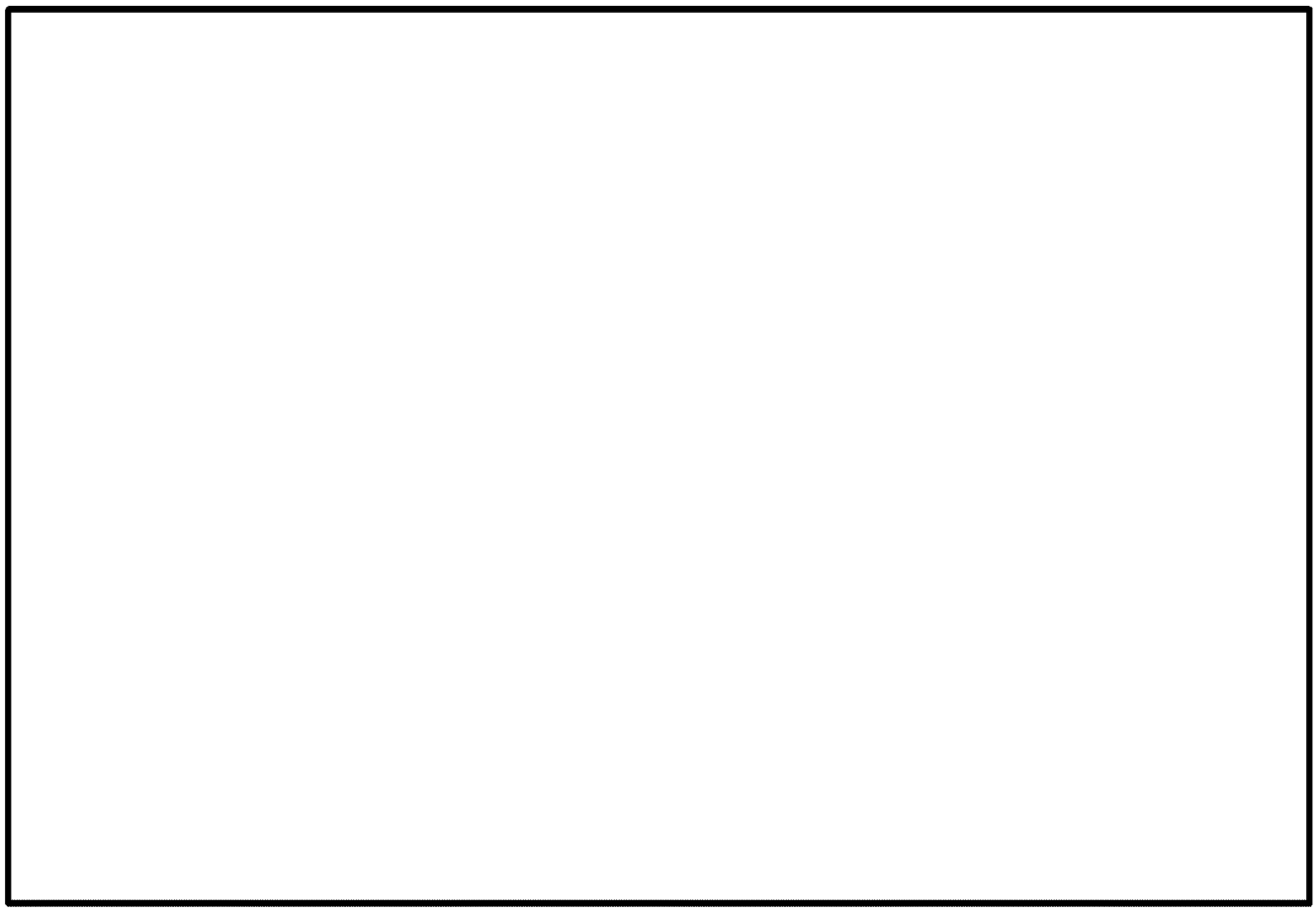
(b)(7)(e)



(b)(7)(e)



(b)(7)(e)



[180] "Processing of Refugee Cases with National Security Concerns," (November 19, 2008). Note, RAD/HQ may discretionarily deny cases with national security concerns.

## SUPPLEMENT B – ASYLUM DIVISION

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

## REQUIRED READING

1. "Updated Instructions for Handling TECS B10 Hits," Ted H. Kim, Acting Chief, Asylum Division (June 19, 2012).
2. Asylum Division Identity and Security Checks Procedures Manual (ISCPM), especially Section VIII of the ISCPM regarding Cases Involving Terrorism or Threats to National Security.
3. Asylum Division Affirmative Asylum Procedures Manual (AAPM).
4. "Issuance of Revised Section of the Identity and Security Checks Procedures Manual Regarding Vetting and Adjudicating Cases with National Security Concerns" (ISCPM), Joseph Langlois, Chief, Asylum Division (May 14, 2008).

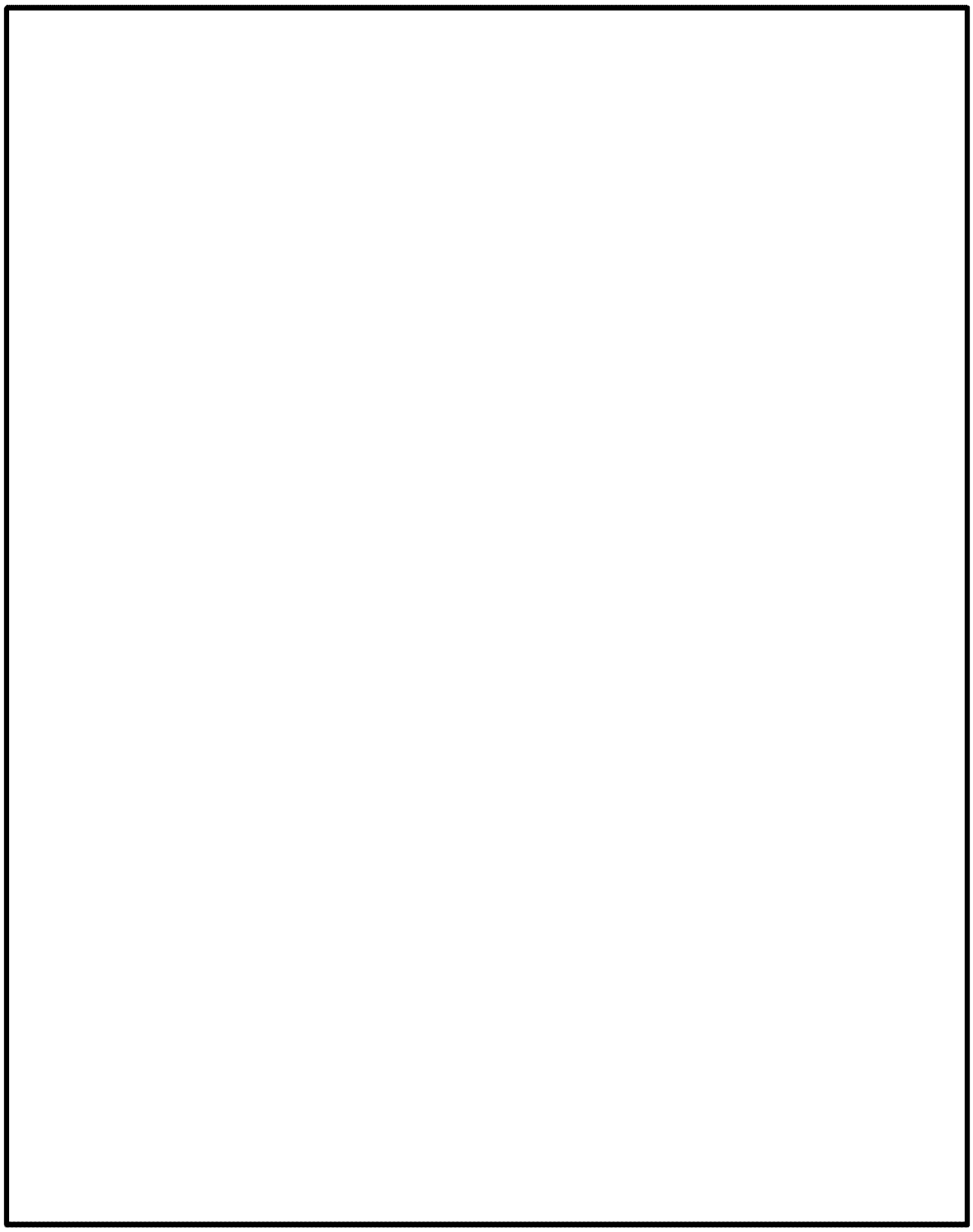
## ADDITIONAL RESOURCES

1. ECN Overview for ASM Training.
2. *Matter of A-H-*, 23 I&N Dec. 774 (AG 2005)
3. *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004)
4. *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003)

## SUPPLEMENTS

(b)(7)(e)

(b)(7)(e)



[181] 8 C.F.R. § 208.14(b); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996); *Matter of A-H-*, 23 I&N Dec. 774, 780 (AG 2005); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir. 2004).

[182] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996).

[183] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

(b)(7)(e)

[redacted]

For further explanation and requirements, see RAIO Module, *Interviewing - Note-Taking*, including the Asylum Supplement and see the Affirmative Asylum Procedures Manual (AAPM).

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

## REQUIRED READING

1. "Guidance for International Operations Division on the Vetting, Deconfliction, and Adjudication of Cases with National Security Concerns" Memo, Alanna Ow, Acting Director of International Operations (April 28, 2008).

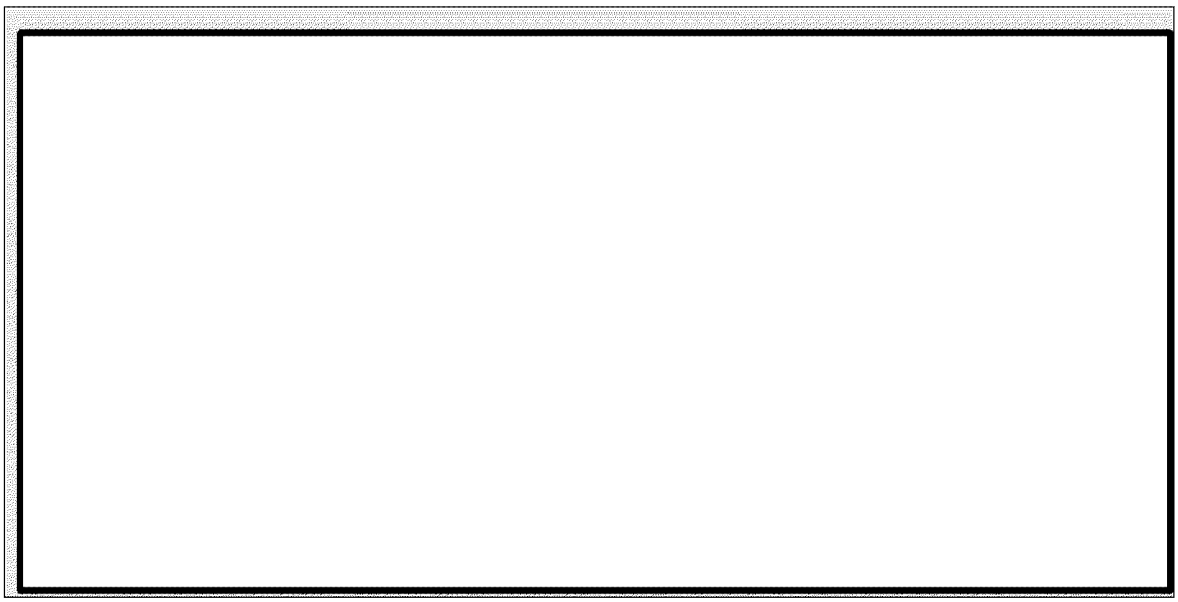
2. "Processing of Refugee Cases with National Security Concerns" Memo, Barbara Strack (Chief, RAD) and Joanna Ruppel (Chief, IO) (November 19, 2008).

## ADDITIONAL RESOURCES

1. "Updated Background Identity and Security Check Requirements for Refugee/Asylee Following-to Join Processing" Memo Joanna Ruppel, Chief, International Operations (March 29, 2011).

## SUPPLEMENTS

(b)(7)(e)



U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

*RAIO Combined Training Course*

# NEXUS –

# PARTICULAR SOCIAL GROUP

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# NEXUS – PARTICULAR SOCIAL GROUP

Training Module

## MODULE DESCRIPTION:

This module discusses membership in a particular social group (PSG), one of the protected grounds in the refugee definition codified in the Immigration and Nationality Act. The discussion describes membership in a particular social group (PSG) and examines its interpretation in administrative and judicial case law. The primary focus of this module is the determination as to whether an applicant has established that past harm suffered or future harm feared is on account of membership in a particular social group.

## TERMINAL PERFORMANCE OBJECTIVE(S)

Given a request to adjudicate either a request for asylum or a request for refugee status, the officer will be able to apply the law (statutes, regulations and case law) to determine whether an applicant is eligible for the requested relief.

## ENABLING PERFORMANCE OBJECTIVES

1. Explain factors to consider in determining whether persecution or feared persecution is on account of membership in a particular social group.

## INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Practical Exercises

## METHOD(S) OF EVALUATION

## REQUIRED READING

1. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).
2. *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).
3. *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014)

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

1. *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).
2. *Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 1985)
3. Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).
4. United Nations High Commissioner for Refugees, *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.* HCR/GIP/02/02, 7 May 2002, 5 pp.
5. Phyllis Coven. INS Office of International Affairs. *Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Gender Guidelines)*, Memorandum to all INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p. *See also* RAIO Training Module, Gender-Related Claims.
6. Rosemary Melville. INS Office of International Affairs. *Follow Up on Gender Guidelines Training*, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 7 July 1995), 8 p.
7. Paul W. Virtue. INS Office of General Counsel. *Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA*, Memorandum to Kathleen Thompson, INS Office of International Affairs (Washington, DC: 9 December 1993), 7 p.

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

| Task/ Skill # | Task Description |
|---|---|
| ILR6 | Knowledge of U.S. case law that impacts RAIO (3) |
| ILR9 | Knowledge of policies and procedures for processing lesbian, gay, bisexual and transgender (LGBT) claims (3) |
| ILR10 | Knowledge of policies and procedures for processing gender-related claims (3) |
| ILR14 | Knowledge of nexus to a protected characteristic (4) |
| ILR15 | Knowledge of the elements of each protected characteristic (4) |
| DM2 | Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence) (5) |
| RI1 | Skill in identifying issues of claim (4) |
| RI2 | Skill in identifying the information required to establish eligibility (4) |

SCHEDULE OF REVISIONS

| Date | Section (Number and Name) | Brief Description of Changes | Made By |
|---|---|---|---|
| **11/06/2013** | **Summary (of 4/30/2013 edition)** | **Revised last sentence of paragraph 1 of Summary and corrected corresponding footnote # 114; added an additional sentence as clarification.** | **J.Kochman** |
| **2/4/2014** | **Additional Resources** | **Removed Dea Carpenter memo (not yet accepted)** | **L. Gollub (incorporated by V. Conley and Joyce)** |
| **7/27/15** | **Throughout LP** | **Substantial revision of LP for updated case law and new guidance:** | **ASM QA, ASM Training, RAD TAQA, RAIO Training** |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

Table of Contents

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

## 1. INTRODUCTION

The refugee definition at INA §101(a)(42) states that an individual is a refugee if he or she establishes past persecution or a well-founded fear of future persecution on account of one or more of the five protected grounds. All of the elements of the refugee definition are reviewed in the RAIO Training Module, *Refugee Definition.* The requirements for an applicant to establish eligibility based on past persecution are discussed in the module, *Persecution.* The elements necessary to establish a well-founded fear of future persecution are discussed in the module, *Well-Founded Fear.* The analysis of the persecutor's motive and the requirements needed to establish that persecution or feared persecution is "on account of" race, religion, nationality, or political opinion are discussed in the module, *Nexus and the Protected Grounds* (minus PSG).

This module provides you with an understanding of the requirements needed to establish whether persecution or feared persecution is "on account of" membership in a particular social group (PSG).

The nexus analysis for particular social group claims is fundamentally the same as it is for cases involving the other protected characteristics; you must determine:

1. whether the applicant possesses or is perceived to possess a protected characteristic;

   and

2. whether the persecution or feared persecution is on account of that protected characteristic.

## 2. DOES THE APPLICANT POSSESS A PROTECTED CHARACTERISTIC?

The first question is the starting point for all protected grounds – whether the applicant possesses, or is perceived to possess, a protected characteristic: membership in a particular social group. Membership in a particular social group may overlap with other protected grounds, such as political opinion, and you should also consider whether the applicant can establish eligibility based on a different protected ground.

For cases based on membership in a particular social group, the analysis is expanded, requiring you to identify the characteristics that form the particular social group and explain why persons with those characteristics form a particular social group within the meaning of the refugee definition.

Determining whether a specific group constitutes a particular social group can be a complicated task. Recognizing this complexity, the Board of Immigration Appeals has set forth a three-part test for evaluating whether a group meets the definition of a particular social group.[1] While looking to precedential decisions from the Board and the circuit courts of appeals may help inform your decision, you must apply the analysis discussed below to the facts of each individual case.

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

An applicant who is seeking asylum based on membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity.[2] All three elements must be established.

It is important to remember that membership in a particular social group may be imputed to an applicant who is not, in fact, a member of a particular social group.

### Step One: Common Immutable Characteristic

The group must comprise individuals who share a common, immutable characteristic, meaning it is one that the members of the group either cannot change, or should not be required to change because it is fundamental to each member's identity or conscience.[3] The defining characteristic can be a shared innate characteristic, a shared past experience, or a social or other status.[4]

#### *Unchangeable Characteristics*

[1] *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014).

[2] *Matter of M-E-V-G-*, 26 I&N Dec. at 237; *Matter of W-G-R-*, 26 I&N Dec. at 212-218; *see also Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014)(applying to a domestic violence scenario the three-part test put forth in *Matter of M-E-V-G-* and *Matter of W-G-R-*.)

[3] *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

[4] *Id.* at 233-34; *W-G-R-*, 26 I&N Dec. at 212-13; *A-R-C-G-*, 26 I&N Dec. at 392-393.

Unchangeable characteristics are traits that cannot be changed. Some examples of characteristics that cannot be changed include innate ones, like gender, race, ethnicity, skin color, and family relationships.[5] Some of these characteristics are biological traits of a person. Others might be shared past experiences that cannot be changed because a person is unable to change the past.

### *Fundamental Characteristics*

Fundamental characteristics are traits, beliefs, or statuses that a person should not be required to change because they are essential to the individual's identity or conscience. In analyzing this type of claim, you should consider both how the applicant experiences the trait as part of his or her identity and whether the trait is fundamental from an objective point of view. With regard to the latter, you may consider whether human rights norms suggest the characteristic is fundamental. An example of a shared trait that is fundamental to an individual's identity or conscience is having intact genitalia in the female genital mutilation (FGM) context. In contrast, even though an applicant may consider being a member of a terrorist or criminal organization as being fundamental to his or her identity or conscience, there is no basic human right to pursue such an association, and it would not be considered fundamental from an objective point of view.[6]

In *Matter of Acosta*, 19 I&N Dec. 211, 234 (BIA 1988), the Board explained that the unchangeable characteristic or fundamental characteristic is part of the definition of a particular social group because each of the other four protected grounds describe persecution aimed at an immutable characteristic.[7] Therefore, the Board interpreted the term "particular social group" consistently with the other grounds of persecution in the INA, explaining that "the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution."[8]

### *Assumption of Risk Considerations*

In some cases, the applicant's voluntary assumption of an extraordinary risk of serious harm in taking on the trait that defines the group may be evidence of fundamentality.[9] An applicant's decision to assume significant risks can, in some cases, provide evidence that the belief or trait is fundamental to the applicant's identity or conscience.[10] The relevance

---

[5] *See Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993); *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996).

[6] *See Arteaga v. Mukasey*, 511 F.3d 940, 946 (9th Cir. 2007) (the court noted, "we would be hard-pressed to agree with the suggestion that one who voluntarily associates with a vicious street gang that participates in violent criminal activity does so for reasons so fundamental to 'human dignity' that he should not be forced to forsake the association").

[7] *Matter of Acosta*, 19 I&N Dec. at 233-34.

[8] *Id.*

[9] *See* Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[10] *Id.* at 3.

of an applicant's voluntary assumption of risk must be considered on a case-by-case basis. Not all individuals assume the risk of a particular activity because the activity is fundamental to their identity.[11] For example, an individual may assume the risk of a particular activity for monetary gain, and in such a case that assumption of risk may undercut fundamentality.[12]

**Step Two: Social Distinction**

A group's shared characteristic must be perceived as distinct by the relevant society.[13] This element has sometimes been referred to as "social visibility." However, in its rulings 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), the Board renamed "social visibility" as "social distinction" to avoid confusion.[14] The Board emphasized that "social distinction" does not require the shared characteristic to be seen by society (i.e., visible); instead the group characteristic must be perceived as distinct by society.[15] There must be evidence indicating "that a society in general perceives, considers, or recognizes persons" as a group.[16] This requirement can be met by showing that the society in question sets apart or differentiates between people who possess the shared belief or trait and people who do not, even if individual group members are not visibly recognized as group members. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.[17] The Board's interpretation of "social distinction" is consistent with USCIS's longstanding interpretation of the term.[18]

In some circumstances, members of a group may be visibly recognizable, but society may also consider persons to be a group without being able to identify the members by sight. Board cases have recognized groups that were not ocularly visible. For instance, in *Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996), the Board determined that young women from a certain ethnic group in Togo who have not been previously subjected to FGM but are opposed to it constitute a particular social group. In *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) the Board held that "homosexuals" in Cuba were a particular social group. In *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988), the Board concluded that former national police members could be

[11] Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[12] *Id.*

[13] *Matter of W-G-R-*, 26 I&N Dec. at 216.

[14] *Matter of M-E-V-G-*, 26 I&N Dec. at 240; *W-G-R-*, 26 I&N Dec. at 216.

[15] *M-E-V-G-*, 26 I&N Dec. at 240; *W-G-R-*, 26 I&N Dec. at 216.

[16] *W-G-R-*, 26 I&N Dec. at 217.

[17] *M-E-V-G-*, 26 I&N Dec. at 238.

[18] *See, e.g.*, Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

a particular social group in some circumstances. These cases illustrate the point that ocular visibility is not required. In such cases, it may not be easy or possible to identify who has not been subjected to or is opposed to FGM, who is gay, or who is a former member of the national police.[19]

### *Social distinction must be evaluated on a case-by-case basis and society-by-society basis*

As previously noted, for social distinction, there must be evidence showing that society in general perceives or considers people who share a particular characteristic as distinct.[20] Evidence such as country conditions, witness testimony, and press accounts may establish that a group is distinct.[21] The Board has emphasized that the social distinction determination must be made on a case-by-case basis.[22] Laws, policies, or cultural practices of a society, as well as governmental or non-governmental programs targeting certain groups, may also establish social distinction. For instance, in evaluating whether Guatemalan widows are socially distinct, you could research whether the Guatemalan government has laws and policies addressing the needs of widows, and whether NGOs have assistance programs helping widows. In *Matter of A-R-C-G-*, the Board explained that evidence that a certain group is protected within a society could establish social distinction.[23] The Board and the courts have not limited the types of society-specific evidence upon which you can rely. In another context, a society might have songs or poetry about witnesses who testify in court against members of criminal groups, and this could serve as some evidence that such witnesses might be distinct in that society. The individual group member's treatment may be relevant to whether such a group is socially distinct. The relevant society may include the entire country or a particular region or community within the country. Accordingly, you should consider all evidence before you to determine whether or not the proposed group is socially distinct.

Examining the Board's holdings in *M-E-V-G-*and *W-G-R-*, the Ninth Circuit also has emphasized that the analysis must be case-specific and society-specific.[24] The Ninth Circuit noted that "[i]t is an error…to assume that if a social group related to the same international gang…has been found non-cognizable in one society, it will not be cognizable in any society. Honduras, El Salvador, Guatemala, Nicaragua, and Panama have used different strategies for combating gang violence…[and] these different local responses to gangs in nations with distinct histories…may well result in a different social

[19] *M-E-V-G-*, 26 I&N Dec. at 240.

[20] *W-G-R-*, 26 I&N Dec. at 217 (BIA 2014).

[21] *M-E-V-G-*, 26 I&N Dec. at 244 (BIA 2014); *see also Matter of A-R-C-G-*, 26 I&N Dec. 388, 394 (BIA 2014) (discussing the types of evidence that may show social distinction in domestic violence-related particular social groups, including evidence that the society recognizes the need to offer protection to victims of domestic violence and other sociopolitical factors).

[22] *M-E-V-G-*, 26 I&N Dec. at 242.

[23] *A-R-C-G-*, 26 I&N Dec. at 394.

[24] *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014).

recognition of social groups opposed to gang violence…." The Ninth Circuit concluded that "the agency must make a case-by-case determination as to whether the group is recognized by the particular society in question . . . [and] may not reject a group solely because it had previously found a similar group in a different society to lack social distinction."[25] The Second Circuit also has examined the Board's holdings in *M-E-V-G-* and *W-G-R-* and remanded a case for the Board to conduct additional case-specific analysis.[26]

This case-specific approach is not new. In *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007), the Board indicated that determining whether a group has a socially distinct shared characteristic must be "considered in the context of the country of concern and the persecution feared."[27] In *A-M-E- & J-G-U-*, the Board reviewed country conditions to evaluate whether, in context, the proposed particular social group members shared socially distinct characteristics. The Board found that the applicants did not establish the existence of a particular social group because the proposed particular social group – "affluent Guatemalans" – did not share a common trait that was socially distinct in Guatemalan society.[28] In that case, the country of origin information before the Board demonstrated that "affluent Guatemalans" were not at greater risk of criminality or extortion than the general population. Instead the country of origin information demonstrated that criminality is pervasive in all Guatemalan socio-economic groups. The report indicated that impoverished Indians were also subjected to both crimes. For the same reason, the Board also rejected the following possible formulations of the group: "wealth," "upper income level," "socio-economic level," "the monied class," and "the upper class." The Board specifically noted, however, that wealth- or class-based social groups must be analyzed in context, and that, under some circumstances, such groups might qualify as particular social groups.[29] For example, should a government institute a policy of imprisoning and mistreating persons with assets or income above a fixed level, there could be a basis for a societal perception that the class of wealthy persons, as defined by the government, would constitute a particular social group.[30]

Because case-specific analysis is required, it is critical for you to look at all relevant information, including the applicant's individual circumstances, the circumstances surrounding the events of persecution, and country of origin information, before making a

[25] *Id.* at 1084 n.7.

[26] *Paloka v. Holder*, 762 F.3d 191, 198 (2d Cir. 2014) (instructing the Board to determine whether the proposed groups of "young Albanian women" or "young Albanian women between the ages of 15 and 25" qualified as cognizable social group).

[27] *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007); *cf. Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005).

[28] *See also Donchev v. Mukasey*, 553 F.3d 1206, 1218-1219 (9th Cir. 2009) ("friends of Roma individuals or of the Roma people" not a socially distinct group, in part, because country conditions did not show that members of the group, such as the applicant's family members, were viewed or treated by Bulgarian society in a uniform manner).

[29] *A-M-E- & J-G-U-*, 24 I&N Dec. at 75,n.6.

[30] *Id.*; *see also Tapiero de Orejuela*, 423 F.3d at 672 (finding that a particular social group of educated, wealthy, landowning, cattle-farming Colombians, was a cognizable group because the group was not defined merely by wealth).

social distinction determination. Country of origin information indicating that the immutable characteristic reflects societal distinctions is relevant when analyzing whether a group constitutes a particular social group.[31]

***The group does not have to self-identify as a group and members may hide their membership***

It is not necessary for a group to identify itself explicitly as a group in order for the social distinction requirement to be met. In addition, the fact that a member of a particular social group may make efforts to hide his or her membership to avoid persecution does not prevent such a group from constituting a cognizable particular social group.[32] Accordingly, a group may not appear cohesive and may not display the traditional hallmarks of a group that shows its existence openly. If the society in question distinguishes people who possess the immutable trait from others because of their shared belief or characteristic, then the group is socially distinct.[33]

**Step 3: Particularity**

Applicants seeking to establish membership in a particular social group must also establish that the group is defined with sufficient particularity. The particularity requirement relates to the group's boundaries or the need to put outer limits on the definition of a particular social group.[34] The term "particular[ity]" is included in the plain language of "particular" social group and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined.[35] The characteristics defining the group must provide a clear benchmark for determining who falls within the group and who does not.[36] The group must be discrete and have definable boundaries.[37]

The Board has made clear that this particularity inquiry must take into account the perspectives of the society in question.[38] Thus, the Board noted in *W-G-R-* that

[31] *See* Castellano-Chacon v. INS, 341 F.3d 533, 548 (6th Cir. 2003) (noting that a society's reaction to a group may provide evidence that a particular social group exists, so long as the persecutors' reaction to the members of the group is not the central characteristic of the group); *see also* Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) ("A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor – or in the eyes of the outside world in general.").

[32] *Matter of W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014).

[33] *Id.*

[34] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 238 (BIA 2014) (citing *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003)).

[35] *Id.* at 239.

[36] *Id.* (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 76).

[37] *Id.* (citing Ochoa v. Gonzales, 406 F.3d 1166, 1170-71 (9th Cir. 2005)); *see also Matter of A-R-C-G-*, 26 I&N Dec. 388, 393 (BIA 2014) (noting that "married," "women," and "unable to leave the relationship" have commonly accepted definitions within Guatemalan society, and that these terms may be combined to create a group with discrete and definable boundaries).

[38] *W-G-R-*, 26 I&N Dec. at 214.

"landowners" might be able to meet the particularity requirement in an undeveloped, oligarchical society but would be considered too ill-defined in the United States or Canada.[39]

The Board has upheld the principle that "major segments of the population will rarely, if ever, constitute a distinct social group."[40] This principle, however, does not preclude the possibility that a large segment of society could constitute a particular social group in some situations. The "particularity" requirement means that the group must be identifiable and have clearly defined boundaries, and major segments of a society frequently are not sufficiently "particular."

You should avoid an overly broad or overly narrow characterization of a group. Courts have held that a particular social group should not be defined so broadly as to make it difficult to distinguish group members from others in the society in which they live, or so narrowly that what is defined does not constitute a meaningful grouping. [41] Moreover, even when such groups are cognizable, claims based on groups that are defined too broadly or too narrowly may fail the nexus requirement.

It also is important to remember that you should not analyze each characteristic of a group separately and reject one piece at a time. In a case involving a proposed social group of Tanzanians who exhibit erratic behavior and suffer from bipolar disorder, the Fourth Circuit concluded that the Board "erred because it broke down [the petitioner's] group into pieces and rejected each piece, rather than analyzing his group as a whole." [42] The court noted that "erratic behavior," by itself, might lack particularity, but when combined with bipolar disorder, the group would satisfy the particularity requirement.[43] The Fourth Circuit cautioned not to "miss the forest for the trees."[44]

## 2.2 General Principles for Formulating Particular Social Groups

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

[39] *Id.* at 214-15.

[40] *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005) (holding a group of business persons were not particular)).

[41] *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575-1577 (9th Cir. 1986); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003); *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003).

[42] *Temu v. Holder*, 740 F.3d 887, 895 (4th Cir. 2014).

[43] *Id.*

[44] *Id.*

Under general principles of refugee protection, the shared characteristic of terrorist, criminal, or persecutory activity or association, past or present, cannot form the basis of a particular social group.[45]

Three federal courts have found that groups consisting of former gang members may constitute particular social groups in some circumstances. For asylum cases arising within the jurisdiction of the Fourth, Sixth, and Seventh Circuits, former membership in a gang may form a particular social group if the former membership is immutable and the group of former gang members is socially distinct and particular.[46] It is important to note, though, that these court decisions were issued before the BIA's rulings in *M-E-V-G-* and *W-G-R-* and did not analyze whether these groups met the "social distinction" and "particularity" criteria as articulated in those cases. Asylum officers in these circuits must analyze whether proposed groups meet these criteria on a case-by-case basis.[47] *See* Asylum Supplement – Former Gang Membership as a Particular Social Group.

*Current* gang membership, however, may not be the basis for a particular social group even in these circuits. For example, the Fourth Circuit noted:

> We agree that current gang membership does not qualify as an immutable characteristic of a particular social group….It is not the case that current gang members "cannot change" their status as gang members, as they can leave the gang. Nor do we think that they "should not be required to change because [gang membership] is fundamental to their individual identities or consciences." To so hold would "pervert the manifest humanitarian purpose of the statute."[48]

---

[45] Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007). *See, e.g.*, *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) ("Whatever its precise scope, the term 'particular social groups' surely was not intended for the protection of members of the criminal class in this country…."); *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (holding that current or former gang membership does not give rise to a particular social group due to gang members' criminal activities); *Cantarero v. Holder*, 734 F.3d 82, 85-88 (upholding the BIA's conclusion that recognizing former members of a gang as members of a particular social group would undermine the legislative purpose of the INA).

[46] *Urbina-Mejia v. Holder*, 597 F.3d 360, 365–67 (6th Cir.2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of a "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009); *Martinez v. Holder*, 740 F.3d 902, 911-13 (4th Cir. 2014) (holding that the petitioner's membership in a group of former MS-13 members was immutable, and remanding the case to the Board to analyze the other particular social group criteria); *see also* USCIS Asylum Division Memorandum, *Notification of Ramos v. Holder: Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit* (Mar. 2, 2010).

[47] *See also Matter of W-G-R-*, 26 I&N Dec. 208, 220-222 (BIA 2014) (holding that an applicant's proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not sufficiently particular, because it could include people of any age, sex, and background and their participation in the gang could vary widely in terms of strength and duration, or socially distinct, because there was not enough evidence in the record about the treatment or status of former Mara 18 members in Salvadoran society).

[48] *Martinez*, 740 F.3d at 912 (citations omitted).

The Fourth Circuit's position on gang membership not being a fundamental trait is consistent with USCIS's position that a particular social group may not be based on present criminal activity.[49]

### *Avoid Circular Reasoning*

A group cannot be defined *solely* by the fact that its members are subject to the harm that the applicant claims to have suffered or to fear as persecution. The shared characteristic of persecution by itself, however, does not disqualify an otherwise valid social group.[50] An otherwise valid group may be defined in part by the fact that its members are subject to persecution if the group is defined by other viable immutable characteristics separate from the feared persecution, or the fact of past persecution itself a basis for additional persecution.[51]

In some cases, the fact that an individual has been harmed in the past can create an independent reason why that individual would be targeted for additional harm in the future. In some societies, a shared past experience of having been harmed in the past may give rise to a socially distinct, particularly defined group. For example, in some circumstances, survivors of rape, if the rape is or were known to others, may be treated differently from other individuals by the surrounding society and/or may face social ostracism, or be more vulnerable to further harm as a result of their past harm. In such a case, the fact that the initial rape was not on account of a protected trait does not preclude a finding that subsequent harm, whether it is in the form of repeated rape or of some other kind of harm, may be on account of a shared characteristic that the applicant obtained by virtue of the initial rape.[52] In such scenarios, the inclusion of the initial incident of past harm as part of the particular social group definition does not violate the rule against circularity. Such a group formulation, however, could not provide the required nexus for the initial incident of mistreatment for purposes of any past persecution analysis.

Another example of past harm forming the basis of a valid particular social group is the *Lukwago v. Ashcroft* case, involving a Ugandan man who was forcibly recruited by the Lord's Resistance Army (LRA) as a child.[53] He claimed past persecution based on his membership in the particular social group of "children from Northern Uganda who are

[49] *See also W-G-R-*, 26 I.&N. Dec. at 215 n. 5.

[50] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 243 (BIA 2014) (citing *Cece v. Holder*, 733 F.3d 662, 671 (7th Cir. 2013)); *see also Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007) (noting that the fact that members of a group have been harmed may be a relevant factor in considering the group's social distinction within society).

[51] *Cece*, 733 F.3d at 671-72.

[52] *Cf. Gomez v. INS*, 947 F.2d 660, 663-4 (2d Cir. 1991) (rejecting an applicant's claim that she would be harmed in the future as a member of a particular social group "women previously battered and raped by Salvadoran guerrillas" because there was no evidence that the applicant would be targeted for future harm on that basis).

[53] *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (remanding to the BIA to consider an applicant's claim of well-founded fear on account of being a former child soldier).

abducted and enslaved by the LRA."[54] The Third Circuit rejected the past persecution claim, holding that the LRA was motivated to recruit the applicant by a desire to grow its ranks, and not by his membership in the proposed particular social group.[55] The applicant was not a member of the group at the time he was recruited. However, the court held that the applicant might be able to present a claim based on his well-founded fear of future persecution on account of a similar particular social group.[56] There may be a valid particular social group since the experience of having been a child soldier for the LRA is immutable, and assuming former child soldiers are socially distinct and well-defined in Ugandan society, it could form a valid particular social group with regard to well-founded fear.

While evidence that members of a group are harmed by either the government or private actors can be evidence that they share a distinct trait, you should be careful to avoid defining a particular social group *solely* or *primarily* by the harm the applicants suffer.

***No size limitation***

There are no maximum or minimum limits to the size of a particular social group. While the Board has cautioned that major segments of the population will rarely constitute distinct social groups, particular social groups may contain only a few individuals or a large number of people.[57]

***The perception of the society in question, rather than the perception of the persecutor, is most relevant to social distinction.***

The Board has held that defining a particular social group from the perspective of the persecutor is inconsistent with prior holdings that a social group cannot be defined "exclusively" by the fact that a member has been subjected to harm.[58] The perception of the applicant's persecutors may be relevant, as it can be indicative of whether society views the group as distinct.[59] The persecutors' perception by itself, however, is insufficient to make a group socially distinct.[60]

***No voluntary associational relationship needed***

[54] *Id.* at 167.

[55] *Id.* at 170.

[56] *Id.* at 178-79.

[57] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014); *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (reasoning "that the size and breadth of a group alone does not preclude a group from qualifying as such a social group").

[58] *M-E-V-G-*, 26 I&N Dec. at 242 (disagreeing with the Ninth Circuit's suggestion, in *Henriquez-Rivas v. Holder*, 707 F.3d 1081,1089 (9th Cir. 2013), that the perception of the persecutor may matter the most).

[59] *Id.*

[60] *Id.*

A voluntary association is not a required component of a particular social group, but can be a shared trait that defines a particular social group.[61] Thus, a voluntary association should be analyzed as any other trait asserted to define a particular social group.

### *Cohesiveness or homogeneity not required*

Cohesiveness or homogeneity of group members is not a required component of a particular social group.[62] It is not necessary that group members be similar in all or many aspects and it is not required that the group members know each other or associate with each other. The relevant inquiry is whether there is a shared characteristic or belief that members share.

## 3. IS THE PERSECUTION OR FEARED PERSECUTION "ON ACCOUNT OF" THE APPLICANT'S PARTICULAR SOCIAL GROUP MEMBERSHIP?

Even if an applicant establishes that he or she is a member of a particular social group, the applicant must still establish that he or she was persecuted, or has a well-founded fear of persecution, on account of his or her membership in the group. To determine whether an applicant has established a nexus, you must elicit and consider all evidence, direct and circumstantial, relevant to the motive of the persecutor.

You must keep this step in the analysis distinct from your determinations of 1) whether a particular social group exists, and 2) whether the applicant is a member of the group. This step in the process is the same analysis that you must conduct with any of the four other protected grounds.

## 4. PRECEDENT DECISIONS (SPECIFIC GROUPS)

Below are summaries of precedent decisions that have identified certain groups that are particular social groups and other groups that were found not to be particular social groups based on the specific facts of the case. These examples are not an exhaustive list. Since this area of law is evolving rapidly, it is important to be informed about current cases and regulatory changes. It also is important to emphasize that these decisions were limited to the records before the Board and courts. Unlike the appellate context where the record is already developed, you have a duty to develop the record, eliciting testimony

[61] *Matter of C-A*, 23 I&N Dec. 951,956 (BIA 2006); *see Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1097 (9th Cir. 2013) (acknowledging that the Board does not require members of a particular social group to share a voluntary associational relationship); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000) (holding that a particular social group "is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members).

[62] *C-A-*, 23 I&N Dec. at 957. *See also Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1097 (9th Cir. 2013); UNHCR *Guidelines On International Protection: "Membership of a Particular Social Group"*, para. 15.

and researching country conditions, news reports, laws, policies, and other evidence, to determine whether a group is cognizable in the relevant society.[63]

## 4.1 Family Membership

When analyzed on a case-by-case basis under the framework set out in this lesson plan, in many cases a family may constitute a particular social group. This approach is consistent with existing case law recognizing family as a "particular social group." For instance, the First Circuit has held that a family constitutes the "prototypical example" of a particular social group. The court found a link between the harm the applicant experienced and his family membership, and concluded that the harm experienced was persecution on account of the applicant's membership in a particular social group (his nuclear family).[64] The Seventh Circuit has found that parents of Burmese student dissidents share a common, immutable characteristic sufficient to constitute a particular social group.[65] The Fourth Circuit has found that "family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses" is a viable particular social group where evidence showed that street gang members often intimidate their enemies by attacking those enemies' families. The court found that "[t]he family unit – centered around the relationship between an uncle and his nephew – possesses boundaries that are at least as 'particular and well-defined' as other groups whose members have qualified for asylum," thus meeting the particularity requirement.[66]

In analyzing whether a specific family group qualifies as a particular social group, the shared familial relationship should be analyzed as the common trait that defines the group. The immutability criterion can easily be satisfied. The right to have a relationship with one's family is fundamental, as it is protected by international human rights norms. Also, familial relationships for the most part cannot be changed. Often, the determinative question is whether the familial relationship also reflects social distinctions. That would depend on the circumstances, including the degree and nature of the relationship asserted

[63] *See* Pirir-Boc v. Holder, 750 F.3d 1077 (9th Cir. 2014) (reiterating that "[i]t is an error . . . to assume that if a social group . . . has been found non-cognizable in one society, it will not be cognizable in any society"); *Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997) (noting that the adjudicator has the duty to develop the record). As refugee officers have limited ability to research country conditions when interviewing applicants abroad, RAD generally provides guidance at pre-departure briefings regarding particular social groups that have been recognized in certain regions. *See* RAD Supplement. In addition, RAD adjudicates applications abroad and outside of the jurisdiction of any federal circuit court of appeals. Consequently, while case law on particular social groups may be informative, refugee officers must ensure that they have elicited sufficient testimony consistent with specific, relevant country conditions to support a social group-based claim regardless of whether or not the particular social group has been recognized in circuit court case law.

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

[65] *See Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *see also Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997) (recognizing that family could constitute a particular social group).

[66] *Crespin-Valladares v. Holder*, 632 F.3d 117, 125-26 (4th Cir. 2011) (reversing BIA's rejection of particular social group comprised of family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses).

to define the group and the cultural context that would inform how that type of relationship is viewed by the society in question. The question here is not generally whether a specific family is well-known in the society. Rather, the question is whether the society perceives the degree of relationship shared by group members as so significant that the society distinguishes groups of people based on that type of relationship.

In most societies, for example, the nuclear family would qualify as a particular social group, while those in more distant relationships, such as second or third cousins, may not. In other societies, however, extended family groupings may have greater social significance, such that they could meet the "social distinction" element.[67] You should carefully analyze this issue in light of the nature and degree of relationship within the family group and pay close attention to country of origin information about social attitudes toward family relationships.

It is important to keep in mind that it is the family membership itself that forms the basis for the particular social group. A case that at first glance may appear to be a personal dispute may satisfy the nexus requirement with regard to family members; it is not necessary that the persecutor have initially targeted the family on account of a different protected characteristic. For example, the persecutor may target the applicant to seek revenge on a family member with whom the persecutor has a personal dispute. Where the persecutor is motivated to harm the victim because of the victim's family membership, the targeting is not in fact because of a personal dispute with the applicant or for revenge against the applicant.[68]

In many cases, multiple members of a family may have been threatened or targeted by the same persecutor, and there may be evidence that the persecutor may have been motivated both by the applicant's family membership and by other factors. You must determine whether the applicant's family membership was a sufficient part of the persecutor's motive to meet the nexus standard.

In *Aldana-Ramos v. Holder*, for example, the First Circuit considered a case in which two brothers applied for asylum after their father, a successful business owner, was kidnapped for ransom by members of a criminal gang in Guatemala. Although the brothers paid the

[67] *Matter of H-*, 21 I&N Dec. 337, 342-43 (BIA 1996) (indicating that a Somali clan or subclan represents a familial-type relationship that is socially distinct).

[68] *See, e.g.*, *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015) ("Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities. The BIA's conclusion that these threats were directed at her not because she is his mother but because she exercises control over her son's activities draws a meaningless distinction under these facts. It is therefore unreasonable to assert that the fact that Hernandez is her son's mother is not *at least one* central reason for her persecution."); *Cordova v.Holder*, 759 F.3d 332, 339 (4th Cir. 2014) ("The BIA certainly did not err in holding that Aquino [Cordova]'s cousin and uncle were targeted because of their membership in a rival gang and not because of their kinship ties. But that holding does not provide a basis for concluding that MS–13 did not target *Aquino* on account of *his* kinship ties to his cousin and uncle.").

ransom, their father was killed, and they continued to receive threats from the gang. The First Circuit reversed the Board's conclusion that the brothers had been threatened solely on the basis of wealth and held that the Board had erred by failing to consider the applicants' contention that they had been targeted on account of their membership in their immediate family.[69] It remanded the case to the Board for further consideration of whether the applicants' family membership was "one central reason" they had been targeted as required for them to be eligible for asylum.[70] In *Perlera-Sola v. Holder*, by contrast, the First Circuit upheld the Board's determination that a Guatemalan applicant had not met his burden to show that his family membership was a central reason for the harm he suffered where the applicant had, along with several members of his family, been attacked and threatened by unknown criminals because of their perceived wealth.[71]

## 4.2 Clan Membership

A clan is an extended family group that has been found to be a particular social group. The BIA has held that membership in a Somali sub-clan may form the basis of a particular social group.[72] In 1993, the Immigration and Naturalization Service (INS) Office of the General Counsel issued a legal opinion that a Somali clan may constitute a particular social group.[73] Although extended family groups may not always be recognized as particular social groups, in the Somali context, a clan is a discrete group, whose members are linked by custom and culture.[74] Clan members also are usually identifiable within their countries of origin as members of their clan.

## 4.3 Age

The Board noted in *Matter of S-E-G-* that a particular social group may be valid where the age of the members is one of the shared characteristics. The Board stated that although age is not strictly immutable, it may give rise to a particular social group since "the mutability of age is not within one's control and … if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a

[69] *Aldana-Ramos v. Holder*, 757 F.3d 9, 18-19 (1st Cir. 2014).

[70] *Id.* at 19.

[71] *Perlera-Sola v. Holder*, 699 F.3d 572, 576-577 (1st Cir. 2012).

[72] *Matter of H-*, 21 I&N Dec. at 338 (BIA 1996).

[73] Paul W. Virtue, INS Office of General Counsel, *Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA*, Memorandum to Kathleen Thompson, Director, Refugee Branch, OIA (Washington, DC: 9 December 1993).

[74] *Matter of H-*, 21 I&N Dec. 337, 342-43 (BIA 1996); *Malonga v. Mukasey*, 546 F.3d 546 (8th Cir. 2008) (concluding that Lari ethnic group of the Kongo tribe is a particular social group for purposes of withholding of removal; members of the tribe share a common dialect and accent, which is recognizable to others in Congo, and members are identifiable by their surnames and by their concentration in southern Congo's Pool region).

claim for asylum may still be cognizable."[75] In other words, in the context of age-based particular social groups, you should consider the immutability of age at the time of the events of past persecution or at the time the applicant expresses a fear of future persecution.

Several Board and circuit court cases have addressed the validity of using age, in conjunction with other characteristics, as the basis for a particular social group. The Board and some courts have rejected social groups composed of young, urban males who feared either conscription by the military or forcible recruitment by guerrillas.[76] In those cases, the persecutors targeted the young men because they were desirable combatants. It appears that the courts rejected the claims because of the applicants' failure to establish the requisite motive ("on account of"), and not because of their failure to establish membership in a valid particular social group.

The Third Circuit, in *Lukwago v. Ashcroft*, noted that age changes over time, "possibly lessening its role in personal identity." The court further noted that children as a class represent a large and diverse group, suggesting that the class is not particular enough. Nevertheless, age did make up an important component in the particular social group based on the applicant's shared past experience in *Lukwago*. The court held that "former child soldiers who escaped [Lord's Resistance Army] enslavement" were a particular social group at risk of persecution by the LRA and the Ugandan government because they could not undo the shared past experience of being child soldiers.[77]

The immutability of age was also taken into account by the Seventh Circuit in considering a case involving an Albanian woman who feared being trafficked in the future due to her youth, gender, and living alone. The court stated, "the Petitioner is part of a group of young Albanian women who live alone. Neither their age, gender, nationality, or living situation are alterable."[78] Without considering the Board's requirements of social distinction and particularity, the Seventh Circuit held, "These characteristics qualify Cece's proposed group as a protectable social group under asylum law."[79]

## 4.4 Gender

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

[76] *Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988); *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986); *Matter of Sanchez and Escobar*, 19 I&N Dec. 276 (BIA 1985). *See also Civil v. INS*, 140 F.3d 52 (1st Cir. 1998); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

[77] *Lukwago v. Ashcroft*, 329 F.3d 157, 178 (3d Cir. 2003).

[78] *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (en banc).

[79] *Id.*

Gender is an immutable trait and has been recognized as such by the BIA and some federal courts.[80] Courts have not yet addressed whether broad social groups based solely on an applicant's gender may meet the "particularity" and "social distinction" requirements as outlined in *M-E-V-G-* and *W-G-R-*,[81] but some earlier circuit court decisions have indicated that gender may form the basis of a particular social group in combination with the applicant's nationality or ethnicity and that there may be a nexus between an applicant's membership in that group and the harm he or she fears.[82]

In most cases, though, an applicant's status as a man or woman is not, by itself, a central reason motivating the persecutor to harm him or her. Rather, the persecutor is motivated to harm him or her based on membership in a group defined by gender in combination with some other characteristic he or she possesses, such as a person's social status in a domestic relationship.[83] In general, you will formulate gender-related particular social groups based on gender, nationality and/or ethnicity, and at least one other relevant trait or characteristic. The following sections discuss some of the common gender-related particular social groups.

### 4.4.1 Female Genital Mutilation (FGM)[84]

FGM cases also raise gender-related issues. In *Matter of Kasinga*, the BIA held that gender, in conjunction with other characteristics, formed the basis of a particular social group. The BIA granted asylum to the applicant, who feared persecution on account of her membership in the particular social group defined as "young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice."[85]

Case law has taken a variety of approaches to defining a particular social group in cases involving FGM. As stated in the Attorney General's decision on certification in *Matter of*

[80] *See, e.g.*, *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (listing "sex" as a paradigmatic example of an immutable characteristic); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993); *Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996).

[81] *See Paloka v. Holder*, 762 F.3d 191 (2d Cir. 2014) (remanding to the BIA for consideration of whether the proposed social groups of "young Albanian women" or "young Albanian women between 15 and 25" are proposed social groups under the *M-E-V-G-* framework).

[82] *See Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (finding that "gender plus tribal membership" may identify a social group); *Mohammed v. Gonzales*, 400 F.3d 785, 797 ("the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law"); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007). *See also Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993); *Bah v. Mukasey*, 528 F.3d 99, 112 (2d Cir. 2008); *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010).

[83] *See, e.g.*, *Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013) (*en banc*) (finding that the petitioner had a well-founded fear of persecution on account of her membership in a particular social group of "young Albanian women living alone" and noting that "the social group is defined by gender plus one or more narrowing characteristics.").

[84] Sometimes referred to as female genital cutting.

[85] *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996).

*A-T-*, the framework for analyzing such cases depends in critical ways on how the group is formulated.[86]

In FGM cases, you should consider whether the relevant social group should be defined as females of a certain nationality or ethnicity who are subject to gender-related cultural traditions. For additional guidance on FGM cases in the asylum context, see RAIO Training Module, *Well-Founded Fear.*

*Eligibility Based on Feared FGM of Applicant's Children*

In *Matter of A-K-*, the BIA made clear that an applicant cannot establish eligibility for asylum based *solely* on a fear that his or her child would be subject to FGM if returned to the country of nationality. The persecution an applicant fears must be on account of the *applicant's* protected characteristic (or protected characteristic imputed to the applicant). When a child is subjected to FGM, it is generally not because of a parent's protected characteristic. Rather, the FGM is generally imposed on the child because of the *child's* characteristic of being a female who has not yet undergone FGM as practiced by her culture.[87]

If the child of an applicant were specifically targeted for FGM in order to harm the parent because of the parent's opposition to FGM, it might be possible to establish a nexus to the parent's membership in a particular social group defined as parents who oppose FGM, if that group, viewed in the applicant's society, meets the requirements to be considered a particular social group.[88] More simply, however, in most cases involving parent(s) who oppose FGM, the claim would fit better within a political opinion analysis. Accordingly, you should first explore any evidence that supports whether the persecutor may seek to harm the parent on account of his or her political opinion.

### 4.4.2 Widows

A group consisting of widows from a country is another potential gender-related particular social group. The Eighth Circuit has held that a group consisting of Cameroonian widows is a cognizable particular social group.[89] The court reasoned that widows share the past experience of losing a husband—an experience that cannot be changed. The court also found that Cameroonian society perceives widows as a distinct

[86] *Matter of A-T-*, 24 I&N Dec. 617 (AG 2008).

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

[88] *Gatimi v. Holder*, 578 F.3d 611, 617 (7th Cir. 2009).

[89] *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034-35 (8th Cir. 2008); *see also Sibanda v. Holder*, 778 F.3d 676, 681 (7th Cir. 2015) (noting, in a case involving a widowed applicant who was expected to marry her deceased husband's brother, that her "proposed social group – married women subject to the bride-price custom – appears to fall easily within this court's established definition of particular social group").

group, noting the pervasiveness of discrimination against widows.[90] In cases involving widows, social distinction also may be demonstrated by laws providing benefits to widows, government or non-governmental programs specifically targeted to widows, testimony, or any other relevant evidence. Although the Eighth Circuit did not analyze particularity, a group comprised of widows seems to be defined with precision, such that it is clear who falls within the group: widowhood does not contain various permutations, as one is either widowed or not widowed.

### 4.4.3 Gender-Specific Dress Codes

Where refusal to abide by gender-specific dress codes could result in serious punishment or consequences, an applicant may establish that treatment resulting from his or her noncompliance amounts to persecution on account of membership in a particular social group.

Both the Third Circuit, in *Fatin v. INS*, and the Eighth Circuit, in *Safaie v. INS*, stated that Iranian women who would refuse to conform to the country's gender-specific laws may constitute a particular social group. However, neither applicant in the cases before those courts established that she was a member of such a group, because each applicant failed to demonstrate that she would refuse to comply with the gender-specific laws.[91]

In *Fatin*, the Third Circuit found the applicant to be a member of the particular social group of "Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them."[92] The court examined whether, for this applicant, compliance with the laws would be so abhorrent to her that wearing the chador would itself be tantamount to persecution. Because the applicant testified that she would only try to avoid compliance and did not testify that wearing the chador would be abhorrent to her, the court concluded that the applicant had not established that her compliance with the gender-specific laws was so abhorrent to her such that it could be considered persecution.

Similarly, the Seventh Circuit in *Yadegar-Sargis v. INS* considered whether an applicant who established her membership in the particular social group of "Christian women in Iran who do not wish to adhere to the Islamic female dress code" would suffer persecution by her compliance with the dress code. Looking to *Fatin* for guidance, the court found that because the applicant did not testify that compliance with the dress code violated a tenet of her Christian faith and testified that she was not prevented from attending church or practicing her faith when she complied with the dress code, the evidence could be interpreted such that the dress requirements were "not abhorrent to [the

[90] *Id.*

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

[92] *Fatin*, 12 F.3d at 1241-42.

applicant's] deepest beliefs."[93] The issue in this case did not turn on whether the group constituted a particular social group, but rather on whether forced compliance with dress codes constituted persecution.

## 4.5 Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI)

Persecution on account of sexual orientation constitutes persecution on account of membership in a particular social group. The Board found that a gay male in Cuba who was harmed on account of his homosexuality was persecuted on account of his membership in a particular social group.[94] In that case, where the applicant was registered as "homosexual" by the Cuban government, the Board found that the applicant was being targeted because of his status as a gay man, and that this status defined a particular social group.[95] A persecutor's perception of an applicant as a sexual minority can be established by a variety of types of evidence. For example, harm an applicant experiences because he or she engages in intimate sexual activity with a consenting adult of the same sex may constitute persecution on account of membership in a particular social group defined by its members' actual or imputed sexual minority status.[96]

The Ninth Circuit has held that gay men with female sexual identities in Mexico constitute a particular social group.[97] The court held that the applicant's female identity was immutable because it was an inherent characteristic. In *Matter of M-E-V-G-*, the Board emphasized that a gay male applicant does not need to be literally visible to society; instead the question is the extent to which the group is understood to exist as a recognized component of society.[98]

The Third Circuit, in *Amanfi v. Ashcroft*, recognized that harm suffered or feared on account of an applicant's *perceived* homosexuality, even where the applicant is not gay, could be sufficient to establish past or future persecution on account of an imputed membership in a particular social group.[99]

For more information, *see* RAIO Training Module, *Guidance for Adjudicating LGBTI Refugee and Asylum Claims*.

---

[93] *Yadegar-Sargis v. INS*, 297 F.3d 596, 604-605 (7th Cir. 2002).

[94] *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) (designated by the Attorney General as a precedent decision on June 16, 1994); *see also Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1089 (9th Cir. 2005).

[95] *Toboso-Alfonso*, 20 I&N Dec. at 821.

[96] *See Karouni v. Gonzales*, 399 F.3d 1163, 1173 (finding "no appreciable difference between an individual…being persecuted for being a homosexual and being persecuted for engaging in homosexual acts").

[97] *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094-95 (9th Cir. 2000).

[98] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 238-39 (BIA 2014).

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

## 4.6 Domestic Violence

### 4.6.1 Women Who Are Unable to Leave a Domestic Relationship or Women Who Are Viewed as Property by Virtue of their Position within a Domestic Relationship

The Board has addressed the issue of "whether domestic violence can, in some instances, form the basis for a claim of asylum."[100] In *Matter of A-R-C-G-*, the applicant married at the age of 17 and suffered physical and sexual abuse by her husband. The respondent repeatedly attempted to leave the relationship by staying with relatives, but her husband continued to find her and threaten her.[101] Based on these facts, the group before the Board was articulated as "married women in Guatemala who are unable to leave their relationship." The Board found that the proposed group satisfied the three necessary criteria. It was immutable because it involved gender and a marital status that the applicant could not change.[102] The Board also found that the group was defined with particularity, as the terms "married," "women," and "unable to leave the relationship" have commonly accepted definitions within Guatemalan society. The Board noted that evidence of social distinction for women in marriages they cannot leave would include "whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors."[103]

Although the specific facts in *A-R-C-G-* involved a married woman, the absence of a formal marriage does not defeat the cognizability of the group if the domestic relationship (or imputed relationship) that gives rise to a group meets all three criteria. As the Board stated, the group "must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question."[104] For instance, even in the absence of a formal marriage, there may be a valid particular social group. DHS's brief to the Board in *Matter of L-R-*, another case that involved domestic violence, noted that the groups of women unable to leave a domestic relationship or women who are viewed as property by virtue of their positions within a domestic relationship could be cognizable particular social groups.[105] *L-R-* involved a woman who, although not married, was in a domestic relationship for two decades. This brief, which continues to represent the DHS position, argued that under these two social group formulations, an applicant's status within a domestic relationship is immutable where the applicant is economically,

---

[100] *Matter of A-R-C-G-*, 26 I&N Dec. 388, 390 (BIA 2014).

[101] *Id.* at 389.

[102] *Id.* at 392-93.

[103] *Id.* at 394.

[104] *Id.* at 392.

[105] DHS's Supplemental Brief in *Matter of L-R-*, April 13, 2009.

socially, or physically unable to leave the abusive relationship, or where "the abuser would not recognize a divorce or separation as ending the abuser's right to abuse the victim."[106]

The particularity requirement for either of these groups can be established by a showing that the domestic relationship has a clear definition.[107] The *L-R*-brief also emphasized that the term domestic relationship could be "tailored to the unique situation" in the applicant's society.

### 4.6.2 Other Types of Domestic Relationships

Of course, abuse serious enough to amount to persecution can also occur within other domestic relationships. Where claims are based on assertions of harm within a relationship that is not spousal or spouse-like, the adjudicator must identify the relationship, and determine whether such a relationship is a domestic relationship. Once the relationship is determined to be a domestic relationship, you can assess whether the applicant is a member of a cognizable particular social group similar to the ones discussed in the previous section. If you determine that the applicant is a member of a cognizable group, of course, the applicant must also establish a nexus and the other requirements for asylum or refugee status.

In *Ming Li Hui v. Holder*, for example, the Eighth Circuit addressed an asylum applicant's claim for asylum based on physical and emotional abuse by her mother.[108] In that case, the applicant asserted that "her mother severely abused her as a child 'because she hated girl[s].' The abuse included the mother burning her hand with a cigarette butt, withholding food, calling her 'trash, garbage,' and telling her she 'wish[ed] you'd die soon.'[109] The applicant also testified that at the age of 20, she got a job that paid well enough for her to be able to leave the home and escape the abuse. She was able to live away from her mother for five years, and although her mother threatened her during this period, she did not harm the applicant.[110] The Eighth Circuit, without specific analysis, accepted the applicant's proposed particular social group of "Chinese daughters [who are] viewed as property by virtue of their position within a domestic relationship."[111] The court concluded, however, that a fundamental change in circumstances rebutted the

[106] *Id.* at n.12.

[107] *See id.* at 19 (citing section 237(a)(2)(E)(1), which defines "crimes of domestic violence" to include offenses "against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws."

[108] *Ming Li Hui v. Holder*, 769 F.3d 984 (8th Cir. 2014).

[109] *Id.* at 985.

[110] *Id.*

[111] *Id.* at 985-86.

presumption of a well-founded fear on account of her membership in that group because the applicant testified that she had only been abused when she lived with her mother, and not after she was able to leave her mother's household.[112]

### 4.6.3 Children in Domestic Relationships

As reflected in the decision in *Ming Li Hui,* claims involving child abuse can involve some of the same dynamics of power and impunity as claims involving other kinds of domestic violence. In some cases, a child's vulnerable status and lack of protection within the family and society may make a persecutor believe that he or she can harm the child with impunity and is entitled to do so, which in combination may form a significant part of the persecutor's motivation. In analyzing a child abuse case, you, following the proposed group before the court in *Ming Li Hui* and one of the groups analyzed in DHS's brief in *Matter of L-R-,* could formulate the particular social group as [nationality] children who are viewed as property by virtue of their position within a domestic relationship.

All claims require case-by-case analysis, but it is generally established in precedent that when persecution is suffered or feared on account of a characteristic that includes being a child, that characteristic is immutable within the meaning of *Acosta.* This is because a child cannot change his or her age at the time of persecution.[113] Similarly, a child is typically unable to leave the family or other domestic relationship in which the child is situated, due to the inherent dependency of minors as well as the established legal and cultural expectations in most societies that children are subordinate to the authority of their parents or other adults acting in the role of parents. [114] A child is not expected to leave his or her family.

In child abuse cases, social distinction could be established by evidence such as the existence of laws that are designed to protect children from domestic abuse, programs to assist such children, reports about the prevalence of domestic violence and prosecution of domestic violence or lack of prosecution, or other evidence that members of this group are distinguished from others in the society in which they live.[115] Additionally, although

---

[112] *Id.* at 986. Note that the fundamental change in circumstances analysis would not apply to refugee resettlement cases, as the past persecution, by itself, would be sufficient to establish a claim. For asylum cases, the assessment of what would constitute a fundamental change in circumstances under such an analysis would be specific to the facts of each case.

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

[114] *Cf. Matter of A-R-C-G-*, 26 I&N Dec. 388, 393 (BIA 2014) (In the separate context of intimate partner domestic violence, discussing the definable boundaries of a group involving married women unable to leave the relationship, noting "that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation").

[115] *See id.* at 394 (for a particular social group of married Guatemalan women who are unable to leave the relationship, noting that evidence of social distinction "would include whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors.")

past persecution by itself cannot be used to define a particular social group, a group's being subjected to harm is a good indication that it is socially distinct.[116] At the same time, social distinctions do not have to be discriminatory or punitive. Many of the ways in which society distinguishes children are benign or are intended to protect them.

The group of children who are viewed as property by virtue of their position within a domestic relationship also can be described with sufficient particularity because it is possible to determine who falls within the group: they are (1) minors[117] (2) who fall within the boundaries of a domestic relationship, and (3) are treated and perceived as property because of their subordinate status within that relationship.[118] As noted by the Board in examining the particularity of a group involving violence within the domestic relationship, "the terms can combine to create a group with discrete and definable boundaries."[119]

Even where an applicant whose claim is based on child abuse can establish membership in a cognizable particular social group, all the other eligibility requirements must also be met. The dynamics of domestic relationships between children and their parents or other parental figures are different from the dynamics of domestic relationships between adults. In claims involving child abuse, nexus must be analyzed in the context of a parent's role (or that of another person acting in a parental capacity) in raising a child. The relevance of power and authority of an adult over a child is assessed differently than in the context of adult domestic partnerships. Strong deference is generally shown to parents in determining the child's best interests. Where a parent or person acting in a parental capacity is motivated by legitimate disciplinary or child-rearing goals and the discipline is reasonable in degree, the punishment is not on account of a protected ground. Only where harm is clearly inflicted for purposes other than discipline or other legitimate child-rearing goals or is clearly disproportionate to such goals could it objectively constitute persecution on account of a protected ground. Factors that may indicate that the harm is not legitimately related to discipline or other child-rearing goals (and hence there may be persecution and a nexus to a protected ground) could be: (1) where the harm inflicted is clearly disproportionate or unrelated to any child-rearing goal; (2) where the abuse is coupled with repeated remarks devaluing the child; or (3) where the abuser tries to cover up the abuse. Rape is an example of harm that would never further a legitimate child-rearing goal.

---

[116] *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006); *see also Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007) ("the fact that its members have been subjected to harm...may be a relevant factor in considering the group's visibility in society").

[117] The Convention on the Rights of the Child defines children as individuals under the age of 18, and provides a benchmark for determining who is a minor.

[118] *Cf. A-R-C-G-*, 26 I&N Dec. at 393 (In the separate context of intimate partner domestic violence, discussing the definable boundaries of a group involving married women unable to leave the relationship, noting "that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation").

[119] *Id.*

In the asylum context, in cases where the applicant has been found to have suffered past persecution based on his or her membership in a particular social group related to domestic violence, it is necessary to assess whether there is a fundamental change in circumstances or a reasonable possibility of internal relocation to rebut the presumption of well-founded fear. When an applicant is a child at the time of the asylum interview, the applicant remains dependent on caregivers, potentially including former abusers, and there is no obvious fundamental change in circumstances that rebuts the presumption of a well-founded fear, and children are not expected to relocate outside of the family. In such cases, you will generally find that the applicant is a member of a particular social group consisting of children who are viewed as property because of their position within a domestic relationship. If the applicant suffered past persecution within a domestic relationship and the applicant is no longer a child at the time of the asylum interview, you should examine whether the applicant continues to be viewed as property because of his or her position within a domestic relationship, such as due to being a daughter or son in the domestic relationship or a female or male in the domestic relationship.

In such cases, you will need to thoroughly analyze whether there has been a fundamental change in circumstances due to the applicant no longer being a child or whether the applicant could safely and reasonably relocate outside of the domestic relationship. Once an applicant is an adult, the conditions that created his or her subordinate and vulnerable status at the time the applicant was harmed may have fundamentally changed.[120] You must elicit testimony and review country conditions to determine whether there are specific facts showing that the dynamics of power and control within the relationship had fundamentally changed. Among other things, you must analyze whether the applicant can live independently and safely outside of the domestic relationship considering the applicant's age, economic resources, marriage, or other reasons.[121] In some circumstances, the harm to the applicant may have begun when he or she was a child and continued into adulthood, and the applicant continued to be in a subordinate and vulnerable status. In such circumstances, there would generally not be a fundamental change in circumstances.

## 4.7 Ancestry

The Board has found that "Filipinos with Chinese ancestry" could define a particular social group, because of the immutability of the characteristic.[122] Note that this protected characteristic can also be appropriately analyzed under the nationality or race protected grounds.

---

[120] *Cf.* *Ming Li Hui v. Holder*, 769 F.3d 984 (8th Cir. 2014) (finding, in examining another proposed group involving the parent-child relationship, that there had been a fundamental change in circumstances because Hui, as an adult, could control whether she lived with her mother).

[121] If the presumption of well-founded fear is rebutted, you must complete a *Chen* analysis to determine whether an exercise of discretion to grant asylum may be warranted. Similarly, you must consider whether there is a reasonable possibility of other serious harm.

[122] *Matter of V-T-S*, 21 I&N Dec. 792, 797 (BIA 1997).

## 4.8 Individuals with Physical or Mental Disabilities

In an opinion later vacated and remanded by the Supreme Court, the Ninth Circuit held in *Tchoukhrova v. Gonzales* that Russian children with serious disabilities that are long-lasting or permanent constitute a particular social group. The court reserved the question of whether individuals with disabilities from any country would constitute a particular social group, but found that in Russia, children with disabilities constitute a specific and identifiable group, as evidenced by their "permanent and stigmatizing labeling, lifetime institutional[ization], denial of education and medical care, and constant, serious, and often violent harassment."[123]

The Supreme Court vacated the Ninth Circuit's opinion in *Tchoukhrova v. Gonzales*, so this opinion is no longer precedent. However, the concerns with the case that were raised on appeal were unrelated to the formulation of the particular social group. The particular social group formulation in the Ninth Circuit's opinion is consistent with USCIS's interpretation. The Asylum Division has granted asylum to people with disabilities when the applicant established that he or she was persecuted in the past or would be persecuted in the future on account of his or her membership in a particular social group, defined as individuals who share those disabilities. The proper analysis is whether 1) the disability is immutable; 2) persons who share that disability are socially distinct in the applicant's society; and 3) the group is particularly defined.

More recently, in *Temu v. Holder*, the Fourth Circuit held that individuals with bipolar disorder, who exhibit erratic behavior, can constitute a viable particular social group.[124] The applicant credibly testified that he was persecuted by nurses and prison guards because of his illness. The court concluded that the Board's decision, finding no particular social group, was "manifestly contrary to the law and an abuse of discretion."[125] Using the term "social visibility," but essentially applying the social distinction test, the court found that the petitioner "appears to have a strong case for social visibility," as Tanzanians with severe mental illnesses are singled out for abuse in hospitals and prisons and are labeled "mwenda wazimu."[126] The court also rejected the Board's reasoning that if a persecutor targets an entire population ("the persecutor's net is too large"), "social visibility" must be lacking. The court highlighted that the "folly of this legal conclusion can be demonstrated with a hypothetical," specifically to assume "that an anti-Semitic government decides to massacre any Jewish citizens [and] imagine that in putting its policy into practice, the government collects a list of surnames of individuals who are

[123] *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1189 (9th Cir. 2005), *reh'g and reh'g en banc denied*, 430 F.3d 1222 (9th Cir. 2005), *vacated*, 127 S.Ct. 57 (U.S. 2006).

[124] *Temu v. Holder*, 740 F.3d 887, 892-96 (4th Cir. 2014).

[125] *Id.* at 892.

[126] *Id.* at 893.

known to be Jewish and then kills anyone with the same surname. Jews and Gentiles alike might be murdered, but this does not change the fact that Jews have social visibility as a group."[127]

The court in *Temu* also rejected the Board's analysis related to particularity, noting that the Board "missed the forest for the trees."[128] Specifically, the Board "erred because it broke down [the petitioner's] group into pieces and rejected each piece, rather than analyzing his group as a whole." The court recognized that a group characterized as people with "mental illnesses" without additional defining characteristics might lack particularity, as the group would cover "a huge swath of illness that range from life-ending to innocuous."[129] Similarly, the court recognized that "erratic behavior," by itself, would likely lack particularity. The petitioner's group, however, did not "suffer from the same shortcoming" because his group was defined by people who exhibit erratic behavior *and* who suffer from bipolar disorder.[130] The court emphasized that the group as a whole must be analyzed for particularity. Finally, the court found that the proposed group "easily satisfies" the immutability requirement, as there is no cure for bipolar disorder and the petitioner would be unable to access medication to control his disorder.[131]

The Seventh Circuit also has held that mental illness can form the basis of a valid particular social group, disagreeing with the BIA's finding that mental illness is not a basis for a particular social group in that case because it is not immutable.[132]

## 4.9 Unions

In *Matter of Acosta*, a case that involved a member of a Salvadoran taxi cooperative, the BIA considered a social group with the defining characteristics of "being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages."[133] The BIA found that neither characteristic was immutable, because the members of the group could either change jobs or cooperate in work stoppages. However, the BIA did not address whether being a member of a cooperative or union is a characteristic an individual should not be required to change.

---

[127] *Id.* at 894.

[128] *Id.* at 895.

[129] *Id.*

[130] *Id.*

[131] *Id.* at 896-97.

[132] *Kholyavskiy v. Mukasey*, 540 F.3d 555, 572-73 (7th Cir. 2008). While the Eighth Circuit found that the groups of "mentally ill Jamaicans" or "mentally ill female Jamaicans" do not constitute a particular social group because the members of the group are not "a collection of people closely affiliated with each other, who are actuated by some common impulse or purpose," *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003), the Board rejected the need for cohesiveness or a voluntary associational relationship in its decision in *Matter of C-A-*, 23 I&N Dec. 951, 956-57 (BIA 2006).

[133] *Matter of Acosta*, 19 I&N Dec. 211, 234 (BIA 1985).

The Fifth Circuit, in *Zamora-Morel v. INS*, assumed without deciding that a trade union may constitute a particular social group. The court held that the applicant was not persecuted and did not have a well-founded fear *on account of* his membership in the union, analyzing the case as if the union was a particular social group.[134]

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

## 4.10 Students and Professionals

Courts have held that particular social groups of students are either not cognizable particular social groups,[135] or that the harm applicants suffered was not on account of their membership in student groups.[136] These holdings do not preclude a finding that a specific, identifiable group of students could constitute a particular social group.

The First Circuit has recognized that persons who are associated with a former government, members of a tribe, and educated or professional individuals could be members of a social group.[137] On the other hand, the Board has rejected a particular social group where the applicant, who was a former government soldier, testified that guerrillas targeted him due to his expertise as an artillery specialist.[138] The Second Circuit has determined that a particular social group of experts in computer science "was not cognizable because its members possess only 'broadly-based characteristics.'"[139]

## 4.11 Small-Business Owners Indebted to Private Creditors

The Tenth Circuit held in *Cruz-Funez v. Gonzales* that being indebted to the same creditor is not the kind of group characteristic that a person either cannot change or should not be required to change.[140] Therefore, the court concluded that the applicants in that case could not establish that they were members of a cognizable particular social group.

## 4.12 Landowners

[134] *Zamora-Morel v. INS*, 905 F.2d 833, 838 (5th Cir. 1990).

[135] *Civil v. INS*, 140 F.3d 52, 56 (1st Cir. 1998) (social group of pro-Aristide young students is not cognizable because it is overbroad).

[136] *Matter of Martinez-Romero*, 18 I&N Dec. 75, 79 (BIA 1981).

[137] *Ananeh-Firempong v. INS*, 766 F.2d 621, 626-27 (1st Cir. 1985).

[138] *Matter of C-A-L-*, 21 I&N Dec. 754, 756-57 (BIA 1997).

[139] *Delgado v. Mukasey*, 508 F.3d 702, 704-05 (2d Cir. 2007).

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

The Seventh Circuit has found that the "educated, landowning class" in Colombia who had been targeted by the Revolutionary Armed Forces of Colombia (FARC) constituted a particular social group for asylum purposes. The court distinguished the situation in Colombia from other situations where the risk of harm flowing from civil unrest affects "the population in a relatively undifferentiated way" and found that members of this group were the "preferred victims" of the FARC.[141]

The court further distinguished this group from groups based solely on wealth, a characteristic that had been rejected as the basis of a particular social group when considered alone by the BIA in *Matter of V-T-S*, because it included the members' social position as cattle farmers, their level of education, and their land ownership. These shared past experiences were of a particular type that set them apart in society such that the FARC would likely continue to target the group members, even if they gave up their land, cattle farming, and educational opportunities.[142]

In a separate case, the Seventh Circuit found that Colombian landowners who refuse to cooperate with the FARC constituted a particular social group.[143] The Seventh Circuit emphasized that "there can be no rational reason for the Board to reject a category of 'land owners' when the Board in *Acosta* specifically used land owning as an example of a social group."[144]

The Board opined in *Matter of M-E-V-G-* that "in an underdeveloped, oligarchical society," a group of landowners may meet the particularity and social distinction criteria.[145] If analyzing a claim involving landowners, the Board instructed adjudicators to "make findings whether 'landowners' share a common immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers 'landowners' as a significantly distinct group within the society."[146]

Additionally, the Ninth Circuit has held that landownership may form the basis of a particular social group.[147] The court emphasized that "landownership [is] an illustrative example of a characteristic that might form the basis of a particular social group."[148] The

---

[141] *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005), citing *Ahmed v. Ashcroft*, 348 F.3d 611, 619 (7th Cir. 2003).

[142] *Id.*, citing *Matter of V-T-S*, 21 I&N Dec. 792, 799 (BIA 1997); *cf. Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 75 (BIA 2007) (finding that the group of "affluent Guatemalans" was not sufficiently distinct in society to constitute a particular social group. Country conditions indicated that "affluent Guatemalans" were not at greater risk of criminality or extortion in particular.) See section on "Wealth or Affluence," below for further discussion and comparison to the "landowner" particular social group.

[143] *N.L.A. v. Holder*, 744 F.3d 425, 439 (7th Cir. 2014).

[144] *Id.*

[145] 26 I&N Dec. 227, 241 (BIA 2014).

[146] *Id.*

[147] *Cordoba v. Holder*, 726 F.3d 1106, 1114 (9th Cir. 2013).

[148] *Id.*

court also pointed out that both petitioners offered evidence suggesting that landowners in their respective countries (Colombia and Mexico) are targets of persecution. One petitioner offered country conditions showing that the FARC specifically targets "wealthy landowners." The other petitioner relied on testimony of a professor specializing in Latin American politics to show that the applicant's family had been established landowners in Mexico for generations and this was a significant factor in why the applicant had been targeted by drug cartels.[149]

## 4.13 Groups Based on "Wealth" or "Affluence"

In *Matter of A-M-E- & J-G-U-*, the BIA found that groups defined by wealth or socio-economic levels alone often will not be able to establish that they possess an immutable characteristic, because wealth is not immutable.[150] Wealth is, however, a characteristic that an individual should not be required to change, and therefore could be considered fundamental within the meaning of *Acosta*. In evaluating groups defined in terms of wealth, affluence, class, or socio-economic level, you must closely examine whether the proposed group can be defined with enough particularity and whether it is socially distinct. In *A-M-E- & J-G-U-*, the BIA concluded that the proposed group failed the particularity requirement, noting that the terms "wealthy" and "affluent" standing alone fail to provide an adequate benchmark for determining group membership. To support its particularity conclusion, the BIA stated that the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more.[151]

In the context of the facts established in *A-M-E & J-G-U-*, the BIA rejected various particular social group formulations involving wealth and socio-economic status for failure to establish social visibility (or social distinction). The BIA stressed that this analysis must take into account relevant country of origin information. Considering Guatemalan country conditions, the BIA found a variety of groups failed as particular social groups, including groups defined by "wealth," "affluence," "upper income level," "socio-economic level," "the monied class," and "the upper class."[152]

The BIA, however, did not reject altogether the possibility that a group defined by wealth could constitute a particular social group. The court noted that these types of social groups must be assessed in the context of the claim as a whole. For example, the Board opined that such a group might be valid in a case where persecutors target individuals within certain economic levels.[153]

---

[149] *Id.* at 1114-15.

[150] *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007).

[151] *Id.*

[152] *Id.*

[153] *Id.*

The BIA's emphasis on social context is consistent with the Seventh Circuit's approach in *Tapiero de Orejuela v. Gonzales*, where members of the "educated, landowning class" in Colombia were recognized as members of a particular social group. Although affluence was a shared trait for this group, group members also shared a distinctive social status (albeit one derived in significant part from affluence and the attributes of affluence) that made them preferred targets of the FARC.[154] The significance of this social status was evident when the claim was viewed in the context of the country conditions that showed that the FARC is a "leftist guerilla group that was originally established to serve as the military wing of the Colombian Communist Party" and that membership in an economic class, not merely "wealth," was an important motivating factor for them.[155]

When encountering claims involving particular social groups based in whole or in part on wealth, you must assess the viability of the particular social group asserted in each case and carefully consider relevant country of origin information and other relevant evidence to determine if the group constitutes a particular social group as defined by the BIA and other courts. As the Seventh Circuit pointed out, "[t]here may be categories so ill-defined that they cannot be regarded as groups-the 'middle class,' for example. But this problem is taken care of by the external criterion-if a Stalin or a Pol Pot decides to exterminate the bourgeoisie of their country, this makes the bourgeoisie 'a particular social group,' which it would not be in a society that didn't think of middle-class people as having distinctive characteristics; it would be odd to describe the American middle class as 'a particular social group.'"[156]

## 4.14 Present or Former Employment in Either Law Enforcement or the Military

When an applicant asserts membership in a particular social group that involves either past or present service as a police officer or soldier, you must first determine whether, in the context of the applicant's society, persons employed, or formerly employed, as police officers or soldiers form a particular social group.

Note, however, that often claims by persons employed, or formerly employed, as police officers or soldiers may also be analyzed under another protected ground, such as actual or imputed political opinion, depending on the facts of the case.

### 4.14.1 Former Military/Police Membership

[154] *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2006).

[155] *Id.* at 668.

[156] *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009).

The BIA recognized in both *Matter of C-A-* and *Matter of Fuentes* that *former* military leadership is an immutable characteristic that may form the basis for a particular social group under some circumstances. Similarly, while holding that the dangers arising solely from the nature of employment as a policeman in an area of domestic unrest do not support a claim, the Board indicated in *Fuentes* that *former* service in the national police is an immutable characteristic that, in some circumstances, could form the basis for a particular social group. In order to satisfy the definition of a particular social group, the applicant also must demonstrate that the purported social group has a distinct identity in society to meet the "social distinction" test.[157]

The USCIS interpretive memo on *C-A-* clarifies that "harm inflicted on a former police officer or soldier in order to seek revenge for actions he or she took in the past is not on account of the victim's status as a former police officer or soldier."[158] In other words, if the former officer is being targeted for his or her "status" as a former officer, he or she could establish an asylum claim, but not if he or she is being targeted only for his or her actions as a former police officer. It is important to note, however, that many of these cases will involve mixed motives, and it is possible that a former officer is being targeted on account of both status and former acts. An applicant would satisfy the "status" requirement where (1) there is a cognizable particular social group, (2) he or she is a member of the group, and (3) he or she is being targeted because of his or her membership, regardless of whether there may be evidence that he is also being targeted on account of past acts. As long as the membership in a cognizable particular social group is a sufficient reason to meet the requisite nexus standard, evidence that he is also targeted on account of past acts should not undermine the claim.

The Ninth Circuit, in *Madrigal v. Holder*, reviewed a case where the petitioner based his past persecution claim partially on the mistreatment he suffered while serving in the military and partially on events that occurred after he left the military.[159] The Ninth Circuit analyzed the petitioner's proposed particular social group of "former Mexican army soldiers who participated in anti-drug activity," and noted that case law distinguishes between current versus former military or police service when determining whether a particular social group is cognizable.[160] The Ninth Circuit concluded that the petitioner's proposed particular social group was valid and remanded the case to the

---

[157] Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007); *Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006); *see also Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988); *Estrada-Escobar v. Ashcroft*, 376 F.3d 1042, 1047 (10th Cir. 2004) (finding that the rationale of *Fuentes* applies to threats from terrorist organizations resulting from an applicant's work as a law enforcement official targeting terrorist groups because the threat was received as a result of the employment, not the applicant's political opinion).

[158] Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[159] *Madrigal v. Holder*, 716 F.3d 499, 503-04 (9th Cir. 2013).

[160] *Id.* at 504.

Board.[161] Specifically, the Ninth Circuit noted, "Although mistreatment motivated purely by personal retribution will not give rise to a valid asylum claim, if a retributory motive exists alongside a protected motive, an applicant need show only that a protected ground is 'one central reason' for his persecution.... In Tapia Madrigal's case, even if revenge partially motivated Los Zetas' mistreatment of him, the record makes clear that their desire to intimidate members of his social group was another central reason for the persecution."[162]

The Seventh Circuit has indicated that "former law-enforcement agents in Mexico" can be a viable particular social group.[163] In that case, drug organizations initially offered the applicant, an investigator, bribes to cooperate with them; however, when he refused, they tried to kill him under their "plata o plomo" policy— "money or bullets." Afraid of being killed, the applicant resigned from his position and opened an office supply business, trying to conceal his former position. The Seventh Circuit concluded that being a former law enforcement agent is an immutable characteristic, as the applicant cannot erase his employment history.[164] The record also contained evidence supporting that the feared persecution was because the applicant was a former agent. The record contained evidence that drug organizations have tried to kill other officers who resigned from the police. The Seventh Circuit noted that "[p]unishing people after they are no longer threats is a rational way to achieve deterrence . . . [and] there's nothing implausible about [the applicant's] testimony that drug organizations in Mexico share this view of deterrence."[165]

### 4.14.2 Current Military/Police Membership

Current service as a soldier or police officer, under some circumstances, could define a particular social group if that service is so fundamental to the applicant's identity or conscience that he or she should not be required to change it. The applicant would also have to demonstrate that the purported social group has a distinct identity in the society, and that the group is particular. If these requirements are met, it is possible that an applicant could establish a cognizable social group in such circumstances.[166]

Even if membership in a particular social group is established in such a case, however, the determination that the persecution was or will be "on account" of the particular social group is especially difficult. The determination requires special scrutiny.

---

[161] *Id.* at 505.

[162] *Id.* at 506 (internal citations omitted).

[163] *R.R.D. v. Holder*, 746 F.3d 807, 810 (7th Cir. 2014).

[164] *Id.*

[165] *Id.*

[166] *See* Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

Harm inflicted on a police officer or soldier because of his role as a public servant carrying out his official government duties in an ongoing armed struggle or civil war is not on account of the applicant's membership in a group of police officers or soldiers.[167] Such a claim would therefore fail on the "on account of" element, even if the applicant has established membership in a group that constitutes a particular social group.

Under a different set of circumstances, if the evidence showed that the applicant was targeted because he or she was a police officer or soldier, the nexus requirement may be met. It is only where the harm is inflicted because of the applicant's membership in a group, rather than to interfere with his or her performance of specific duties, that the nexus requirement may be met. This is a particularly difficult factual inquiry. One factor that may assist in making this determination is whether the harm inflicted on the applicant or threats occur while the applicant is on official duty, as opposed to once the applicant has been taken out of combat or is no longer on duty.

The Ninth Circuit also has held that the general risk associated with military or police service does not, in itself, provide a basis of eligibility. The Ninth Circuit, like the BIA, recognizes a distinction between *current* service and *former* service when determining the scope of a cognizable social group.[168]

It is important to note that the fact of current service does not preclude eligibility. A police officer or soldier may establish eligibility if he or she can show that the persecutor is motivated to harm the applicant because the applicant possesses, or is perceived to possess, a protected characteristic. The following passage from *Cruz-Navarro v. INS*, is instructive:

> *Fuentes*, therefore, does not flatly preclude "police officers and soldiers from establishing claims of persecution or fear of persecution." [citing *Velarde* at 1311] Rather, *Fuentes* suggests that persecution resulting from membership in the police or military is insufficient, by itself, to establish persecution on account of membership in a particular social group or political opinion.[169]

The Seventh Circuit has not adopted the distinction between current and former police officers set forth in *Fuentes*. In dicta, the Court expressed disapproval of any reading of *Fuentes* that would create a *per se* rule that dangers encountered by police officers or military personnel during service could never amount to persecution. However, in the case before it, the Court upheld the BIA's determination that the dangers the applicant

[167] *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988).

[168] *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000); *Velarde v. INS*, 140 F.3d 1305 (9th Cir.1998) (former bodyguard of daughters of Peruvian President threatened by Shining Path with reference to the applicant's specific duties); see also *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (suffering while in military on account of applicant's race, not participation in military).

[169] *Cruz-Navarro v. INS*, 232 F.3d at 1029.

experienced while serving as a military and police officer arose from the nature of his employment and were not on account of a protected characteristic.[170]

## 4.15 Drug Traffickers

Under general principles of refugee protection, the shared characteristic of terrorist, criminal, or persecutory activity or association, past or present, cannot form the basis of a particular social group.[171] In *Bastanipour v. INS*, an applicant was convicted of trafficking in drugs in the United States and faced removal to Iran. He claimed a well-founded fear, asserting that the Iranian government executes individuals who traffic in illegal drugs. The Seventh Circuit held that:

> [w]hatever its precise scope, the term "particular social groups" surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do. A contrary conclusion would collapse the fundamental distinction between persecution on the one hand and the prosecution of nonpolitical crimes on the other. We suppose there might be an exception for some class of minor or technical offenders in the U.S. who were singled out for savage punishment in their native land, but a drug felon sentenced to thirty years in this country (though Bastanipour's sentence was later reduced to fifteen years) cannot be viewed in that light.[172]

## 4.16 Criminal Deportees

Similarly, the USCIS position that criminal activity or association may not form the basis of a particular social group is consistent with courts' views of criminal deportees as an invalid particular social group. In *Elien v. Ashcroft*, the First Circuit upheld a finding by the BIA that a group defined as "deported Haitian nationals with criminal records in the United States" does not qualify as a particular social group for the purposes of asylum. The First Circuit agreed with the BIA that it would be unsound policy to recognize criminal deportees as a particular social group, noting that the BIA had not extended particular social group to include persons who "voluntarily engaged in illicit activities."[173]

---

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

[171] Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

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

[173] *Elien v. Ashcroft*, 364 F.3d 392, 397 (1st Cir. 2004); *see also Toussaint v. Attorney General of U.S.*, 455 F.3d 409, 417 (3d Cir. 2006) (adopting the reasoning of the First Circuit in ruling that criminal deportees to Haiti do not constitute a particular social group).

## 4.17 Persons Returning from the United States

The Ninth Circuit has held that "returning Mexicans from the United States" does not constitute a valid particular social group.[174] The applicant in that case pointed to reports of crime against Americans on vacation, as well as Mexicans who had returned to Mexico after living in the United States, to support the fear of harm based on membership in the proposed social group.[175]

The First Circuit has also upheld the BIA's conclusion that a group defined as "Guatemalan nationals repatriated from the United States" did not constitute a particular social group. In that case, the court reasoned that the applicant was essentially arguing that he would be targeted by criminals for perceived wealth, and "being a target for thieves on account of perceived wealth, whether the perception is temporary or permanent, is merely a condition of living where crime is rampant and poorly controlled."[176]

## 4.18 Tattooed Youth

The Sixth Circuit has found that a group of "tattooed youth" does not constitute a particular social group under the INA. The court found that having a tattoo is not an innate characteristic and that "tattooed youth" are not closely affiliated with one another. Further, the court stated that "the concept of a refugee simply cannot guarantee an individual the right to have a tattoo."[177]

## 4.19 Individuals Resisting and Fearing Gang Recruitment, and Opposition to Gang Authority

In *Matter of S-E-G-*, the BIA rejected a proposed particular social group defined as "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities," because it lacked "well-defined boundaries" that make a group particular and, therefore, lacked social visibility.[178] Similarly, in *Matter of E-A-G-*, the BIA held that the applicant, a young Honduran male, failed to establish that he was a member of a particular social group of "persons resistant to gang membership," as the evidence failed to establish that members of Honduran

[174] *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151-1152 (9th Cir. 2010).

[175] *Id.* at 1151-52.

[176] *Escobar v. Holder*, 698 F.3d 36, 39 (1st Cir. 2012).

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

[178] *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

society, or even gang members themselves, would perceive those opposed to gang membership as members of a social group.[179]

In *Matter of M-E-V-G-*, a Honduran gang threatened to kill the applicant if he refused to join the gang.[180] The applicant claimed that he was persecuted on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs. Citing *S-E-G-*, the BIA recognized that it is often difficult to conclude that such a group is much narrower than the general population, and noted that it might be difficult to satisfy the social distinction and particularity requirements.[181] The BIA, however, remanded the case for the immigration judge to analyze updated country conditions and arguments regarding the applicant's particular social group claim.[182] The BIA reasoned that its holdings in *S-E-G-* and *E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs; the applicant's proposed particular social group had evolved during the pendency of his appeal; and the BIA's guidance on particular social group claims had been clarified since the case was last before the immigration judge.[183]

After the BIA's decision in *M-E-V-G-*, the Ninth Circuit, in *Pirir-Boc v. Holder*, held that a group characterized as individuals "taking concrete steps to oppose gang membership and gang authority" may be cognizable.[184] Prior to the Board's decision in *M-E-V-G-*, the Board had rejected the proposed group that Ninth Circuit analyzed in *Pirir-Boc*.[185] In *Pirir-Boc*, the petitioner's younger brother had joined the Mara Salvatrucha gang in Guatemala. Gang members overheard the petitioner instructing his brother to leave the gang. After his brother left the gang, gang members severely beat the petitioner and threatened to kill him. Without conducting case-specific analysis, the Board rejected the petitioner's proposed particular social group, citing to *S-E-G-*. On petition for review, the Ninth Circuit remanded the case to the Board to determine whether Guatemalan society recognizes the petitioner's proposed social group.[186]

In *Rodas-Orellana v. Holder*, the Tenth Circuit, applying *M-E-V-G-* and *W-G-R-*, upheld the BIA's determination that a social group characterized as "El Salvadoran males threatened and actively recruited by gangs, who resist joining because they opposed the gangs" was not socially distinct.[187] The Court found that the petitioner, a Salvadoran who

[179] *Matter of E-A-G-*, 24 I&N Dec. 591, 594-95 (BIA 2008).

[180] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 228 (BIA 2014).

[181] *Id.* at 249-50.

[182] *Id.* at 253.

[183] *Id.* at 251-52.

[184] *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

[185] *Id.*

[186] *Id.* at 1084.

[187] *Rodas-Orellana v. Holder*, 780 F.3d 982, 992 (10th Cir. 2015).

was threatened and beaten for refusing to join the Mara Salvatrucha, had not presented evidence suggesting that Salvadoran society perceived individuals who resisted gang recruitment as a distinct group; rather, the record in that case showed that "Salvadoran gangs indiscriminately threaten people for monetary gain or for opposing them."[188] The Court rejected the petitioner's argument that the case needed to be remanded for additional analysis in light of *M-E-V-G* and *W-G-R-*, finding that, unlike in *Pirir-Boc,* the Board had properly considered the record before it.

## 4.20 Non-Criminal Informants, Civilian Witnesses, and Assistance to Law Enforcement

The question of whether and when serving as a witness or providing other law enforcement assistance may form the basis of a particular social group is an evolving area of the law. In *Matter of C-A-*, the Board concluded that a group composed of confidential non-criminal informants did not constitute a particular social group.[189] The Board pointed out that "social visibility" is "limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members."[190]

Circuit courts have subsequently recognized select circumstances where serving as a witness or cooperating with law enforcement may form the basis of a particular social group. In *Garcia v. Att'y Gen. of U.S.*, involving an individual placed in witness protection and relocated by the Guatemalan Public Ministry outside of her country, the Third Circuit recognized that "[c]ivilian witnesses who have the 'shared past experience' of assisting law enforcement against violent gangs that threaten communities in Guatemala" share an immutable characteristic.[191] In *Gashi v. Holder*, involving an individual who observed alleged military crimes by a leader of the Kosovo Liberation Army and cooperated with international investigators by being placed on a list of potential witnesses though ultimately not testifying in court, the Second Circuit held that a group of cooperating witnesses could constitute a particular social group.[192] The Ninth Circuit held in *Henriquez-Rivas v. Holder* that witnesses "who testified in court against gang members" in El Salvador may be a cognizable particular social group.[193] The

[188] *Id.* at 993.

[189] *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).

[190] *Id.* at 960 (emphasis added).

[191] *Garcia v. Att'y Gen. of U.S.*, 665 F.3d 496, 504 n.5 (3d Cir. 2011) (distinguishing case from *C-A-* because the applicant's identity was "known to her alleged persecutors," whereas in *C-A-* the assistance to law enforcement was confidential).

[192] *Gashi v. Holder*, 702 F.3d 130, 137 (2d Cir. 2012) (holding that the group was immutable due to the shared past experience, was socially visible due to Gashi being labeled as a traitor for meeting with international investigators, and particular due to the finite number of people who have cooperated with official war crimes investigators).

[193] *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (finding that the BIA erred in applying its own precedents in deciding whether Henriquez-Rivas was a member of a particular social group, citing to language in *C-A-* that those who testify against cartel members are socially visible); *see also Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (citing *Henriquez-Rivas* for the principle that a retributive motive may exist alongside a protected motive, noting, "Gang persecution of adverse witnesses would certainly have revenge as one motive, but group-based intimidation would be another.").

*Henriquez-Rivas* court concluded that "for those who have publicly testified against gang members, their 'social visibility' is apparent," as it involves "a distinct group of persons."[194] In addition, Henriquez-Rivas met the particularity criterion, as her "group can be easily verified – and thus delimited – through court records documenting group members' testimony."[195]

While the public nature of the past experience in *Garcia*[196] and *Henriquez-Rivas*[197] helped establish social distinction, the Ninth Circuit has emphasized that it "by no means intend[s] to suggest that the public nature of [the applicant's] testimony is essential" for a viable particular social group.[198] Further, in *Garcia*, the Third Circuit case, the assistance was not completely public in that the applicant testified while wearing a disguise.[199] The Board, in *Matter of M-E-V-G-*[200] and *Matter of W-G-R-*,[201] has since made clear that literal visibility in the public or elsewhere is not a requirement to show social distinction.

Some courts have rejected particular social groups where gangs were targeting and harming the petitioners, and then the petitioners reported the gangs to the police. For instance, in *Zelaya v. Holder*, the Fourth Circuit rejected a group consisting of young Honduran males who (1) refuse to join a gang, (2) have notified authorities of gang harassment, and (3) have an identifiable tormentor within the gang.[202] In *Garcia v. Holder*, the Eighth Circuit rejected a particular social group consisting of "young Guatemalan men who have opposed the MS–13, have been beaten and extorted by that gang, reported those gangs to the police[,] and faced increased persecution as a result" because the group was insufficiently particular and the petitioner failed to produce sufficient evidence of social distinction.[203]

---

[194] *Id.* at 1093.

[195] *Id.*

[196] *Garcia*, 665 F.3d at 504.

[197] *Henriquez-Rivas*, 707 F.3d at 1092.

[198] *Id.* n.14.

[199] *Garcia*, 665 F.3d at 500.

[200] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 240 (BIA 2014).

[201] *Matter of W-G-R-*, 26 I&N Dec. 208, 216 (BIA 2014).

[202] *Zelaya v. Holder*, 668 F.3d 159, 162 (4th Cir. 2012). While the Fourth Circuit rejected the proposed group in *Zelaya* due to lack of particularity, the court subsequently held in another case that "[e]ach component of the group…might not have particular boundaries[;]…[o]ur case law is clear, however, that the group as a whole qualifies." *Temu v. Holder*, 740 F.3d 887, 896 (4th Cir. 2014) (citing *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) (recognizing a particular social group of family members of those who actively oppose gangs by agreeing to be prosecutorial witnesses, even if on its own, "'[p]rosecutorial witnesses' might reach too broad a swath of individuals" and "'those who actively oppose gangs' might be too fuzzy a label for a group.")).

[203] *Garcia v. Holder*, 746 F.3d 869, 872-73 (8th Cir. 2014).

In *Carvalho-Frois v. Holder*, the First Circuit rejected a group of "witnesses to a serious crime whom the government is unable or unwilling to protect" as not socially visible.[204] The applicant in that case heard two gunshots at a neighbor's home, and was warned by two men leaving the home that she was in danger and not to reveal anything about what she saw. She subsequently learned that a murder had occurred. The applicant relocated after receiving a phone call that the callers knew where she lived and they would kill her if she said anything to the police. This decision was based on lack of social visibility, and was reached before the BIA's decisions in *M-E-V-G-* and *W-G-R-* on social distinction and particularity.

In addition, in *Bathula v. Holder*, the Seventh Circuit upheld the BIA's determination that an Indian applicant who was threatened after testifying in court against a land mafia had not established nexus to a protected ground because he "was the victim of intimidation and then retaliation for his specific testimony in a specific case against the land mafia" rather than on account of his membership in a particular social group, which he had defined as "those willing to participate, despite personal risk, in the orderly administration of justice against criminal elements."[205] The court only considered the nexus issue and did not address the validity of the group.

Several circuit courts have upheld decisions that applicants who served as informants in the U.S. did not establish persecution on account of a protected ground.[206] In *Costa v. Holder*, the First Circuit considered the case of a Brazilian applicant who had worked as an ICE informant in the United States and received indirect threats from the family of a man named Lelito who had been arrested because of the applicant's work. It upheld the BIA's conclusion that she had not established that the threats were on account of her membership in the particular social group of "former ICE informants."[207] The Court reasoned, "Although Costa participated in multiple sting operations, the record indicates that only Lelito's arrest triggered the threats that form the basis of her application....There is little to suggest that the scope of persecution extends beyond a 'personal vendetta.'."[208] Similarly, in *Martinez-Galarza v. Holder*, the applicant proposed two groups: people who have provided information to ICE to enable that organization to remove individuals residing illegally in the United States, and witnesses for ICE. The Eighth Circuit rejected

[204] *Carvalho-Frois v. Holder*, 667 F.3d 69, 73 (1st Cir. 2012) ("[t]he fact that the petitioner was known by a select few to have witnessed a crime tells us nothing about whether the putative social group was recognizable to any extent by the community… Because we discern no feature of the group that would enable the community readily to differentiate witnesses to a serious crime from the Brazilian populace as a whole, the claimed group is simply too amorphous to satisfy the requirements for social visibility.").

[205] *Bathula v. Holder*, 723 F.3d 889, 900-01 (7th Cir. 2013).

[206] *See, e.g., Jonaitiene v. Holder*, 660 F.3d 267 (7th Cir. 2011); *Wang v. Gonzales*, 445 F.3d 993 (7th Cir. 2006); *U.S. v. Aranda-Hernandez*, 95 F.3d 977 (10th Cir. 1996).

[207] *Costa v. Holder*, 733 F.3d 13, 17 (1st Cir. 2013).

[208] *Id. See also Scatambuli v. Holder*, 558 F.3d 53 (1st Cir. 2009); *Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 91 (1st Cir. 2008) (involving a Salvadoran man who provided information to the police and testified before a grand jury concerning arson committed in the U.S. by two gang members, the First Circuit held, "Amilcar-Orellana's fear of persecution stems from a personal dispute with X and Y, not his membership in a particular social group.").

a nexus to these proposed groups, stating, "Sanchez's alleged reason for wanting to harm Martinez–Galarza—because Martinez–Galarza ended Sanchez's American dream—is motivated by purely personal retribution, and thus not a valid basis for an asylum claim."[209] The court acknowledged, "There may be asylum protections for an applicant who shows the threatened persecution is motivated by both personal retaliation and a protected motive, but Martinez–Galarza presents no evidence to suggest this is the situation here. He does not allege that Sanchez has threatened or attacked other ICE informants."[210] Based on the specific facts of the case, it may nonetheless be possible that an informant to U.S. law enforcement officials may be able to establish eligibility.

When you encounter potential particular social groups related to testifying against criminals or cooperating with law enforcement against criminals, there is no bright-line rule about what type of testimony or law enforcement assistance will establish a cognizable particular social group. As the Board held in *M-E-V-G-* and *W-G-R-*, the viability of a particular social group must be analyzed on a society-by-society and case-by-case basis. You should analyze country reports, news articles, testimony, and other evidence to determine whether someone who assists law enforcement through courtroom testimony or other means is perceived by society as distinct. Depending on the evidence, a certain type of law enforcement assistance or witness testimony might be socially distinct in one society, but not in another society. You also would need to articulate how the proposed group has definable boundaries, so it is clear who fits within the group and who does not.

The nexus inquiry may be difficult in cases where an applicant claims to have been targeted for having assisted law enforcement. Even where such a social group is cognizable and the applicant is a member of the group, you should examine the evidence to determine whether the applicant was targeted on account of his or her membership in a group defined by past assistance to law enforcement.

It is possible that an applicant who appears to have been targeted out of revenge for having cooperated with law enforcement may also be able to establish nexus to a particular social group defined by this shared past experience. You must carefully consider any direct evidence in the record of the persecutor's motive and indirect evidence such as the timing and circumstances of the harm or threats the applicant claims to have experienced, the applicant's testimony about the experiences of similarly situated individuals in the society, and country conditions reports or news articles relating to the treatment of other members of the group to make this determination. You should generally first examine whether there exists a group that meets the requirements of a particular social group, and then should analyze whether the applicant was or will be persecuted on account of any cognizable particular social group.

[209] *Martinez-Galarza v. Holder*, 782 F.3d 990, 993 (8th Cir. 2015).

[210] *Id.* at 994 (internal citation omitted).

## 4.21 Gang Members

The Ninth Circuit has found that "tattooed gang members" is not a particular social group, because the group is not defined with particularity. The court also found that neither former nor current gang membership constitutes a valid particular social group.[211]

A group defined as "gang members" is not a particular social group, despite having the shared immutable trait of past experience and arguably being able to establish the social distinction prong, because the group's shared experience stems from criminal activity.[212] Groups based upon criminality do not form the basis for protection, because the shared trait is "materially at war with those [characteristics] we have concluded are innate for purposes of membership in a social group."[213] To find otherwise, said the court, would pervert the humanitarian purpose of refugee protection by giving "sanctuary to universal outlaws." The court also found that "participation in criminal activity is not fundamental to gang members' individual identities or consciences."[214]

The court also analyzed whether current gang membership gives rise to a particular social group using the Ninth Circuit's alternate "voluntary association" test. The court found that current gang membership does not constitute a particular social group, because the gang association is for the purpose of criminal activity. Thus, it is not an association that is fundamental to human dignity; i.e., it is not the kind of association that a person should not be required to forsake. Therefore, current gang members are not members of a particular social group on the basis of their gang membership.[215]

The applicant also failed to establish a particular social group of "former" gang members. Disassociation from a gang does not automatically result in the creation of a new social group. Citing to *Matter of A-M-E- & J-G-U-*, the court found that "non-association" and "disaffiliation" are unspecific and amorphous terms, even if qualified with the word "tattooed," as in "former tattooed gang members."[216]

## 4.22 Former Gang Members

Some circuit courts have found that "former gang members" may be a particular social group. This finding is not consistent with USCIS's and RAIO's legal interpretation, according to which a particular social group may not be based on criminal activity or

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

[212] *Id.* at 945-46.

[213] *Id.* at 945.

[214] *Id.* at 946.

[215] *Id.*; *see also Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1097 (9th Cir. 2013) (acknowledging that the Board does not require members of a particular social group to share a voluntary associational relationship).

[216] *Id.*

associations, past or present.[217] However, for cases arising within the jurisdiction of those circuits, asylum officers must follow these rulings[218] as well as the analytical framework laid out by the BIA in *Matter of W-G-R-* and *Matter of M-E-V-G-*.[219] *See* Asylum Supplement – Former Gang Membership as a Particular Social Group. Because refugee applications are adjudicated outside of the jurisdiction of any circuit court of appeals, refugee officers are not bound by these circuit court decisions and should follow USCIS, RAIO and RAD guidance.

## 5. SUMMARY

An applicant who is seeking asylum based on membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity. A common, immutable characteristic is one that the members of the group either cannot change, or should not be required to change because it is fundamental to the member's identity or conscience. For social distinction, a group's shared characteristic must be perceived as distinct by the relevant society. Social distinction does not require the shared characteristic to be seen by society (i.e., literally visible). To satisfy the particularity requirement, there must be a benchmark and definable boundaries for determining who falls within the group and who does not. All three elements are required, and the elements must be analyzed on a case-by-case basis and society-by-society basis. In analyzing particular social groups, it also is important to consider the other general principles discussed in this lesson plan, including: to avoid circular reasoning; to avoid defining a group by terrorist, criminal, or persecutory activity; and to recognize that voluntary association, cohesiveness, or homogeneity are not required.

You should also avoid conflating nexus with the validity of a particular social group. Even if an applicant establishes that he or she is a member of a particular social group, the applicant must still establish that he or she was persecuted, or has a well-founded fear of persecution, on account of his or her membership in the group. Membership in a particular social group also may be imputed to an applicant who, in fact, is not a member of a particular social group. Finally, membership in a particular social group may overlap

---

[217] *See* Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[218] *Urbina-Mejia v. Holder*, 597 F.3d 360, 365–67 (6th Cir. 2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009); *Martinez v. Holder*, 740 F.3d 902, 911-13 (4th Cir. 2014) (concluding that Martinez's membership in a group that constitutes former MS-13 members is immutable, but did not address the social distinction and particularity criteria. The court remanded the case to consider other criteria).

[219] *Matter of W-G-R-*, 26 I&N Dec. 208, 215 n.5 (BIA 2014) (opining that "[g]ang members willingly involved in violent, antisocial behavior are more akin to persecutors and criminals, who are barred from establishing eligibility for asylum and withholding of removal, than to refugees, whom the Act is intended to protect"); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

with other protected grounds, such as political opinion, and you should also consider whether the applicant can establish eligibility based on a different protected ground.

## PRACTICAL EXERCISES

Practical exercises will be added at a later time.

**Practical Exercise # 1**

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

## OTHER MATERIALS

There are no "Other Materials" for this module.

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**RAD Supplement**

Given the nature of access to the U.S. Refugee Admissions Program (USRAP), many refugee applicants abroad are able to establish eligibility through nexus to one of the four protected grounds apart from membership in a particular social group (PSG). For that reason, a nexus to the other protected grounds should always be analyzed first. At pre-departure briefings, refugee officers will usually be informed of PSGs that have previously been recognized in populations they will be interviewing in that region. New PSGs are generally reviewed by the RAD Policy Branch to ensure consistency in RAD adjudications throughout all regions.

In the past, RAD has recognized PSGs of, for example, sexual minorities in certain countries as well as women from certain countries who have been subjected to sexual and gender-based violence (SGBV) who face familial and social ostracism, and other stigmatization or harm as a result. Before applying any of these PSGs to other populations, refugee officers must first ensure that the PSG meets the requisite three-part test and that country conditions support all elements of the PSG. For example, for women from a certain country who have been subjected to SGBV, country conditions should indicate that such women are socially distinct as

stigmatized, ostracized or facing other harm as a result of the violence before any such PSG claim is recognized to avoid circularity in the PSG definition.

For gender based PSG claims, it is also important to distinguish between UNHCR's designation of "women at risk" from any possible PSG to which such women may belong. "Women at risk" refers to one of UNHCR's seven categories for submission of refugees for resettlement and is one way in which a refugee may be granted access to the USRAP through a Priority 1 referral. However, UNHCR's identification of a refugee applicant as a "woman at risk" cannot be conflated with her eligibility for refugee status. Any gender-based PSG to which the applicant may belong must be fully analyzed and supported by the record and relevant evidence of country conditions where appropriate.

For further guidance, *see* RAIO Training Module, *Gender-Related Claims;* RAD Policy Branch, Responses to Queries: *PSGs within the context of Afghan Women at Risk* and *PSGs within the context of sexual and gender based violence against Congolese women.* Please note that these RAD documents were issued prior to the Board's articulation of the three-part test in 2014. Nonetheless, the documents contain other relevant guidance and suggested lines of inquiry.

## SUPPLEMENT B – ASYLUM DIVISION

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

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**ASM Supplement - Former Gang Membership as a Particular Social Group in the Fourth, Sixth, and Seventh Circuits**

Prior to the Board of Immigration Appeals' decisions in *Matter of M-E-V-G-* and *Matter of W-G-R*, the Sixth and Seventh Circuits issued decisions holding that former gang membership can form the basis of a particular social group.[220] The Fourth Circuit has also held that former members of the MS-13 gang in El Salvador shared an immutable characteristic and rejected the argument that a particular social group may not be defined by former criminal associations, though it did not decide whether the group met the "particularity" or "social distinction" criteria and remanded for the Board to consider whether the proposed group met those criteria.[221] On the other hand, the First and Ninth Circuits have held that former gang membership does not give rise to a particular social group.[222]

[220] *Urbina-Mejia v. Holder*, 597 F.3d 360, 365–67 (6th Cir.2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

[221] *Martinez v. Holder*, 740 F.3d 902, 911-13 (4th Cir. 2014).

In *W-G-R-*, the Board considered the case of an applicant who claimed that he had been targeted by the Mara 18 gang in El Salvador for retribution because he had left the gang.[223] The Board held that the applicant's proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not sufficiently particular, because it could include people of any age, sex, and background and their participation in the gang could vary widely in terms of strength and duration, or socially distinct, because there was not enough evidence in the record about the treatment or status of former Mara 18 members in Salvadoran society.[224] In addition, the Board opined that "[g]ang members willingly involved in violent, antisocial behavior are more akin to persecutors and criminals, who are barred from establishing eligibility for asylum and withholding of removal, than to refugees, whom the Act is intended to protect."[225] The Board quoted from its decision in *Matter of E-A-G-*, stating, "Treating affiliation with a criminal organization as being protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior."[226]

As the Fourth, Sixth, and Seventh Circuits have issued decisions that conflict with USCIS's interpretation of the term "particular social group" not to include groups based on past or present criminal, persecutory, or terrorist activity or association, and the Board has not expressly held that these decisions have been superseded, asylum officers adjudicating cases in those circuits may not rely on this principle. No circuit court, however, has yet considered whether social groups based on former membership in a criminal gang may be cognizable according to the three-part test set forth in *M-E-V-G-* and *W-G-R-*. Asylum Officers in the Fourth, Sixth, and Seventh Circuits must consider whether groups based on former criminal activities or associations are valid by applying all three criteria as articulated in the Board decisions.

---

[222] *See* *Cantarero v. Holder*, 734 F.3d 82, 86 (1st Cir. 2013) ("The shared past experiences of former members of the 18th Street gang include violence and crime. The BIA's decision that this type of experience precludes recognition of the proposed social group is sound."); *Arteaga v. Mukasey*, 511 F.3d 940, 945-46 (9th Cir. 2007) ("We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft."); *cf.* *Elien v. Ashcroft* (1st Cir. 2004) (in rejecting repatriated Haitian criminals as a particular social group, stating, "the BIA has never extended the term 'social group' to encompass persons who voluntarily engaged in illicit activities"); *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) (rejecting drug traffickers as a particular social group).

[223] *Matter of W-G-R-*, 26 I&N Dec. 208, 209 (BIA 2014).

[224] *Id.* at 221.

[225] *Id.* at 215 n. 5.

[226] *Id.* (quoting *Matter of E-A-G-*, 24 I&N Dec. 591, 596 (BIA 2008)).

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

*RAIO Combined Training Course*

# DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

Training Module

## MODULE DESCRIPTION

This module discusses the definition of persecution and the determination as to whether an act constitutes persecution.

## TERMINAL PERFORMANCE OBJECTIVE(S)

When adjudicating a request for asylum or refugee resettlement, you will correctly apply the law to determine eligibility for asylum in the United States or resettlement in the United States as a refugee.

## ENABLING PERFORMANCE OBJECTIVES

1. Distinguish between government and non-government agents of persecution.
2. Explain factors to consider in determining whether an act(s) is sufficiently serious to constitute persecution.
3. Explain factors to consider when deciding whether an applicant is eligible for asylum or refugee status based on past persecution alone.

## INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Group and individual practical exercises

## METHOD(S) OF EVALUATION

- Multiple-choice exam

## REQUIRED READING

1.

2.

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

1. UNHCR Handbook
2. *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989)
3. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (en banc)
4. *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).
5. *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007)
6. *Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011)
7. *Haider v. Holder*, 595 F.3d 276, 288 (6th Cir. 2010).

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

| Task/ Skill # | Task Description |
|---|---|
| ILR6 | Knowledge of U.S. case law that impacts RAIO (4) |
| ILR19 | Knowledge of criteria for past persecution (4) |
| ILR20 | Knowledge of the criteria for refugee classification (4) |
| ILR21 | Knowledge of the criteria for establishing a well-founded fear (WFF)(4) |
| ILR23 | Knowledge of bars to immigration benefits (4) |

| | |
|---|---|
| DM2 | Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5) |
| DM3 | Skill in applying eligibility requirements to information and evidence (5) |
| DM5 | Skill in analyzing complex issues to identify appropriate responses or decisions (5) |

## SCHEDULE OF REVISIONS

| Date | Section (Number and Name) | Brief Description of Changes | Made By |
|---|---|---|---|
| 1/20/14 | Throughout document | Fixed links, added recent case law examples | RAIO Training |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

## Table of Contents

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

## 1 INTRODUCTION

This is one in a series of modules on eligibility for asylum and refugee status. This module provides an overview of the definition of persecution and eligibility based on past persecution.

Other RAIO Training modules on asylum and refugee eligibility discuss:

- the basic elements of the refugee definition (*Refugee Definition*)
- eligibility based on fear of future persecution (*Well-Founded Fear)*
- the motive of the persecutor and the five protected grounds in the refugee definition (*Nexus and the Five Protected Grounds*; *Nexus: Particular Social Group)*
- the burden of proof and evidence (*Evidence)*
- the role of discretion (*Discretion)*
- participation in the persecution of others on account of a protected ground (*Analyzing the Persecutor Bar)*
- entry into and permanent status in a third country (*Firm Resettlement)*

In addition, for asylum adjudications, one of the Asylum Lesson Plans discusses mandatory reasons to deny asylum. For overseas refugee adjudications, the RAIO Training module, *Grounds of Inadmissibility* discusses reasons an applicant may be inadmissible to the United States and the availability of waivers. The RAD *Access* module discusses available means to access the U.S. Refugee Admissions Program.

## 2 PAST PERSECUTION

An applicant may establish that he or she is a refugee based on either past persecution or a well-founded fear of future persecution.[1]

The regulations implementing USCIS's discretionary authority to grant asylum, generally require a well-founded fear of persecution. If an applicant establishes past persecution, a rebuttable presumption of a well-founded fear of future persecution is created.[2] Well-founded fear is presumed unless the officer establishes that a fundamental change in circumstances has occurred, such that the applicant no longer has a well-founded fear, or that the applicant could reasonably avoid future persecution by relocating to another part of his or her country of nationality.[3] If the persecutor is the government or is government-sponsored or the applicant has been persecuted in the past, there is a rebuttable presumption that internal relocation is not reasonable, unless you establish by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.[4] Asylum applicants who suffered past persecution but who no longer have a well-founded fear of future persecution may be granted asylum based on being unable or unwilling to return to the country due to the severity of the past persecution or if there is a reasonable possibility that the applicant will face other serious harm upon return.[5]

In the overseas refugee processing context, there is no equivalent regulatory guidance on past persecution at 8 C.F.R. § 207. In the absence of such regulatory guidance, a plain language interpretation of the term refugee as defined in INA § 101(a)(42) is followed in overseas refugee processing. If an applicant credibly establishes that the harm he or she suffered in the past rose to the level of persecution on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility. A rebuttable presumption is neither created nor necessary. Nonetheless, as a matter of policy, refugee officers will always assess an applicant's well-founded fear of future persecution regardless of whether or not he or she has established past persecution.[6]

---

[1] INA § 101(a)(42)

[2] INA § 208; INA § 101(a)(42); 8 C.F.R. § 208.13(b)(1).

[3] For additional information, *see* Eligibility Based on Past Persection, below, and RAIO Training module, *Discretion*.

[4] 8 C.F.R. § 208.13(b)(3)(ii).

[5] 8 C.F.R. § 208.13(b)(1)(iii); For additional information on granting asylum in the absence of a Well-Founded Fear, see RAIO module, *Discretion*.

[6] *See* Refugee Affairs Division (RAD), Refugee Application Assessment: Standard Operating Procedures (SOP) (requiring officers to elicit testimony and assess well-founded fear even where applicants have demonstrated past persecution).

In contrast, the UN refugee definition focuses primarily on well-founded fear, rather than past persecution. The cessation clauses of the 1951 Convention, however, do provide that a refugee who no longer fears future persecution should be given protection due to compelling reasons arising from previous persecution.[7]

# 3 PERSECUTION

## 3.1 General Elements

### Severity of Harm

To establish persecution, an applicant must show that the harm that the applicant experienced or fears is sufficiently serious to amount to persecution. The degree of harm must be addressed before you may find that the harm that the applicant suffered or fears can be considered "persecution."

### Motivation

An applicant also must prove that the persecutor's motivation in harming, or seeking to harm him or her, is on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.[8] Proving motivation is discussed in more detail in RAIO Training module, *Nexus and the Five Protected Grounds.* You should separate the analysis of motivation from the evaluation of whether the harm rises to the level of persecution, in order to make the basis of your decision as clear as possible.

### Persecutor

The applicant must show that the entity that harmed, or is threatening, the applicant (the persecutor) is either an agent of the government or an entity that the government is unable or unwilling to control.[9]

### Location

Only harm suffered in the country of nationality or, if stateless, the country of last habitual residence, may be considered in a finding of past persecution, for the purpose of establishing eligibility. Harm suffered in the United States or a third country may be considered as evidence of a well-founded fear if the applicant can establish a connection between the persecutor and his or her country of origin.[10]

---

[7] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Article 1C, paras. (5) and (6), incorporated by reference into the 1967 Protocol relating to the Status of Refugees.

[8] For additional information, *see* RAIO Training module, *Nexus and the Five Protected Grounds.*

[9] For additional information, *see* section, *Identifying a Persecutor.*

[10] *See* 8 C.F.R. § 208.13(b)(1); *Costa v. Holder*, 733 F.3d 13, 15 (1st Cir. 2013).

*Example*

Applicant testifies to being the victim of domestic violence while living in the United States. Because applicant has filed a complaint against her spouse, the spouse has been removed to his country of nationality and now the applicant claims to fear additional harm from her spouse if returned to the same country as her spouse. In such a situation the applicant would not be considered to have suffered past persecution, but you would consider the violence suffered in the United States as evidence in your analysis of well-founded fear.

## 3.2 Whether the Harm Amounts to Persecution

### 3.2.1 Board of Immigration Appeals (BIA) Decisions

In an often-cited BIA decision, the BIA defined persecution as harm or suffering inflicted upon an individual in order to punish the individual for possessing a belief or characteristic the persecutor seeks to overcome.[11]

The BIA later modified this definition and explicitly recognized that a "punitive" or "malignant" intent is not required for harm to constitute persecution.[12] The BIA concluded that persecution can consist of objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm.[13]

Additionally, the BIA has found that the term "persecution" encompasses more than physical harm or the threat of physical harm so long as the harm inflicted or feared rises to the level of persecution.[14] Non-physical harm may include "the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."[15]

### 3.2.2 Guidance from the Department of Justice

In a proposed rule providing guidance on the definition of persecution, the Department of Justice indicated its approval of the conclusion in *Kasinga* that the existence of persecution does not require a malignant or punitive intent.[16] The Department also

[11] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), modified by *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987).

[12] *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997).

[13] *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); for additional information, *see* RAIO Training module, *Nexus and the Five Protected Grounds*.

[14] *Matter of T-Z-*, 24 I&N Dec. 163, 169-71 (BIA 2007).

[15] *Matter of T-Z-*, 24 I&N Dec. at 171, citing *Laipenienks v. INS*, 750 F.2d 1427 (9th Cir. 1985).

[16] U.S.Department of Justice, Asylum and Withholding Definitions, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. This proposed rule did not become a regulation but indicates the agency's view on the topic.

emphasized that the victim must experience the treatment as harm in order for persecution to exist. Thus, under this reasoning, in a case involving female genital mutilation, whether the applicant at hand would experience or has experienced the procedure as serious harm, not whether the perpetrator intends it as harm, is a key inquiry.

### 3.2.3 Federal Court Decisions

Persecution encompasses more than just physical harm. The Supreme Court has held that persecution is a broader concept than threats to "life or freedom."[17]

The U.S. Court of Appeals for the Ninth Circuit has defined "persecution" as "infliction of suffering or harm upon those who differ . . . in a way regarded as offensive" and "oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate."[18] Such harm could include severe economic deprivation.[19]

Similarly, the Seventh Circuit described persecution as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate."[20] The term "persecution" includes actions less severe than threats to life or freedom. Non-life threatening violence and physical abuse also fall within the definition of persecution.[21] However, "actions must rise above the level of mere 'harassment' to constitute persecution."[22] More recently, the Seventh Circuit has faulted the BIA for failing to distinguish "…among three forms of oppressive behavior" that an applicant might experience: discrimination, harassment, and persecution.[23] The court offered the following definitions, in the absence of an agency definition:

- Discrimination "refers to unequal treatment, and is illustrated historically by India's caste system and the Jim Crow laws in the southern U.S. states."[24]
- Harassment "involves targeting members of a specified group for adverse treatment, but without the application of significant physical force."[25]
- Persecution is "the use of significant physical force against a person's body, or the infliction of comparable physical harm without direct application of force (locking a

[17] *INS v. Stevic*, 467 U.S. 407, 428 fn. 22 (1984).

[18] *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985).

[19] *Kovac*, 407 F.2d at 107.

[20] *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000).

[21] *Id.*

[22] *Id.*

[23] *Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011).

[24] *Id.* at 947-48.

[25] *Id.* at 948.

> person in a cell and starving him would be an example), or nonphysical harm of equal gravity," such as refusing to allow a person to practice his religion or pointing a gun at a person's head.[26]

The court then went on to distinguish between harassment and persecution as being the difference "between the nasty and the barbaric, or alternatively between wishing you were living in another country and being so desperate that you flee without any assurance of being given refuge in any other country."[27]

The First Circuit has described persecution as an experience that "must rise above unpleasantness, harassment and even basic suffering."[28] There is no requirement that an individual suffer "serious injuries" to be found to have suffered persecution.[29] However, the presence or absence of physical harm is relevant in determining whether the harm suffered by the applicant rises to the level of persecution.[30]

Serious threats made against an applicant may constitute persecution even if the applicant was never physically harmed.[31] Under some circumstances, a threat may be sufficiently serious and immediate to constitute persecution even if it is not explicit.[32] Consider the following issues to explore when evaluating whether a threat is serious enough to rise to the level of persecution:

- Has the persecutor attempted to act on the threat?[33]
- Is the nature of the threat itself indicative of its seriousness?[34]
- Has the persecutor harmed or attempted to harm the applicant in other ways?[35]
- Has the persecutor attacked, harassed, or threatened the applicant's family?[36]

---

[26] *Id.*

[27] *Id.*

[28] *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000).

[29] *Asani v. INS*, 154 F.3d 719, 723 (7th Cir. 1998); *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004); *Sanchez-Jimenez v. U.S. Att'y Gen.*, 492 F.3d 1223 (11th Cir. 2007).

[30] *Ruiz v. Mukasey*, 526 F.3d 31, 37 (1st Cir. 2008).

[31] *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074 (9th Cir. 2002), amended by *Salazar-Paucar v. INS*, 290 F.3d 964 (9th Cir. 2002).

[32] *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014).

[33] *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) (death threats alone may constitute persecution).

[34] *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998) (three letters within three months containing death threats constituted persecution).

[35] *Mejia v. U.S. Att'y Gen.*, 498 F.3d 1253, 1257-58 (11th Cir. 2007).

- Has the persecutor carried out threats issued to others similarly situated to the applicant?[37]

- Did the applicant suffer emotional or psychological harm as a result of the threat(s)?[38]

The federal courts, as well as the BIA, have held that cumulative instances of harm, considered in totality, may constitute persecution on account of a protected characteristic, so long as the discrete instances of harm were each inflicted on account of a protected characteristic.[39]

You should evaluate the entire scope of harm experienced and feared by the applicant to determine if he or she was persecuted and fears persecution.

### 3.2.4 Guidance from the UNHCR Handbook

The UNHCR Handbook explains the following:[40]

- A threat to life or freedom, or other serious violation of human rights on account of any of the protected grounds is always persecution.

- Other, less serious harm may constitute persecution depending on the circumstances.

- Acts that do not amount to persecution when considered separately can amount to persecution when considered cumulatively.

### 3.2.5 General Considerations

#### Individual Circumstances

It is important to take into account the individual circumstances of each case and to consider the feelings, opinions, age, and physical and psychological characteristics of the applicant in determining whether the harm suffered or feared rises to the level of persecution.[41] For example, one may hold passionate political or religious convictions, the hindrance of which would cause great suffering; while another may not have such strong convictions.[42]

---

[36] *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Sanchez Jimenez v.U.S.Atty Gen.* 492 F.3d 1223, 1233 (11th Cir. 2007).

[37] *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998).

[38] For additional information, *see* section on *Psychological Harm*.

[39] *Chand v. INS*, 222 F.3d 1066, 1073 (9th Cir. 2000); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998); *Matter of O-Z-& I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998); cf. *Mihalev v. Ashcroft*, 388 F.3d 722, 728 (9th Cir. 2004).

[40] UNHCR Handbook, paras. 51-55.

[41] *Id.* at para. 52.

[42] *Id.* at para. 40.

### Age

In assessing whether harm rises to the level of persecution, you should determine the age of the applicant at the time the harm occurred and determine if age is a factor that should be considered.[43] For example, the effect of similar circumstances might be more severe on a child or an elderly person than they may be on others. Harm that may not rise to the level of persecution for an adult may be persecution if the harm is inflicted on a child. In considering whether past harm suffered by a child rises to the level of persecution, it is important to take into account a child's young age and dependence on family and community.[44]

### No Set Number of Incidents Required

There is no minimum number of acts or incidents that must occur in order to establish persecution.[45] One serious incident or threat may constitute persecution, or there may be several incidents or acts, which considered together, constitute persecution.

## 3.3 Human Rights Violations

Violations of "core" or "fundamental" human rights, prohibited by international law, may constitute harm amounting to persecution. These rights include freedom from:[46]

- arbitrary deprivation of life
- genocide
- slavery
- torture and other cruel, inhuman, or degrading treatment
- prolonged detention without notice of and an opportunity to contest the grounds for detention
- rape and other severe forms of sexual violence

Torture can take a wide variety of forms. It can include severe physical pain by beating or kicking, or pain inflicted with the help of objects such as canes, knives, cigarettes, or metal objects that transmit electric shock. Torture also includes the deliberate infliction of

[43] *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Ordonez-Quino v. Holder*, 760 F.3d 80, 93 (1st Cir. 2014).

[44] For additional information, *see* RAIO Training module, *Children's Claims*.

[45] *See, e.g., Vaduva v. INS*, 131 F.3d 689, 690 (7th Cir. 1997); and *Lumaj v. Gonzales*, 462 F.3d 574, 577 (6th Cir. 2006).

[46] *See* Guy S. Goodwin-Gill, *The Refugee in International Law Second Edition* (New York: Oxford University Press, 1998), pp.68-9; and James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1992), p. 109.

severe mental suffering.[47] Torture will always rise to the level of persecution. Keep in mind, however, that for purposes of asylum or refugee status, as opposed to protection under the Convention Against Torture, torture must have been inflicted on account of one of the five protected grounds. Convention Against Torture protection is available in immigration court removal proceedings, *see* Asylum Lesson Plans on Credible Fear and Reasonable Fear.

Other fundamental rights are also protected by customary international law, such as the right to recognition as a person in the law, and the right to freedom of thought, conscience, and religion or belief.[48] Deprivation of these rights may also constitute persecution.[49]

***Examples***

- The BIA has found that the enforcement of coercive family planning policy through forced abortion or sterilization is a violation of fundamental human rights. Forced abortion or sterilization deprives the individual of the right to make individual or conjugal decisions regarding reproductive rights.[50]

- The Third Circuit has stated that compelling an individual to engage in conduct that is abhorrent to that individual's deepest beliefs may constitute persecution.[51]

- UNHCR guidelines on religious-based refugee claims indicate that forced compliance could constitute persecution "if it becomes an intolerable interference with the individual's own religious belief, identity, or way of life and/or if noncompliance would result in disproportionate punishment."[52]

## 3.4 Discrimination and Harassment

[47] J. Herman Burgers & Hans Danelius, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), pp. 117-18. For additional information, *see* RAIO Training module, *International Human Rights Law* (section on *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*).

[48] Guy S. Goodwin-Gill, *The Refugee in International Law Second Edition* (New York: Oxford University Press, 1998), p.69.

[49] For additional information, *see* RAIO Training module, *The International Religious Freedom Act (IRFA) and Religious Persecution Claims*.

[50] *See* *Matter of S-L-L-*, 24 I&N Dec. 1, 5-7 (BIA 2006), (en banc), overruled on other grounds by *Matter of J-S-*, 24 I&N Dec. 520 (AG 2008); *Matter of Y-T-L-*, 23 I&N Dec. 601, 607 (BIA 2003); UNHCR, *UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies* (Geneva: Aug. 2005).

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

[52] UNHRC, *Guidelines on International Protection: Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (HCR/GIP/04/06, 28 April 2004), para. 21.

Less preferential treatment and other forms of discrimination and harassment generally are not considered persecution.[53] Where discriminatory practices or instances of harassment accumulate or increase in severity to the extent that they lead to consequences of a substantially prejudicial nature, adverse actions that would themselves constitute only discrimination or harassment may, cumulatively, rise to the level of persecution.[54]

The Second Circuit Court of Appeals has indicated that differentiating between harassment and persecution can be a matter of degree and that adjudicators must consider the context in which mistreatment occurs.[55] A minor beating may constitute only harassment when inflicted by a non-governmental entity. In the context of an arrest or detention by a government official, however, a minor beating, if inflicted on account of a protected characteristic, may rise to the level of persecution.

The fact that a non-citizen does not enjoy all of the same rights as citizens in the country of last habitual residence is generally, by itself, not harm sufficient to rise to the level of persecution.[56]

***Examples***

- Discrimination did not rise to the level of persecution against an Armenian living in Russia when it included merely harassment and pushing by Russian officers because of ethnicity and being denied a job because "there were no jobs for Armenians."[57]

- An Egyptian Coptic Christian claimed that his career as a medical doctor would suffer because of discrimination against Christians. The Ninth Circuit found that this level of discrimination was insufficient to amount to persecution.[58] In contrast, the inability to practice medicine through the invalidation of a medical degree does amount to persecution when it is on account of the applicant's ethnicity.[59]

### *General Factors to Consider*

Some relevant questions to consider in determining whether the discrimination and harassment of the applicant amount to persecution are:

---

[53] *See* UNHCR Handbook, paras. 54-55; *Stanojkova v. Holder*, 645 F.3d 943, 947-948 (7th Cir. 2011); *Matter of A-E-M-*, 21 I&N Dec. 1157, 1159 (BIA 1998); *Matter of V-F-D-*, 23 I&N Dec. 859, 863 (BIA 2006); *Baka v. INS*, 963 F.2d 1376, 1379 (10th Cir. 1992); *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998).

[54] *Ivanishvili v. USDOJ*, 433 F.3d 332, 342 (2d Cir. 2006).

[55] *Beskovic v. Gonzales*, 467 F. 3d 223, 226 (2d Cir. 2006).

[56] *Ahmed v. Ashcroft*, 341 F.3d 214, 217 (3d Cir. 2003); *Najjar v. Ashcroft*, 257 F.3d 1262, 1291 (11th Cir. 2001); *Faddoul v. INS*, 37 F.3d 185, 189 (5th Cir. 1994).

[57] *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000).

[58] *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir.1995); cf. *Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004).

[59] *Stserba v. Holder*, 646 F.3d 964, 976 (6th Cir. 2011).

- Was the harm actually persecution, not merely discrimination or harassment?
- How long has the discrimination or harassment lasted?
- Which human rights were affected?
- How has the discrimination or harassment affected the particular applicant?
- How many types of discriminatory practices or how much harassment has been imposed on the applicant, cumulatively?
- Has there been any escalation over time in the frequency or seriousness of the discrimination or harassment or has it remained at the same level over time?

Some significant factors to consider in determining whether discrimination and harassment amount to persecution include:

- serious restrictions on the right to earn a livelihood[60]
- serious restrictions on the access to normally available educational facilities
- arbitrary interference with a person's privacy, family, home, or correspondence
- relegation to substandard dwellings
- exclusions from institutions of higher learning
- enforced social or civil inactivity
- passport denial
- constant surveillance
- pressure to become an informer
- confiscation of property
- the accumulation and type of discriminatory practices or harassment that have been imposed on the applicant

Generally none of these factors, by themselves, would be considered to rise to the level of severity necessary to constitute persecution, but may, on a case by case basis, be deemed to rise to the level of persecution. Each case must be judged individually based on the unique facts of that claim.

[60] *See, e.g.*, *Gormley v. Ashcroft*, 364 F.3d 1172, 1179 (9th Cir. 2004)(in rejecting claim, court relied on fact that South African government provided unemployment compensation to couple laid off pursuant to affirmative action).

## 3.5 Arrests and Detention

In evaluating whether a detention is persecution, consider:

- length of the detention
- legitimacy of the government action
- mistreatment during the detention
- judicial processes or due process rights accorded[61]

Generally, a brief detention without mistreatment will not constitute persecution. Prolonged detention is a deprivation of liberty, which may constitute a violation of a fundamental human right and amount to persecution. Similarly, multiple brief detentions may, considered cumulatively, amount to persecution. Evidence of mistreatment during detention also may establish persecution.[62]

***Examples***

- A Chinese Christian was arrested during an underground religious service, detained for seven days, and repeatedly beaten. On one occasion, he was chained to an iron bar outside in the rain for several hours, causing him to become ill. The Eleventh Circuit Court of Appeals held that the evidence compelled the conclusion that the harm the applicant suffered rose to the level of persecution.[63]

- A Kosovar Albanian was interrogated on three occasions by Serbian police. One time, during a 24-hour detention, he suffered an injury to his hands caused by the police. The Seventh Circuit held that substantial evidence supported a finding that the applicant had not suffered past persecution.[64]

- A 16-year old Chinese girl was detained for two days by police, during which time she was pushed and her hair was pulled, she was expelled from school, and her home was ransacked by police. The Seventh Circuit held that substantial evidence supported a finding that the applicant had not suffered past persecution.[65]

---

[61] For additional information, *see* RAIO Training module, *Nexus and the Five Protected Grounds*.

[62] *Asani v. INS*, 154 F.3d 719, 723 (7th Cir. 1998)(the court instructed the BIA on remand to apply the correct persecution standard and questioned the BIA, using the incorrect standard applied, "If having two teeth knocked out and being deprived of sufficient food and water are not 'serious injuries' or 'physical harm,' what is?")

[63] *Shi v. U.S. Att'y Gen.*, 707 F.3d 1231, 1237-1239 (11th Cir. 2013).

[64] *Prela v. Ashcroft*, 394 F.3d 515, 518 (7th Cir. 2005).

[65] *Mei Dan Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004).

- A Chinese national was detained at a police station for three days, during which time he was interrogated for two hours and hit on his back with a rod approximately ten times, causing him pain and temporary red marks, but not requiring any medical treatment. The Ninth Circuit found that the facts did not compel a finding of past persecution.[66]

- A Bulgarian Christian was detained by police twice, each for two days, and on a third occasion was beaten by police in her home, resulting in a miscarriage of her pregnancy. The Seventh Circuit found that treatment suffered by the applicant was so severe as to compel a finding of past persecution.[67]

- A Bulgarian of Roma descent was detained by police for ten days, during which time he was beaten daily with sandbags and forced to perform heavy labor. The applicant suffered no significant bodily injury. The Ninth Circuit found that treatment suffered by the applicant was so severe as to compel a finding of past persecution.[68]

## 3.6 Economic Harm

To rise to the level of persecution, economic harm must be deliberately imposed and severe.[69] Severe economic harm must be harm "above and beyond [the economic difficulties] generally shared by others in the country of origin and involve more than the mere loss of social advantages or physical comforts."[70]

In *Matter of T-Z-*, the Board held that adjudicators should apply the following test in determining whether economic harm amounts to persecution: whether the applicant suffered or faces a "deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."[71] An applicant, however, need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution.[72]

In this decision, the BIA highlighted some factors to consider in assessing whether the fines and job loss at issue amounted to persecution,[73] including

[66] *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006).

[67] *Vladimirova v. Ashcroft*, 377 F.3d 690, 693 (7th Cir. 2004).

[68] *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004).

[69] *See Minwalla v. INS*, 706 F.2d 831, 835 (8th Cir. 1983); *Ambati v. Reno*, 233 F.3d 1054, 1060 (7th Cir. 2000); *Guan Shan Liao v. INS*, 293 F.3d 61, 69-70 (2d Cir. 2002).

[70] *Matter of T-Z-*, 24 I&N Dec. 163, 173 (BIA 2007).

[71] *Matter of T-Z-*, 24 I&N Dec. 163, 173 (BIA 2007). *See also Vicente-Elias v. Mukasey*, 532 F.3d 1086 (10th Cir. 2008)(adopting *Matter of T-Z-* standard on economic persecution); *Borca v. INS*, 77 F.3d 210 (7th Cir. 1996) (holding that total economic deprivation is not required to establish persecution).

[72] *Matter of T-Z-*, 24 I&N Dec. at 173.

[73] *Id.* at 173-75.

- the applicant's and his or her household's earnings
- the applicant's net worth
- other employment available to the applicant
- loss of housing
- loss of health benefits
- loss of school tuition and educational opportunities
- loss of food rations
- confiscation of property, including household furniture and appliances
- any other relevant factor

In *Vincent v. Holder*, the Sixth Circuit held that the burning of the applicant's house was "sufficiently severe and targeted to constitute persecution," relying on *T-Z-*'s holding that a large-scale confiscation of property may in itself constitute persecution.[74] In contrast, in *Yun Jian Zhang v. Gonzales*, the Seventh Circuit held that the partial destruction of the applicant's house was not severe economic harm where damage could be repaired, particularly given that the applicant worked in construction; the applicant continued to be gainfully employed; the family found shelter at his in-laws' home; and the government did not continue to harm him or his family.[75]

In *Zhen Hua Li v. Att'y Gen. of U.S.*, the Third Circuit held that a fine worth eighteen months' salary, combined with being blacklisted from any government employment and from most other forms of legitimate employment, the loss of health benefits, school tuition, and food rations, and the confiscation of his household furniture and appliances, would constitute the deliberate imposition of severe economic disadvantage that could threaten his family's freedom, if not their lives.[76] In *Mu Ying Wu v. U.S. Att'y Gen.*, on the other hand, the Eleventh Circuit held that substantial evidence supported a finding that a fine that would amount to about 60 to 100 per cent of the applicant's family's annual income, which could be paid in installments or which the applicant could avoid paying by forgoing free medical care and public education for her children, would not, without any additional harm, rise to the level of persecution.[77]

[74] *Vincent v. Holder*, 632 F.3d 351, 355 (6th Cir. 2011), *citing T-Z-*, 24 I&N Dec. at 174.

[75] *Yun Jian Zhang v. Gonzales*, 495 F.3d 773, 777-78 (7th Cir. 2007).

[76] *Zhen Hua Li v. Att'y Gen. of U.S.*, 400 F.3d 157, 166-69 (3d Cir. 2005).

[77] *Mu Ying Wu v. U.S. Att'y Gen.*, 745 F.3d 1140, 1157 (11th Cir. 2014).

Applying the BIA's standard in *Matter of T-Z-*, the Eighth Circuit has held that being relegated to low-level jobs despite advanced schooling did not amount to severe economic deprivation. Because private employment remained available, the economic discrimination was not sufficiently harsh so as to constitute persecution.[78]

An applicant's loss of employment as a result of a government-sponsored employment program instituted to correct past discrimination is not sufficient to support a finding of past persecution on account of a protected characteristic where the government provided considerable unemployment compensation to the applicant, and other similarly situated individuals were able to maintain or regain employment.[79] On the other hand, a program of state-sponsored economic discrimination against a disfavored group within the society that could lead to extreme economic harm may amount to past persecution.[80]

## 3.7 Psychological Harm

### 3.7.1 Psychological Harm Alone May Be Sufficient to Constitute Persecution

You should always consider evidence, including the applicant's testimony, that the events he or she experienced caused psychological harm.[81] Psychological harm alone may rise to the level of persecution.[82] Evidence of the applicant's psychological and emotional characteristics, such as the applicant's age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution.

### 3.7.2 Under The Convention Against Torture, Severe Mental Harm Alone May Be Sufficient to Constitute Torture

Under the Convention Against Torture, severe mental suffering may constitute torture under certain circumstances.[83] Some examples of mental suffering that fall within this definition of torture, and thus would be considered serious enough to rise to the level of persecution, include:

---

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

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

[80] *Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004)(finding that Palestinian applicants were members of a persecuted minority who, due to Kuwaiti state-sponsored economic discrimination, would be subject to denial of right to work, attend school, and to obtain drinking water if returned to Kuwait).

[81] For additional information, *see* RAIO Training module, *Interviewing Survivors of Torture*.

[82] *Ouk v. Gonzales*, 464 F.3d 108, 111 (1st Cir.2006) ("a finding of past persecution might rest on a showing of psychological harm"); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir.2004) ("Persecution may be emotional or psychological, as well as physical."). The Fourth Circuit held that in withholding of removal cases only, which are not at issue in asylum or refugee adjudications, psychological harm alone cannot amount to persecution. *Niang v. Gonzales*, 492 F.3d 505,512 (4th Cir. 2007).

[83] *See* 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990); UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465; and 8 C.F.R. § 208.18.

- mental harm caused by the intentional infliction or threatened infliction of severe physical pain or suffering
- administration or threatened administration of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality
- threat of imminent death
- threat that another person will imminently be subjected to death or severe physical pain or suffering

### 3.7.3 Other Forms of Mental Harm May Be Sufficient to Constitute Persecution

Other forms of mental harm that amount to persecution, but may not amount to torture include:

- receipt of threats over a prolonged period of time, causing the applicant to live in a state of constant fear
- being forced to witness the harm of others[84]
- forced compliance with religious laws or practices that are abhorrent to an applicant's beliefs

For example, the Ninth Circuit found in *Mashiri v. Ashcroft* that the emotional trauma suffered by a native of Afghanistan living in Germany was sufficiently severe to amount to persecution. The cumulative harm resulted from watching as a foreign-owned store in her neighborhood was burned, finding her home vandalized and ransacked, running from a violent mob that attacked foreigners in her neighborhood, reading in the newspaper about a man who lived along her son's path to school who shot over the heads of two Afghan children, and witnessing the results of beatings of her husband and children.[85]

The U.S. Court of Appeals for the Third Circuit has indicated that forced compliance with laws that are deeply abhorrent to a person's beliefs may constitute persecution. For example, being forced to renounce religious beliefs or to desecrate an object of religious importance might be persecution if the victim holds strong religious beliefs.[86]

## 3.8 Sexual Harm

### 3.8.1 Rape and Other Sexual Abuse

[84] *See* *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004). *But see* *Shoaira v. Ashcroft*, 377 F.3d 837, 844 (8th Cir. 2004) (upholding a finding that the emotional harm suffered did not rise to the level of persecution ).

[85] *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004).

[86] *Fatin v. INS*, 12 F.3d 1233, 1241-42 (3d Cir. 1993).

Rape and other severe forms of sexual harm constitute harm amounting to persecution, as they are forms of serious physical harm.[87] Rape is regarded as a "form of aggression constituting an egregious violation of humanity," which can constitute torture.[88]

You should also consider less severe sexual harm when determining whether harm amounts to persecution.[89] You must examine the entire circumstances of the case before you, including any resulting psychological harm, the social or cultural perceptions of the applicant as a victim of the sexual harm, and other effects on the applicant resulting from the harm.

***Example***

> The applicant was stopped by the police several times and three times was stripped and twice threatened with sodomy by a gun barrel. In overturning the IJ's decision, the court stated, "[m]ost egregiously, the IJ failed to consider the significance of the sexual humiliation that occurred on three occasions. This court has previously noted that abuse of this nature can make all the difference."[90]

### 3.8.2 Female Genital Mutilation or Female Genital Cutting

The practice of female genital mutilation (FGM), also known as female genital cutting (FGC), is objectively a sufficiently serious form of harm to constitute persecution.[91] Generally, in determining whether FGM is persecution to the applicant, you should consider whether the applicant experienced or would experience the procedure as serious harm.[92] The BIA in *Matter of S-A-K- & H-A-H-* recognized that FGM imposed on a young child constituted past persecution.[93] The BIA held that she and her mother had suffered an atrocious form of persecution that resulted in continuing physical pain and discomfort and that they merited humanitarian asylum based on the severity of their harm.[94]

---

[87] *See* Memorandum from Phyllis Coven, INS Office of International Affairs, to INS Asylum Officers and HQASM Coordinators, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, (26 May 1995), p.9.

[88] See UNHCR, *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/02, 7 May 2002), para. 9; *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097-98 (9th Cir. 2000); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996); and *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003).

[89] *See, e.g., Angoucheva v. INS*, 106 F.3d 781, 790 (7th Cir. 1997).

[90] *Haider v. Holder*, 595 F.3d 276, 288 (6th Cir. 2010).

[91] *See Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996)

[92] U.S. Department of Justice, Asylum and Withholding Definitions, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. The proposed rule did not become a regulation but represents the agency's view on the topic.

[93] *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464, 465 (BIA 2008)

[94] *Id.* at. 465-66.

Even in countries that have prohibited the practice of FGM, the government may condone, tolerate, or be unable to protect against the practice. The fact that a state has enacted a law prohibiting FGM does not necessarily indicate that the government is willing and able to protect an applicant.[95]

## 3.9 Harm to Family Members or Other Third Parties

Harm to an applicant's family member or another third party may constitute persecution of the applicant where the harm the applicant suffers is serious enough to amount to persecution and where the persecutor's motivation in harming the third party is to harm the applicant.[96] The BIA has held that emotional harm may rise to the level of persecution where a person "persecutes someone close to an applicant, such as a spouse, parent, child or other relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself."[97] For example, the wife of a political dissident may be abducted and killed as a way of teaching her husband a political lesson.

An applicant may suffer severe psychological harm from the knowledge that another individual has been harmed in an effort to persecute the applicant.[98] The harm may be intensified if the applicant feels that his or her status or actions led the persecutor to harm the family member or if the applicant witnessed the harm to the family member.[99] The witnessing of harm to a family member or third party will not constitute persecution of the applicant, unless the intent in harming the third party is to cause harm to the applicant, the applicant's family, or all members of a group to which the applicant belongs on account of a protected characteristic.[100] Furthermore, as explained above, harm that would constitute torture will always rise to the level of persecution, and the definition of torture under U.S. law includes threats that another person would be imminently subjected to death or severe physical pain or suffering.[101]

---

[95] For additional information, *see* section, *Entity the Government is Unable or Unwilling to Control.*

[96] *See* Memorandum from Joseph Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Persecution of Family Members*, (30 June 1997).

[97] *Matter of A-K-*, 24 I&N Dec 275 (BIA 2007); *see also Sumolang v. Holder*, 723 F.3d 1080, 1084 (9th Cir. 2013) (finding that the emotional harm an applicant suffered from the death of her child constituted persecution where doctors had denied the child medical treatment because of the mother's race and the parents' religion).

[98] For additional information, *see* RAIO Training module, *Interviewing - Survivors of Torture.*

[99] *See* Memorandum from Joseph Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Persecution of Family Members*, (30 June 1997).

[100] *See N.L.A. v. Holder*, 744 F.3d 425, 432-433 (7th Cir. 2014) (holding that a direct threat to an applicant's family member may cause suffering that constitutes persecution of an applicant where the threat is intended to target the entire family); *Panoto v. Holder*, 770 F.3d 43, 47 (1st Cir. 2014) (finding that the harm an Indonesian Christian applicant suffered when a bomb was planted at her church and, within six months, she witnessed a fellow Christian passenger being brutally murdered during a ferry highjacking by an anti-Christian group could constitute persecution of the applicant on account of her religion).

[101] 8 C.F.R. § 208.18(a)(4)(iv); see also Section 3.3, Human Rights Violations.

For example, if a persecutor severely assaults an applicant's spouse and indicates that the harm was motivated by the applicant's political activity, the applicant may be able to establish that he was persecuted on account of his political opinion. However, psychological harm suffered by an applicant based on the harm to a family member would not constitute persecution if the family member was targeted solely because of the family member's own protected characteristic rather than the protected characteristic(s) of the applicant. In the latter case, the harm was not directed at the applicant.

## 4 IDENTIFYING A PERSECUTOR

Inherent in the meaning of persecution is the principle that the harm that an applicant suffered or fears must be inflicted either by the government of the country where the applicant fears persecution, or by a person or group that the government is unable or unwilling to control.[102]

The UNHCR Handbook, para. 65 provides context:

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

### 4.1 The Government

In cases in which the applicant was harmed or fears harm by the government, the applicant must establish the following:

- the harm or feared harm was on account of a protected characteristic
- the harm or feared harm is sufficiently serious to rise to the level of persecution
- the persecutor or feared persecutor is an agent or agents of the government

The Court of Appeals for the Ninth Circuit has stated that where a government agent is responsible for the persecution, it is unnecessary to consider whether the applicant sought protection from the police or other government entity.[103]

---

[102] *See Matter of Villalta*, 20 I&N Dec. 142, 147 (BIA 1990); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996); and *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (en banc).

[103] *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004).

## 4.2 Entity the Government Is Unable or Unwilling to Control

### 4.2.1 General Principles

An applicant may establish that he or she has suffered or will suffer persecution by a non-government actor if the applicant demonstrates that the government of the country from which the applicant fled is unable or unwilling to control the entity doing the harm.[104] The applicant is not required to show direct government involvement or complicity with the non-government actor.

In determining whether a government is unable or unwilling to control the entity that harmed or seeks to harm the applicant, you should address whether:

- there were reasonably sufficient governmental controls and restraints on the entity[ies] that harmed the applicant
- the government had the ability and will to enforce those controls and restraints with respect to the entity that harmed the applicant
- the applicant had access to those controls and constraints
- the applicant attempted to obtain protection from the government and the government's response, or failure to respond, to those attempts[105]

### 4.2.2 Guidance from Federal Courts

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

> While the acts of persecution were not perpetrated directly by government officials, the widespread nature of the persecution of ethnic Armenians documented by the State Department Country Report, combined with the police officer's response when Mr. Andriasian turned to him for help, clearly establishes that the government of Azerbaijan either could not or would not control Azeris who sought to threaten and harm ethnic Armenians living in their country.[106]

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

- evidence that government actors committed or instigated the acts

[104] *See Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007).

[105] *Surita v. INS*, 95 F.3d 814, 819-20 (9th Cir. 1996); *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007).

[106] *Andriasian v. INS*, 180 F.3d 1033, 1042-43 (9th Cir. 1999).

- evidence the government actors condoned the acts
- evidence of an inability on the part of the government to prevent the acts[107]

The First Circuit has further explained that the applicant must demonstrate more than "a general difficulty preventing the occurrence of particular future crimes" and that "where a government is making every effort to combat violence by private actors, and its inability to stop the problem is not distinguishable from any other government's struggles, the private violence has no government nexus and does not constitute persecution."[108]

### 4.2.3 Efforts to Gain Government Protection or an Explanation of Risk or Futility

To demonstrate that the government is unable or unwilling to protect a refugee or asylum applicant, the applicant must show that he or she sought the protection of the government, or provide a reasonable explanation as to why he or she did not seek that protection.[109]

Reasonable explanations for not seeking government protection include evidence that the government has shown itself unable or unwilling to act in similar situations, that the applicant would have increased his or her risk by affirmatively seeking protection, or that the applicant was so young that he or she would not have been able to seek government protection.[110]

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

***Examples***

- An Indian Muslim applicant was shot by Hindu extremists during the 2002 riots in Gujarat. While he was in the hospital, a police officer visited him and advised him not to tell anyone the truth about what had happened. The applicant remained in India for four years without ever formally reporting the incident to the police or seeking help from state or federal authorities. He explained that based on what the police officer had told him, he believed that reporting would be futile. Considering country conditions evidence indicating that the Indian government was making significant and often successful efforts to apprehend perpetrators of anti-Muslim violence in Gujarat, the

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

[108] *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007); *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (citing *Burbiene v. Holder*, 568 F.3d 251, 255-56 (1st Cir. 2009).

[109] *Roman v. INS*, 233 F.3d 1027, 1035 (7th Cir. 2000).

[110] *See Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1057 (9th Cir. 2006); and *cf. Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005).

Seventh Circuit held that substantial evidence supported the conclusion that the Indian government was not unwilling or unable to protect him at the time.[111]

- A Colombian applicant who was threatened and attacked several times by the Revolutionary Armed Forces of Colombia (FARC) because of her political activity did not report any of the incidents to the police. The BIA concluded that she had not established that the Colombian government was unwilling or unable to protect her because she did not seek protection from law enforcement. The Eleventh Circuit Court of Appeals held that the BIA erred in its decision because it failed to address the applicant's argument that her testimony and country conditions evidence established that reporting the attacks to law enforcement would have been futile.[112]

### 4.2.4 Unwilling to Control

There may be situations in which the government is unwilling to control the persecutor for reasons enumerated in the refugee definition (the government shares, or does not wish to oppose, the persecutor's opinion about the applicant's protected characteristic).[113] However, there is no requirement that the government's unwillingness to protect the applicant be motivated by any protected characteristic.[114]

A government may be unwilling to intervene in what are perceived to be domestic disputes within a family, or in disputes between tribes, or in a dispute that involves societal customs.[115] You may need to evaluate country conditions information concerning relevant laws and the enforcement of those laws, as well as the applicant's testimony, to determine if the government is unwilling to control the persecutor.

Evidence that the government is unwilling to control the persecutor could include a failure to investigate reported acts of violence, a refusal to make a report of acts of violence or harassment, closing investigations on bases clearly not supported by the circumstances of the case, statements indicating an unwillingness to protect certain victims of crimes, and evidence that other similar allegations of violence go uninvestigated.[116]

### 4.2.5 Unable to Control

[111] *Vahora v. Holder*, 707 F.3d 904, 908-909 (7th Cir. 2013).
[112] *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2010).

[113] UNHCR Handbook, para. 65.

[114] *Doe v. Holder*, 736 F.3d 871, 878 (9th Cir. 2013).

[115] UNHCR. *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/02, 7 May 2002), paras. 9, 15 and 19.

[116] *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004).

No government can guarantee the safety of each of its citizens or control all potential persecutors at all times. In order for you to find that the government was "unable to control" a non-governmental persecutor when the applicant was harmed, the applicant "must show more than just a difficulty controlling private behavior. Rather, the applicant must show that the government condoned the private behavior or at least demonstrated a complete helplessness to protect the victims."[117] Where the state has made reasonable efforts to control the persecutor or protect the applicant, the harm the applicant suffered does not constitute persecution.[118] However, generalized evidence that the government has attempted to control a private persecutor does not preclude you from finding, based on the applicant's testimony and the record as a whole, that the government was unable or unwilling to control the persecutor in an applicant's individual case.[119] In most cases, the determination of whether a government is unable to control the entity that harmed the applicant requires careful evaluation of the most current country of origin information available, as well as an evaluation of the applicant's circumstances.

***Examples***

- A Pakistani applicant received death threats from the Taliban after he urged people in his community to oppose them, and his house was attacked with a grenade. He reported the incidents to the police, and they investigated and took statements from witnesses, but they did not apprehend the perpetrators. The First Circuit upheld the BIA's determination that the applicant had not demonstrated the Pakistani government's inability to control the persecutors because law enforcement officials had made reasonable efforts to protect him and, according to country conditions evidence, had had some success in combating the Taliban in his area; although the government had not "eradicated" the threat the Taliban posed, a reasonable factfinder could conclude that it was willing and able to control them.[120]
- A Mexican applicant was kidnapped and beaten by the Los Zetas drug cartel because of his own activities opposing Los Zetas while in the Mexican armed forces. The Ninth Circuit held that the BIA's determination that the Mexican government was willing and able to control the persecutors was in error because it failed to consider significant evidence in the record that the Mexican government's efforts to control the persecutor had been

[117] *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732-733 (8th Cir. 2013) (citations omitted); *see also Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005) (holding that the state must provide "protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct").

[118] *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013).

[119] *See N.L.A. v. Holder*, 744 F.3d 425, 441-442 (7th Cir. 2014) (holding that the BIA erred in relying solely on country conditions reports indicating that some parts of the Colombian government have recently engaged in efforts to control the FARC and ignoring applicants' testimony that the police were not willing to help them in their particular situation).

[120] *Khan*, 727 F.3d at 7.

> unsuccessful; instead, it had focused solely on the government's willingness.[121]

A government in the midst of a civil war, or one that is unable to exercise its authority over portions of the country may be unable to control the persecutor in areas of the country where its influence does not extend.[122] An evaluation of how people similarly situated to the applicant are treated, even in portions of the country where the government does exercise its authority, is relevant to the determination of whether the government is unable to control the entity that persecuted the applicant.

In order to establish that he or she is a refugee based on past persecution, the applicant is not required to demonstrate that the government was unable or unwilling to control the persecution on a nationwide basis.[123] The applicant may meet his or her burden with evidence that the government was unable or unwilling to control the persecution in the specific locale where the applicant was persecuted.

## 5 ELIGIBILITY BASED ON PAST PERSECUTION

### 5.1 In the Refugee Context: Past Persecution is Sufficient

Overseas, if an applicant for classification as a refugee credibly establishes that the harm he or she suffered in the past rose to the level of persecution, and that the harm was on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility for refugee status. However, officers must still elicit testimony on and assess whether or not an applicant has a well-founded fear of persecution on account of any of the five protected grounds.[124]

### 5.2 In the Asylum Context: Presumption of Well-Founded Fear

In the asylum context, if an applicant has established past persecution on account of a protected characteristic, the applicant is not required to separately establish that his or her fear of future persecution is well-founded.[125] It is presumed that the applicant's fear of future persecution, on the basis of the original claim, is well-founded, and the burden of proof shifts to USCIS to establish by a preponderance of the evidence that,

---

[121] *Madrigal v. Holder*, 716 F.3d 499, 506-507 (9th Cir. 2013).

[122] *Matter of H-*, 21 I&N Dec. 337, 345 (BIA 1996).

[123] *Mashiri v. Ashcroft*, 383 F.3d 1121, 1122 (9th Cir. 2004).

[124] *See* RAD Refugee Application Assessment SOP. RAD requires assessment of both past persecution and well-founded fear for several reasons, including situations of split credibility, where the applicant is found not credible on past persecution, but demonstrates a credible, well-founded fear of future persecution. *See* RAIO Lesson Plan, *Credibility*.

[125] 8 C.F.R. § 208.13(b)(1); *see Matter of A-T-*, 24 I&N Dec. 617 (AG 2008)

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

  or

- the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.[126]

If USCIS does not meet this burden, the applicant's fear is well-founded. A well-founded fear of persecution on the basis of the original claim means fear of persecution on account of the protected characteristic on which the applicant was found to have suffered past persecution. If USCIS is able to rebut the presumption of well-founded fear, the applicant may still be granted asylum, in the exercise of discretion, based on severe past persecution, or other serious harm. For more information, *see*
**[ASM Supplement 1]**

# 6 CONCLUSION

An applicant must meet all the elements of the refugee definition in order to establish eligibility for protection as a refugee or asylee. Unlike the international definition, the definition of refugee in the INA allows an applicant to establish eligibility by a showing of past persecution, without having to establish a well-founded fear of persecution in the future. In order to show past persecution the applicant must establish that he or she has suffered harm in the past that rises to the level of severity necessary to constitute persecution, that the harm was inflicted on account of a protected characteristic, and that the agent of harm was either a part of the government, or an entity that the government was unable or unwilling to control.

# 7 SUMMARY

## 7.1 Persecution

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

To establish persecution, the level and type of harm experienced by the applicant must be sufficiently serious to constitute persecution.

[126] For further information refer to RAIO Training module, *Well-Founded Fear and Matter of A-T-*, 24 I&N Dec. 617 (AG 2008).

There is no single definition of persecution. Guidance may be found in precedent decisions, the UNHCR Handbook, and international human rights law. The determination of whether an act or acts constitute persecution must be decided on a case-by-case basis, taking into account all the circumstances of the case including the physical and psychological characteristics of the applicant.

Serious violations of core or fundamental human rights that are prohibited by customary international law almost always constitute persecution. Less severe human rights violations may also be considered persecution. Discrimination, harassment, and economic harm may be considered persecution, depending on the severity and duration of the harm. The harm may be psychological, such as the threat of imminent death, the threat of infliction of severe physical pain or suffering, or the threat that another person will imminently be subjected to death or severe physical pain or suffering.

Acts that in themselves do not amount to persecution may, when considered cumulatively, constitute persecution.

## 7.2 Eligibility Based on Past Persecution

In the overseas refugee context, an applicant is eligible for refugee status if he or she establishes past persecution on account of one of the five protected grounds. There is no requirement that the applicant have an on-going fear of future persecution. Also, if the past harm is found to have risen to the level of persecution, there is no additional requirement that the harm be particularly severe and compelling in order to grant status on past persecution alone.

In the asylum context, after an applicant has established eligibility through past persecution, you must still consider whether there is a well-founded fear. In this inquiry the burden of proof is on the government to show by a preponderance of the evidence that a well-founded fear no longer exists. If you can show that the applicant no longer has a well-founded fear, the application should be denied or referred as a matter of discretion unless the applicant can show that there are compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution, or that there is a reasonable possibility they would face other serious harm if returned.

# PRACTICAL EXERCISES

## Practical Exercise # 1

- **Title:** *Persecution Exercise*
- **Student Materials:**

**Fact Pattern:**

You are the parent of a sixteen year old girl. She attends the local public high school and is a member of the marching band. She is also involved with several extra-curricular activities. She has a 3.8 grade point average and has already been accepted to several distinguished universities.

One activity that she participates in is a student club known as Students for Civic Responsibility, and she is one of the main organizers. Another is Students for Social Change, and she is the Secretary of this club. These clubs have been very active in holding information fairs on a wide range of issues, such as police violence, spouse abuse, corruption in local government, and environmental concerns. These clubs are regularly contributing articles and letters to the local paper, have their own websites, and produce their own monthly newsletters.

One winter day you returned home from work, and your daughter did not come home from band practice at the normal time that she usually arrives home. After a delay of about 40 minutes, you begin to call a few of her friends. They tell you that band practice was cancelled due to the band director's illness, and that there were no after-school activities. The last person you talk to tells you that he saw your daughter talking to some police officers at the parking lot of the school, but his bus pulled away before he could see what happened. You call the school, but at this late hour, there is no answer.

You then call the local police station to find out if there was some problem involving your daughter, and if they know where she is. The duty officer at the station tells you that he does not have any record of any incident involving your daughter, and that there was no incident at the school that day. When you explain that your daughter was last seen talking to police officers at the school, the duty officer tells you that he has no record of the police being at the school that day. You then request to make a missing persons report, but are advised that you must wait 48 hours after the disappearance before they will take a report.

You call all of the other area police departments, but you are told the same thing. You call every person that you can think of that might know of your daughter's

whereabouts, explaining the situation, and asking them for more leads. All of your leads turn up dry.

It is now about 10:00 PM. You get in your car and begin driving throughout the neighborhood, starting with the high school, and working your way out. You drive until 2:00 AM, and then return home. No one is at home and there are no messages on your answering machine. You call out from work the next morning, and repeat the whole process. You finally get the police to accept a missing persons report early. You contact the local television news station and ask for help. They tell you to call them the next day, just in case she shows up.

On the third day you call out from work again and continue to look for your daughter. Once again, there is no luck.

The same on the fourth day. But on the fourth night you get a telephone call at 1:00 AM and you hear your daughter crying and begging you in a shaken voice to pick her up outside the Municipal Building. You speed to the building and find your daughter huddled in a phone booth. You make sure that she is not physically injured, and take her home.

After calming her, you are able to talk to her about what happened. She tells you that the police came to the school and stopped her when she came out of the school. Once they verified her identity, they told her that there was a family emergency, and that she must accompany them to the station. Once at the station, she was hand-cuffed without explanation, and taken by two men in dark suits to a car, and was driven to another building about an hour away. She was placed in a solitary cell. The men did not talk to her at all, despite her plea for an explanation. She was given two meals each day, and her cell had a sink and faucet with potable water. On the last night, she was taken from her cell, again without explanation, and dropped off in front of the municipal building. She saw the telephone booth and called home. She has no idea who the men were or why she was held for four days.

The next day you call the police and demand an explanation, but they tell you that they do not know what you are talking about. You call a reporter at the local television station and try to explain the situation, but the reporter tells you that, without more information, he cannot help you. In the meantime, your daughter refuses to leave the house, and is afraid to be alone.

Finally, one day you get an anonymous telephone call and the caller tells you that they know that your daughter was under the custody of the FBI. You call the nearest FBI office and demand an explanation. You are simply told that it is none of your business, and that if you persist, you might need several days in a cell.

**Discussion:**

1. Would you conclude that your daughter was a victim of persecution? If so,

why? If not, why not?

**Practical Exercise # 2**

- **Title:** *Matter of H- - Past Persecution*
- **Student Materials:**

**Fact Pattern:**

The applicant is a native of Somalia and an undisputed member of the Darood clan and the Marehan subclan, an entity which is identifiable by kinship ties and vocal inflection or accent. For 21 years Somalia had been ruled by Mohammed Siad Barre, a member of the Marehan subclan, which constitutes less than 1 percent of the population of Somalia. In December of 1990, an uprising was instituted by members of the other clans, which ultimately caused Mohammed Siad Barre to relinquish his power and to flee the capital city of Mogadishu on January 21, 1991.

As a result of favoritism that had been shown to members of the Marehan subclan during the course of Mohammed Siad Barre's often brutal regime, the clans which rebelled against this regime sought to retaliate against those who had benefited from the regime. The applicant's father, a businessman who had greatly benefited from his membership in the Marehan subclan, was murdered at his place of business in Mogadishu on January 12, 1991, by members of the opposition United Somali Congress, composed mostly of members of the Hawiye clan. The applicant's family home, located in the Marehan section of the city, was targeted 2 days later by the same group. During the course of that attack, the applicant's brother was shot. He was later murdered at the hospital to which he had been brought for the treatment of his injury.

On January 13, 1991, 1 day after the attack on the applicant's home, he fled Mogadishu with his step-mother and younger siblings to a smaller town, Kismayu, which was a stronghold of the Darood clan. Approximately 1 month later, that town was attacked by the United Somali Congress. As a result, the applicant, who was not with his family at the time, was rounded up and detained without charges along with many other Darood clan members. During the course of his 5-day detention, the applicant was badly beaten on his head, back, and forearm with a rifle butt and a bayonet, resulting in scars to his body which remain to the present. A maternal uncle of the applicant, who was a member of the United Somali Congress, recognized him and assisted in his escape, driving him approximately 40 kilometers in the direction of Kenya.

**Discussion:**

1. Is the applicant unwilling or unable to return to his/her country due to past harm or mistreatment? Yes ☐ No ☐

2. If no, go to Question 3. If yes, identify the perpetrator(s) of, and describe, harm or mistreatment.

Perpetrators:

3. Harm/Mistreatment:

4. Does the claimed harm or mistreatment rise to the level of persecution? If no, explain. Yes ☐ No ☐

**Practical Exercise # 3**

- **Title:** *Applicant Testimony and Interview Notes* – Past Persecution
- **Student Materials:**

**Fact Pattern:**

The Applicant testified that before fleeing his country, he resided with his son and his Russian wife in the Ukrainian city of Kharkiv. On February 12, 1992, he attended a political rally at which he gave a short speech promoting democracy and unification with Russia. Immediately after he finished his speech, someone grabbed him and began to beat him. He recognized the insignia on the clothing of his attacker as a symbol of "Rukh," a nationalistic, pro-Ukrainian independence movement. The Applicant required stitches on his lip and eyebrow from the beating. That evening, he discovered a leaflet from Rukh in his pocket, with the message "Kikes, get away from Ukraine." He testified that he began to receive similar anti-Semitic leaflets at home in his mailbox or slipped under the door. The record contains one of the leaflets he received in 1993.

In March 1992, a month after the attack at the rally, the Applicant's apartment was vandalized. The door had been broken down, furniture was ripped open, some of his possessions were stolen, others were smashed, and a half dozen leaflets from Rukh were left at the scene. The leaflets warned that "kikes" and "Moskali," a derogatory term for Russian nationals living in Ukraine, should leave Ukraine to the Ukrainians.

On January 3, 1993, the Applicant was attacked on his way home from work. He heard a voice saying, "Sasha, we've been waiting for you for quite some time." He

was thrown to the ground and kicked. During the beating, the attackers repeatedly warned him to take his "Moskal" wife and "mixed" son out of Ukraine. He sustained a rib injury from the attack.

On July 3, 1993, the Applicant and his son were physically assaulted at a bus stop near their home by four men who were calling them derogatory names and making anti-Semitic remarks. The Applicant was pushed to the ground, and when his son tried to come to his aid, the assailants picked him up and dropped him on the pavement. The beating left bruises on the Applicant's torso, and his son sustained an injury to his right knee, which required surgery.

The Applicant also recounted the abuse his son endured at school on account of his Jewish background. In 1991, his class was required to read nationalist literature promulgated by Rukh. In December of that year, he was dragged into a corner by some classmates who made anti-Semitic comments and beat him. Also, in December 1993, he was cornered in the men's room by his classmates and forced to remove his pants to show that he had been circumcised. He did not return to school after this incident.

The Applicant testified that he reported the burglary as well as the January 1993 and July 1993 assaults to the police. He testified that the police promised to "take care of [it]" on each occasion, but that no action was ever taken.

**Practical Exercise #4**

- **Title:** *Eligibility –Discussion of Discrimination or Harassment Persecution*
- **Student Materials:**

**Fact Pattern 2-a:**

Applicant is a 50-year-old male native and citizen of Egypt who entered the United States in 1990, and was admitted as a visitor.

Applicant credibly testified that he is a Coptic Christian. Applicant was a successful accountant in Cairo and owned his own business. He was the only Christian business owner in a building with approximately 15 businesses. Because of Applicant's social standing, fundamentalist Muslims tried to force him to convert to Islam; they felt that it would be a great success if a successful businessman converted to Islam. Fundamentalist Muslim religious leaders visited Applicant several times at his office and to tell him how much he could benefit by becoming Muslim. Applicant expressed his Christian beliefs and asked the religious leaders to leave him alone. He accused them of being fanatics. The Muslim religious leaders

then organized a Muslim boycott of Applicant's business. As a result, Applicant lost approximately 40% of his clientele. Other business owners in the building began to pray in front of Applicant's door making it difficult for clients to come and go. Whenever they encountered Applicant, the other business owners would degrade Applicant's religion. One day Applicant found that the sign for his business had been smashed. Applicant learned from a friend that the Muslims who smashed the sign arranged with the police to accuse Applicant of defaming Islam if he reported the incident. Therefore, Applicant was afraid to report the incident to the police. Applicant was also afraid to hang another sign identifying his business. Shortly after this, Applicant's car was vandalized.

Applicant used to attend Church regularly. However, because of the harassment he and other congregants experienced, Applicant began to attend church less frequently. Stones and feces were thrown at his church. Muslims standing outside would call out pejorative names and degrade the Christian religion. As a result, Applicant and his family no longer felt it was safe to go to church.

Because of the decrease in business, Applicant found it more difficult to support his family. He also worried about his children who were often taunted at school because of their religion. He feared the situation for Christians would only deteriorate. Therefore, he brought his family to the United States and applied for asylum.

**Discussion**

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution.

2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.

3. What additional information could be elicited to better evaluate the claim?

**Fact Pattern 2-b:**

Applicant is a 31-year-old female citizen of Belarus. Applicant credibly testified that she was often humiliated at school because of her Pentecostal religion. As an adult, Applicant continued to be harassed because of her religion. Applicant and her husband often held prayer meetings in their home. Their neighbors, who accused them of participating in a cult and practicing magic, would throw trash and waste in front of Applicant's door and would threaten to call the police, which they often did. When the police arrived, they would push people around and threaten to exile Applicant and her husband if they did not stop praying. On one occasion when a neighbor called the police in 1989, the police roughly pushed the congregants and destroyed some of Applicant's property. Applicant was eight months pregnant at

the time. The police told the congregants that if they did not stop praying, they would be detained.

Applicant had difficulty finding and retaining employment. Her employers dismissed her after learning that the police were often summoned to her home because she held prayer meetings there.

Applicant received inadequate medical care when she was once hospitalized for removal of a tumor. One of the nurses knew Applicant was Pentecostal. She told the other nurses, who then neglected to care for Applicant. Applicant was often left waiting for long periods of time before nurses would respond to her calls for assistance to get to the bathroom, and several times Applicant was not brought meals when other patients were fed. Two times, nurses neglected to give her pain killers at the prescribed time.

**Discussion**

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment. Also consider the individual characteristics of Applicant (would it make a difference whether or not she were pregnant when pushed?)

2. What additional information could be elicited to better evaluate the claim?

**Fact Pattern 2-c:**

Applicant is a 28-year old male from Russia. Applicant credibility testified that he is Jewish, though he has never practiced his religion and does not believe in any one religion. Because he is Jewish, he experienced discrimination in Russia. For example, he was not admitted to a university and could not pursue his dream to study Russian literature. He was admitted to a technical school for machinery and technology, where he learned the trade of machinist. Applicant stated that he had difficulty obtaining employment as a machinist and eventually found work as a cashier. Applicant was never given any raises and was generally harassed at work. For example, his supervisor would tell him that he was not correctly doing his work, even though Applicant followed all the instructions his supervisor gave him. Applicant came to the United States to visit an aunt. He now wants to remain in the United States where he can pursue his life-long dream of studying Russian literature.

**Discussion**

1. Discuss issue of whether the harm Applicant experienced in the past

amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment. Consider also individual characteristics of Applicant.

2. What additional information could be elicited to better evaluate the claim?

**Fact Pattern 2-d:**

Applicant is a 25-year old citizen of Russia. When Applicant was in primary school, she was the only Jew in her class. The teacher often hit Applicant's hands with a wooden pointer without giving her a reason. She was too young to understand at the time, but she now believes she was treated this way because she is Jewish. None of the other children were treated the same way. Applicant's parents moved her to another school, where she had problems with other students. They made fun of her and taunted her, making pejorative nicknames out of her last names, because she is Jewish. Applicant was moved to a different school. Applicant had difficulties with her feet and received a note from a physician explaining that she should not participate in physical exercises and competition. Her teacher did not believe that she had problems with her feet and said the note was only an excuse from a Jewish doctor. Applicant was forced to participate in a physical competition and, as a result, was hospitalized for several months as doctors tried to heal her feet.

Applicant did not receive good grades at the university, even though she prepared better than other students. Because she did not receive good grades, Applicant was not entitled to a stipend. She believes she was given poor grades, because she is Jewish. Since she could not obtain a stipend, she was forced to attend night school so that she could earn money during the day. She was not able to pass one class, even though she prepared for it. The professor explained that she would not pass the Applicant, because Applicant is Jewish. In 1987, Applicant was expelled from school, because she complained about receiving a lower grade than a student who was not as prepared as she was. When the faculty later changed, Applicant was readmitted. As a result of these set-backs, it took Applicant seven years to graduate from university, even though the average time for completion was four years.

From 1986 to 1988, Applicant worked as an assistant teacher. She felt that other teachers isolated her and made it difficult for her to work with the children by speaking poorly to her in front of the children. Applicant told a teacher that her grandfather was on the ritual committee at the main Moscow synagogue. This exacerbated the poor treatment she had been receiving. Because Applicant felt she could not do her job in that atmosphere, she quit her job. She then worked as a teacher at a different school until she left Russia.

One evening as Applicant was returning home from a friend's house, she was stopped by three men. They pushed her and made pejorative comments such as

"You Jews should get out of Russia." They spoke in general about Jews and also said, "Pamiat will show you," indicating that they were associated with the anti-Semitic group, Pamiat. A man walked near-by, and his presence frightened the three men. They ran away, leaving Applicant frightened, but unharmed.

**Discussion**

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.

2. What additional information could be elicited to better evaluate the claim?

**Fact Pattern 2-e:**

Applicant is a 48-year old male citizen from Belarus. Applicant credibly testified that he was born and raised in Minsk, where he attended the Polytechnic Institute. After graduation, he was certified as an electrical engineer. Applicant interviewed for a position as an electrical engineer at the Enterprise of Refrigeration and was told to report to personnel to complete an application. At the personnel office, Applicant's internal passport was checked. He was then told that there was no position available. Applicant believes he was told this because his internal passport revealed that he is Jewish. Applicant took another job as an electrician and continued to work as an electrician for approximately twenty years until he came to the United States in 1991. Applicant's job required him to travel quite a bit. At one time, he was required to spend two months to the Gomel Region, where radiation from Chernobyl was still very high. When Applicant asked why he, as opposed to other employees, was sent to that region, he was told, "Go to Israel, there is no radiation there. You should be thankful that with your passport, you are able to keep this job."

Applicant's wife worked as an accountant. After Applicant's wife married Applicant, she stopped receiving the promotions she had been receiving every year prior to the marriage.

In the last three or four years that the Applicant lived in Minsk, his family received threatening letters in the mail box once or twice a month. The letters said, "Dirty Jews, go to Israel."

**Discussion**

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into

account severity and duration of discriminatory actions and/or harassment.

2. What additional information could be elicited to better evaluate the claim?

**Fact Pattern 2-f:**

Applicant is a 38-year old male citizen of Romania. Applicant credibly testified that he is a woodcarver and had his own studio and business in Romania. In 1986, Applicant organized the people in his town to strike to protest the building of a chemical plant near the town. Applicant publicly spoke out against the government -- accusing the local politicians of corruption and failure to represent the people's interest. Applicant began receiving anonymous letters stating that if he did not stop speaking out against the government, his home and studio would be burned. Applicant's wife was fired from her government job. Undercover government agents began to watch Applicant and would go to his studio about two or three times a week. When the undercover agents went to Applicant's studio, they would linger inside, asking him questions about what he did and how much money he made, and would watch the people who entered his studio. Sometimes, the agents would remain at the studio all day, making it difficult for Applicant to work. Customers, who feared the agents, stopped coming to Applicant's studio. This continued for several months before Applicant left Romania.

**Discussion**

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.

2. What additional information could be elicited to better evaluate the claim?

**Practical Exercise #5**

- **Title:** *Eligibility – Discussion of Past Persecution*
- **Student Materials:**

**Fact Pattern 3-a:**

Applicant is a 40 year old female native and citizen of India. Applicant credibly testified that she is Muslim, but lived in a predominantly Hindu neighborhood. During Muslim-Hindu riots that erupted after the destruction of a mosque by

fundamentalist Hindus, Applicant remained hidden in her bedroom, praying for protection of her son, who had been out in the street when the rioting erupted. The riots occurred during the month of Ramadan and Applicant was fasting, as prescribed by her religious beliefs. As Applicant prayed, a Hindu mob burst into the house and pulled Applicant out into the streets. They removed from Applicant's head the scarf that she wore over her head whenever in the company of men and began making obscene gestures at her. Several men then dragged a beaten teenager and threw him at her feet. She recognized the teenager as her son. The leader of the mob thrust a piece of cooked pork into Applicant's hand and ordered her to eat it. At first Applicant refused, because she was prohibited by her religious beliefs from eating pork and she was also prohibited from eating prior to sundown during the month of Ramadan. The leader struck Applicant's son with a bamboo stick, then threatened to beat her son even more if she did not eat the pork. Despite the religious prohibition, Applicant ate the pork to save her son from further abuse. Satisfied, the leader of the mob led the mob on to find their next victim.

**Discussion**

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect.

2. What additional information could be elicited to better evaluate the claim?

**Fact Pattern 3-b:**

Mr. Z is a citizen of Poland. From 1974 to February 1982, he worked as a manager of a livestock farm owned by the Polish government. At the end of 1981, he refused to sign an oath of loyalty to party officials. Soon after this refusal, the police arrested and interrogated Mr. Z three times. He was not physically mistreated on any of these occasions. In February of 1982, he was dismissed from his job. He was not given a reason. He then started his own business, a fox farm. He was again arrested in April of 1982 and interrogated about his association with Mr. M, a Solidarity member to whom he had loaned money. Although Mr. Z had loaned Mr. M money, he was not himself involved in the activities of Solidarity. Beginning in June of 1982 and continuing until December of 1984, the police would summon Mr. Z every two to three months and interrogate him over a period of three to five hours, primarily about his relationship to Mr. M, but also about his own activities. He was not physically harmed during any of these detentions. Mr. Z's final detention occurred in 1984, while he was in Warsaw selling fox furs. He was detained for 36 hours but released once the police determined that his papers were in order. Although the police spoke harshly to the applicant, he was not physically harmed during this detention. When Mr. Z returned home after this detention, he found that his apartment had been searched and some money and foxes confiscated. He left Poland shortly thereafter and entered the United States on a tourist visa.

**Discussion**

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect.

2. What additional information could be elicited to better evaluate the claim?

**Fact Pattern 3-c:**

Applicant is a 42-year-old male native and citizen of Peru. Applicant credibly testified that he lived in the city of Lima, where he worked at a bank. He owned and his wife managed a small dairy farm outside the city. In early 1988, he attended a public rally for the Democratic Action (AD) party at the invitation of his uncle, a political activist. At the rally, Applicant was challenged by a police officer who demanded his identification and questioned him about his supposed membership in *Sendero Luminoso* (SL). Applicant denied membership in SL. Applicant's wife testified that her husband may have been questioned because his uncle has a history of political activism for the opposition AD party and had often been harassed by the police.

In the weeks following the rally, Applicant was questioned repeatedly at his home and work by police officers concerning his supposed affiliation with SL. On three occasions he was taken from home by the police for further interrogation at the police station. The interrogation sessions at the police station lasted from 3 to 5 hours. During these interrogations, Applicant was initially pressured by slaps in the face with a wet cloth, and then the abuse progressed to blows with closed fists. At the bank where Applicant worked, police officers periodically appeared and kept watch on him while he worked, causing consternation among his co-workers and his supervisor. Applicant insisted that he had no relation to SL and the police were unable to come up with any evidence to link him to the terrorist group.

On May 15, 1988, two men attempted to abduct Applicant's son as he was leaving school. They were deterred by alarms which Applicant's wife and other parents raised. Applicant's wife believes the abductors were policemen. This incident caused Applicant to take precautionary measures. He sent his wife and son to live with his grandparents in another city and began planning the family's departure from Peru.

Applicant testified further that the employees of his dairy farm learned that he was under suspicion as an SL member. Some of the employees were SL members or sympathizers. They took advantage of the situation to invite him to join SL. He said he wanted nothing to do with the SL because he opposed their Communist ideology. Shortly after his departure from Peru in September of 1988, Applicant's dairy was burned by a mob shouting "Long Live *Sendero Luminoso*!"

**Discussion**

1. Does the harm Applicant suffered from the police amount to persecution?

2. Does the harm Applicant suffered from the SL amount to persecution? Discuss which rights have been violated and the degree of harm Applicant suffered from each event and cumulatively.

3. What additional information could be elicited to better evaluate the claim?

**Practical Exercise #6**

- **Title:** *Eligibility – Discussion of Persecution*
- **Student Materials:**

**Fact Pattern 4-a:**

Vladimir is a 43-year old native of Lviv, Ukraine, where he owns a small bookstore. He started the bookstore because no one would hire him for employment because his father is ethnic Turkmen. Vladimir's name and distinct facial features make him stand out among Ukrainians and reveal his ethnicity.

Starting five years ago, policemen came to his store demanding that he pay them approximately $100.00 monthly to make sure that "nothing would happen" to his store. Although the amount represented a severe hardship to him, he paid it because he was afraid what might happen if he did not.

Five months ago, the policemen told him that his mandatory monthly donation was increased to $500.00. He told them that he was barely able to pay $100.00. They warned him to consider the consequences. He had no money to pay the demanded amount. The policemen returned after one week, and severely beat him with sticks, and kicked him with their steel-toed boots. They left him alone, bleeding and unconscious in the back of his store. Luckily, he was found by an off-duty employee, who returned to the store having forgotten her keys.

Vladimir returned to the store after a month of recuperation. After he returned to work, he re-arranged the window display to feature a book critical about the Ukrainian role in the Nazi holocaust during World War II. The book had been discussed at the Orthodox Church he attends.

The following morning, before Vladimir opened the store, a large crowd gathered outside and chanted, "No more Jews." A few minutes later, several men in the crowd broke the storefront glass and destroyed all the books in the new display.

They then proceeded to set the business on fire, which completely destroyed the building.

When Vladimir arrived, he was stunned by the chaotic scene. A policeman passing through the area observed the commotion and quickly came to the scene. When the policeman inquired as to the cause of the trouble, the people in the crowd told him that it was because of the displayed books. The policeman observed the activity for a few minutes and then hit Vladimir on the head several times with his nightstick. Vladimir lost consciousness. "That should do it," the policeman said before returning to his vehicle and driving away.

Vladimir was hospitalized for 2 days to recover from the beating. After he was released, he went to visit the site of his store, and he saw the store had been totally destroyed by fire. On its site was a huge sign, stating "Ukrainians yes, Jews no."

**Discussion**

1. Discuss whether the harm Vladimir experienced in the past amounts to past persecution.

2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory action and/or harassment.

3. What additional information could be elicited to better evaluate the claim?

**Fact Pattern 4-b:**

The applicant, Laurita Tong, is a 24-year old Chinese ethnic female native of Indonesia. She has lived her entire life in Jakarta. Three years ago, she completed her university studies with a bachelor's degree in Travel and Tourism. Her family owns a successful travel agency in Jakarta, where she works.

Laurita is Catholic by birth and attends church whenever she can – usually twice a month and on most holy days.

On April 14, 2004, she was walking to work when a native Indonesian man, who was sitting on the steps of his house, stared at her as she walked by. Each day thereafter, he stared at her as she walked to work. Laurita was convinced that he was giving her the "evil eye," and that horrible things would happen to her. The windows of his house were covered with pictures of Muslim religious leaders.

On May 2, 2004, a group of native Indonesians blew up the church that Laurita attends. These people often harassed the churchgoers on Sundays and told them that they would be cursed unless they converted to Islam. Laurita became afraid to attend church after that happened.

On May 12, 2004, Indonesian natives raped Laurita's best friend, Melanie. The men told her that she should "go back to China."

On May 27, 2004, Laurita was leaving a shoe store when a native Indonesian man grabbed her roughly and yelled, "I hate you rich Chinese. Give me all your money, or I'll kill you now." Laurita handed over her purse, and the man ran away.

After these events, Laurita suffered from severe anxiety and depression. She was afraid to leave her house because she was worried what would happen to her. She did not leave her house until June 2, 2004, when she left Indonesia. Her father gave her an airplane ticket for Seattle, where she arrived the same day.

**Discussion**

1. Discuss whether the harm experienced by Laurita in the past amounts to persecution.

2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of each act.

**Fact Pattern 4-c:**

Applicant, Lin Xiang, is a 25-year old female native and citizen of China. For two years, she has worked as a bookkeeper at the Fujian Electronics Cooperative, a private business, which has received subsidies from the Chinese government. During the last three months, Lin and most of the other 314 workers have not received any pay because of unexpected financial shortages.

Lin became increasingly outraged. She wrote and printed a pamphlet explaining that the owners of the business had recently bought new homes, luxury vehicles, and even enjoyed vacations in Monte Carlo. She included a photo of one of the owner's homes in her pamphlet. Because of her position at the company, she had personal knowledge of the financial circumstances of the business.

Lin went out late one night in February to distribute the pamphlets into random mailboxes in several apartment buildings. She distributed the pamphlets in a similar manner each night for ten nights. On the tenth night, she was walking in a different neighborhood with about 75 pamphlets in her backpack when a policeman asked her what she was doing out on the street at 1:10 a.m. She replied that she came outside to walk because she could not sleep. He inquired as to what she carried in her backpack, and she told him she had documents from her work. He insisted on inspecting the documents, and after he did so, he angrily chastised her for lying and for disturbing the public social order. He then handcuffed her and brought her to the local Public Security Bureau.

Upon arrival at the Public Security Bureau, Lin was required to identify herself,

and to explain what she had been doing. She explained that she had not been paid since December, and that she did not have enough food to feed her little girl. The police asked Lin who employed her and who put her up to distributing the pamphlets. Lin told the police that she does not get paid for her work and that everything she does is accomplished on her own.

The investigator angrily stated, "I don't believe you. I want you to examine yourself, and understand the damage you have done," he said. Then, he grabbed her and struck her on her back with an electric baton. She was released without conditions after 24 hours without further harm. However, as a result of the electric shock, she suffered a miscarriage in her third month of pregnancy.

After her release, she received notice that she was terminated from her employment. She sought other employment, but was unable to find any job because of her "bad record."

She became despondent, and realized that she could no longer live in China.

**Discussion**

1. Does the harm experienced by the applicant constitute persecution?
2. What facts support your conclusion?
3. What additional information, if any, would help evaluate this claim?

**Practical Exercise #7**

**Alternative Exercise For Any of the PEs Above With Multiple Fact Patterns**

- **Title:** *House of Commons Debate*
- **Introduction**

The participants of the face-to-face session are challenged in the *House of Commons* debate to react to stimulating positions. A panel chairman facilitates the debate and a jury is responsible for the judgment concerning the content of the arguments. The nature of the positions and the role of the panel chairman guarantee a lively discussion, in which "pro's" and "con's" surface very quickly. Per round you need approximately 45 minutes.

- **Output**

The output of the *House of Commons* debate is an overview of all possible arguments pro and con of the position. Because of the competitive element in the debate all participants are stimulated to actively contribute and take turns.

- **Method**

**Preparation**

The debate will be based on any of the fact patterns from the practical exercises above, seeking subject matter that will be stimulating, controversial and interesting for all participants. The group will be split into three teams and for each fact pattern used, one team will be assigned the role of supporter of the applicant's claim, one group will be assigned to oppose the applicant's claim, and the third group will act as a jury. This will not take more than 5 minutes.

**Tasks**

Every group prepares, in separate rooms, for the coming debate. In approximately 10 minutes, each group collects arguments for the defense of the group's stand in the debate. The participants prepare themselves both on the content of the arguments and on the presentation of the arguments.

**Organization**

The debate will be facilitated by a panel chairman. Next to this, there is the jury group, who will observe and judge the debate and the debaters.

## OTHER MATERIALS

There are no Other Materials for this module.

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the lesson plan referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**RAD Supplement**

**Module Section Subheading**

## SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the lesson plan referenced in the subheading of the supplement text box.

### REQUIRED READING

1. 8 C.F.R. § 208.13(b)

### ADDITIONAL RESOURCES

1. 1. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors and Deputy Directors, *Change in Instruction Concerning One Year Filing Deadline and Past Persecution,* (15 March 2001) (HQ/IAO 120/16.13).

2. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Persecution of Family Members*, (30 June 1997).

3. Memorandum from David A. Martin, INS Office of General Counsel, to Management Team, et al., *Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, (21 Oct. 1996) (HQCOU 120/11.33-P).

4. Memorandum from David A. Martin, INS Office of General Counsel, to Asylum Division, *Legal Opinion: Palestinian Asylum Applicants*, (27 Oct. 1995) (Genco Opinion 95-14).

5. Memorandum from David A. Martin, INS Office of General Counsel, to John Cummings, Acting Assistant Commissioner, CORAP, *Legal Opinion: Application of the Lautenberg Amendment to Asylum Applications Under INA Section 208*, (6 Oct. 1995) (Genco Opinion 95-17).

6. Memorandum from Rosemary Melville, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Follow Up on Gender Guidelines Training*, (7 July 1995) (208.9.9).

7. Memorandum from Phyllis Coven, INS Office of International Affairs, to Asylum Officers and HQASM Coordinators, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, (26 May 1995).

8. T. Alexander Aleinikoff. "The Meaning of 'Persecution' in United States Asylum Law," *International Journal of Refugee Law* 3, no. 1 (1991): 411-434.

9. UNHCR, *Note on Refugee Claims Based on Coercive Family Planning Laws or Policies* (Aug. 2005).

## SUPPLEMENTS

**ASM Supplement – 1**

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

If past persecution on account of a protected characteristic is established, then the applicant meets the statutory definition of refugee. Regulation and case law provide guidelines on the exercise of discretion to grant asylum to a refugee who has been persecuted in the past, but who no longer has a well-founded fear of persecution.[127]

- **Granting Asylum in the Absence of a Well-Founded Fear**

  Regulations direct that the adjudicator's discretion should be exercised to deny asylum to an applicant whose fear of future persecution is no longer well founded,[128] unless either of the following occurs:

  - "The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution."[129]
  - "The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country."[130]

- **Severity of Past Persecution**

  When evaluating when to exercise discretion to grant asylum based on past

---

[133] INA 101(a)(42)

[128] 8 C.F.R. § 208.13(b)(1)(iii)

[129] 8 C.F.R. § 208.13(b)(1)(iii)(A)

[130] 8 C.F.R. § 208.13(b)(1)(iii)(B)

persecution alone, the factors you should consider include:

- duration of persecution
- intensity of persecution
- age at the time of persecution
- persecution of family members
- conditions under which persecution was inflicted
- whether it would be unduly frightening or painful for the applicant to return to the country of persecution
- whether there are continuing health or psychological problems or other negative repercussions stemming from the harm inflicted
- any other relevant factor

- **BIA Precedent Decisions**

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

***Matter of Chen***

In *Matter of Chen*, the BIA held that discretion should be exercised to grant asylum to an applicant for whom there was little likelihood of future persecution. The applicant in that case related a long history of persecution suffered by both himself and his family during the Cultural Revolution in China. As a young boy (beginning when he was eight years old) the applicant was held under house arrest for six months and deprived of an opportunity to go to school and later abused by teachers and classmates in school. The applicant was forced to endure two years of re-education, during which time he was physically abused, resulting in hearing loss, anxiety, and suicidal inclinations. In finding that the applicant was eligible for asylum based on the past persecution alone, the BIA considered the fact that the applicant no longer had family in China and that though there was no longer an objective fear of persecution, the applicant subjectively feared future harm.[131]

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

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

may be warranted.

***Matter of H-***

In *Matter of H-*, the BIA did not decide the issue of whether the applicant should be granted asylum in the absence of a well-founded fear, but remanded the case to the IJ to decide whether a grant of asylum was warranted. The BIA held that "[c]entral to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past."[132]

***Matter of B-***

In *Matter of B-*, the BIA found that an Afghani who had suffered persecution under the previous Communist regime was no longer at reasonable risk of persecution. Nevertheless, the BIA held that discretion should be exercised to grant asylum based on the severity of the persecution the applicant had suffered in the past – a 13- month detention, during which time the applicant endured frequent physical (sleep deprivation, beatings, electric shocks) and mental (not knowing the fate of his father who was also detained and separation from his family) torture, inadequate diet and medical care, and integration with the criminal population – and the on-going civil strife in Afghanistan at the time of decision.[133]

***Matter of N-M-A-***

In *Matter of N-M-A-* the BIA found that a grant of asylum in the absence of a well-founded fear was not warranted where the applicant's father was kidnapped, the applicant's home was searched twice, and the applicant was detained for one month (during which time he was beaten periodically and deprived of food for three days). In reaching that conclusion, the BIA noted that the harm was not of a great degree, suffered over a great period of time, and did not result in severe psychological trauma such that a grant in the absence of a well-founded fear was warranted.[134]

***Matter or S-A-K- and H-A-H-***

In *Matter of S-A-K- and H-A-H-*, the BIA held that discretion should be exercised to grant asylum to a mother and daughter who had been involuntarily subjected to FGM based on the severity of the persecution they suffered. Some of the factors the Board considered in finding that the persecution was severe were: the applicant's daughter was subjected to FGM at an early age and was not anesthetized for the procedure; the mother nearly died from an infection she developed after the procedure; both mother and daughter had to have their vaginal opening reopened

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

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

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

later on in their lives, in the case of the mother about five times; mother and daughter continued to experience medical problems related to the procedure (e.g., the mother experienced great pain and the daughter had difficulty urinating and cannot menstruate); and the mother was beaten because she opposed having her daughters subjected to FGM.[135]

- **Federal Court Decisions**

A comparison of the decisions above with the federal cases below will help you understand the application of this standard.

**Eighth Circuit – *Reyes-Morales v. Gonzales***

The court upheld the BIA's the denial of asylum finding that the applicant did not establish that the past persecution he suffered was sufficiently serious to warrant a discretionary grant of asylum in the absence of a well-founded fear.[136] In this case, members of the Salvadoran military beat the applicant to unconsciousness, resulting in a physical deformity and several scars.[137] The applicant's friend was killed during the same incident. On review, a federal court cannot disturb a discretionary ruling by the BIA unless it is arbitrary or capricious.

**Third Circuit – *Lukwago v. Ashcroft***

The court held that although forcible conscription of a child by a guerrilla group may constitute persecution, it was not on account of a protected ground. The severity of past harm cannot provide the basis for a grant of asylum in the absence of a well-founded fear if the applicant has not established that the harm was inflicted on account of a protected ground.[138]

- **"Other Serious Harm"**

Even where the past persecution suffered by an applicant does not rise to the higher level of severe persecution, a grant in the absence of a well-founded fear may be justified where there is a reasonable possibility that an applicant who suffered past persecution may face other serious harm upon return.[139]

---

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

[136] For additional federal cases, see *Lal v. INS*, 255 F.3d 998, 1009–10, as amended by *Lal v. INS*, 268 F.3d 1148 (9th Cir. 2001); and *Vongsakdy v. INS*, 171 F.3d 1203, 1206–07 (9th Cir. 1999).

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

[138] *Lukwago v. Ashcroft*, 329 F.3d 157, 173-74 (3d Cir. 2003).

[139] 8 C.F.R. 208.13(b)(1)(iii)(B)

By "other serious harm," the Department means harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but that is so serious that it equals the severity of persecution.[140]

In considering whether there is a reasonable possibility of other serious harm, you should focus on current conditions that could severely affect the applicant, such as civil strife and extreme economic deprivation, as well as on the potential for new physical or psychological harm that the applicant might suffer.[141] Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as "other serious harm."

Two federal courts that have considered this regulation have noted that the following circumstances might qualify as "other serious harm:"

- harm resulting from the unavailability of necessary medical care[142]
- debilitation and homelessness due to unavailability of specific medications[143]

In *Matter of T-Z-* the BIA found that to rise to the level of persecution and, thus, be considered "serious" economic disadvantage, the harm must be not just substantial but "severe," and deliberately imposed.[144] When analyzing whether economic disadvantage constitutes "other serious harm," you need to determine if the harm is "serious." In making that determination, you need to focus your analysis on whether the economic disadvantage feared is "severe" as required by *Matter of T-Z*, but you do not need to find that the economic harm will be deliberately imposed. The deliberate imposition requirement of *Matter of T-Z-* is not required in the context of analyzing "other serious harm" because in that context the harm feared does not necessarily have to be volitionally imposed by a persecutor on account of a protected characteristic but can be the result as well from non-volitional situations and events such as, for example, natural disasters.

- **Additional Humanitarian Factors**

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

For example, in *Matter of H-*, the BIA indicated that on remand the Immigration

[140] 65 FR 76121 at 76127; *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012).

[141] *Matter of L-S-*, 25 I. & N. Dec. 705 (BIA 2012).

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

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

[144] For additional information, *see* section on *Economic Harm*.

Judge could consider humanitarian factors independent of the applicant's past persecution, such as age, health, or family ties, when exercising discretion to grant asylum.[145] However, in the supplemental information to the final rule, the Department of Justice specifically stated that it did not intend for adjudicators to consider additional humanitarian factors unrelated to the severity of past persecution or other serious harm in exercising discretion to grant asylum in the absence of a well-founded fear.[146] Thus, under the current rules, humanitarian factors such as those that the BIA referenced in *Matter of H-* are considered in the exercise of discretion analysis only if they have a connection to either the severity of past persecution or to other serious harm that the applicant may suffer.

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

[146] 65 FR 76121 at 76127.

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the lesson plan referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

### ADDITIONAL RESOURCES

1.

### SUPPLEMENTS

**IO Supplement**

**Module Section Subheading**

U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

*RAIO Combined Training Course*

# ANALYZING THE PERSECUTOR BAR

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# 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
- 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);

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

1. *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011);
2. *Matter of Vides Casanova,* 26 I&N Dec. 494 (BIA 2015).

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

| Task/ Skill # | Task Description |
|---|---|
| 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 |
|---|---|---|---|
| 4/14/15 | Throughout document | Minor formatting edits; fixed broken links; a few recent cases added | RAIO Trng |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

TABLE OF CONTENTS

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

## 1 INTRODUCTION

The 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. [RAD 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 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* and in the RAD and IO division-specific courses.

[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 (1984).

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

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)

[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).

[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.

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 ASM 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.

> 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]

---

[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.

[11] *McMullen*, 19 I&N Dec. at 97.

## 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.
- 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**

[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.").

- 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 Division-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;
- 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

[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

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?
- 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

---

Cir. 2007) (mere association "with an enterprise that engages in persecution is insufficient" on its own to trigger the persecutor bar).

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.

*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 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, 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

[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).

[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*.

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?

**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

[18] *Bah*, 341 F.3d at 351.

[19] *Singh*, 417 F.3d at 740.

> 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]

***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**

---

[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] *Rodriguez-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.").

[25] *Id.* at 1253.

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 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 Did the Applicant **Order** Others to Commit a Persecutory Act?

[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] *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] *A-H-*, 23 I&N Dec. at 784.

[31] INA § 101(a)(42)(B).

[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; *Vukmirovic*, 362 F.3d at 1252; *Hernandez*, 258 F.3d at 814.

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 Did the Applicant **Incite** Others to Commit a Persecutory Act?

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 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

[35] *Maikovskis v. INS*, 773 F.2d 435, 446 (2d. Cir. 1985).

[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] *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] *A-H-*, 23 I&N Dec. at 784.

"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 Did the Applicant Assist or Otherwise Participate in, or Actively Carry Out or Commit Persecution of Others?

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.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 785.

*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;
- 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

[42] 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").

> 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] 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** |

[43] *Fedorenko*, 449 U.S. at 513 n.34 (1981).

[44] See *id.*; *Miranda-Alvarado*, 449 F.3d at 925-927.

[45] *Id.* at 926.

[46] *Id.*

[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.

| | | |
|---|---|---|
| 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 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 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)

[50] See section below: *Did the Applicant Know that Persecution was Occurring?*

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 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*

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 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.

*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 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 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

*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 Did the Applicant 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 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. Although Castañeda was in radio contact with the two other patrols, 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

[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.

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]

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 Did the Applicant Act under 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 your division specific guidance for handling such cases. See RAD Supplement-Duress; Asylum 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]

[54] *Diaz-Zanatta*, 558 F.3d 450.

[55] *Higuit*, 433 F.3d 417.

[56] *Negusie*, 555 U.S. 511 (2009).

[57] *Id.* at 514-515 (2009).

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 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]

---

[58] *Fedorenko*, 449 U.S. 490 (1981).

[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.*

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]

*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

[63] *See, e.g.*, Miranda Alvarado, 449 F.3d at 927.

[64] *Id.*

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.

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?

---

[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.*

# 4 DECISION-MAKING AND WRITING

## 4.1 Mandatory Nature of the Persecutor Bar

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 ASM 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).

*Example*

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 ASM Supplement – Decision Writing.
See ASM Supplement – Note Taking.
See ASM Supplement – Identity Checks.
See ASM Supplement – One Year Filing Deadline.
See RAD 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.

**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.

# PRACTICAL EXERCISES

## Practical Exercise # 1

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

## 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.**

**a) Did the harm rise to the level of persecution?** Yes ☐ No ☐

If no, stop –applicant is not subject to the bar. If yes, proceed to next step.

**b) Was there a nexus to a protected ground? If yes, what was the targeted characteristic?**

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.

**c) Was the act a legitimate act of war or law enforcement?**
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.**

**a) Did the applicant order, incite, assist, otherwise participate in, or actively carry out or commit persecution of others?**
Yes ☐ No ☐

If no, stop –applicant is not subject to the bar. If yes, proceed to Step 3b.

**b) Did the applicant know that the persecution was occurring?**

Yes ☐ No ☐

If no, stop –applicant is not subject to the bar. If yes, proceed to Step 3c.

**c) Did the applicant act under duress?** 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 division-specific guidance.

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**RAD Supplement – 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 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.

**RAD Supplement – Decision Making and Recording**

*Please see* Refugee Application Assessment Standard Operating Procedure (SOP): "D. Section IV – BARS AND INADMISSIBILITIES."

http://connect.uscis.dhs.gov/org/RAIO/RAD/Documents/SOP%20-%20Assessment%20SOP,%2001-11-12.pdf

**RAD Supplement – Duress**

Pursuant to the following guidance, all cases involving persecution committed under duress must be placed on hold for review at RAD 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 RAD, 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 refugee 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.

**Response to Query**

**Date:** June 30, 2009

**Subject:** Persecution Committed Under Duress

**Keywords**: Duress, Persecution, Bars, *Negusie*

**Query:** In light of the recent *Negusie* ruling, what should officers do with cases in which applicants are found to have ordered, incited, assisted or otherwise participated in the persecution of others if such actions were taken under duress?

**Response:** Effective immediately, officers must place on hold any case in which a

refugee applicant is found to have ordered, incited, assisted or otherwise participated in the persecution of others ***if such actions were taken under duress***. Supervisors are requested to keep track of all cases (including case numbers) placed on hold pursuant to this instruction in their standard trip report. Where IO staff serve as a team leader or otherwise oversee adjudication of refugee processing (either through nomad circuit rides or as part of the regular IO workload), IO staff should send to RAD Headquarters, through the Overseas District chain of command, a list of the cases on hold, including A-numbers, and note the reason for placement on hold as an applicant found to have ordered, incited, assisted or otherwise participated in the persecution of others while under duress.

While no duress exception to the persecutor bar currently exists, the requirement to place such cases on hold has been made at the request of the Department of Homeland Security's Office of the General Counsel in light of the March 3, 2009, Supreme Court decision in *NEGUSIE v. HOLDER*.

The issue presented by the case is whether the provision of the Immigration and Nationality Act that prohibits the finding that an individual is a refugee if he/she has engaged in the persecution of others applies to those who were compelled to do so under duress (for example, coercion through physical harm or threats of death or torture.) The petitioner in the case, Negusie, at age 18, was forcibly conscripted by Eritrean military forces in the longstanding war with Ethiopia. On account of his Ethiopian heritage, however, Negusie refused to fight against those he deemed his "brothers." He served roughly two years in prison on account of his refusal. Following his term of imprisonment, Negusie was directed to serve as a guard at the same prison where he had been held. Torture reportedly is common at the prison. Based on his work as a prisoner, the Fifth Circuit denied Negusie relief, finding the forcible service as a prison guard is irrelevant to deciding applicability of the bar.

The Court asserted that, "…the BIA and the Court of Appeals misapplied *Fedorenko*. We reverse and remand for the agency to interpret the statute, free from the error, in the first instance." The Court held that simply because the INA is silent on a duress exception doesn't mean that one should or should not exist and held that the BIA should use its interpretive authority to decide the matter.

DHS is assessing the issue at this time to formulate a department position. As such, all USCIS Divisions have been instructed to hold any cases that raise a plausible duress claim. Cases put on hold must contain a ***plausible*** claim of duress as to any persecutory act ***and be otherwise eligible*** for the benefit. If there is no plausible duress claim and/or the individual is not otherwise eligible, the case may be denied.

Refugee Officers are accustomed to analyzing duress in the context of TRIG exemptions. The same factors may be considered when determining whether duress was a factor in the applicant's actions. At a minimum, the persecutory act must have been committed as a response to a ***reasonably-perceived threat*** of ***serious***

***harm***. Lines of inquiry/considerations to assess whether the action was taken under duress include but are not limited to:

• What led the applicant to commit the act

• Whether the act was voluntary or if the applicant felt pressure to commit the act

• Whether the applicant believed he/she had a choice

• Whether the applicant reasonably could have avoided, or took steps to avoid committing a persecutory act

• The severity and type of harm inflicted or threatened

• To whom the threat of harm was directed (e.g., the applicant, the applicant's family, the applicant's community, etc.)

• The perceived imminence of the harm threatened

• The perceived likelihood that the threatened harm would be inflicted (e.g., based on instances of past harm to the applicant, to the applicant's family, to the applicant's community, and the manner in which harm was threatened, etc.)

• Whether the applicant was aware of other threats or instances of harm inflicted by this group on his community

• Any other relevant factor regarding the circumstances under which the applicant felt compelled to act

## SUPPLEMENT B – ASYLUM DIVISION

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

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**ASM Supplement - 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 acts. If the applicant denies involvement, you must then determine the credibility of

[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).

that denial. For additional information regarding credibility determinations and evaluation of evidence, see RAIO Training modules, *Credibility* and *Evidence Assessment*. 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.

**ASM Supplement - Note-Taking**

Asylum Division 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 Supplement, and see the Affirmative Asylum Procedures Manual (AAPM).

**ASM 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 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 asylum officer may be able to support a determination that asylum should not be granted as a matter of discretion.

Asylum 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.

**ASM Supplement – Headquarters Review**

Cases involving the persecutor bar require headquarters review. Specifically, Headquarters Quality Assurance will review the following cases involving the persecutor bar:

- **Grants** of cases where evidence indicates that the applicant may have ordered, incited, assisted, or other otherwise participated in persecution of others on account of any of the five grounds, and the applicant is found to have met his or her burden of proof to establish that he or she should not be barred a persecutor.
- **All Notices of Intent to Deny (NOID) and referrals to the immigration judge** when an applicant is found to be credible and found to be barred as a persecutor.
- **All NOIDs and referrals of credible applicants** with **cases that involve having committed persecution of others under duress**. Pending finalization of guidance relating to the issue of voluntariness and the persecutor bar, HQ Quality Assurance will put on hold cases where there is evidence of duress and intent.

[71] *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

## ASM 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, 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 Division 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.

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

**There is no IO Supplement.**

## REQUIRED READING

1.

2.

## ADDITIONAL RESOURCES

1.

2.

## SUPPLEMENTS

**IO Supplement – 1**

**There is no IO Supplement.**

U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

***RAIO Combined Training Course***

# REFUGEE DEFINITION

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# REFUGEE DEFINITION

Training Module

## MODULE DESCRIPTION:

This module discusses the definition of a refugee as codified in the Immigration and Nationality Act and its interpretation in administrative and judicial case law.

## TERMINAL PERFORMANCE OBJECTIVE(S)

When adjudicating a request for asylum or refugee resettlement, you will correctly apply the law to determine eligibility for asylum in the United States or resettlement in the United States as a refugee.

## ENABLING PERFORMANCE OBJECTIVES

1. Explain the elements necessary to establish that an individual is a refugee.
2. Explain eligibility issues raised by facts presented in a case.
3. Describe how to determine nationality, if any, of an applicant.

## INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Group and individual practical exercises

## METHOD(S) OF EVALUATION

- Multiple-choice exam

## REQUIRED READING

1. INA §101(a)(42)

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

1. UNHCR Handbook

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

SOURCE: The Tasks listed below are from the Asylum Division's 2001 Revalidation. These tasks will need to be modified to reflect the results of the RAIO Directorate – Officer Training Validation study.

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

## SCHEDULE OF REVISIONS

| Date | Section (Number and Name) | Brief Description of Changes | Made By |
|---|---|---|---|
| 01/20/2015 | Throughout document | Fixed links; minor edits and additions of recent case law | RAIO Trng |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

## Table of Contents

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

## 1 INTRODUCTION

In order to be granted either asylum or refugee status, U.S. law requires that an applicant satisfy the definition of refugee under the Immigration and Nationality Act (INA).[1] This module provides an overview of the refugee definition and the legal requirements an applicant must meet in order to establish that he or she is a refugee, and is the first in a series of modules on the elements of the refugee definition.

It is important to note that while there are multiple other eligibility determinations that must be made when adjudicating claims for asylum or refugee status, both adjudications are predicated on a determination that the individual satisfies the refugee definition. These other eligibility determinations in the asylum context include, for example, the applicability of mandatory bars and the exercise of discretion. In the refugee context, a determination of admissibility and whether the applicant is of special humanitarian concern and has proper access to the U.S. Refugee Admissions Program must be made. Subsequent modules discuss these and other requirements for asylum and refugee eligibility, including:

- the definition of persecution and eligibility based on past persecution (*Definition of Persecution and Eligibility Based on Past Persecution*)
- eligibility based on fear of future persecution (*Well-Founded Fear)*
- the motive of the persecutor and the five protected grounds in the refugee definition (*Nexus and the Protected Grounds and Nexus – Particular Social Group)*
- the burden of proof and evidence (*Evidence)*

[1] INA § 207 and § 208.

- the role of discretion (*Discretion)*
- participation in the persecution of others on account of a protected ground (*Analyzing the Persecutor Bar)*
- entry into and permanent status in a third country (*Firm Resettlement)*

Additionally, for asylum adjudications, the RAIO module, *Mandatory Bars to Asylum* discusses mandatory reasons to deny asylum. For overseas refugee adjudications, the RAIO module, *Overview of Inadmissibility Grounds, Mandatory Bars, and Waivers* discusses reasons an applicant may be inadmissible to the United States and waiver availability, and the *Access, Processing Priorities & Case Composition* module discusses available means to access the U.S. Refugee Admissions Program.

## 2 BASIC DEFINITION OF "REFUGEE"

The INA provides that an applicant may be granted asylum or refugee status, in the exercise of discretion, if the applicant is a refugee within the meaning of section 101(a)(42) of the INA.[2] Therefore, a firm understanding of the definition of refugee is critical to determine whether an alien is eligible for asylum or refugee status.

### 2.1 Section 101(a)(42)(A) & (B) of the INA

The term "refugee" as defined at INA section 101(a)(42) includes two subparagraphs—section 101(a)(42)(A) and (B). Subparagraph (A) provides the broad definition of "refugee," whereas subparagraph (B) provides for so-called "in-country" overseas refugees processing in certain special circumstances. Specifically, under INA section 101(a)(42)(A), a refugee is:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[3]

INA section 101(a)(42)(B) provides for in-country processing under special circumstances as specified by the President for:

[2] INA § 208; Note that INA § 207, the statute governing the annual admission of refugees to the U.S., is written in such a way that it assumes a refugee status determination has already been made prior to the actual admission. Since there are no other provisions governing such a determination, the officer makes that determination at the same time he or she makes the determination that the applicant has proper access to the U.S. Refugee Admissions Program.

[3] INA § 101(a)(42)(A).

> any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[4]

For both subparagraphs (A) and (B), the refugee definition "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."[5] This exclusion from the definition is known as the "persecutor bar," and is the subject of a separate module, *Analyzing the Persecutor Bar*.

Finally, the statute specifically includes provisions dealing with coercive population control in the refugee definition, stating:

> 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.[6]

For more information on coercive population control claims, see ASM Supplement – Coercive Population Control in RAIO module, *Nexus and the Protected Grounds*.

## 2.2 Comparison with Convention Definition

As explained in previous modules, the U.S. definition of refugee was derived from the definition of refugee in the 1951 Convention relating to the Status of Refugees (1951 Convention, Refugee Convention, or Convention), as amended in the 1967 Protocol Relating to the Status of Refugees (1967 Protocol or Protocol). The 1951 Convention definition of refugee, as amended, is:

> Any person who…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not

[4] INA § 101(a)(42)(B).

[5] INA § 101(a)(42); INA § 208(b)(2)

[6] INA § 101(a)(42).

> having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.[7]

While the U.S. definition of refugee, which was codified by the Refugee Act of 1980 and subsequently modified by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), is derived from the Convention definition, there are several key differences between the two. These differences are explained below.

### 2.2.1 Past Persecution

Unlike the Convention definition, which requires a well-founded fear of future persecution, inclusion in the U.S. refugee definition may be based on either past persecution or a well-founded fear of future persecution.[8]

The regulations implementing USCIS's discretionary authority to grant asylum, however, generally require a well-founded fear of persecution. If an applicant establishes past persecution, a rebuttable presumption of a well-founded fear of future persecution is created.[9] In order to rebut the presumption of well-founded fear, the officer must either establish that a fundamental change in circumstances has occurred, such that the applicant no longer has a well-founded fear, or establish that the applicant could reasonably avoid future persecution by relocating to another part of his or her country of nationality. Asylum applicants who suffered past persecution but who no longer have a well-founded fear of future persecution may be granted asylum based on being unable or unwilling to return to the country due to the severity of the past persecution or if there is a reasonable possibility that the applicant will face other serious harm they may face upon return.[10]

In the overseas refugee processing context, there is no equivalent regulatory guidance on past persecution at 8 C.F.R. § 207. In the absence of such regulatory guidance, a plain language interpretation of the term refugee as defined in INA § 101(a)(42) is followed in overseas refugee processing. If an applicant credibly establishes that the harm he or she suffered in the past rose to the level of persecution on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility. A rebuttable presumption is neither created nor necessary.

In contrast, the UN refugee definition focuses primarily on having a well-founded fear, not past persecution. The cessation clauses of the 1951 Convention, however, do provide

---

[7] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, Vol. 189.

[8] INA § 101(a)(42).

[9] INA § 208; INA § 101(a)(42); 8 C.F.R. § 208.13(b)(1).

[10] 8 C.F.R. § 208.13(b)(1)(iii); For additional information on granting asylum in the absence of a Well-Founded Fear, see RAIO modules, *Discretion* and *Definition of Persecution and Eligibility Based on Past Persecution*.

that a refugee who no longer fears future persecution should be given protection due to compelling reasons arising from previous persecution.[11]

### 2.2.2 Coercive Population Control

Unlike the Convention, the INA specifically incorporates language dealing with coercive population control stating that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion."[12] There is no provision in the Convention definition dealing with coercive population control.

### 2.2.3 Location of Individual

Generally, to meet the Convention definition of "refugee," an individual must be outside of his or her country of nationality or, if stateless, country of last habitual residence.[13]

The U.S. definition of refugee at section 101(a)(42)(B), however, permits the President to specify circumstances under which in-country refugee processing is allowed. For example, the U.S. Refugee Admissions Program conducts in-country processing of certain nationals of the former Soviet Union in Moscow, certain Cubans in Havana, Cuba, and certain Iraqis in Baghdad, Iraq.[14] In accordance with the President's determination, any U.S. Ambassador may also refer an individual to the program for in-country processing.[15]

### 2.2.4 Persecution of Others

The U.S. definition explicitly excludes from the refugee definition anyone who has participated in the persecution of others on account of a race, religion, nationality, membership in a particular social group, or political opinion.[16]

---

[11] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Article 1C, paras. (5) and (6), incorporated by reference into the 1967 Protocol relating to the Status of Refugees.

[12] INA § 101(a)(42). Coercive Population Control (CPC) scenarios, while possible, are less prevalent in overseas refugee processing as they are in asylum processing. For more information on coercive population control claims, see ASM Supplement – *Coercive Population Control* in RAIO module, *Nexus and the Protected Grounds.*

[13] UNHCR Handbook, para. 88.

[14] In the Presidential Determination for FY 2014 Refugee Admissions, in-country processing was designated for persons in Cuba, Eurasia and the Baltics, Iraq, and, in exceptional circumstances, persons identified by a U.S. embassy in any location.

[15] *Id.*

[16] *See* INA § 101(a)(42). For additional information, see RAIO module, *Analyzing the Persecutor Bar.*

In contrast, the Refugee Convention excludes from refugee status any person who has "committed a crime against peace, a war crime, or a crime against humanity, as defined in international instruments."[17] The United Nations High Commissioner for Refugees (UNHCR) advises that an adjudicator must first determine whether a person meets the definition of refugee and only then determine whether the person is subject to the exclusion clause as not deserving of international protection.[18]

## 2.3 Elements of the Refugee Definition

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

1. Is outside his or her country of nationality (or if stateless, the country of last habitual residence) and

    - is *unable or unwilling* to return to, and
    - is unable or unwilling to avail himself or herself of the protection of the country of nationality (or if stateless, the country of last habitual residence), or
    - in the context of in-country, overseas processing, whether the applicant is a national or habitual resident within the country of processing;[19]

2. Because he or she

    i. has suffered *past persecution*

    or

    ii. has a *well-founded fear of persecution*

3. *On account of* race, religion, nationality, membership in a particular social group, or political opinion.

An applicant must establish all three elements (1, 2, and 3) to meet the definition of a refugee.[20] The applicant can establish that he or she is a refugee by demonstrating either actual past persecution or a well-founded fear of future persecution, but does not need to establish both.[21]

---

[17] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Article 1F(a), incorporated by reference into the 1967 Protocol relating to the Status of Refugees.

[18] UNHCR Handbook, *Chapter II – Inclusion Clauses, Chapter IV – Exclusion Clauses.*

[19] INA §§ 101(a)(42)(A) and (B).

[20] INA § 101(a)(42)(A).

[21] 8 C.F.R. § 208.13(b).

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

## 3.1 Definition of Nationality

For purposes of the first part of the refugee definition – "outside any country of such person's nationality" – nationality, in most cases, refers to "citizenship."[22]

Contrast this with the definition of "nationality" in the second part of the refugee definition – "on account of … nationality." In the second part of the definition, "nationality" is not to be understood only as "citizenship," but also refers to ethnic or linguistic groups, and may overlap with the term "race."[23]

The INA defines "national" as a "person owing permanent allegiance to a state."[24] The U.S. Court of Appeals for the Second Circuit has noted that "[n]ationality is a status conferred by a state, and will generally be recognized by other states provided it is supported by a 'genuine link' between the individual and the conferring state."[25]

## 3.2 Identifying Nationality

### 3.2.1 Passports

#### Presumption of Nationality

Possession of a passport creates a presumption that the holder is a national of that country, unless the passport states otherwise.[26]

#### Overcoming the Presumption of Nationality

There may be reliable information that a travel document or passport does not establish nationality, but is a so-called "passport of convenience."[27] You must consider the circumstances under which the applicant obtained the passport and available information on whether a country issues passports to non-nationals. Some countries have issued passports to non-nationals for the sole purpose of allowing these individuals to leave the country issuing the passport. Some applicants have obtained passports through misrepresentation or payment of bribes.

---

[22] UNHCR Handbook, para. 87.

[23] UNHCR Handbook, para. 74.; see also, RAIO module, *Nexus and the Five Protected Grounds*, (section on *Nationality*).

[24] INA § 101(a)(21).

[25] *Dhoumo v. BIA*, 416 F.3d 172, 175 (2d Cir. 2005).

[26] UNHCR Handbook, para. 93.

[27] *Id.*

The presumption of nationality may be rebutted by, for example, an assertion that a passport is a travel document only, combined with information from the issuing country that it has issued such passports to non-nationals for travel purposes only. If information from the issuing authority cannot be obtained, the applicant's consistent and detailed explanation of the circumstances could rebut the presumption of nationality established by the passport.[28]

When determining whether the presumption of citizenship created by the presentation of a passport is overcome, you must weigh all of the available evidence, including the applicant's testimony.[29]

### 3.2.2 Inability to Establish Nationality

An applicant is not required to establish nationality in order to be eligible for asylum or refugee status, but the issue of the applicant's nationality is a threshold matter that you must address.[30] Documentary evidence is not necessarily required for an applicant's nationality to be established; in some circumstances, you may find the applicant's credible testimony alone to be sufficient to resolve this issue.[31] If nationality cannot be clearly established, you should determine asylum or refugee status based on the country of the applicant's last habitual residence. See the discussion of statelessness, below.

There is no precedent case law directly on point describing the standard of proof required to establish nationality. The UNHCR Handbook indicates that when an applicant cannot clearly establish his or her nationality, the country of his or her former habitual residence must be taken into account.[32] UNHCR does not appear to be speaking to a standard of proof in this paragraph, but to the issue of analyzing well-founded fear of a person who cannot clearly establish his or her nationality.

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

## 3.3 Multiple Nationality

### 3.3.1 Eligibility

---

[28] *Id.*

[29] See *Palavra v. INS*, 287 F.3d 690, 694 (8th Cir. 2002).

[30] See *Dulane v. INS*, 46 F.3d. 988 (10th Cir. 1995); *Wangchuck v. DHS*, 448 F.3d 524, 528 (2d Cir. 2006)

[31] *Urgen v. Holder*, 768 F.3d 269, 273 (2d Cir. 2014).

[32] UNHCR Handbook, para. 89.

The refugee definition provides that the applicant must be unable or unwilling to return to "any country of such person's nationality . . . ."[33] A dual citizen must establish persecution or a well-founded fear of persecution in both countries of nationality to be eligible for asylum or refugee status.[34]

You must evaluate asylum or refugee eligibility with respect to any country of which the applicant is a citizen[35] or national.[36]

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

### 3.3.2 Distinction between Issue of Multiple Nationality and Firm Resettlement

An applicant may have resided in a third country before entering the United States, but after fleeing his or her country of nationality. Residence alone does not necessarily confer citizenship or nationality.

Permanent residence in a third country may indicate that the applicant was firmly resettled in that country. Firm Resettlement is a bar to asylum and to refugee resettlement and a distinct issue from multiple nationality.[37]

### 3.3.3 Citizens of North Korea

Section 302 of the North Korean Human Rights Act provides that asylum applicants from North Korea are not ineligible for asylum in the United States on account of "any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea."[38] Based on this law, you may not treat a citizen of North Korea as a dual national of South Korea, unless the applicant is a former North Korean citizen who has already availed him or herself of the rights of citizenship in South Korea.

## 3.4 Statelessness

---

[33] INA § 101(a)(42)(A); UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Article I A(2); UNHCR Handbook, para. 106.

[34] *Matter of B-R-*, 26 I&N Dec. 119 (BIA 2013) (holding that a dual citizen of Venezuela and Spain could not meet the definition of a refugee where he had no fear of persecution in Spain).

[35] UNHCR Handbook, para. 106.

[36] INA § 101(a)(21).

[37] For additional information, see RAIO module, *Firm Resettlement.*

[38] *North Korean Human Rights Act of 2004*, H.R. 4011, P.L. 108-333 (Oct. 18, 2004), 118 Stat. 1287; and Memorandum from Joseph E. Langlois, Director, USCIS Asylum Division, to Asylum Office Directors, et al., *North Korean Human Rights Act of 2004*, (HQASM 120/9) (22 October 2004).

If stateless, the applicant must establish persecution or a well-founded fear of persecution in the country of his or her last habitual residence.[39] The fact that an applicant is stateless is not itself sufficient to establish eligibility for asylum or refugee status.[40] On the other hand, if a state divests an applicant of citizenship and renders him or her stateless on account of a protected ground, the applicant's denaturalization may constitute persecution in some circumstances.[41]

### 3.4.1 Definition

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."[42] The INA defines "national" as a person owing permanent allegiance to a State.[43] Both definitions should be considered when determining whether an individual is stateless for purposes of the asylum or refugee adjudication. Even if the applicant believes he or she owes allegiance to a State, if the State does not consider the applicant to be a national of that State, the applicant should be considered stateless.

### 3.4.2 Country Where Applicant Last Habitually Resided

#### General Definition

Although the INA does not define "last habitually resided" for purposes of asylum or refugee eligibility, the INA does define "residence" as "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent."[44]

In one of the only precedent decisions addressing the issue of last habitual residence, the U.S. Court of Appeals for the Third Circuit considered the Immigration Judge's (IJ's) application of this general definition in the asylum context. The court found that the IJ properly concluded that the fact that a stateless Serb from Croatia did not intend to reside in a refugee camp in Serbia was not relevant in determining that Serbia was his place of last habitual residence.[45] The Court also held that it was permissible for the IJ to consider

---

[39] INA § 101(a)(42).

[40] *Agha v. Holder*, 743 F.3d 609, 618 (8th Cir. 2014); *Ahmed v. Keisler*, 504 F.3d 1183, 1191 n.5 (9th Cir. 2007); *Najjar v. Ashcroft*, 257 F.3d 1262, 1293 (11th Cir. 2001); *Ahmed v. Ashcroft*, 341 F.3d 214, 218 (3d Cir. 2003); UNHCR Handbook, para. 102.

[41] *Stserba v. Holder*, 646 F.3d 964, 973 (6th Cir. 2011); *Haile v. Holder*, 591 F.3d 572, 574 (7th Cir. 2010).

[42] UN General Assembly, Convention Relating to the Status of Stateless Persons, Article I, para. 1, United Nations Treaty Series, No. 5158, Vol. 360.

[43] INA § 101(a)(21).

[44] INA § 101(a)(33); see also 8 C.F.R. § 214.7(a)(4)(i) (definition of habitual residence in the territories and possessions of the United States).

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

the amount of time spent in Serbia in determining whether the applicant's residence there was "habitual."

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

### No Requirement of Firm Resettlement

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

*Example*

A Palestinian born in the Israeli-occupied territories, who then moved to Kuwait where he worked legally but did not receive permanent residency rights, is stateless and the country of last habitual residence is Kuwait.

### Last Habitual Residence

A stateless person may have formerly resided in more than one country and may fear persecution in more than one of those countries.[46] However, eligibility for asylum or refugee status should be analyzed based on the country of last habitual residence only.[47] There can only be one country of last habitual residence. There is no case law addressing the issue of how the refugee definition should be applied to stateless individuals who last habitually resided in territories that are not part of any recognized state (such as the West Bank, the Gaza Strip, and Western Sahara). Some courts have assumed without deciding that these claims should be analyzed by treating those territories as places of last habitual residence.[48]

### Case-by-Case Determination

There is no clear case law indicating how to determine the country of last habitual residence. Determinations must be made on a case-by-case basis. When the country of last habitual residence is not readily apparent, you should consult your supervisor. If your supervisor does not have a firm answer the supervisor may contact Asylum HQ Quality Assurance and RAD Policy and Regional Operations if the issue requires further review.

## 4 UNABLE OR UNWILLING TO RETURN

[46] UNHCR Handbook, para. 104.

[47] INA § 101(a)(42).

[48] *See, e.g.,*; *Al Yatim v. Mukasey*, 531 F.3d 584, 588 (8th Cir. 2008); *Jabr v. Holder*, 711 F.3d 835, 838 (7th Cir. 2013).

## 4.1 General Principles

To meet the requirements of the refugee definition, the asylum or refugee status applicant must establish that he or she is unable or unwilling to return to his or her country because of past or feared persecution.[49] In most cases, the fact that the applicant applied for asylum or refugee status is evidence that the applicant is unwilling to return to that country.

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

## 4.2 Return to Country of Past or Feared Persecution

An asylum or refugee applicant's return to a country of persecution or feared persecution may indicate that the applicant is willing and able to return, but does not in and of itself preclude establishment of eligibility.[50] You must evaluate the reasons that motivated the applicant's temporary visit, the circumstances surrounding that visit, any problems or lack of problems the applicant faced upon return, and any precautions the applicant took to determine if the applicant is unable or unwilling to return.

### 4.2.1 Does Return Indicate that the Applicant Is Able and Willing to Return?

In evaluating whether an applicant's return to the country of claimed persecution may indicate that he or she is both willing and able to return, you must first consider the reason for the applicant's return. Circumstances may have compelled the applicant's return. For example, one of the applicant's immediate family members may have died or may have been in a grave situation that compelled the applicant to return. The applicant remained unwilling to return, but the death or illness compelled him or her to return. During the interview, you must elicit and evaluate information concerning the applicant's reasons for return and any precautions the applicant took to avoid harm. You should not conclude that a return due to compelling factors establishes that the applicant is able and willing to return.[51] [ASM Supplement – 1]

### 4.2.2 What Happened when the Applicant Returned?

You must also elicit information to determine if harm or threats occurred after the applicant returned to the country of claimed persecution, if the applicant took precautions to avoid harm, or if circumstances have subsequently occurred that put the applicant at

[49] INA § 101(a)(42).

[50] 8 C.F.R. § 208.8(b).

[51] *De Santamaria v. US Att'y Gen.*, 525 F.3d 999 (11th Cir. 2008) (applicant who returned to Colombia to continue philanthropic and political activities and to be with her family was found eligible for asylum).

risk. Subsequent harm, threats, or risk, may establish that the applicant, while willing and able to return for the last visit, is no longer willing and able to return.[52]

## 5 UNABLE OR UNWILLING TO AVAIL ONESELF OF PROTECTION

In most cases, an individual's application for asylum or refugee status is sufficient proof that he or she is unwilling to seek protection in the country from which he or she fled.[53] The definition of refugee requires that a refugee be unable *or* unwilling to avail him or herself of protection. An applicant is not required to prove both. Either proof of being unable or proof of being unwilling is sufficient for this part of the refugee definition.

Note that whether an applicant is unable or unwilling to avail himself or herself of the protection of the country from which he or she fled could be important to determining whether it would be reasonable for the applicant to internally relocate within that country. Whether there is a reasonable internal relocation option relates to whether the applicant has a well-founded fear of persecution and is discussed in the RAIO module, *Well-Founded Fear*.[54]

This concludes the basic overview of the refugee definition. Subsequent lessons on Past Persecution, Well-Founded Fear, Nexus, and the Persecutor Bar will delve further into the refugee definition, providing advanced instruction on the remaining elements of the refugee definition.

[52] For additional information, see RAIO module, *Well-Founded Fear*.

[53] For additional information, see RAIO module, *Definition of Persecution and Eligibility Based on Past Persecution*, (section on *Identifying a Persecutor*).

[54] For additional information, see RAIO module, *Well-Founded Fear,* (section on *Internal Relocation*).

## PRACTICAL EXERCISES

[**NOTE:** If there are no practical exercises, state "There are no Practical Exercises for this module." If there is only one practical exercise, do not number it.]

**Practical Exercise # 1**

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

## OTHER MATERIALS

There are no Other Materials for this module.

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**RAD Supplement**

**Module Section Subheading**

## SUPPLEMENT B – ASYLUM DIVISION

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

### REQUIRED READING

1. 8 CFR § 208.13

### ADDITIONAL RESOURCES

1. 1. Memorandum from Joseph E. Langlois, Director, USCIS Asylum Division, to Asylum Office Directors, et al., *North Korean Human Rights Act of 2004*, (HQASM 120/9) (22 October 2004).

2. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors and Deputy Directors, *Change in Instruction Concerning One Year Filing Deadline and Past Persecution*, (15 March 2001) (HQ/IAO 120/16.13).

3. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Persecution of Family Members*, (30 June 1997).

4. Memorandum from David A. Martin, INS Office of General Counsel, to Asylum Division, *Legal Opinion: Palestinian Asylum Applicants*, (27 Oct. 1995) (Genco Opinion 95-14).

5. Memorandum from David A. Martin, INS Office of General Counsel, to John Cummings, Acting Assistant Commissioner, CORAP, *Legal Opinion: Application of the Lautenberg Amendment to Asylum Applications Under INA Section 208*, (6 Oct. 1995) (Genco Opinion 95-17).

6. Memorandum from Rosemary Melville, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Follow Up on Gender Guidelines Training*, (7 July 1995) (208.9.9).

7. Memorandum from Phyllis Coven, INS Office of International Affairs, to Asylum Officers and HQASM Coordinators, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, (26 May 1995).

8. T. Alexander Aleinikoff. "The Meaning of 'Persecution' in United States Asylum Law," *International Journal of Refugee Law* 3, no. 1 (1991): 411-434.

9. UNHCR, *Note on Refugee Claims Based on Coercive Family Planning Laws or Policies* (Aug. 2005).

## SUPPLEMENTS

**ASM Supplement – 1**

**Does Return Indicate that the Applicant is Able and Willing to Return?**

**8 C.F.R. § 208.8(a) and (b):**

Procedurally, asylum applicants who leave the United States without first obtaining advance parole [a type of re-entry document] are presumed to have abandoned their asylum applications. 8 C.F.R. § 208.8(a).

Asylum applicants who leave the United States with advance parole documents, but who return to their country of claimed persecution, are presumed to have abandoned their asylum application absent "compelling reasons" for their return. 8 C.F.R. § 208.8(b).

An applicant can overcome the presumption of abandonment by a preponderance of the evidence indicating that he or she did not abandon the asylum application. Appearance at the asylum office by an applicant, generally, is substantial evidence that he or she has not abandoned his or her asylum application. This factor must be weighed along with other evidence relating to the reasons for the return and events that occurred during the return.

For applicants who leave the United States without advance parole documents, the presumption of abandonment is rebuttable. Applicants who leave the United States with advance parole documents and return to their country of claimed persecution may overcome the presumption of abandonment if there are compelling reasons for the applicant's return to that country.

If the presumption of abandonment is not overcome by compelling reasons for the return, events that occurred during the time that the applicant was in his or her country could be the basis for a new claim.

An applicant's return to the country of feared persecution, and the events that occur during that return, may not lead to a procedural finding that the asylum application was abandoned; however, the return to the country of persecution raises substantive questions regarding whether or not the applicant has a well-founded fear of return

to that country.

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**IO Supplement**

**Module Section Subheading**

U.S. Citizenship and Immigration Services

# RAIO DIRECTORATE – OFFICER TRAINING

*RAIO Combined Training Course*

# DETECTING POSSIBLE VICTIMS OF TRAFFICKING

TRAINING MODULE

*This Page Left Blank Intentionally*

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

# DETECTING POSSIBLE VICTIMS OF TRAFFICKING

Training Module

## MODULE DESCRIPTION:

This module provides guidelines for adjudicating requests for benefits by victims of trafficking. Issues addressed include indicators that may demonstrate an individual is a victim of trafficking, specific assistance and benefits available to victims of trafficking as well as guidelines for sensitive interview techniques.

## TERMINAL PERFORMANCE OBJECTIVE(S)

You will be able to assess whether an interviewee is a victim of trafficking and articulate whether the trafficking-related experience relates to the benefit being sought, and where appropriate, provide trafficking-specific information and/or assistance to the interviewee.

## ENABLING PERFORMANCE OBJECTIVES

1. Define the components of human trafficking.
2. Distinguish between human trafficking and human smuggling.
3. Discuss factors that may indicate that an interviewee has been or is currently a victim of human trafficking.
4. Summarize the rights and forms of immigration relief that may be available to a trafficking victim.
5. Identify factors that may inhibit a victim's ability to fully present his or her claim for protection.
6. Analyze substantive issues related to the past persecution and well – founded fear of persecution specific to victims of trafficking.
7. Describe possible issues affecting benefit eligibility for trafficking victims and traffickers.

## INSTRUCTIONAL METHODS

- Interactive Presentation
- Practical Exercises

## METHOD(S) OF EVALUATION

Written exam
Practical exercise exam

## REQUIRED READING

1.

2.

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

1.

2.

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## CRITICAL TASKS

| Task/ Skill # | Task Description |
|---|---|
| ILR12 | Knowledge of polices and procedures for processing claims from victims of trafficking (3) |
| ITK4 | Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4) |
| ITK5 | Knowledge of strategies and techniques for communicating with survivors of torture and other severe trauma (4) |
| RI6 | Skill in identifying information trends and patterns (4) |
| DM2 | Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5) |
| IR2 | Skill in interacting with individuals who have suffered trauma (e.g., considerate, non-confrontational, empathetic) (4) |
| IR5 | Skill in persuading others and gaining cooperation (4) |
| IR7 | Skill in collaborating and coordinating with external stakeholders (4) |
| SCM1 | Skill in maintaining professional demeanor in stressful situations (e.g., potentially dangerous encounters, emergency situations, threats to personal safety) (4) |

## SCHEDULE OF REVISIONS

| Date | Section (Number and Name) | Brief Description of Changes | Made By |
|---|---|---|---|
| 6/16/2014 | 3.4.3 Human Trafficking Distinguished from Smuggling | Changed "illegal alien" to "undocumented alien" and added three hyperlinks to the footnote on page 24 | LG |
| **6/5/2015** | **Asylum supplement** | **Removed outdated sample assessment** | **RAIO Trng** |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

## Table of Contents

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

# 1 INTRODUCTION & OVERVIEW

***Ten years ago, the United Nations negotiated the international standards against trafficking in persons and the United States enacted the Trafficking Victims Protection Act. Since then, the international community has witnessed tangible progress in the effort to end the scourge of trafficking in persons. More victims have been protected, more cases have been successfully prosecuted, and more instances of this human rights abuse have been prevented. Countries that once denied the existence of human trafficking now work to identify victims and help them to overcome the trauma of modern slavery, as well as hold responsible those who enslave others.***[1]

***-Hillary Rodham Clinton, U.S. Secretary of State***

According to the 2010 U.S. Department of State (DOS) Trafficking in Persons Report[2]:

- 12.3 million adults and children are currently subjected to forced labor, bonded labor, and forced prostitution around the world
- 56% are women and girls

[1] Secretary of State Hillary Clinton, U.S. Dept. of State, Trafficking in Persons Report—10th Ed., June 2010, (herein after USDOS TIP 2010).

[2] USDOS TIP 2010

As an officer in the RAIO Directorate, you may come in contact with interviewees who are victims of human trafficking and individuals who have engaged in the trafficking of human beings. It is crucial that you understand the relevant laws and regulations related to the trafficking of human beings, as well as the procedures for interviewing and adjudicating benefits for both trafficking victims and perpetrators.

Although sometimes incorrectly used interchangeably, the terms "trafficking" and "smuggling" are actually two distinct crimes governed by different bodies of law. While a great deal of international law has been developed regarding trafficking, smuggling continues to remain primarily under domestic jurisdiction, making it easily adaptable to different criminal justice capacities in countries of origin, transit and destination.

**TRAFFICKING VS. SMUGGLING—THE PRIMARY DIFFERENCES[3]**

The distinctions between smuggling and trafficking are often very subtle and at times the two crimes overlap. A situation that begins as migrant smuggling may develop into a situation of human trafficking. There are four primary differences between trafficking and smuggling:

1. Consent – migrant smuggling, while often undertaken in dangerous or degrading conditions, involves consent. Trafficking victims, on the other hand, have either never consented or if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive action of the traffickers.

2. Exploitation – migrant smuggling ends with the migrant's arrival at his or her destination, whereas trafficking involves the ongoing exploitation of the victim.

3. Transnationality – smuggling is always transnational, whereas trafficking may not be. Trafficking can occur regardless of whether victims are taken to another state or moved within a state's borders.

4. Source of profits – in smuggling cases profits are derived from the transportation or facilitation of the illegal entry or stay of a person into another country, while in trafficking cases profits are derived from exploitation.

This module focuses on trafficking and:

- Provides a general overview of international and U.S. human trafficking legislation and policy.

[3] *Migrant Smuggling FAQs*, United Nations Office on Drugs and Crime, located at http://www.unodc.org/unodc/en/human-trafficking/faqs-migrant-smuggling.html

- Discusses the elements of a human trafficking crime, trends in trafficking, and rights and benefits accorded to identified victims in the United States.
- Describes how you may encounter a potential victim or perpetrator of trafficking during the course of your work and how it may impact the outcome of the final adjudication.

## 2 INTERNATIONAL AND DOMESTIC LAWS & GUIDELINES REGARDING TRAFFICKING

Concern about human trafficking, both internationally and domestically, has led to the development of a globally coordinated response aimed at combating the practice. One of the first international treaties to address trafficking was the *International Agreement for the Suppression of the White Slave Traffic* signed in 1904. As the first comprehensive international agreement on the subject, the agreement contained several key provisions reflected in current legislation, including:

- identifying trafficking victims at ports of entry and transportation stations
- collecting information from trafficked women
- providing protection and care of indigent victims pending repatriation[4]

### 2.1 International Agreements & Conventions

Since the enactment and implementation of the International Agreement for the Suppression of White Slave Traffic in 1904, countries throughout the world have entered into and adopted various treaties and agreements, as well as developed and implemented new policies and legislation related to human trafficking. The most significant agreement to which the United States is a party is the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children—also known as the Palermo Protocol.

***United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol, 2000)***

The establishment of the Palermo Protocol in 2000 brought the issue of trafficking to the forefront of governmental discourse and global consciousness. Calling for a comprehensive international approach to the issue of trafficking in countries of origin, transit, and destination, the Palermo Protocol utilized the "three P" strategy to combat trafficking (prevention, protection, prosecution).[5] The United States subsequently used

[4] International Agreement for the Suppression of the White Slave Traffic (1904), May 18, 1904, reprinted at http://www1.umn.edu/humanrts/instree/whiteslavetraffic1904.html.

[5] United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 25, annex II, U.N.

this approach as the foundation of federal trafficking legislation including the Victims of Trafficking and Violence Protection Act of 2000 (TVPA).

To date, there are 133 parties to the Palermo Protocol, of which 117, including the United States, are signatories. Additional policies and legislation related to trafficking are discussed in further detail below.

## 2.2 United States Laws Related to Human Trafficking

### 2.2.1 Thirteenth Amendment & Related Criminal Federal Statutes

Domestic trafficking statutes in the United States are rooted in the prohibition of slavery and involuntary servitude as guaranteed by the Thirteenth Amendment, which states in pertinent part that:

> Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Title 18 of the U.S. Code (U.S.C.) houses the specific criminal statutes related to trafficking.

### 2.2.2 Trafficking Victims Protection Act (TVPA) and Trafficking Victims Protection Re-authorization Act (TVPRA)

On October 28, 2000, Congress enacted The Trafficking Victim's Protection Act (TVPA), affording certain rights and protections to victims of severe forms of trafficking, including:

- Protection and assistance to trafficking victims;
- Punishment of traffickers; and
- Prevention of trafficking domestically and internationally.

In 2003, 2005, and 2008 Congress re-authorized the TVPA. Since its re-authorization, the TVPA is now referred to as the Trafficking Victims Protection Re-Authorization Act (TVPRA).

### 2.2.3 Mandate for federal immigration officials

The TVPA (2000) and its subsequent re-authorizations and accompanying regulations, specifically outline a mandate for federal immigration officials as part of the U.S. Government led anti-trafficking efforts, and more clearly define our responsibilities

---

GAOR, 55th Sess., Supp. No. 49 at 60, U.N. Doc A/45/49 (Vol. I)(2001), entered into force Dec. 5, 2003 [Palermo Protocol], preamble, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

under the TVPRA. For example, the 2008 TVPRA significantly impacted asylum field policy and procedures when the Asylum Division was accorded initial jurisdiction on unaccompanied minor cases, a particularly vulnerable demographic within the U.S. immigrant population.[6]

In July 2010, the Department of Homeland Security (DHS) launched the Blue Campaign – a first-of-its-kind campaign to coordinate and enhance the Department's anti-human trafficking efforts. The Blue Campaign harnesses and leverages the varied authorities and resources of DHS to deter human trafficking by increasing awareness, protecting victims, and contributing to a robust criminal justice response. The campaign is led by an innovative cross-component steering committee, chaired by the Senior Counselor to the Secretary of Homeland Security, and comprised of representatives from seventeen operational and support components from across DHS. The Blue Campaign mandates that all USCIS and other DHS personnel receive training on human trafficking issues.[7]

As an officer within the RAIO Directorate, you are responsible for identifying potential victims of trafficking and reporting your findings so that data on such individuals can be tracked. If you are working domestically, your responsibilities may, where appropriate, include providing victims of trafficking with mandated informational materials about the benefits which may be accorded to them as potential victims, and making referrals to the closest law enforcement official charged with investigating and prosecuting trafficking-related crimes within your jurisdiction.

## 3 SEVERE FORMS OF TRAFFICKING IN PERSONS

In order for a victim of trafficking to qualify for trafficking-related immigration relief and other benefits, services, and protections in the United States, she or he must meet the definition under the TVPRA of an individual who has been a victim of a "severe form of trafficking in persons." The term "severe form of trafficking" implies a legal determination that you, as an officer, are not responsible for making. Rather, as an officer you are responsible for familiarizing yourself with the definition of trafficking to the extent that it will assist you in recognizing when an interviewee may be involved in a trafficking-related situation so you can take appropriate next steps to protect that individual and/or ensure the interviewee receives a fair adjudication.

In addition to this definition, the T visa (trafficking-related immigration relief which is discussed below) has additional eligibility requirements. As an officer within RAIO, you will not need to analyze whether an interviewee meets the criteria for a T visa when you are assessing whether an interviewee is a potential victim of trafficking for RAIO adjudication or protection purposes.

### 3.1 Definition

[6] For additional information, please refer to RAIO module, *Children's Claims.*

[7] Fact Sheet: DHS Blue Campaign, located at: http://www.dhs.gov/ynews/gc_1279809595502.shtm

Under the TVPRA, the following are listed as severe forms of trafficking in persons:

- **Sex trafficking**, which is defined as the "recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act," in which the commercial sex act is induced by
  - force, fraud, or coercion, or
  - in which the person induced to perform such act has not attained 18 years of age

or

- **Labor trafficking**, which is defined as the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through
  - the use of force, fraud, or coercion
  - for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery

A simple way to define human trafficking is all of the activities involved in obtaining or maintaining a person in forced labor or sex service.

Three categories of trafficking victims emerge from this legal definition. They include:

- Minors (under 18) induced into commercial sex
- Individuals age 18 or over involved in commercial sex via force, fraud or coercion
- Children and adults forced to perform labor or other services in conditions of involuntary servitude, peonage, etc. by force, fraud or coercion

This definition applies to any individual who is subjected to trafficking, whether she or he is a foreign national or U.S. citizen.

**No Movement Necessary**

Despite popular misconception to the contrary, the movement or transportation of an individual is not a required element of the crime of "trafficking."

f

Trafficking is a process comprised of many actions that may occur over a long period of time. During the course of your work with USCIS, you may encounter foreign national interviewees who were trafficked via a range of diverse methods, and who come before you at different points in the spectrum of exploitation. These individuals may have been

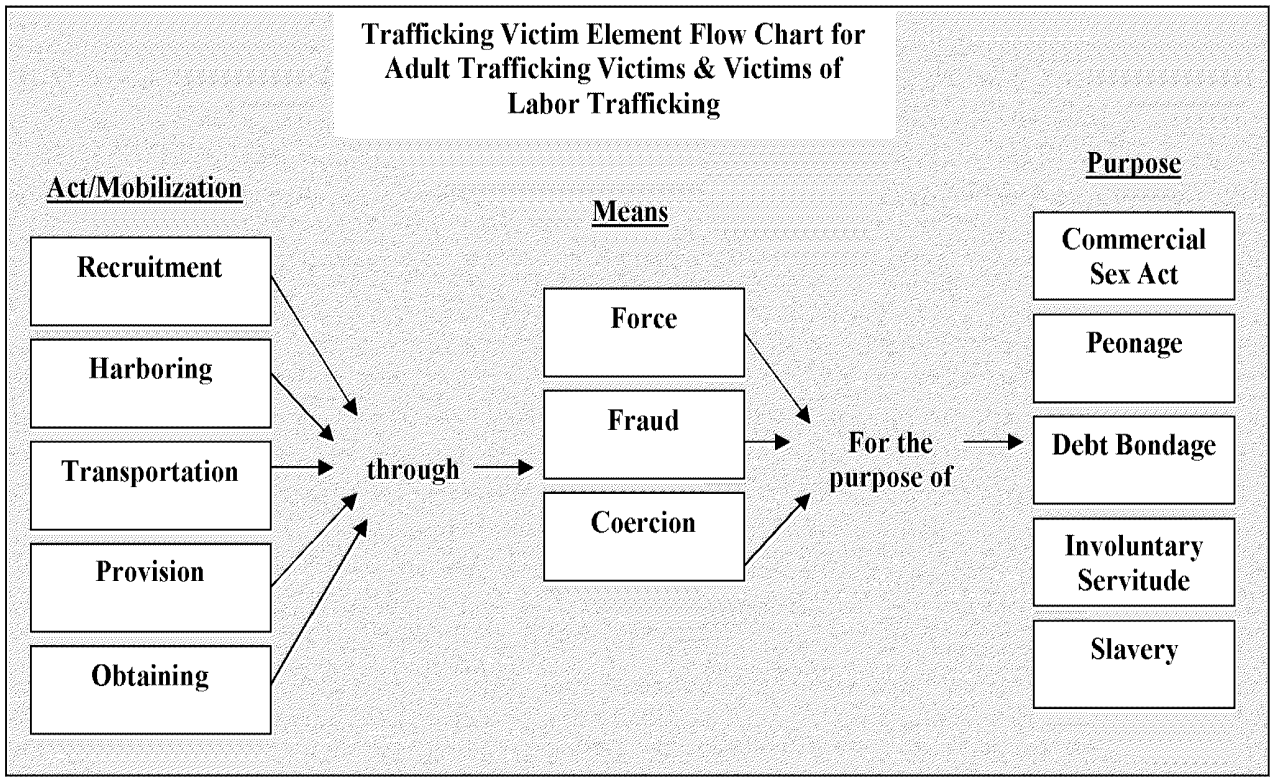
trafficked in the past, be in a situation of ongoing trafficking/exploitation in the United States or in the third-country where she or he is:

- being interviewed for resettlement
- at-risk for trafficking in the United States or a third country, and/or
- at-risk for being trafficked upon return to his or her home country

## 3.2 Components[8]

In order to better understand what constitutes a trafficking crime and how to recognize whether an interviewee is involved in a trafficking-related situation, it is helpful to look at the component parts of the definition individually. The chart below provides a visual framework for you to understand the process of human trafficking. The three components include:

- Act/Mobilization
- Means
- Purpose




### 3.2.1 Act/Mobilization

[8] The framework used in the following sections is derived from International Organization for Migration (IOM) Counter-Trafficking Training Modules. More information about the individual modules can be located at http://www.iom.int/unitedstates/ct/trainingmodules.htm [accessed on November 2, 2011].

What act initiated the trafficking process? Was the person recruited, transported, transferred, harbored, or received? Certain acts by the victim or the perpetrator in the initial stages of the human trafficking process may not be self-evident as trafficking acts. Further, the trafficking victim may initially appear to be complicit in the arrangement. An example of this would be if someone responded to an employment advertisement posted by a local employment agency advertising positions abroad ("recruitment") or voluntarily contracted a smuggler to arrange travel to the United States ("transport").

It is important to remember that an individual is not excluded from consideration as a victim of trafficking if she or he was initially complicit in their own mobilization into trafficking.

### 3.2.2 Means

What techniques such as force, fraud, or coercion (including non-physical inducements) were employed by the third party in order to induce the individual into trafficking?

Some examples of means of force, fraud, or coercion that traffickers may use to control the victim include but are not limited to: debt bondage from a smuggling agreement; confiscation of passports or other identity documents; use of or threat of violence toward the individual and/or his or her family; the threat of shaming the individual; threats of imprisonment or deportation; control of a victim's money; psychological manipulation; and/or isolation from the public and/or the individual's family.

Collusion, a commonly used method of control, is used where the victim may initially have been complicit in an illegal act but then was subjected to trafficking against his or her will, through force, fraud, or coercion. In these situations, the victim may feel responsible for his or her own situation and believe that she or he will be punished for illegal acts in which she or he participated, resulting in a feeling of hopelessness and a reluctance to break free from the trafficking situation.

Under U.S. law, minors cannot consent to providing commercial sex services. Accordingly, in cases where a victim of sex trafficking was under 18 years of age at the time of the crime, the means through which she or he became a victim need not be analyzed. As long as a third party induced the minor's involvement in the exploitation, a determination of the particular means utilized by a third party to traffic the minor is not required.

### 3.2.3 Purpose

What was the end result? Was the individual exploited or was there intent to exploit? If the individual was exploited, was it through sexual exploitation, forced labor, debt bondage, slavery, or another form of qualifying activity?

As the examples that follow demonstrate, a person may be a trafficking victim "regardless of whether they once consented, participated in a crime as a direct result of being trafficked, were transported into the exploitative situation, or were simply born into a state of servitude."[9]

## 3.3 Common Forms of Human Trafficking[10]

In order to fully understand the conditions facing a victim of trafficking, you must bear in mind the full range of potential activities that could constitute trafficking. In the U.S. asylum context, interviewees have disclosed a range of trafficking-related experiences, including forced prostitution, domestic servitude, and child sexual exploitation.

**Trafficking: Not Just a Sex Crime**

Although trafficking is most often associated with the sex trade, RAIO officers should keep in mind that trafficking includes various forms of labor and/or services.

### 3.3.1 Sex Trafficking

Activities that may constitute sex trafficking:

- pornography: If the individual is induced by force, fraud or coercion to perform the commercial sex act for the purpose of producing the pornography
- sex tourism: An individual who engages in illicit sexual conduct in foreign places[11]
- prostitution: If the individual is induced by force, fraud or coercion to perform commercial sex acts
- military prostitution: Under U.S. law, it is illegal for anyone to engage in, aid or abet, or procure or solicit prostitution in the vicinity of a military or naval camp. In some instances, individuals may be brought to military camps to engage in sex acts against their will[12]

Participation in these activities does not necessarily mean an individual is a victim of trafficking. When the victim is over 18, a third party must be employing fraud, force or coercive techniques to compel a person into sexual services in order for the person to be a victim of trafficking.

[9] USDOS TIP 2010

[10] Derived from USDOS TIP 2010

[11] 18 USC § 2423

[12] 18 USC § 1384

### 3.3.2 Labor Trafficking

Activities that may constitute labor trafficking:

- forced labor
- peonage/bonded labor/debt bondage
- involuntary domestic servitude

Labor trafficking may involve sexual violence being inflicted on the victim but the end result in these forms of exploitation is the labor service.

> ***Sheldon — From Seasonal Worker to Bonded Laborer***[13]
>
> A recruiter in Jamaica promised Sheldon a visa through the U.S. federal H-2B seasonal worker program. The processing fee was hefty, but the prospect of working in America seemed worth it. Sheldon arrived in Kansas City eager to work, but ended up at the mercy of human traffickers. Along with other workers from Jamaica, the Dominican Republic, and the Philippines, Sheldon cleaned rooms at some of the best-known hotels in Kansas City. The traffickers kept Sheldon in debt, constantly charging him fees for uniforms, transportation, and rent in overcrowded apartments. Often, his paychecks would show negative earnings. When Sheldon refused to work, the traffickers threatened to cancel his immigration status, making him illegal. In May 2009, a federal grand jury indicted the leaders of this trafficking ring, including eight nationals of Uzbekistan, on charges related to forced labor in 14 states.

#### *Forced labor or involuntary servitude*

Involuntary servitude is defined as:

> [a] condition of servitude induced by means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of the legal process.[14]

In other words, forced labor or involuntary servitude is labor provided against an individual's will. She or he may be obligated to work long hours, under inhumane conditions with little or no pay. The entity exacting the forced labor may use methods such as physical force or the threat of physical force, death threats against the victim or

[13] Derived from the DOS TIP 2010.

[14] 8 CFR § 214.11 (a)

the victim's family, threats to denounce the victim to the police or immigration or another entity that may have authority over the victim (e.g., village elders or parents who have sold the victim), debt repayment obligation (the victim's, the victim's family or ancestors), or other financial obligation scheme.[15]

Because immigrants may be undocumented and may be unfamiliar with the language, culture, authorities, rights and protections afforded to them in a new country, they are particularly vulnerable to these forms of coercion.

### *Peonage (Bonded labor, Debt bondage)*

"A status or condition of involuntary servitude based on real or alleged indebtedness."[16]

Peonage is when a bond or debt is used to force or coerce an individual to remain in involuntary servitude. Workers around the world fall victim to debt bondage when traffickers or recruiters unlawfully exploit an initial debt the worker assumed as part of the terms of employment.

In the refugee and asylum context, interviewees often assume the initial cost of employment or cost of passage/entry into the third country. Then, upon arrival, once the individuals are isolated and/or restricted in their ability to control their own circumstances, the traffickers may exacerbate the existing debt by charging exorbitant prices for food, clothing, or other basic life or work-related necessities.

You may also see debt bondage amongst legal, documented immigrants. As many foreign nationals enter the country as temporary guest workers (migrant agricultural workers, domestic servants, teachers, nurses, etc.), they are required to remain with their employers as a condition of their legal status. This has the potential to engender a situation where peonage may be easily created or maintained.

Interviewees may also have a fear of harm based on a debt they absconded from in their home countries. For example, in South Asia, in particular, it is estimated that there are millions of victims working to pay off their ancestors' debts.[17]

### *Involuntary Domestic Servitude*

***Amita — From Domestic Service to Slavery***[18]

Amita came to London from the Middle East as a domestic servant for a family that

[15] International Labor Organization, "The Cost of Coercion," *supra.*

[16] 8 CFR § 214.11 (a)

[17] USDOS TIP 2010

[18] Example derived from USDOS TIP 2010

treated her well and paid her decently. When her employer moved into a high-level job that provided house staff, the family no longer needed Amita. They helped her find work with another family. Amita's new employers took her passport as soon as she arrived and made her sleep on the floor in the living room to prevent her from stealing things and hiding them in her room. They did not pay her or allow her out of the house, and they threatened to report her to the police as an illegal if she tried to run away. Amita worked in the family's house from 6a.m. to 8p.m. After that, she was taken to clean various office buildings until midnight or early morning. One night, the employer's son and his friends were in the house and attempted to rape Amita. After that she decided to run away and managed to escape with the help of a security guard.

Domestic workers are vulnerable to exploitative conditions because of the nature of their informal work environment. The victim may work as a household servant or as a caretaker of children and live in the employer's house or in adjoining living quarters.

Victims of such exploitation may voluntarily enter into employer/employee arrangements but their situations may evolve over time, or upon arrival in their new country. They may be forced to remain in situations where they become victims of trafficking through force, coercion and sexual exploitation.

Domestic servants may be subjected to verbal abuse, untreated illnesses, deprivation of food, long hours, and, especially in the case of women and girls, sexual abuse and exploitation.[19] As the exploitation occurs in a private residence and the domestic worker is often secluded from outside observation, this type of trafficking would not easily come to the attention of police or other governmental authorities.

### 3.3.3 Child Trafficking

The age and gender of the trafficking victim are often closely related to the type of trafficking to which they are subjected. Male children are often trafficked to be exploited in forced labor, and illicit activity such as petty crimes and drug trafficking, whereas girls tend to be subjected to sexual exploitation and as forced domestic servants.[20]

A child may become involved in trafficking through any of the following means: the child may have been kidnapped; taken from the street (where the child is homeless); legally or illegally adopted; bought from the parents or caretakers; or been given to the traffickers by the parents or caretakers in order to obtain employment.[21] The victims of such trafficking include the child trafficked, the parents or caretakers (where the child

[19] Id.

[20] Id.

[21] It is important to note that a fraudulent intercountry adoption would only constitute trafficking if it resulted in the child becoming a victim of sex trafficking or labor trafficking.

was taken or where false pretenses were used), and even the community from which the child was taken if the traffickers were perceived as legitimate job brokers.[22]

> ***Vipul — A Childhood Lost***[23]
>
> Vipul was born into extreme poverty in a village in Bihar, the poorest state in India. His mother was desperate to keep him and his five brothers from starving, so she accepted $15 as an advance from a local trafficker, who promised more money once 9-year-old Vipul started working many miles away in a carpet factory. The loom owner treated Vipul like any other low-value industrial tool. He forced Vipul and other slaves to work for 19 hours a day, never allowed them to leave the loom, and beat them savagely when they made a mistake in the intricate designs of the rugs, which were sold in Western markets. The work itself tore into Vipul's small hands, and when he cried in pain, the owner stuck Vipul's finger in boiling oil to cauterize the wound and then told him to keep working. After five years, local police, with the help of NGO activists, freed Vipul and nine other emaciated boys.

Types of exploitation[24] to which children in particular might be subjected include the following:

- Labor Exploitation – examples include farming, fishing, domestic servitude, mining, market or street vending, begging, camel jockeying, textile industry, restaurant/hotel work, and shop keeping.
- Sexual Exploitation/Child Sex Trafficking
  - Induced into performance of commercial sex acts.
- Military Conscription/Child Soldiers
  - Victims are often forcibly abducted or "recruited" by government forces, paramilitary organizations, or rebel groups.
  - Victims may be used as combatants, human shields, porters, cooks, guards, servants, messengers, or spies. Young girls may be subjected to forced marriage or forced to have sex with male combatants.
  - Child soldiers of either gender are often sexually abused and are at high risk of contracting sexually transmitted diseases.

[22] Id.

[23] Example derived from the USDOS TIP 2010

[24] Examples derived from the USDOS TIP 2010

- Forced marriage
  - Forced or coerced marriages are used by parents and families for a variety of reasons, such as:
    - to settle debt, receive compensation/dowry, create social ties among families, obtain residency permits, display status, provide inheritance, or to counteract promiscuity.
  - The existence of a forced marriage does not necessarily present a case of human trafficking. When you encounter a case where a minor is married or when an individual testifies that she or he was married against their will, you should inquire into the terms of the marriage, if there was a bride price and whether conditions of exploitation coupled with one of the three means (force, fraud, or coercion) has been or is being employed. The common forms of exploitation seen in forced marriages may include slavery-like conditions in the form of domestic or sexual servitude.
- Delinquent behavior – carrying out criminal activities for others
  - This may arise in the context of homeless or street children and/or children who live in territories controlled by gangs who are compelled to provide services to local gangs, criminal entities or other third parties in order to survive.

### 3.3.4 "Re-Trafficking"

The term re-trafficking was coined to describe a situation in which a trafficked individual falls victim to further trafficking upon return to his or her home country. Individuals may be re-trafficked by the same trafficker that initially exploited them or another individual. In the refugee and asylum context, the issue of "re-trafficking" may arise in an interviewee's discussion of their persecutor and fear of future harm if she or he returns to the home country.

Traffickers often target individuals from families, communities and/or countries which are suffering from socioeconomic and other forms of instability. The individual may have been homeless, sold by his or her family or kinship network, or come from a particularly disadvantaged or disfavored group. The government in the victims' countries may also be unable or unwilling to protect these individuals from the traffickers for a range of reasons, including its own antagonism to a specific population, apathy, lack of resources, and/or general lawlessness and corruption of the security and political authorities in their country.

The same conditions that initially rendered individuals and their communities vulnerable to traffickers likely still exist. After the individual has been trafficked, she or he may suffer from physical and psychological trauma (including shame and humiliation) which

left unaddressed could render her or him vulnerable to further manipulations and coercive tactics of the traffickers.

At the practical level, once a trafficker has victimized an individual, it is relatively easy for the trafficker to locate the victim again. The trafficker is likely to have knowledge of or access to the victim's personal biographical information, his or her family, and even relationships with the authorities in the individual's home locality and/or country.

## 3.4 Differentiating Human Trafficking from Other Crimes

### 3.4.1 Trafficking Victim Liability for Criminal Activities

Through the course of being trafficked, an individual may be induced to participate in activities which in and of themselves, constitute crimes under U.S. law. The TVPRA absolves trafficking victims of criminal liability for crimes resulting from their being trafficked.

Examples of this include the following: An individual trafficked in the United States for the purpose of sexual exploitation would not be held criminally liable for the sex acts she or he performed while she or he was trafficked. An individual who was transported into the United States and then exploited would not be criminally liable for his or her illegal entry and/or use of invalid documents.

An interviewee with a criminal record involving certain crimes could raise a red flag to you that she or he may be a victim of trafficking.

### 3.4.2 Fraudulent Intercountry Adoption Does Not Constitute Human Trafficking

"Over the past few years, the term 'trafficking' has often been used as informal shorthand to refer to any type of inappropriate movement of people across international borders."[25] This is incorrect and often leads to certain fraudulent intercountry adoptions being mislabeled as child trafficking. In many African countries, including Ethiopia, Sierra Leone, Liberia, Madagascar, and Lesotho, fraudulent intercountry adoptions are officially referred to as trafficking.

However, under U.S. law there is a clear distinction between trafficking in persons and illicit intercountry adoption practices, including child-buying and fraud. Human trafficking is the exploitation of a person for the purposes of forced labor or commercial sex. (Please see Section 3 above for the complete definition of human trafficking.) Children undergoing intercountry adoption may be victims of bad actors engaged in criminal practices or other questionable procedures, but a fraudulent intercountry adoption would only constitute trafficking if the adoption was completed for the purposes of forced labor or commercial sex.

[25] Fraudulent Intercountry Adoption Does Not Constitute Trafficking in Persons, Department of State cable 11 STATE 64500 (Jun. 27, 2011)

One type of illicit intercountry adoption practice that is most often confused with trafficking is "child-buying."[26] Since trafficking and child-buying can both involve the giving/receiving of unlawful payments/benefits, many assume that child-buying for adoption is a form of human trafficking. However, that is not always the case. Whereas child-buying is an unacceptable, illegal practice that can occur in the context of an intercountry adoption, it does not necessarily constitute human trafficking under U.S. law. Cases where child-buying occurs during an intercountry adoption, but is not for the purposes of commercial sex or forced labor, would not meet the criteria for trafficking as defined by TVPRA, and under U.S. law would solely be classified as illicit adoption practices.

**Trafficking v. Child-buying**

If prospective adoptive parents adopt and emigrate a child to the United States using the correct immigration process, there would be no element of child trafficking unless the adoption was for the purpose of forced sex or labor. This is true even if there were concerns of fraud and/or child-buying in connection with the adoption.

For example, if a businessman from Costa Rica paid money to obtain custody of a local villager's daughter, then formally adopted her and moved the child to El Salvador to work in a factory, this may constitute trafficking. Alternatively, if a person connected to an orphanage paid a birth mother in Vietnam to release her child and that child was in turn adopted by a U.S. family, this may meet the definition of child-buying but would not in itself constitute trafficking.

### 3.4.3 Human Trafficking Distinguished from Smuggling

The terms human trafficking and human smuggling are often used interchangeably when they are, in fact, distinct crimes. Under U.S. law, the crime of smuggling is generally defined as: "the importation of people into the United States involving deliberate evasion of immigration laws." This offense includes bringing undocumented aliens into the United States illegally, as well as the unlawful transportation and harboring of aliens already in the United States. The end result of a smuggling agreement is that the individual arrives in the destination country, and after having paid the smuggler the previously-agreed upon fee, the relationship between the two parties ends. Individuals who have been smuggled may have experienced or witnessed violence, including murder,

[26] *See* 8 C.F.R. § 204.3(i) for non-Hague cases and §§ 204.304 and 204.309(b)(3) for Hague cases.

kidnapping, rape and other crimes, but the presence of these aggravating factors alone does not constitute human trafficking.[27]

***U.S. v. Jimenez-Calderon et al.—Smuggled Into Trafficking***

Between October 2000 and February 2002, Antonia Jimenez-Calderon, Librada Jimenez-Calderon, and their brothers conspired to recruit underage girls from Mexico to perform acts of prostitution in the United States. The brothers would target young girls from poverty-stricken areas in Mexico, and lure them away from their families and communities with false promises of love, marriage, and a better life. Once smuggled into the United States the girls were held captive and forced into prostitution in a brothel in New Jersey.[28]

Human trafficking involves an act of compelling or coercing an individual to perform labor services or commercial sex acts. These two crimes are often mistaken for one another. As discussed above (3.2.1 Acts/Mobilization), under the TVPA definition of trafficking, one of many methods a trafficker may use to mobilize an individual to be trafficked is to transport him or her. A trafficker may "smuggle" an individual into another country against his or her will in order to exploit him or her upon arrival, or the trafficker may misrepresent him or herself as a smuggler and then change the terms of the agreement once the individual arrives in the destination country. However, the act of smuggling an individual and/or being smuggled has no direct relationship to the crime of trafficking itself.

**Complicity is not Always a Crime**

An individual's willingness to be smuggled into another country does not minimize the victimization he or she may experience at the hands of a trafficker.

The chart below highlights the factors that distinguish the crime of smuggling from human trafficking:[29]

[27] 8 USC § 1324; ICE Office of Investigations Memo "Definitions of 'Human Smuggling' and 'Human Trafficking'", dated December 13, 2004.

[28] U.S. v. Jimenez-Caleron, Criminal Section Selected Case Summaries, U.S. Department of Justice, located at http://www.justice.gov/crt/about/crm/selcases.php#humantrafficking.

[29] 8 USC § 1324; ICE Office of Investigations Memo "Definitions of 'Human Smuggling' and 'Human Trafficking'", dated December 13, 2004.

| | Smuggling | Trafficking |
|---|---|---|
| **Purpose** | Obtain illegal entry into the United States | Recruiting, transporting, harboring or receiving persons by force or coercion for the purpose of exploitation |
| **Consent** | Consented to be smuggled | May or may not have consented, or initial consent rendered meaningless by coercive or abusive actions of the traffickers |
| **Result** | Ends with arrival into the United States | Involves ongoing exploitation |

## 3.5 Rights and Immigration Relief for Victims of Human Trafficking

With each re-authorization of the TVPRA, the U.S. Government response to trafficking has become more comprehensive, as has its ability to extend protection to victims and to more aggressively investigate and prosecute these crimes.

Victims of trafficking who are present in the United States, especially undocumented foreign nationals, will likely not be aware that the crimes being committed against them are punishable under U.S. law, and that they have rights and could be eligible for benefits in the United States because of the crimes committed against them. Human traffickers also often use the threat of reporting the victim to immigration authorities as a way of keeping the victim under their control.

In order to provide protection to those who are undocumented and to enable these individuals to participate in law enforcement investigations, immigration law provides specific forms of relief from removal for such victims of severe forms of trafficking and benefits from the U.S. Department of Health and Human Services, similar to the benefits granted to refugees. Trafficking victims may also qualify for other forms of relief available to all qualifying aliens under immigration law, such as asylum or withholding of removal.

During the course of your work, you may encounter interviewees who have received or have pending applications for trafficking-related immigration benefits. It is important for you to understand the significance of these documents only so far as it furthers your understanding of the interviewee's claim during their adjudication.

The forms of immigration relief available to victims of severe forms of human trafficking include:

- Continued Presence
- T Visa
- U Visa
- Asylum/Withholding of Removal

### 3.5.1 Continued Presence (CP)

CP is a temporary immigration status provided to individuals identified by law enforcement as victims of human trafficking. In order to qualify, the individual must be an identified victim of trafficking who is a potential witness in the investigation or prosecution of the trafficker.

This status allows such victims to remain in the United States temporarily during the ongoing investigation into the human trafficking-related crimes of which they were victims. CP is initially granted for one year and may be renewed in one-year increments. It provides victims a legal means to temporarily live and work in the United States for the duration of the investigation of the trafficking case and/or the adjudication of another form of immigration relief.[30]

Only federal law enforcement officials are authorized to apply for CP on a victim's behalf and applications are submitted to ICE HQ for consideration. If granted, the victim becomes eligible for a work permit and U.S. Department of Health and Human Services benefits.[31]

### 3.5.2 T Visa

The T visa provides a victim of trafficking with four years of legal status in the Unites States, which can be extended, and the possibility of becoming a Lawful Permanent Resident (LPR). T visa recipients receive work authorization, and may also request advance parole and may seek derivative status for their relatives (spouse, children, and, if the recipient is under age 21, parents and unmarried siblings under age 18).[32] A trafficked person may meet the requirements for T visa eligibility if he or she:

- is or was a victim of trafficking, as defined by law
- is in the United States or its territories, or at a port of entry due to trafficking

[30] 22 USC § 7105(c)(3)

[31] ICE Information Pamphlet, "Continued Presence: Temporary Immigration Status for Victims of Trafficking," http://www.dhs.gov/xlibrary/assets/ht-uscis-continued-presence.pdf.

[32] 8 USC 1101(a)(15)(T)(ii)

- complies with any reasonable request from law enforcement for assistance in the investigation or prosecution of the human trafficker
- demonstrates that he or she would suffer extreme hardship involving unusual and severe harm if removed from the United States
- is admissible to the United States or, if inadmissible, qualifies for a waiver

An application for a T Visa is completed on a Form I-914, Application for T Nonimmigrant Status. Click on the link below for more detailed information about eligibility requirements for T visas.

- T Visa Eligibility Requirements

The requirements for a T visa, specifically the need to be physically in the United States on account of said trafficking, should not be confused with the definition of a trafficking victim. If you come across a file which contains a T visa application, you should only use the information it contains to elicit more nuanced testimony that substantiates or discredits the interviewee's claim to the extent it is relevant to your adjudication.

### 3.5.3 U Visa

The U visa provides immigration status to victims of twenty-six specified serious crimes including trafficking, domestic violence, involuntary servitude, and kidnapping.[33] The U visa affords similar benefits as the T visa, including four years legal status, with the possibility of extension, LPR status after three years if the alien qualifies, work authorization, and advance parole. The individual may also seek derivative status for his or her relatives (spouse, children, and, if the recipient is under age 21, parents and unmarried siblings under age 18). Eligibility for a U visa requires that an individual:

- is or was the victim of qualifying criminal activity
- is or has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity
- has information about the criminal activity
- is, was, or is likely to be helpful to law enforcement in the investigation or prosecution of the crime
- was involved in a crime that occurred in the United States or violated U.S. laws
- is admissible, or if inadmissible, able to qualify for a waiver

[33] 8 USC 1101(a)(15)(U)(iii)

An application for a U-Visa is completed on a Form I-918, Petition for U Nonimmigrant Status. Click on the link for below for more detailed information about U-visas.

- U Visa Eligibility Requirements

As with the T visa, if you come across a file which contains a U visa application, you should only use the information it contains to elicit more nuanced testimony to the extent that it substantiates or discredits the interviewee's claim and is relevant to your adjudication. The fact that an individual's legal advocate made the strategic and discretionary decision to apply for a U visa on an individual's behalf in lieu of a T visa is in no way determinative as to whether an individual is a victim of trafficking.

**Two Visas for Trafficking?**

The "T" nonimmigrant status, also known as the "T" visa, was created to provide immigration protection to victims of a severe form of human trafficking. The "U" nonimmigrant status, or "U" visa, is designated for victims of certain crimes who have suffered mental or physical abuse because of the crime and who are willing to assist law enforcement and government officials in the investigation of the criminal activity.

Congress created the "T" and "U" nonimmigrant classifications with passage of the TVPA in October 2000. The legislation was intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of persons and other crimes while, at the same time, offering protection to victims of such crimes.[34]

### 3.5.4 Refugee/Asylum/Withholding of Removal/Credible Fear

A victim of trafficking or an individual who fears being trafficked in his or her country of origin may be eligible for refugee or asylum status or withholding of removal as would any other individual who meets the definition of a refugee. The United Nations Office of the High Commissioner for Refugees recognizes that not all victims or potential victims of trafficking fall within the scope of the refugee definition. However, on occasions where trafficking victims do fall within the refugee definition, the international protection community has a responsibility to recognize it as such and afford the corresponding international protection.[35] Click on the link below for specific information about asylum and refugee eligibility for trafficking victims.

[34] Fact Sheet: USCIS Publishes New Rule for Nonimmigrant Victims of Human Trafficking and Specified Criminal Activity.

[35] Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, UN High Commissioner for Refugees (UNHCR), 7 Apr 2006, 17 p.

- Eligibility requirements for asylum or refugee status

## 4 ENCOUNTERING VICTIMS OF HUMAN TRAFFICKING

The officers and agents of the three DHS front-line agencies, U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP), are most likely to encounter potential victims of trafficking during the course of their daily work. An ICE agent may encounter a trafficking victim during an investigation or operation, whereas a CBP officer may intercept someone who is being smuggled or who is attempting entry into the United States through a port of entry. Officers within one of the three RAIO divisions may encounter a potential victim of trafficking in the context of the adjudication of a request for an immigration benefit.

Indicators that an interviewee may be a victim of trafficking may surface prior to, during, and/or after the interview adjudication.

### 4.1 "What Does a Human Trafficking Victim Look Like?"

Trafficking victims can include individuals from any country, of any age, gender, nationality, educational background and immigration status. Trafficking may take place in "underground" operations, like illegal brothels, sweatshops, factories, mines, agriculture fields, fishing vessels or private homes. However, trafficking is often carried out in public establishments such as bars, restaurants, nightclubs, casinos, hotels and massage parlors, or in street vending and/or begging.

While a trafficking victim's experience may be quite unique, there are certain risk factors, patterns and trends in trafficking among different demographics in the population that you interview (within ethnicities, countries of origin, age, and gender) of which you should be aware. This knowledge will assist you in detecting and discerning indicators of trafficking from other concerns for a particular interviewee.

**Addressing the Myths about Trafficking Victims**

- Trafficking is not equivalent to smuggling. It does not require forced movement or border crossing.
- Trafficking does not require physical force, kidnapping, restraint or abuse.
- The consent of the victim is considered irrelevant, as is payment.

- Not all trafficked people have been trafficked for the purposes of sexual exploitation.
- Those who migrate legally can be victims of trafficking.
- Women and children are not the only victims of trafficking.
- Trafficking is not only a problem in Eastern Europe and Southeast Asia.
- Trafficking is not only a problem amongst the uneducated and poor.

## 4.2 Detecting Indicators of Human Trafficking

As discussed above, as an officer in the RAIO directorate you are responsible for detecting indicators that the interviewee before you may have been trafficked or may be at ongoing risk of trafficking, and following appropriate procedures within your division depending on the circumstance.

### 4.2.1 Pre-Adjudication File Review

Prior to the adjudication of a benefit, you may have the opportunity to review the case file.

Documents or database notations that may indicate that the interviewee may be a victim of trafficking include:

- Notations within database records from other agencies regarding investigations, encounters, or contact with informers that indicate that the person has been or is being trafficked. Please keep in mind that such notations may be entered post-USCIS interview but prior to final adjudication.
- Documents from other federal agencies such as DOS, ICE, CBP, etc. that indicate a past encounter with the interviewee indicative of a possible trafficking or smuggling situation.
- Documents from other federal agencies that indicate a past or ongoing investigation or operation regarding trafficking or smuggling.
- Documents or applications for continuing presence or T or U visas present in file.
- Criminal court documents/Database hits that show that the interviewee was arrested for a type of crime in which a trafficking victim might be subjected to exploitation.
- Letters from informants or "snitches."

- Unusual travel patterns indicated in application documents. Such patterns may indicate possible trafficking or smuggling routes.

- Travel from foreign countries that are known for being a source area for trafficking victims.[36]

- Employment in the United States or abroad that may indicate that interviewee has been or is being exploited.

- School-age children who have not listed attendance in school (minor principal interviewees),

- Background information on the application indicates that the interviewee is from a group in society that would be particularly vulnerable to trafficking and the interviewee's presence in the United States or the country from which he is requesting the benefit does not appear to be logical given that background. An example of this may be an unaccompanied minor with uncertain ties in the United States.

If there are indicators that the interviewee before you has been trafficked, you must still maintain your focus on trying to elicit sufficient testimony related to his or her eligibility for the particular benefit you are adjudicating. You may also provide the interviewee with informational pamphlets to fulfill the TVPRA mandate, as appropriate, taking care to note the circumstances of the interviewee as she or he may be endangered if such pamphlets are provided in the presence of the trafficker. If there are indicators that the interviewee is currently in a trafficking situation, you should advise your supervisor as soon as possible. This may be prior to adjudicating the benefit or even during pre-interview file preparation or during the interview, if appropriate.

Depending on the nature of the evidence and the nature of the situation, your supervisor or Office Trafficking Coordinator may need to contact local ICE or other agents, who may have additional information or desire to be present in the event that you interview the individual. Remember that the necessity to contact law enforcement can arise at any stage of the adjudication process.

### 4.2.2 Screening for Potential Victims of Trafficking: Suggested Lines of Inquiry

Individuals who have been or are in the process of being trafficked or exploited experience a significant loss of control over their lives and activities. During their testimony, such interviewees may testify regarding an area of their life being controlled by another person. Additionally, human trafficking victims may have visible signs of

[36] Such as countries designated as "Tier 2," "Tier 2 watch list" or "Tier 3" in the DOS TIP reports. See: http://www.state.gov/j/tip/rls/tiprpt/2011/index.htm

abuse or exhibit behaviors that are associated with people who have been victimized. Such "red flags" may alert you to the fact that the interviewee is or has been a victim of human trafficking.

The information in the links below was designed to assist you in eliciting further information from interviewees in interviews where a red flag has been raised, so that you can determine with more certainty whether the interviewee is a victim of human trafficking. These lines of inquiry will improve your ability to articulate your concerns about the interviewee's current situation to your office management and in office referrals to law enforcement. You should keep in mind that the lists are not all-inclusive and only serve as a framework for questioning. Every interview will be different as your questions will be tailored to the interviewee based on his or her answers to the questions.

You are not expected to indiscriminately run through lists of questions. You are expected to select a few choice questions that directly relate to the red flag that has been raised in the interview and which would not appear unusual in the course of the interview. You are expected to proceed with questioning in an extremely sensitive manner, taking into account that any individuals accompanying the interviewee may be affiliated with the trafficker.

***Suggested Lines of Inquiry by Subject Matter***

- Understanding Asylum Benefits and Process
- Physical health/behavior
- Recruitment/Migration
- Identification
- Working Conditions
- Debt Questions
- Living Environment/Transportation
- Social Ties/Conditions
- Force, Fraud, Coercion
- Minor: Under 18
- Safety Assessment (if interviewee alone and expresses fear)

### 4.2.3 Other Indicators of Trafficking

If during the interview you discover indicators that the interviewee is currently in a trafficking situation, you should advise your supervisor prior to concluding the interview. In all cases, follow the procedure for such cases in your particular office. [RAD procedures; ASM procedures; IO procedures]

### 4.2.4 Interviewing Where the Victim is Accompanied by a Third Party

If your interviewee is accompanied by a third party who appears potentially suspicious, such as an interpreter, representative, or (in the case of a minor child) a parent or trusted adult, you do not want to alert them to your suspicions as he/she may be working with the trafficker. Whenever possible, the interviewee should be questioned in regard to the trafficking concerns apart from such persons, preferably using a trusted person who speaks the interviewee's language. Because of the complicated nature of interviewing individuals in these circumstances, you should consult your division's procedures for specific instructions.

## 4.3 Other Adjudication Considerations

In a case where the trafficking-related experience that an interviewee testifies to relates to the basis of a protection claim, the interviewee is forthcoming about his or her claim, and does not appear to be at ongoing risk, officers apply the facts of the case, including the trafficking-related elements, to the protection-related legal analysis. Identifying and understanding the type of trafficking the victim suffered can inform the questions you ask to elicit more complete testimony.

If an interviewee is not forthcoming about a trafficking experience and you suspect she or he is currently being trafficked, his or her testimony may arouse suspicions as to his or her credibility when, in fact, there may be reasons other than abject fraud for this behavior. For further guidance and considerations, see RAIO Training modules, *Children's Claims*, *Evidence Assessment*, and *Interviewing–Interviewing Survivors of Torture and Other Severe Trauma*.

## 4.4 Issues Affecting Benefit Eligibility for Trafficking Victims and Traffickers

The Immigration and Nationality Act (INA) has various legal provisions that are applicable to interviewees who have committed or been convicted of a crime related to human trafficking. Additionally, sometimes the victim of the trafficking crime may have been forced or coerced into committing acts such as theft, drug trafficking, or prostitution that constitute crimes that might be impediments to obtaining immigration status.

Positive results from a background check and/or police or criminal court documents found in the file regarding criminal offenses such as the ones described above, in addition to being evidence of a possible impediment to an immigration benefit, may be an indication that the person is or has been a victim of human trafficking.

### 4.4.1 Trafficking Victim

A victim of trafficking may have been forced to engage in or have been convicted of a criminal act, such as larceny, drug carrier, prostitution, or other illegal vice, and this activity may render him or her subject to criminal or security inadmissibility grounds under INA § 212 (a)(2) and (a)(3)(b). These interviewees may be eligible for exemptions

or waivers. If you interview such an individual, be sure to elicit full testimony as to the nature and type of coercion involved in securing the interviewee's participation or support of the criminal activities as this information may not only assist law enforcement, but also may establish the victim's eligibility for an exemption or waiver if necessary.

### 4.4.2 Trafficker

If your interviewee has demonstrated participation in criminal behavior that indicates she or he has colluded in trafficking crimes, you must review this activity to determine if it is a bar to eligibility for the benefit you are adjudicating, or if a ground of inadmissibility applies.

In addition to being subject to a mandatory bar in the asylum context, an alien who is found to have persecuted others on account of a protected ground may not be considered a refugee under the refugee definition and therefore would not be eligible for refugee status or asylum status within the United States.[37]

### 4.4.3 Additional Resources

Department of State, Trafficking in Persons Report (TIP)

- An annual report produced by DOS to evaluate foreign governments' responses to trafficking. The TIP report is the premier U.S. Government resource on trafficking trends and includes country-specific narratives that describe the specific at-risk populations and types of trafficking in each country. For the most current report visit DOS TIP Report.

National Human Trafficking Resource Center (NHTRC)

- A Department of Health and Human Services (HHS) funded hotline providing comprehensive resources for victims, government and NGO practitioners on all trafficking-related issues. Hotline number: 1-800-3737-888.

UNHCR Report "Refugee Protection and Human Trafficking"

- A December 2008 report analyzing the interaction of refugee protection and human trafficking. The resource list at the end is a very comprehensive list of legal documents and country-specific reports that have been published on trafficking. http://www.unhcr.org/publ/PUBL/4986fd6b2.pdf.

[37] INA § 101 (a)(42)

## PRACTICAL EXERCISES

**Practical Exercise # 1**

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

# OTHER MATERIALS

## Other Materials – 1

### Definition of Terms

**Coercion**: Threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process. [return]

**Commercial sex act**: Any sex act on account of which anything of value is given to or received by any person. [return]

**Debt bondage**: The status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined. [return]

**Involuntary servitude**: A condition of servitude induced by means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of the legal process. [return]

**Peonage**: A status or condition of involuntary servitude based on real or alleged indebtedness. [return]

**Slavery:** (according to Art. 1, Slavery Convention, 1926 as amended by 1953 Protocol) The status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised. [return]

**Smuggling**: (according to Article 3(a) of the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air): The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident. Smuggling contrary to trafficking does not require an element of exploitation, coercion, or violation of human rights.

**Trafficking in persons** (according to Article 3 of the Palermo Protocol): The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery,

servitude or the removal of organs. [return]

**Other Materials - 2**

**T visa Eligibility Requirements**

The eligibility requirements for the T visa can be found at INA §101 (a)(15)(T) and at 8 CFR § 214.11. To be eligible for a T visa, the alien:

- Is or has been a victim of a severe form of trafficking in persons;
- Is physically present in the United States, American Samoa, Northern Mariana Islands, or at a port of entry on account of such trafficking;
- Has complied with a reasonable request for assistance in the investigation or prosecution of acts of trafficking or is under 18 years old or is unable to cooperate with a request for assistance due to physical or psychological trauma;
- Would suffer extreme hardship involving unusual and severe harm upon removal;
- Must be admissible, or if inadmissible under any ground of inadmissibility applicable to T visa applicants, must be eligible for a waiver of inadmissibility; and
- Must merit a favorable exercise of discretion.

Exemptions and waivers exist for T visa applicants and can be found at INA § 212(d)(13)(A) & (B). T visa applicants are not subject to the public charge ground under INA § 212(a)(4) and may be granted a waiver of any other inadmissibility ground, except provisions regarding terrorist activity (212(a)(3)) and miscellaneous grounds such as child abduction and renunciation of U.S. citizenship to avoid taxation (212(a)(10)(C) & (E)), if the activities rendering the alien inadmissible were caused by or incident to the victimization and if the Secretary of Homeland Security considers a waiver grant to be in the national interest.

**Other Materials – 3**

**U Visa Eligibility Requirements**

The eligibility requirements for the U visa can be found at INA §101 (a)(15)(U) and at 8 CFR § 214.14. To be eligible for a U visa, the alien must establish that:

- The alien has suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity, which includes trafficking;
- The alien possesses information concerning that qualifying criminal activity (or in the case of an alien child under the age of 16, the parent, guardian or next friend of the alien);
- The alien has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement investigating or prosecuting one of the qualifying criminal activities (or in the case of an alien child under the age of 16, the parent, guardian or next friend of the alien);
- The criminal activity described violated the laws of the United States or occurred in the United States;
- The alien must be admissible, or if inadmissible under any ground of inadmissibility applicable to U visa applicants, must be eligible for a waiver of inadmissibility;
- The alien merits a favorable exercise of discretion.

With the exception of INA § 212(a)(3)(E) (participants in Nazi persecution, genocide, and/or torture), all inadmissibility grounds may be waived under INA § 212(d)(14) if the Secretary of Homeland Security considers that it would be in the public or national interest to do so.

**Qualifying Criminal Activities**

- Abduction
- Abusive Sexual Content
- Blackmail
- Domestic Violence
- Extortion
- False Imprisonment
- Female Genital Mutilation
- Felonious Assault

- Hostage
- Incest
- Involuntary Servitude
- Kidnapping
- Manslaughter
- Murder
- Obstruction of Justice
- Peonage
- Perjury
- Prostitution
- Rape
- Sexual Assault
- Sexual Exploitation
- Slave Trade
- Torture
- Trafficking
- Witness Tampering
- Unlawful Criminal Restraint
- Other Related Crimes

**Other Materials – 4**

**Eligibility Requirements for Asylum or Refugee Status**

***Harm***

Victims of trafficking are widely known to have experienced harm (physical and emotional coercion, severe forms of labor and sexual exploitation, threats to their life) to a level of severity that would constitute persecution. This harm may be inflicted or condoned by the government of their country, those closely affiliated with branches of their government, or by individuals and/or groups that the government of the country they are fleeing cannot or does not control.

***Protected Characteristics***

A central part of the analysis will focus on whether the persecutor selected the individual

indiscriminately and then trafficked him or her for purely opportunistic criminal reasons or if the persecutor was motivated to harm the victim on account of one of the five protected grounds possessed by or imputed to the victim. In some countries, traffickers may target members of particular ethnic or political minorities, which would fit under the traditional rubric of the nationality and political opinion protected characteristics.

Victims may be targeted on account of their status as members of a particular social group, which would require evidence from country conditions reports and a proper legal analysis. See RAIO Training module, *Nexus and the Five Protected Grounds*. Traffickers associated with organized crime or insurgent groups may also have authority or influence over a particular area in a given country such that sub-groups within that area may be considered members of a particular social group. A potential particular social group may be based on an interviewee's status as a victim of trafficking (e.g. "formerly-trafficked COUNTRY females/children/ males") if country conditions reports indicate that trafficking victims who return to their country of origin may be targeted and suffer harm.

Immediately below are sample inquiries relevant to particular social groups that might be used to elicit a possible nexus to a protected ground from a trafficking victim:

- Does the interviewee possess a protected characteristic or could a protected characteristic be imputed to the interviewee?
- Was the perpetrator aware of any such actual or imputed characteristic?
- Does the interviewee know any other persons that were victimized by the feared perpetrator? Did any such victims share common characteristics with the interviewee?
- Did the interviewee know the perpetrator before the harm was committed?
- Is the perpetrator or feared perpetrator a person of power or connected with persons of power in the area in which the interviewee lived?
- Was interviewee targeted as punishment for the protected characteristic? E.g., the interviewee belonged to a rival political group, belonged to particular tribe, minority nationality, minority religion, etc.?
- Does or did the interviewee have shared, immutable or fundamental characteristics that are sufficiently visible within her or his society that facilitated or made trafficking of the victim advantageous?
- Do country conditions indicate that the interviewee is similarly situated to groups that are selected for harm within her or his country or country of last habitual residence?
- Does the interviewee come from a city/region/country where human trafficking is prevalent? Do populations targeted for trafficking in that country share common

characteristics?

- Is the interviewee aware of human trafficking victims who have been returned to their country? Have they had any problems?

*Country Conditions Evidence*

The Department of State Annual Trafficking in Persons Report (and other country conditions reports) outline the demographic groups at risk for trafficking in each country and monitor and evaluate individual government's efforts to prevent trafficking crimes, protect victims of such crimes, and prosecute those responsible for trafficking others. These resources should be consulted to assist you in making a determination and substantiating your position as to whether the interviewee suffered past persecution or has a well-founded fear of persecution on account of one of the protected characteristics, and whether she or he was targeted by the government or by an entity that the government remains unable or unwilling to control.

**NOTE: As mentioned above, the following lines of suggested inquiry are meant to serve as a guide and not an exhaustive list of interview questions. RAIO officers should always tailor interview questions to the specific facts of each interview.**

**Other Materials – 5**

**Understanding Benefits and Application Process**

| Indicators | Suggested Questions |
|---|---|
| • Interviewee does not understand/ know what she or he is applying for<br>• Interviewee has inconsistencies in his or her story<br>• Interviewee is accompanied by someone who is speaking on his or her behalf<br>• Interviewee uses false identification papers | • Do you know why you are here?<br>• What will happen if you receive the benefit?<br>• Who prepared your application?<br>• Was it read back to you?<br>• Were you given any materials to help you during your interview?<br>• If you are granted the benefit, will you be in debt to anyone?<br>• What is your relationship to the person |

| | |
|---|---|
| | accompanying you?<br>• How did you meet the person accompanying you/interpreter/ preparer/attorney/ representative?<br>• Where did you get these documents? |

| **Other Materials – 6**<br>**Physical Health/Behavior[38]** | |
|---|---|
| **Indicators** | **Suggested Questions** |
| • Interviewee exhibits paranoia, fear, anxiety, depression, tension, nervous behavior<br>• Interviewee displays heightened emotionality that in some way is inconsistent with the benefit request being presented<br>• Submissive, tense, nervous behavior and/or avoids eye contact[39]<br>• Reluctance to speak in front of people of shared background<br>• Reluctance to speak with someone of opposite or same gender<br>• Signs of poor health/ malnourishment. | • Do you have any mental or physical health issues? How long? Cause?<br>• Do you feel uncomfortable speaking about any issues in your claim with a male/female officer? Or with me for any particular reason?<br>• How many meals/day do you eat?<br>• Can you eat anytime you want? Is your food locked up?<br>• Do you have to pay for food?<br>• If you pay your employer for food, could you also buy food from anyone else if you want?<br>• Were you ever hungry?<br>• Do you have to ask permission to eat? |

[38] Officers should keep in mind that most, if not all, of these indicators are fairly common in victims of torture/trauma/abuse in the asylum/refugee context.

[39] Although these might be indicators of trafficking, officers should keep in mind that all of these behaviors may be appropriate/expected depending on the culture of the interviewee and be unrelated to trafficking concerns.

| | |
|---|---|
| • Visible physical injuries (scars, cuts, bruises, burns)<br>• Tattoos or other marks | • Do you eat together with the people you are living with? Do you eat the same food as the people you are living with?<br>• How did you receive your injuries? Have you seen a doctor for your injuries?<br>• Where did you receive those tattoos or markings? What do they mean? |

| **Other Materials – 7**<br>**Recruitment/Migration** | |
|---|---|
| **Indicators** | **Suggested Questions** |
| • Interviewee was recruited for one purpose and forced to engage in another job<br>• Interviewee was brought to the United States against his or her will<br>• Interviewee did not know his or her destination was the United States<br>• Interviewee did not arrange his or her own travel<br>• Interviewee is not informed about means and method of travel from home country | • Why did you come to the United States?<br>• How did you get here?<br>• Who did you come with?<br>• How did you get your passport?<br>• Who arranged your travel?<br>• Who paid for your ticket to come?<br>• Do you owe money for your trip?<br>• Did you incur a debt before you left your country?<br>• If so, how did you pay it?<br>• How much did you pay the smuggler?<br>• Who picked you up from the airport? |

| | |
|---|---|
| | • How did you find out about the job?<br>• What did you expect when you came?<br>• What was it like when you started to work?<br>• What did you end up doing?<br>• Were you scared? |

| **Other Materials – 8**<br>**Identification** | |
|---|---|
| **Indicators** | **Suggested Questions** |
| • Interviewee is not in possession and/or control of his or her documents<br>• Employer is holding interviewee's identity and/or travel documents | • When you traveled to the United States were you able to keep your identification documents with you or did someone take them from you?<br>• Do you have any papers?<br>• Do you have your passport and identity documents? If not, who has them?<br>• Do you have access to them?<br>• Where are they kept? |

| **Other Materials – 9**<br>**Working Conditions** | |
|---|---|
| **Indicators** | **Suggested Questions** |

| | |
|---|---|
| • Interviewee is not in control of his or her own money<br>• Interviewee expresses lack of freedom to leave working conditions<br>• Interviewee was forced to perform sexual acts as part of employment<br>• Interviewee was forced to work extensive hours without fair compensation | • Are you in school?<br>• Are you working?<br>• What kind of work do you do?<br>• How did you get this job?<br>• Are you paid? How much?<br>• How often?<br>• What are your work hours?<br>• How much do you make per hour?<br>• Do you get overtime pay?<br>• Were you able to discuss how much you were getting paid with your employer?<br>• Do you owe money to your boss or someone else?<br>• What would have happened if you didn't give that person your paycheck?<br>• If you were sick, could you take a day off or stop working?<br>• Can you take days off work?<br>• How much time could you take off?<br>• Has your boss told you that you owe money?<br>• Did anyone ever take your income?<br>• Can you keep your money?<br>• Can you leave your job if you want? Did you ever? Why or why not?<br>• Were you able to take breaks when you |

| | |
|---|---|
| | wanted to?<br>• What happens if you make a mistake at work?<br>• Are there guards at work or video cameras that monitor and ensure no one leaves?<br>• What did you fear would happen if you left?<br>• Are you ever forced to do something you don't want to do?<br>• Did anyone ever threaten to hurt you or your family if you did not work?<br>• Are you afraid of your employer? Why?<br>• Did anyone force you to cook or clean the house?<br>• If you worked outside the home, were you lied to about the type of work you would be doing when you accepted the job?<br>• Did your employer tell you what to say to immigration officials or law enforcement?<br>• Did your employer ever threaten to have you arrested? |

| **Other Materials – 10**<br>**Debt Questions** | |
|---|---|
| **Indicators** | **Suggested Questions** |
| • Interviewee's salary is being garnished to pay off debt (Paying off smuggling fee alone is not trafficking but is a red flag.) | • How much money did you have left over after you paid everything you need to pay?<br>• Could you spend your money the way you |

| | |
|---|---|
| | want to?<br>• Did the person who pays you ever "save" or "hold" money for you?<br>• Do you owe anyone money? If so, who is it and why?<br>• How did you incur the debt?<br>• How long have you had your debt?<br>• Is it increasing? If so how is it increasing and why?<br>• Do you feel it's difficult to pay off your debt and why?<br>• What do you think will happen to other people in your life if you don't pay?<br>• Do you have weekly/monthly expenses to your employer? What are they? |

| **Other Materials – 11**<br>**Living Environment/Transportation** | |
|---|---|
| **Indicators** | **Suggested Questions** |
| • Interviewee exhibits lack of knowledge of his or her own whereabouts (jurisdiction)<br>• Interviewee has been harmed or deprived of food, water, sleep, medical care or other life necessities<br>• Interviewee is living at workplace or with employer<br>• Lack of freedom to leave living conditions | • Where do you live? (inability to clarify address = indicator)<br>• Who else lives there?<br>• Where do you sleep?<br>• Can you leave as you wish?<br>• Are you scared to leave? |

| | |
|---|---|
| • Interviewee is always escorted, is never alone | • Do you live in the place where you work?<br>• Do you go to the grocery store by yourself?<br>• What city did you first live in the United States?<br>• How do you get around from place to place?<br>• How much do you usually pay for transportation?<br>• Do you drive? Where did you learn to drive?<br>• Do you go places by yourself? |

| **Other Materials – 12**<br>**Social Ties/Conditions** | |
|---|---|
| **Indicators** | **Suggested Questions** |
| • Interviewee cannot contact friends and family freely<br>• Interviewee is isolated from their community | • Do you have family or friends in the United States?<br>• Do you spend time with them?<br>• Do you have time to spend with your friends/family?<br>• What do you do with them?<br>• Can you bring friends home?<br>• Do you buy food and clothes on your own?<br>• If you are in trouble, who are you most |

| | |
|---|---|
| | likely to call? |

| **Other Materials – 13**<br><br>**Force, Fraud, Coercion** | |
|---|---|
| **Indicators** | **Suggested Questions** |
| • Interviewee does not have freedom of movement<br>• Interviewee's friends or family have been threatened with harm if interviewee escapes.<br>• Interviewee has been threatened with deportation or law enforcement action<br>• Unusual distrust of law enforcement<br>• Interviewee was forced to perform acts against his or her will<br>• Interviewee was forced to perform sexual acts against his or her will<br>• Evidence of abuse (physical, mental, sexual) | • Has anyone ever threatened you to keep you from running away?<br>• Has anybody ever hurt you to make you stay?<br>• Has your family been threatened?<br>• Did you ever feel pressured to do something that you didn't want to do or felt uncomfortable doing? How did you feel pressured?<br>• Did your employer ever take photos of you? What (if anything) did he/she say he/she would do with those photos?<br>• How safe do you feel right now?<br>• Were you allowed to leave the location/building where you live, where you work?<br>• Do you feel like your movement is controlled by someone else?<br>• Was there ever a time you wanted to leave somewhere and you felt you couldn't? Why did you feel that way?<br>• What do you think would have happened if you left without telling anyone? |

| | |
|---|---|
| | • Were you ever physically hit and/or slapped by your employee/manager or anyone else?<br>• Did you ever see anyone else get hit or slapped by your employer?<br>• Do you feel you were deceived about anything having to do with your current job?<br>• How did you find your job?<br>• What were you told about your job before you started?<br>• Were you ever promised something that did not happen?<br>• Did conditions on your job change over time? |

| **Other Materials – 14**<br>**Minor: Under 18** | |
|---|---|
| **Indicators** | **Suggested Questions** |
| • Interviewee is a child and not in school or has significant gaps in schooling<br>• Interviewee does not live with her or his parents<br>• Interviewee provides insufficient information about parental knowledge of benefit application<br>• Interviewee provides insufficient or contradictory information about the relationship to guardians and/or trusted adults accompanying her or him to the | • Are you in school?<br>• How does your parent/guardian/caregiver treat you?<br>• Are there rules/conditions that your caregiver has set?<br>• Are you responsible for obtaining your food or purchasing other items?<br>• How do you get money to purchase items? |

| | |
|---|---|
| interview<br>• Interviewee may be hungry or malnourished or have not reached their full height<br>• Interviewee may have poorly formed or rotten teeth<br>• Interviewee may be attending school sporadically or provides vague testimony on schooling<br>• Interviewee may refer to non-family members with family titles (uncle, aunt, cousin)<br>• Interviewee may display symptoms of disorientation and confusion | • Where do you sleep?<br>• How many people live in the same house?<br>• Who are the other people?<br>• What would happen if you left your caregiver /work without permission? |

| **Other Materials – 15**<br>**Safety Assessment (if interviewee alone and expresses fear)** | |
|---|---|
| **Indicators** | **Suggested Questions** |
| • Interviewee displays heightened general sense of fear<br>• Interviewee reveals having been physically harmed<br>• Interviewee shares having been deprived of: Food, water, sleep, medical care and/or other life necessities<br>• Interviewee shares having been threatened with harm to him or herself or their family<br>• Interviewee has been threatened with removal or reporting to immigration/ police officials | • Do you feel safe right now?<br>• Is there anyone you are concerned about?<br>• Anyone who is making you feel uncomfortable or stressed?<br>• What is your understanding of why you are here right now?<br>• How did you get here today? |

<table>
<tr><td colspan="2">

- **Other Materials – 16**
- **Stages of Trafficking**

• Four sets of circumstances through which RAIO officers may detect indicators of trafficking and initiate component specific trafficking procedures:

</td></tr>
<tr><td>

• Ongoing trafficking/At risk

</td><td>

• Officer detects indicators of ongoing trafficking from interviewee in interview and believes the interviewee is currently being exploited.

</td></tr>
<tr><td>

• Past trafficking<br>• Unrelated to claim<br>• Not in imminent danger in U.S.

</td><td>

• Officer detects indicators of trafficking-related violations from interviewee's testimony and/or application, trafficking circumstances are unrelated to interviewee's immigration benefit request, and interviewee is no longer in exploitative situation.

</td></tr>
<tr><td>

• Past trafficking<br>• Related to claim<br>• Not in imminent danger in U.S.

</td><td>

• Officer detects indicators of trafficking–related violations from interviewee's testimony and/or application, these violations relate directly to the immigration benefit the interviewee is seeking, and interviewee is no longer in exploitative situation.

</td></tr>
<tr><td>

• Return to field office/r (Trafficking POC) for follow-up

</td><td>

• Supervisory, Quality Assurance, and/or Headquarters review detects indicators of trafficking through intra-office or HQ case review.

</td></tr>
</table>

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

1.

2.

### ADDITIONAL RESOURCES

1.

2.

### SUPPLEMENTS

**RAD Supplement**

**Module Section Subheading**

## SUPPLEMENT B – ASYLUM DIVISION

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

### REQUIRED READING

1. All Supplemental Materials
2.

### ADDITIONAL RESOURCES

1.
2.

### SUPPLEMENTS

**ASM Supplement – 1**

**The TVPRA and Asylum**

As noted earlier, the 2008 TVPRA significantly impacted asylum field policy and procedures when the Asylum Division was accorded initial jurisdiction on unaccompanied minor cases, a particularly vulnerable demographic within the U.S. immigrant population.[40] Further, in the asylum context, USCIS responds to the TVPRA mandate to provide victims of trafficking information on the rights and services afforded to them, by providing informational pamphlets regarding these benefits to interviewees. Asylum Officers will not be trained nor expected to "identify" a victim of trafficking for the purpose of determining his or her eligibility for other forms of immigration relief. Officers may provide potential victims, who are not in imminent risk, with specific, authorized, informational pamphlets that apprise individuals of benefits for which they may be eligible. Officers should not give advice or provide any other information about the interviewee's situation or claim for asylum outside of giving them these informational materials.

[40] For additional information, please refer to RAIO module, *Children's Claims.*

The following informational pamphlets are available for dissemination: Department of Justice pamphlet, *Office for Victims of Crime – Funded Grantee Programs to Help Victims of Trafficking*, and USCIS pamphlet, *Immigration Options for Victims of Crime*.

**ASM Supplement – 2**

**Trafficking in the Credible and Reasonable Fear Process**

In the Credible and Reasonable Fear Context, officers will have the opportunity to question the interviewee alone, without a third party present, and may be able to elicit more information from an individual at-risk of ongoing trafficking, without compromising the victim's safety.

**ASM Supplement – 3**

**Trafficking Experiences and One-Year Filing Deadline**

An interviewee may apply for asylum or refugee status with one basis of claim, e.g. political opinion, but may describe a trafficking-related experience, either in his or her country of origin or in the United States. that materially relates to his or her asylum eligibility. One example of this would be an individual who flees persecution in the home country, arrives in the United States without resources, and finds employment as a domestic servant with an employer who controls and exploits them. This individual may become freed several years after arrival in the United States and pursue an asylum benefit at that time. If the adjudicating officer elicits relevant testimony and applies the appropriate trafficking lens to analyze the conditions the interviewee faced upon arrival in the United States, depending on the circumstances, the officer may find an extraordinary circumstance exception to the one-year filing deadline

**ASM Supplement – 4**

**Affirmative Asylum Procedures Manual**

**November 2007, revised July 2010**

**Section III.B.14. Trafficking Victims**[41]

[41] The language in this supplement was preliminarily cleared by OCC in March 2012.

The Trafficking Victims Protection Act (TVPA) guarantees certain rights, services and protections to victims of severe forms of trafficking.

The TVPA defines a victim of a severe form of trafficking as a person subject to:

(a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age: or

(b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

While Asylum Officers are not responsible for making a determination as to an applicant's status as a victim of trafficking, the Asylum Officer can play a key role in the protection of victims and in the prosecution of traffickers by detecting indicators of trafficking during applicant's testimony and bringing the cases of possible trafficking victims to the attention of ICE officials.

If the potential victim is a child filing for asylum as a principal applicant, the Asylum Officer should consult Section III.B.1 for additional guidance.

Each Asylum Office Director must designate a Supervisory Asylum Officer (SAO) as the point of contact (POC) for human trafficking matters for their field office. This POC will serve as the principal liaison between the asylum field office and the ICE POC during the trafficking referral process outlined below. In the event that the SAO Trafficking POC is unavailable when a trafficking-related situation arises, all SAOs must be trained and prepared to serve as back-up POCs.

The Asylum Officer must differentiate between a suspected, current trafficking situation where the applicant may be in immediate danger because he/she is a potential or self-declared victim of current trafficking or a potential or self-declared victim of past trafficking.

Asylum Officers encountering potential victims of human trafficking during the course of an asylum adjudication must follow this five step process: 1) detection, 2) notification, 3) referral, 4) information providing, and 5) tracking.

- **Step 1- Detection:**

In the course of an asylum interview, an AO should be aware of potential indicators of human trafficking. For a reminder of possible indicators of trafficking, please consult the *Trafficking Training and Suggested Lines of Inquiry for Possible Victims of Trafficking, AVL hyperlink.*

Once an Asylum Officer suspects that an applicant has been or is currently being trafficked, they should ask follow up questions to elicit more information without

alerting the applicant or any individuals accompanying them of their concern.

Facts related to the suspected trafficking should be documented in the interview notes. The AO should specifically annotate whether they think the applicant is currently a victim of trafficking and may be in imminent danger or has been trafficked in the past and is no longer in imminent danger.

If the applicant is a minor, the Asylum Officer should consult Section III.B.1, Children Filing as Principal Asylum Applicants, and its accompanying guidance to ensure that his or her inquiry is child sensitive and that it includes questions concerning the minor applicant's care and custody situation, as well as whether the parents are aware of and approve of the asylum application.

- **Step 2- Notification:**

Once the Asylum Officer has identified through their line of inquiry indicators that an applicant has been or continues to be trafficked, the Asylum Officer must alert and discuss their suspicion and indicators of trafficking with the designated SAO POC.

The AO should complete the "Trafficking Victims Memo to File and ICE Referral Template" and provide an electronic copy to the SAO POC.

If the potential victim is a minor principal applicant, asylum office management must be alerted and the case must be reported to the HQASM QA mailbox. (Section III.B.1, Children Filing as Principal Asylum Applicants.) As all minor principal applicants' cases must come to HQASM for QA review, HQASM will instruct on whether the asylum office should proceed with drafting an assessment and submitting a QA referral packet or whether the asylum office should postpone such action while issues related to the minor's care and custody situation are being worked out.

- **Step 3- Referral:**

The Asylum SAO POC will determine the timing and method of a referral to ICE on a case of a possible victim of trafficking based on whether she or he believes the applicant is currently being trafficked and faces imminent danger.

**In instances where the AO and SAO POC believe the applicant is currently in danger and is being trafficked, referral to ICE is immediate.**

1. The SAO POC makes a referral to ICE by phone while the applicant is still in the asylum office.

2. The SAO POC relays the indicators of trafficking to the ICE agent and together they form a plan for action.

3. The applicant should not be alerted to the fact that an ICE agent is being called, unless the SAO POC can confirm they are not in danger and are not accompanied by anyone who poses a risk to them. The timing and method of the ICE response will vary based on their perception of the imminent risk faced by the applicant. Further, the overall accessibility of ICE units may vary nationwide.

4. The SAO POC must use the following means, in the order listed below, to ensure an immediate verbal referral to an agent at ICE in these situations.

   - Call the individual field office's pre-established ICE POC, the Supervisor of an ICE Human Trafficking and Smuggling Unit, located in the proximity of the asylum office.
   - If the ICE POC is not responsive, call the ICE National Directory – X-Sector – at 1-800-XSector and ask to speak with the supervisor of the Human Trafficking and Smuggling Unit in that city. If X-Sector does not have that information, the SAO POC should request the duty agent in the closest ICE SAC.
   - If the SAO POC is unable to reach an agent through either of these mechanisms, they should contact the Trafficking POC at HQ ASM.

In instances where the AO and SAO POC do not believe the applicant is currently being trafficked and is not in imminent danger, the referral to ICE will involve the SAO POC sending their local ICE ASAC POC a copy of the memo to file via email or fax for their records.

If the applicant's case has already been investigated by ICE, there would be no need to refer the case, unless the affirmative asylum interview revealed new information that raised concerns.

- **Step 4- Providing Information to Possible Victims of Trafficking:**

Asylum Officers may provide possible victims of trafficking with the following informational pamphlets. These pamphlets outline the trafficking-specific immigration benefits and the contact information of service providers who assist victims of trafficking.

These pamphlets must only be given to an applicant if the AO and SAO POC are certain that the applicant is no longer at risk of trafficking and/or that the providing of this information to the applicant (who may be accompanied) would not put the applicant in danger.

The AO will provide the applicant with the following:

1. USCIS "Immigration Remedies for Victims of Violence" brochure;

2. DOJ, Office of Victims of Crime, list of federally funded Anti-Trafficking NGOs that operate across the United States;

3. Department of Health and Human Services National Human Trafficking Resource Center hotline number (National Directory for all Trafficking-related referrals): 1-888-3737-888.

- **Step 5- Tracking:**

The AO completes the "Trafficking Victims Memo to File and Referral Template," places a copy in the right-hand side of the A-file, and provides an electronic copy to the SAO POC.

**Once this has been done, the AO processes the asylum case as usual.**

**ASM Supplement – 5**

**Sample Victims Of Trafficking Memo To File**

Alien number:

Interview Date:

Asylum Officer (name, no.):

Consulted with (SAO, Trafficking POC):

Location:

Adjudication: Affirmative Asylum

Attorney name:

Preparer name:

Preparer address:

Interpreter name:

Applicant full name:

Gender: F

Country: Ethiopia

Age: 45

*I. BIOGRAPHIC/ENTRY INFORMATION*

Applicant was employed by a Saudi Arabian Family (*NAME*) as a domestic servant from 19xx until she came to the United States on *ARRIVAL DATE*. Applicant used an agency in Ethiopia to contract with this employer as a maid. Applicant entered the United States at Washington D.C. with this family. She told her supervisor that she wanted her passport. When he refused, she told him that she would call the police; so, he gave it to her. While the family rested, she left the house, called her friend in California, and never returned to this family.

*II. SOURCE OF TRAFFICKING SUSPICION*

Is this a past or present, ongoing trafficking concern? Past trafficking concern

*III. WHAT FORMS OF TRAFFICKING DOES THE AO SUSPECT?*

Applicant was contracted as a maid to clean the house and help raise the children. However, she was forced to work at any hour of the day and at multiple people's homes. Applicant stated she was not allowed to leave the house alone and could only go with the family. Applicant was also raped repeatedly by a supervisor who was hired to watch over Applicant and the other maids. If Applicant fought back, she stated she would be deported to Ethiopia. At one point she became pregnant as a result of the rapes, and made an excuse to return to Ethiopia to have an abortion. Applicant stated she could not have an abortion in Saudi Arabia, as they would find her at fault for being raped and pregnant.

*IV. WHAT ACTIONS HAS THE ASYLUM OFFICE TAKEN?*

Applicant was given the brochure of DHS/CIS information about trafficking and a packet of resources of NGOs that may be able to help her. Applicant was also represented by an attorney.

Please include copy of memo to file in A file and send electronically to Office Trafficking POCs NAMES.

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

There are no supplemental materials for the International Operations Division.

## REQUIRED READING

1.

2.

## ADDITIONAL RESOURCES

1.

2.

## SUPPLEMENTS

**IO Supplement**

**Module Section Subheading**

UNHCR
The UN Refugee Agency

# OVERVIEW OF UNHCR AND CONCEPTS OF INTERNTAIONAL PROTECTION

*These UNHCR training materials were written in collaboration with the*

*United States Citizenship and Immigration Services' (USCIS) Refugee, Asylum, and International Operations Directorate (RAIO)*

*for use in training RAIO officers*

*This Page Left Blank Intentionally*

# UNHCR OVERVIEW

Training Module

## MODULE DESCRIPTION:

This module describes the development of international protection of refugees and other individuals over the course of the 20th century and explains the role of the Office of the United Nations High Commissioner for Refugees (UNHCR) and other international actors in providing this protection. The module describes the elements of international protection, who is in need of international protection, and who provides international protection. Lastly, this module explains the role UNHCR plays in relation to the United States regarding U.S. refugee resettlement, asylum, and other protection issues.

## TERMINAL PERFORMANCE OBJECTIVE(S)

You, the officer, will be able to summarize the principles of international refugee protection and distinguish between the roles that the UNHCR and other international actors play in the protection of refugees around the world.

## ENABLING LEARNING OBJECTIVES

1. Summarize the origin and core principles of refugee protection.
2. Identify the key provisions of the 1951 Convention and 1967 Protocol relating to the Status of Refugees.
3. Summarize the roles and responsibilities of the main actors in refugee protection.
4. Describe the goals of international refugee protection.
5. Identify the groups in need of international protection.
6. Discuss the challenges that particular refugee situations pose to providers of international protection.

## INSTRUCTIONAL METHODS

- Presentation by UNHCR with discussion, Q and A

## METHOD(S) OF EVALUATION

## REQUIRED READING

*Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011), pp. 488-490.

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

## ADDITIONAL RESOURCES

1. United Nations High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (December 2011)(contains the 1951 Convention and 1967 Protocol relating to the Status of Refugees), 200p.

2. United Nations General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, (14 December 1950), A/RES/428(V), 16p.

3. United Nations High Commissioner for Refugees (UNHCR). *Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme*, No. 1 (1975) to present.

4. United Nations High Commissioner for Refugees. *Guidance Note on Refugee Claims relating to Victims of Organized Gangs*, (31 March 2010), 24p.

5. United Nations High Commissioner for Refugees, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, (7 April 2006), HCR/GIP/0607, 17p.

6. United Nations High Commissioner for Refugees, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(FZ) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, (22 December 2009), HCR/GIP/09/08, 28 pp.

7. 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*, (4 September 2003), HCR/GIP/03/05, 9p.

8. United Nations High Commissioner for Refugees. *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees* (the "Ceased Circumstances" Clauses), (10 February 2003), HCR/GIP/03/03, 8 p.

9. United Nations High Commissioner for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (7 May 2002) HCR/GIP/02/01, 11p.

10. United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, (23 July 2003), HCR/GIP/03/04, 8p.

11. United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (7 May 2002) HCR/GIP/02/02, 6p.

12. United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004, HCR/GIP/04/06, 12p.

13. United Nations High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women* (Geneva: July 1991), 31p.

14. United Nations High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (Geneva: 1994), 182p.

15. United Nations High Commissioner for Refugees UNHCR, *Guidelines on Determining Best Interests of the Child*, (May 2008), 100pp.

16. United Nations General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), 1p.

17. United Nations High Commissioner for Refugees UNHCR Protection Policy Paper, *Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, (Nov. 2010), 17pp.

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

## SCHEDULE OF REVISIONS

| Date | Section (Number and Name) | Brief Description of Changes | Made By |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

## TABLE OF CONTENTS

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

# 1 INTRODUCTION

The purpose of this module is to explain the role of the Office of the United Nations High Commissioner for Refugees (UNHCR) and other international actors in the protection of refugees, asylum-seekers, and other groups in need of international protection around the world. Please note that when the term "refugee" is used in this module regarding the work of UNHCR or the protections afforded refugees under international instruments, the term encompasses refugees, asylees, and asylum-seekers. This module provides an overview of the history, mandate, endeavors, and objectives of UNHCR. The issues of international human rights law and the definition of the term "refugee" are covered in greater detail in the RAIO Training Modules, *International Human Rights Law, Sources of Authority*, *Refugee Definition,* and *Definition of Persecution and Eligibility Based on Past Persecution*.

# 2 ORIGINS OF INTERNATIONAL PROTECTION FOR REFUGEES

## 2.1 Early Twentieth Century Responses to Refugee Situations

The first concerted effort by the international community to address a refugee situation arose in the aftermaths of World War I, the Russian Revolution, and the collapse of the Ottoman Empire. The League of Nations created the position of High Commissioner for Russian Refugees in 1921. At the time, the League of Nations defined refugees as specific groups that were deemed to be at risk if returned to their countries of nationality. In later years, additional national categories included Assyrians, Turks, Greeks, Armenians, and German Jews.

Over time, the League of Nations developed comprehensive measures to protect refugees, beginning with a standardization of refugee travel documents, regularization of legal status, access to employment, and protection against expulsion.

In 1947, the United Nations, as the successor to the League of Nations, established the International Refugee Organization (IRO), adding to its mandate refugees resulting from World War II. Today's definition of refugee has its roots in the reaction of the IRO to the unique refugee crisis of the mid-1940s. The IRO looked beyond repatriation and local integration as the sole solutions to the refugee situation. It allowed the option of resettlement for those refugees who expressed "valid objections" to returning to their countries of nationality because of "persecution, or a fear of future persecution because of race, religion, nationality or political opinion."[1]

## 2.2 Creation of the United Nations High Commissioner for Refugees (UNHCR)

In 1949, the General Assembly of the United Nations voted to replace the IRO with the Office of the United Nations High Commissioner for Refugees (UNHCR). On December 14, 1950, the General Assembly adopted the Statute creating UNHCR. The Statute serves as UNHCR's constitution and defines its dual mandate to provide protection to refugees and to seek durable solutions to refugee problems. UNHCR began its work on January 1, 1951.[2]

## 2.3 1951 Convention relating to the Status of Refugees

Following the establishment of UNHCR, members of the international community drafted the 1951 Convention relating to the Status of Refugees (Convention), a legally binding treaty that defines who is a refugee and the rights and legal obligations of States towards refugees.[3] The Convention contains the following key elements:

### 2.3.1 Refugee Definition

Article 1 defines a refugee as a person who, "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence…". , as a result of such events [occurring in Europe or elsewhere before January 1, 1951] is unable or, owing to such fear, is unwilling to return to it." The geographic and time limitations were removed in the 1967 Protocol, as noted below.

### 2.3.2 Geographic and Time Limitations

[1] UNHCR. *The State of the World's Refugees 1993: The Challenge of Protection*, "Introduction: The Challenge of Protection" (New York: 1993), p. 12.

[2] UNHCR's statute was drafted simultaneously with the 1951 Refugee Convention, as a result the key international legal instrument and the organization designed to monitor it are well synchronized.

[3] United Nations General Assembly, Convention Relating to the Status of Refugees, (28 July 1951), United Nations, Treaty Series, vol. 189, p. 137, also found in United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (December 2011), Annex II.

Article 1 requires a refugee to have a fear of persecution "[a]s a result of events occurring before 1 January 1951."[4] In addition, signatories are allowed the option of further limiting the definition of a refugee to those whose fear of persecution resulted from events occurring in Europe.[5]

### 2.3.3 The Principle of *Non-refoulement* or Non-return

Article 33 of the Convention requires that no contracting State shall expel or return (*refouler*) a refugee, in any manner whatsoever, to a territory where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

### 2.3.4 Supervision by UNCHR

Article 35 of the Convention assigns to UNHCR the global mandate of supervising the application of the Convention's provisions. Article II of the Protocol contains the same obligation of States parties to cooperate with UNHCR in the fulfillment of its responsibilities, including its supervisory role, as is delineated in Convention Article 35.

## 2.4 1967 Protocol relating to the Status of Refugees

With the passage of time, it became evident that refugee movements were not a result unique to World War II. Newly emerging refugee populations highlighted the need for a more flexible and universal mechanism to address refugee issues.

The 1967 Protocol relating to the Status of Refugees ("1967 Protocol") removed the 1951 time limitation and the focus on Europe so that the definition of refugee applies regardless of the time or location of events. The 1951 Convention refugee definition, as amended by the 1967 Protocol, defines a refugee as a person who, "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it."

Although related to the Convention, the 1967 Protocol is an independent instrument that States must accede to separately to be bound by its terms even if they have acceded to the Convention.[6] A few States, including the United States, have acceded to the Protocol, but not to the Convention. The Protocol incorporates Articles 2 through 34 of the

---

[4] *Id.* at Art. 1(A)(2).

[5] *Id.* at Art. 1(B)(1).

[6] United Nations General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, also found in United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (December 2011), Annex III.

Convention, thus making those provisions binding on those countries, such as the United States, that have ratified the Protocol alone.

## 2.5 U.S. Definition of Refugee

The United States enacted a definition of refugee similar to the 1967 Protocol's definition. The Immigration and Nationality Act (INA) defines "refugee" as:

> (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or
>
> (B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[7]

The INA definition of refugee was amended to clarify that a person forced to abort a pregnancy or to undergo voluntary 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 has faced persecution on account of political opinion.

Paragraph B, above, allows for overseas resettlement of refugees to the United States even if they are within their country of nationality or, if stateless, their country of last habitual residence.

The INA excludes from the definition of refugee 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 contrast, the 1951 Convention and 1967 Protocol exclude from protection individuals who have committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime.[8]

## 2.6 Regional Expansions of the Refugee Definition

[7] INA § 101(a)(42)

[8] Art. 1(F) of the 1951 *Convention*.

As a result of changing migration patterns that threatened the political stability of many countries in Africa and Central America, intergovernmental regional bodies adopted agreements broadening the scope of protection afforded to persons covered by the agreements. These instruments apply only to nations in the region who are signatories to them.

### 2.6.1 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa

The 1969 OAU Convention expanded the refugee definition to include those who fled their countries because of "external aggression, occupation, foreign domination, or events seriously disturbing public order."[9]

### 2.6.2 Cartagena Declaration on Refugees

In 1984, the Central American countries and Mexico met to address their concerns regarding the large flow of refugees fleeing civil wars across the region. These countries adopted a declaration, the Cartagena Declaration on Refugees, built upon the refugee definition of the OAU Convention adding to it those who are fleeing on account of "generalized violence" and "massive violation[s] of human rights."[10]

## 2.7 Evolving Role of UNHCR and its Expanded Mandate

In the years following the break-up of the Soviet Union and the ensuing civil strife in such countries as Armenia, Azerbaijan, Georgia, Russia, Tajikistan, Turkmenistan, and Uzbekistan, UNHCR increasingly was called on to provide protection to individuals not covered by the Convention, the 1967 Protocol, or the expanded regional definitions. These groups of "persons of concern" are typically internally displaced people (IDPs).[11] These are individuals who are forced to flee their home but who, unlike refugees, remain within their country's borders. IDPs legally remain under the protection of their own government, but are in need of assistance because their home government may not have the means, or the inclination, to protect them. UNHCR's original mandate does not specifically address IDPs, but because of the agency's expertise on displacement, it has

[9] Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45. Note that the heads of state of the countries of the OAU dissolved the organization on July 8, 2002. The African Union was established as its successor. The complete list of countries that have signed, ratified or deposited the OAU Convention is found at the African Union website.

[10] *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, (22 November 1984), Section III.3.

[11] United Nations High Commissioner for Refugees, "Introduction: The Challenge of Protection, Box 2--The Evolution of Refugee Protection," *The State of the World's Refugees 1993: The Challenge of Protection* (New York: 1993), p. 13-14.

increasingly been called upon to respond to IDP situations and has assisted millions of IDPs.[12]

In recent years, IDPs have greatly outnumbered refugees, creating a crisis in international protection. Though UNHCR is not legally responsible for the protection of those who do not fit within its mandate, UNHCR has stepped in on many occasions to meet the needs of IDPs. UNHCR determines on a case-by-case basis whether it will be able to undertake a mission to protect IDPs. In determining whether it can intervene, UNHCR considers the following factors:

- the political will of the host country to grant UNHCR access to the territory and to the displaced populations
- the ability of the host country to fund the mission
- the commitment of the international community to support the effort
- the risk of harm to IDPs and UNHCR protection personnel

UNHCR is currently active in IDP operations in countries such as Afghanistan, the Central African Republic, Chad, Colombia, the Democratic Republic of Congo, Kenya, Pakistan, and Uganda.

# 3 ELEMENTS OF INTERNATIONAL PROTECTION

## 3.1 What is International Protection?

Protection is, first and foremost, the responsibility of States. It is the responsibility of each State to offer its citizens a number of rights and privileges, for example, security, access to its courts, the right to vote in national elections, and access to its social service structures. When a State is unwilling or unable to protect the human rights and security of some of its citizens, other nations, either through charity or international obligation, may assume the responsibility of protecting those in need. An individual can benefit from international protection only when:

- The country of origin is not capable or willing to provide care, and
- The individual has crossed an international border.

International protection is meant to be a temporary safeguard of the refugee's rights. States provide international protection until the government of the country of origin or nationality can resume providing protection, or until the situation has changed so that international protection is no longer needed.

[12] United Nations Commission on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms including the Question of the Programme and Methods of Work of the Commission Questions of Human Rights, Mass Exoduses and Displaced Persons*, (Feb. 11, 1998), E/CN.4/1998/53/Add.1. *See also* UNHCR, *Protecting Refugees the Role of UNHCR*, (March 2009), p. 8-9.

UNHCR and other actors in international protection seek durable solutions to refugee problems. There are three possible solutions: voluntary repatriation, local integration, and third-country resettlement. This module provides information below on each of these durable solutions.

## 3.2 Who Needs International Protection?

The following categories of refugees need international protection.

### 3.2.1 Mandate Refugees

Mandate refugees are those that UNHCR recognizes as refugees according to its Statute, the 1954 or 1961 Conventions on Statelessness,[13] the OAU Convention, or other regional instruments. These refugees may receive the protection of UNHCR regardless of whether the country of first asylum is a party to the 1951 Convention or the 1967 Protocol or has recognized them as refugees. Though UNHCR protects their rights, these refugees do not receive the benefits that States, who are parties to the Convention or Protocol, give to refugees.[14]

*Example*

Eritrea is not a party to either the 1951 Convention or the 1967 Protocol. If individuals fearing persecution in Djibouti flee to Eritrea, UNHCR will assess their protection needs, recognize them as refugees as appropriate and provide protection. Because Eritrea has no asylum system, these refugees will not have any status under the laws of Eritrea. UNHCR has the mandate to protect these individuals despite the fact that the country in which they are situated does not hold any responsibility to protect them.

### 3.2.2 Convention Refugees

Convention refugees are those that a State party to the 1951 Convention or 1967 Protocol recognizes as refugees. Under these instruments, these individuals are entitled to certain benefits, such as work permission, the right to remain lawfully in the country of asylum, the right to freedom of religion and expression, property rights, and the right to seek and be granted citizenship, which the State is obligated to confer to them. There are no "Protocol refugees," *per se*. Under the refugee definition, as amended by the Protocol, these individuals are more accurately termed "Convention refugees."

*Example*

[13] Addressed below under Sources of International Protection.

[14] United Nations General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V).

On June 16, 2010, Monaco became the most recent country to become party to the 1967 Protocol. If individuals fearing persecution flee to Monaco, they can take advantage of the legal structures in place and apply for asylum.[15] If granted asylum, these individuals are Convention refugees. UNHCR would not play a role in their protection unless a problem arose.

### 3.2.3 Refugees under Regional Instruments

This category of refugees includes individuals fleeing their countries of origin for reasons other than those enumerated in the Convention definition of refugee, such as the reasons contained in the OAU Convention and Cartagena Declaration. Not all countries recognize these individuals as refugees. UNHCR, however, typically finds these individuals to be in need of protection. It is UNHCR's long-held position that people fleeing conflicts should be more generally considered refugees if their own country is unwilling or unable to protect them.[16] At times, States and UNHCR will conduct *prima facie* refugee status determinations on a group basis. UNHCR finds this group-based approach appropriate in mass influx situations and also where there is objective information related to the circumstances in the home country.[17]

### 3.2.4 Special Classifications under National Law—Complementary Forms of Protection

Many countries have provisions for protecting individuals who do not meet the Convention definition of refugee, but for whom the option of return home is not feasible. Though not entitled to the benefits accorded to refugees, such as permanent resettlement or citizenship rights, they may be allowed to work in the country of "refuge" and are protected from deportation for a prescribed period of time.

One example of a special classification is Temporary Protected Status (TPS). The United States provides TPS to foreign nationals residing in the United States whose homeland conditions have been determined to be temporarily unsafe to return to because of war, earthquakes, floods, droughts, or other extraordinary and temporary conditions.[18] During their country's designation period, which can vary greatly in length, TPS beneficiaries may remain in the United States and obtain work authorization. TPS, however, does not lead to permanent resident status. TPS designated countries have included, for example, Haiti, El Salvador, Nicaragua, Honduras, Somalia, Sudan, and South Sudan.

### 3.2.5 Returnees

---

[15] As of January 2012, Monaco had one asylum-seeker residing on its territory. UNHCR, 2012 Regional Operations Profile: Monaco.

[16] *See* Regional Expansions of the Refugee Definition, above.

[17] UNHCR, Refugee Status Determinations, Self Study Module 2, (1 September 2005).

[18] *See* INA § 244; 8 U.S.C. 1254.

The heart of UNHCR's mandate concerning the voluntary repatriation of refugees is its responsibility to ensure that for each individual the return is voluntary and that the existing conditions are conducive to voluntary return in safety and with dignity.

Ordinarily, the country of nationality is responsible for protecting the human rights of returning refugees. The unique circumstances of the return and reintegration into community life, however, often demand closer attention than unstable national governments may be able to provide. In these cases, the international community may assist refugees with the reintegration into and the development of their country of origin. This prevents returnees from becoming a destabilizing force.

UNHCR manages numerous large scale voluntary repatriation programs that have brought large numbers of refugees home. In Afghanistan, millions of refugees have returned with UNHCR's assistance. UNHCR also facilitates small scale and, at times, individual repatriations of refugees and internally displaced people on a routine basis. For example, UNHCR has facilitated the repatriation of Congolese refugees from Burundi and Zambia, Burundi refugees from the Congo, and Sri Lankan refugees from India.[19]

### 3.2.6 Internally Displaced People (IDPs)

Unlike refugees, internally displaced people have not crossed an international border. Instead, they have sought safety within their home countries. Like refugees, they have fled similar circumstances, such as armed conflict, human rights violations, and generalized violence. As mentioned above, UNHCR's original mandate did not specifically cover IDPs. Article 9 of UNHCR's Statute, however, allows the High Commissioner to work with non-refugees "as the General Assembly may determine, within the limits of the resources placed at his [or her] disposal." Over the last several decades, the General Assembly has expanded UNHCR's mandate to include the protection of IDPs. Providing protection to IDPs is complicated because it requires the necessary cooperation from the very country that has demonstrated that it is unable or unwilling to protect these individuals.

## 3.3 Organizations and Entities involved in International Protection

Several organizations and entities work together to protect the legal rights and physical safety of refugees. They include:

### 3.3.1 States (Countries)

State signatories to the 1951 Convention, the 1967 Protocol, or the aforementioned regional instruments, are bound by international obligations to provide for the protection of refugees whether such States are countries of first asylum or of resettlement.

[19] *See* UNHCR Refworld, *UNHCR resumes repatriation of Congolese refugees from Burundi*, 1 November 2010; UNHCR News Stories, *Repatriation of Congolese from Zambia reaches 40,000; camps to close* (28 September 2010); *Repatriation of Burundians from Congo launched with convoy of 240* (October 2010); and UNHCR Briefing Notes, *Ferry returns of Sri Lankan refugees from India due to start Wednesday* (11 October 2011).

### 3.3.2 Other Agencies within the United Nations

While UNHCR has primary responsibility for ensuring the protection and care of refugees, other U.N. agencies, such as the World Food Programme (WFP), the World Health Organization (WHO), UNICEF, United Nations Relief and Works Agency (UNRWA), and the International Labor Organization (ILO) also participate in refugee assistance efforts.

### 3.3.3 International Organizations

International organizations, such as the International Committee of the Red Cross (ICRC), respond to refugee crises along with UNHCR. Their global presence allows them to respond immediately to emergencies. Their global perspective and their lack of affiliation with any nation makes it more likely that the needs of all refugees and displaced people will be met regardless of the political situation surrounding the crises or the visibility of the problem in foreign media.

### 3.3.4 Intergovernmental Organizations

Intergovernmental organizations (IGOs) are organizations made up primarily of sovereign or member States. IGOs are established by treaty. They promote a unified, and often regional, approach to refugee protection among nations who have an interest in maintaining a stable environment for refugees and their own citizens.

The International Organization for Migration (IOM), established in 1951, is the leading intergovernmental organization in the field of migration and works closely with governmental, intergovernmental, and non-governmental partners to provide humanitarian assistance to migrants in need, including refugees and internally displaced people. IOM has 132 member States and offices in more than 100 countries. It provides key services to refugees, including providing transportation for refugees who are fleeing conflict situations or who are being resettled to third countries. IOM also provides other services and advice to governments and migrants.[20]

### 3.3.5 Non-governmental Organizations

Non-governmental organizations (NGOs), which include international, national, and local entities, play a crucial role in all aspects of refugee crises, such as prevention, emergency response, provision and maintenance of protection, and resolution. The international community relies heavily on NGOs already on the ground in areas of potential unrest as well as in places where refugees or IDPs are found. NGOs often provide information on the situation and are often able to respond immediately as events unfold. In addition, NGOs, especially those that are local and national within the country of return, are in a

[20] More detailed information about IOM can be found its website.

unique position to assist returnees in the resolution and reintegration phases of an operation, as well as to monitor the success of implementation plans.[21]

### 3.3.6 Refugee Resettlement Voluntary Agencies

Non-governmental voluntary agencies or "volags," contribute significantly to the protection of refugees. Volags are primarily funded by the U.S. State Department's Bureau of Population, Refugees, and Migration (PRM) and private sources. They provide refugees with a wide range of services including case file preparation, family history documentation, and travel coordination. To assist with integration in the country of resettlement, they also provide initial housing, food and clothing, cultural orientation, and counseling. Volags may also contract with the Office of Refugee Resettlement (part of the U.S. Department of Health and Human Services) to provide job placement, English language training, and other social services. Examples of voluntary agencies that work with UNHCR and the United States government include the International Catholic Migration Commission, World Relief, and the Hebrew Immigrant Aid Society.

### 3.3.7 Local Population

The support of the local population is essential to providing refugees with the stability required to move forward with their lives. A welcoming attitude from the local population, in both the countries of first asylum and the resettlement countries, goes a long way to heal the emotional wounds of having to flee a country fearing for one's life. Furthermore, the local population may be in a position to provide refugees with jobs, shelter, and community support if repatriation is not a viable solution.

### 3.3.8 Other Refugees

Refugees can improve their situation in a refugee camp or in their local community in the country of asylum. Refugees lend each other moral support and encouragement and can develop organizational structures to aid in the administration of camp life.

### 3.3.9 Media

The media plays an important role in bringing the issues of refugee protection to the attention of individuals around the world. More importantly, in exposing human rights abuses in countries of origin, the media challenges the international community and national governments to address violations before mass flights of refugees begin.

## 3.4 What are the Goals of International Protection?

The most important goals of the international protection of refugees are as follows.

---

[21] UNHCR. "The Role of NGOs in the Field," *The State of the World's Refugees.* Chapter 5: Responding to Refugee Emergencies. (New York: 1993) pp. 13.

### 3.4.1 Admission to Safety

In order for the international community to have access to those individuals who are fleeing their home countries, refugees must cross an international border. This requires that UNHCR or other members of the international community be present at entry locations to ensure refugees are not refused entry into the country of asylum.

### 3.4.2 Respect for the Principle of *Non-refoulement*

Once refugees have been allowed safe passage into the country of asylum, the international community must ensure that refugees are not in danger of being returned to a country where their lives or freedom would be threatened.

### 3.4.3 Physical Security

Despite the best efforts of the international community to meet the needs of refugees, refugee camps are unstable environments. In certain situations, refugees can be especially vulnerable to physical harm even in a refugee camp. Camps may be composed of individuals of different ethnic or religious groups, some of whom might have been on opposite sides of a conflict in the country of origin. As noted below, there may also be others who could put the refugees' physical safety at risk, such as criminals or human rights abusers. In addition, members of the local population working in and around the camp may harbor anger or frustration with the refugees' presence in the country of asylum. It is the responsibility of the country of asylum and the international community to do everything possible to prevent physical attacks on refugees and to prosecute those who violate the law.

### 3.4.4 Protection of Basic Human Rights

Basic human rights, spelled out in instruments such as the Universal Declaration of Human Rights and the International Covenants on Human Rights, apply to all individuals regardless of their legal status in any country. When individuals become refugees, it is crucial that their rights are protected in the country of first asylum. Once the physical safety of the refugees has been provided for, the next immediate human right to safeguard is the right to seek asylum under Article 14 of the Universal Declaration of Human Rights.

# 4 INTERNATIONAL PROTECTION STANDARDS

## 4.1 Sources of International Protection Standards

The earliest developments in international human rights law focused on establishing standards for the protection of refugees. As noted above, these standards are the core of the 1951 Convention and the 1967 Protocol, to which all signatories are bound.

Non-binding texts also speak to refugee issues and provide guidance to member States. The Executive Committee of the High Commissioner's Programme, an intergovernmental body comprised of States, has issued Executive Committee (Ex Com) Conclusions on an annual basis dating back to 1975.[22] These Ex Com Conclusions are non-binding, serve as an expression of the body of its members, and typically are statements of concern or identification of priority for action in a coming year. The Executive Committee also evaluates and approves the assistance programs that UNHCR proposes to undertake each year.

In addition to the refugee treaties, other international instruments dealing with issues of stateless individuals and displaced people provide guidance in certain situations. These instruments include:

- The *Convention relating to the Status of Stateless Persons* (1954) mandates that those individuals who are stateless be accorded the same standards of treatment as refugees.[23]
- The *Convention on the Reduction of Statelessness* (1961) develops measures designed to reduce the number of individuals who live entire lifetimes without citizenship in any country. Provisions address granting citizenship to those who are born to stateless parents and preventing the deprivation of nationality on the basis of one of the protected grounds.
- The *Fourth Geneva Convention Relative to the Protection of Civilian Person in Time of War* (1949) protects refugees and displaced people forced to flee their homes and/or countries as a result of war (Article 44).[24]
- The *United Nations Declaration on Territorial Asylum* (1967) reaffirms the principle of *nonrefoulement* and emphasizes the obligation of States not to turn away those refugees who present themselves at their borders seeking protection. It also clarifies that a grant of asylum by a particular State is a humanitarian act and is not to be interpreted as hostile by any other State, especially the country of origin of the refugee.[25]

Individual States build on the standards of refugee protection as they create domestic legislation for the treatment of migrants in refugee-like situations. Though domestic legislation varies around the world, all signatories to the 1951 Convention and/or the

[22] *See, e.g.*, United Nations High Commissioner for Refugees, *Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR*, No. 110 (LXI) - 2010, 12 October 2010.

[23] The United States is not a party to the *Convention Relating to the Status of Stateless Persons* or to the *Convention on the Reductions of Statelessness* as of January 17, 2012.

[24] The United States is a party to the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949.

[25] United Nations General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII)

1967 Protocol, are bound by law to uphold all of their principles of protection, especially *nonrefoulement*. Those States that have ratified other protection instruments, such as regional treaties, are bound by those documents as well.

## 4.2 Standards Derived from Human Rights Instruments

The international community's general standards for the treatment of refugees are found in international human rights instruments. These human rights apply to all individuals, regardless of their immigration status. Many of these rights are explicitly incorporated into the 1951 Convention and 1967 Protocol.

### 4.2.1 Universal Declaration of Human Rights (UDHR)

Countries of first asylum and international organizations working in refugee protection must pay particular attention to the following rights enshrined in the Universal Declaration of Human Rights:[26]

- the right to seek asylum from persecution (Article 14)
- the right to have access to the courts and legal system (Article 10)
- the right to equal protection of the law and freedom from discrimination (Article 7)
- the right to cultural expression (Article 27)

### 4.2.2 Article 4 of the International Covenant on Civil and Political Rights (ICCPR)

This provision requires that all States respect and ensure certain fundamental and internationally-accepted human rights without exception, such as:

- the right to life
- freedom from torture, or other cruel, inhuman or degrading treatment or punishment
- freedom from slavery or servitude
- recognition as a person before the law
- freedom of thought, conscience, and religion[27]

These fundamental rights are considered non-derogable. This means that countries have no legal basis, even in a state of emergency, to refuse to honor these human rights. For more information on the specific human rights protected by the ICCPR and other international law instruments, please see the RAIO Training Module, *International Human Rights Law*.

[26] United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

[27] United Nations General Assembly, *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. The United States signed the ICCPR on October 5, 1977 and ratified it on June 8, 1992.

# 5 THE ROLE OF INTERNATIONAL ACTORS IN PROTECTION

## 5.1 States (Countries)

Individual States, not the international community as a whole, have the primary responsibility to provide protection to refugees present on their soil. International treaties and covenants require States parties to those instruments to abide by their provisions. The international community holds States accountable if they violate the rights of refugees, although there is no clear mechanism for enforcement.

Article 14 of the Universal Declaration of Human Rights recognizes the right to seek asylum from persecution as a basic human right. Further, countries of first asylum have an obligation to protect all basic human rights, including the right of an individual not to be returned to a country where his or her life would be threatened on account of one of the protected grounds.[28] This *nonrefoulement* provision is reinforced by a similar *nonrefoulement* provision in Article 3 of the United Nations Convention Against Torture, although Article 3 does not have an "on account of" requirement and differs in other respects.[29]

The international community sometimes joins in the protection of refugees when a country of first asylum cannot adequately address a particular refugee situation on its soil. In all situations, the international community cannot begin its operations unless authorized by the host country.

The obligation of a country not to return refugees to countries where their lives or freedom would be threatened (*nonrefoulement*), coupled with the lack of an obligation of third countries to accept refugees for resettlement, places a burden on the shoulders of some countries of first asylum that is too heavy to bear. The 1967 U.N. Declaration on Territorial Asylum and other regional instruments provide for burden-sharing. This doctrine asserts that any country that is host to a population of refugees that it cannot support can call upon other countries for assistance and, in the spirit of collaboration and cooperation, these countries are expected to provide such assistance.

***Example***

In 1999, a massive influx of refugees from Kosovo threatened the stability of Macedonia. In order to lighten its burden and ensure that the rights of the Kosovars continued to be protected, the Macedonian government, with the support of the United States, initiated a humanitarian evacuation program. Close

[28] United Nations General Assembly, *Convention relating to the Status of Refugees* (28 July 1951), United Nations, Treaty Series, vol. 189, p. 176.

[29] United Nations General Assembly, *Convention Against Torture* (10 December 1984), United Nations Treaty Series, vol. 1465, p. 85.

to 100,000 Kosovar refugees were evacuated to third countries (the United States, Germany, Turkey, and other countries) after appropriate screening.

## 5.2 UNHCR

There are three basic needs that UNHCR fulfills during a refugee crisis.

### 5.2.1 Protection

The first step in dealing with a refugee crisis is to be certain that the physical safety of refugees is safeguarded. UNHCR monitors the situation and works with the interior ministry officials of the host country to ensure that refugees are allowed into the country. Ensuring the protection of refugees also requires UNHCR to intervene when the country of asylum is contemplating *refoulement* as an option for either individual refugees or large groups.

### 5.2.2 Assistance

UNHCR assists refugees by providing for their daily needs. For example, a refugee camp often develops into a small community with healthcare facilities, schools, agricultural projects, recreation, and more. Most of these services are not provided directly by UNHCR, but by non-governmental organizations or voluntary agencies funded by UNHCR contracts.

### 5.2.3 Durable Solutions

UNHCR also seeks ways to find durable solutions to the plight of refugees by helping them to repatriate to their homeland, to integrate in their countries of asylum, or to resettle them in third countries. Each is discussed in greater detail below.

## 5.3 Other Actors in International Protection of Refugees

Many organizations and entities play a role in providing protection for refugees. As noted above, these groups include: international organizations, inter-governmental organizations, non-governmental organizations (NGOs), voluntary agencies (volags), media, local populations, and other refugees. These organizations and/or entities meet specific needs of refugees that UNHCR and the host countries may not be equipped or authorized to provide. For example, these entities:

- Gather information on emerging refugee crises (media, non-governmental organizations, international organizations)
- Provide for the safety and welfare of refugees (international organizations, intergovernmental organizations, voluntary organizations, non-governmental organizations, refugees, and the local population)
- Raise awareness of the public in support of the refugee cause (media, non-governmental organizations, international organizations)

- Provide legal advice or social counseling to individual refugees (voluntary agencies, non-governmental organizations)
- Process applications for resettlement (inter-governmental organizations, voluntary agencies)

### 5.4 U.S. Refugee Admissions Program (USRAP)

The U.S. Refugee Admissions Program (USRAP) consists of a number of governmental and non-governmental partners, both overseas and domestically, whose mission is to resettle refugees in the United States. The U.S. Department of State's Bureau of Population, Refugees and Migration (PRM) has overall management responsibility for the USRAP and has the lead in proposing admissions numbers and processing priorities. The DHS component, U.S. Citizenship and Immigration Services (USCIS), has responsibility for interviewing refugee applicants abroad and adjudicating applications for refugee status. The Office of Refugee Resettlement (ORR) in the Department of Health and Human Services is responsible for funding integration programs once refugees arrive. Resettlement Service Centers (RSCs), such as Church World Service (CWS), the International Organization for Migration (IOM), the International Catholic Migration Commission (ICMC), the International Rescue Committee (IRC), or other NGOs, handle the intake of refugee referrals from UNHCR, U.S. embassies, and certain NGOs, as well as the prescreening of cases and the out-processing of individuals for travel to the United States.[30]

## 6 PROTECTION NEEDS OF REFUGEES

### 6.1 General Protection Issues

Beyond the most basic and immediate issues of both protecting the individual's right to seek asylum and monitoring the States parties' adherence to their obligations under the 1951 Convention and1967 Protocol, UNHCR and its partners often face additional challenges, many of which may further threaten the safety and well-being of refugees. Among these are:

- rape and other forms of sexual violence
- abusive arrest and detention
- forced recruitment of minors into combat
- recruitment of individuals into the armed services or militias
- military attacks on refugees

[30] USCIS, "Refugees: The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities."

- presence of bandits or intimidators in refugee camps or urban refugee settings
- diversion or theft of humanitarian assistance by the host government, paramilitary groups, or criminals
- discrimination
- denial of the right to work
- conflicting local laws

## 6.2 Specific Protection Issues

There are a number of circumstances, outlined below, in which unique protection issues arise.

### 6.2.1 Refugee Women

The protection of refugee women requires careful and sensitive planning and action. Physical and sexual abuse of refugee women occurs frequently. When planning refugee protection missions, UNHCR and other international and local actors consider the structure and management of the camp with an eye to the special needs of refugee women. UNHCR and other actors also include the active participation of women in camp planning and decision-making, as well as in leadership roles within the community. Features that maximize the protection of women include better lighting, more private areas, and special accommodations for single women and women heads of households. When abuses occur, UNHCR responds by identifying the individuals responsible, protecting the victims from reprisals, and providing counseling and medical care.[31]

### 6.2.2 Refugee Children

Children in refugee camps, particularly those who are unaccompanied, require special care. Typically, a small percentage of a refugee population is comprised of unaccompanied minors. UNHCR works with other agencies such as UNICEF, ICRC, and Save the Children to identify these children and try to trace their families. UNHCR has established a database to track the location of families who may have been separated from their children. All children, regardless of whether they are accompanied by relatives, require special care when in a refugee situation. UNHCR, together with the volags and NGOs that provide services to refugees, design healthcare, educational, and recreational services geared to the development needs of children.[32]

UNHCR has developed specialized protections for children not living with their parents who are unaccompanied or separated children (UASC). UASCs should always receive

[31] *See* United Nations High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women* (Geneva: July 1991) 31 pp.

[32] *See* United Nations High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (Geneva: 1994).

special attention because of the particular risks they face. While they are under UNHCR supervision, children's best interests are assessed through a formal process—a "Best Interest Determination." Tracing for parents and other relatives takes place throughout the process and children are reunited with family members when possible.

UNHCR makes recommendations and decisions for these children during different periods of their displacement. When making a recommendation or decision regarding durable solutions for those children who remain unaccompanied or separated, UNHCR follows its *Guidelines on Determining the Best Interests of the Child*.[33] These *Guidelines* require that a child welfare expert examines the child's options for durable solutions (return to home country, integration into host society, or resettlement) and recommends a solution that would be in the child's best interest. The recommendation is reviewed by a committee comprised of UNHCR, NGOs, and host country members. If the committee accepts the recommendation of the child welfare expert, the committee signs the recommendation. The final document, the *Best Interest Determination (BID)* for the child, is intended to prescribe the most appropriate course of action for the State and other actors to undertake on behalf of the child.

### 6.2.3 Mixed Refugee Camp Populations

When a civil conflict divides a country or a community along ethnic, religious, or tribal lines, individuals from both sides may flee the country and find themselves in the same refugee camp. In such situations UNHCR must tread carefully to keep the peace within the refugee camp.

## 7 REFUGEE SOLUTIONS

UNHCR and other actors in international protection seek durable solutions to refugee problems. There are three possible solutions: voluntary repatriation, local integration, and third-country resettlement.

### 7.1 Voluntary Repatriation

This durable solution, preferred by most refugees, allows refugees to return home in safety and with dignity. Voluntary repatriation may require a political solution that addresses the issues that brought about the refugee's flight. Furthermore, attention must be paid to the economic and social development of the community of origin to prevent a resurgence of violence and/or tensions.

The primary goals of UNHCR-sponsored voluntary repatriation are:

- Re-establishing communities;
- Creating conditions for reconciliation; and

[33] United Nations High Commissioner for Refugees, *Guidelines on Determining Best Interests of the Child* (May 2008).

- Protecting the basic human rights of returnees.

Before individuals return to the country of origin, UNHCR must ensure that refugees have all the relevant information to make a fully-informed decision and that their decision is voluntary. UNHCR often provides transportation and a start-up package which may include cash grants, income-generation projects, and practical assistance such as farm tools and seeds. In the case of a large-scale repatriation, UNHCR may also be involved in the political dialogue prior to the repatriation and in monitoring the situation after it has occurred.

## 7.2 Local Integration

Voluntary repatriation may not be an option for refugees when a complex and volatile political situation continues to exist in their country of origin. Local integration provides the next best solution because in many instances, it allows the refugees to live close to their country of origin while providing the opportunity to settle into a secure environment and contribute to the development of their new community.

The government of the country of first asylum must be willing to accept the refugees and offer them a secure status in the country. In some countries, a combination of a state-supported welfare system and the resources of NGOs offer the assistance required to integrate refugees into the society. When the host country cannot provide the necessary funds to sustain local integration, UNHCR lends assistance.

## 7.3 Third Country Resettlement

Resettlement is generally considered when refugees have particular needs or vulnerabilities in a country of first asylum. Generally these are needs that cannot be addressed in the country of first asylum, and voluntary repatriation is not feasible. The only solution then is to seek resettlement to a third country. Only a small number of countries, however, have established programs that provide resettlement places for UNHCR-referred refugees and less than one percent of the world's refugees are resettled in third countries.

UNHCR recommends for resettlement individuals who fall within one or more of the seven categories discussed below.34 These categories are separate and apart from the protected grounds in the Convention definition of a refugee that serve as the basis for granting the protection of asylum and relate to the refugee's experience in the country of origin. The resettlement categories refer specifically to the situation of refugees in the country of first asylum.

### 7.3.1 Legal and/or Physical Protection Needs

[34] United Nations High Commissioner for Refugees, *Resettlement Handbook*, Chapter 6 (July 2011), pp. 243-296.

This category includes individuals who are under a threat of *refoulement* or expulsion and individuals who face arrest, detention, physical harm, or a threat to their fundamental human rights in the country of refuge.

### 7.3.2 Survivors of Torture and/or Other Violence

This category refers to individuals who have experienced torture or other violence in their home country or country of refuge and who may have lingering effects requiring medical or psychological care.

### 7.3.3 Medical Needs

This category includes individuals who have a life-threatening health condition with no adequate treatment available to them and who face the likelihood that their condition will worsen without treatment. To qualify under this category, there must be a favorable prognosis that the medical condition will improve with treatment.

### 7.3.4 Women and Girls at Risk

This category refers to women and girls with protection concerns related to their gender and who lack effective protection normally provided by male family members. The protection risks include, among others, expulsion, physical violence, rape, particular economic hardship, and community hostility.

### 7.3.5 Family Reunification

To qualify under this category, at least one member of a family unit to be reunited must be a refugee under the UNHCR mandate, or be a person of concern to UNHCR, and the family member with whom they are reuniting must be already in the resettlement country. UNHCR considers family reunification to include: parents with minor or dependent children, spouses, and other relatives who lived with the family and are economically and psychologically dependent on the family unit. UNHCR also promotes family reunification for common-law spouses and same-sex or domestic partners.

### 7.3.6 Children and Adolescents at Risk

This category refers to individuals less than 18 years of age who may or may not be unaccompanied; who have compelling protection needs in their country of refuge; and for whom UNHCR has determined that resettlement is the best solution.

### 7.3.7 Lack of Foreseeable Alternative Durable Solutions

This category is generally relevant when other solutions are not possible in the foreseeable future. Referrals under this category balance the quality of protection in a country of resettlement against prospects of local integration or voluntary repatriation in the near future.

# 8 UNHCR RESETTLEMENT REFERRAL PROCESS TO THE UNITED STATES

Facilitating the resettlement of refugees from a country of first asylum is the responsibility of both UNHCR and the international community. There are a number of countries that accept refugees for resettlement, such as Canada, Australia, Norway, and Sweden. The United States accepts the largest number.

Access to resettlement in the United States through the U.S. Refugee Admissions Program (USRAP) is limited to those of special humanitarian concern as required by Section 207 of the Immigration and Nationality Act. Given that the number of refugees around the world far exceeds the capacity of the refugee program, the U.S. Government has established a worldwide processing priority system which sets guidelines for the orderly management and processing of refugee applications for admission to the United States. These processing priorities, designated each fiscal year during refugee admissions consultations,[35] identify the nationalities and groups of individuals who are eligible to access the USRAP. Only those individuals who qualify for one of the processing priorities are eligible for a refugee status interview with USCIS.

FY2012 Processing Priorities[36] include:

- P-1: Individual referred by U.S. Embassy, UNHCR, or designated NGO
- P-2: Groups of special humanitarian concern
- P-3: Family reunification for designated nationalities

UNHCR annually conducts and publishes an assessment of global resettlement need projections. This information is used in the context of the annual consultation process. The USRAP and UNHCR also work closely together throughout the year to discuss potential new populations in need of resettlement who may be referred to the U.S. program. UNHCR referrals to the U.S. may be either on an individual basis (P-1) or be done as part of a group referral process (P-2). UNHCR does not play a role in the referral of family reunification cases that qualify for P-3, but in some instances UNHCR may assist with P-3 processing (e.g., helping to obtain exit permission).

In the case of individual referrals (P-1), UNHCR field or branch offices will prepare

[35] Section 207(e) of the INA requires "discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest…" The Secretary of State traditionally serves as the Cabinet member presenting the President's proposal at the Consultations. This proposal is developed by DOS with input from several federal agencies, state governments and private sector organizations interested/involved in U.S. refugee resettlement. Following the consultations, and after receipt of congressional concurrence with the President's proposal, the Department of State (DOS) drafts a Presidential Determination for signature by the President, which establishes the overall admissions levels and regional allocations.

[36] Presidential Determination No. 2011-17

individual Resettlement Referral Forms (RRFs) for each case that will be submitted to the USRAP. A UNHCR field or branch office may submit the RRF directly to the USRAP, or in some regions, the submissions is through a UNHCR Regional Resettlement Hub (e.g., the Nairobi Hub). For group submissions (P-2), UNHCR and the USRAP agree in advance as to the specific format and process for making referrals. While group referrals procedures can vary substantially from population to population, most UNHCR group submissions include at minimum UNHCR biographic information, such as name, family members, date of birth, and place of birth.

# 9 OTHER UNHCR FUNCTIONS

## 9.1 Research

UNHCR has available at its disposal a comprehensive range of country of origin information to assist those working in refugee protection and resettlement. UNHCR's "Refworld," an online database, is a leading source of information necessary for making decisions on refugee status. Refworld contains a vast collection of reports relating to situations in countries of origin, policy documents and positions, and documents relating to international and national legal frameworks.[37] The information has been carefully selected and compiled from UNHCR's global network of field offices, governments, international, regional and non-governmental organizations, academic institutions, and judicial bodies.[38]

## 9.2 Interpretive Guidance

UNHCR also plays an important legal role in refugee protection. As is evident from the "Additional Resources" section at the beginning of this module, UNHCR issues interpretive guidance on the meaning and application of the refugee definition. This guidance ranges from the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, first published in 1979, to the many Guidelines on International Protection, Guidance Notes, Protection Policy Papers, Handbooks, and training modules on a myriad of topics. USCIS has relied on UNHCR materials as persuasive authority when adjudicating refugee and asylum claims.

## 9.3 Refugee Status Determination

In some situations, UNHCR makes the initial refugee status determination. This occurs when States, both signatories and non-signatories to the Convention and/or Protocol, do not have a protection structure in place and invite UNHCR to make such determinations. UNHCR also conducts refugee status determinations prior to referring cases for resettlement to the United States under Priority 1.

---

[37] Refworld may be accessed through the UNHCR website.

[38] For additional information regarding Refworld, see RAIO Training Module, *Country Conditions Research and the RAIO Research Unit.*

## 9.4 Cooperation

Another UNHCR function is to foster cooperation with and among other U.N. agencies, regional organizations, NGOs, and scientific and research institutions to ensure quick, coordinated responses to refugee problems, as well as to provide protection (both physical and legal) to refugees.

## 9.5 Training

UNHCR develops training programs for its staff, government officials, and NGOs to sensitize them to fundamental protection issues, to promote effective dialogue, to provide practical knowledge and skills, and to disseminate information on the laws and principles governing protection of refugees and the proper recognition of their rights.

## 9.6 UNHCR's Mission in the United States

UNHCR has a regional office in Washington, DC that covers the United States and the Caribbean. The regional office comprises several units, including:

- Resettlement – This unit works closely with government officials on Federal, State, and local levels, as well as with non-governmental organizations, to help refugees in need of resettlement come to the United States. The unit actively participates in state and national conferences and training workshops for U.S. resettlement partners. It also gives ongoing support and assistance to UNHCR offices around the world, which are working with operational issues related to the U.S. resettlement program. UNHCR works closely with U.S. counterparts to promote appropriate support systems for refugees with special needs, such as women and children, and medical cases.
- Protection – This unit informs government officials, attorneys, and NGOs in the United States about international standards of refugee protection. The unit meets regularly with governmental and non-governmental partners on refugee protection matters within the United States, provides comments on proposed legislation and regulation, monitors compliance with international standards, and conducts training sessions for government components and non-governmental organizations. The protection unit also assists asylum seekers and their representatives with information on laws, policies, and procedures pertaining to refugees, and may issue advisory opinions or *amicus* briefs in cases of significant impact.
- Caribbean – This unit covers twenty-seven island states and territories in the Caribbean region and provides support to UNHCR offices located in Haiti and the Dominican Republic. The unit promotes refugee protection through training, advocacy, humanitarian assistance, and long-term solutions on behalf of asylum-seekers, refugees, and stateless people in the Caribbean region. The unit advises regional governments on refugee issues and obligations under international law and supports governments in meeting their obligations towards refugees. The unit also conducts refugee status determinations on behalf of many of the governments in the region that are lacking national protection legislation or the means to effectively

implement such protection. A network of non-governmental Honorary Liaisons in the region assists UNHCR in meeting its objectives.

# 10 CONCLUSION

UNHCR has played a fundamental role in the development of international protection throughout the world. The *1951 Convention relating to the Status of Refugees* and the *1967 Protocol relating to the Status of Refugees* have created flexible and universal mechanisms to address refugee issues. More recently UNHCR has been called on to provide protection to other individuals, including internally displaced people, not covered by the Convention, the Protocol, or any expanded regional instruments.

States, not the international community, have the primary responsibility to provide protection of refugees present on their soil. The *1951 Convention* and the *1967 Protocol relating to the Status of Refugees*, along with other documents listed in this module establish the standards of international protection. The categories of refugees who require international protection include:

- Mandate Refugees
- Convention Refugees
- Refugees under Regional Instruments
- Individuals with Special Classifications under National Law
- Returnees
- Internally Displaced People

UNHCR provides protection and assistance to refugees and seeks durable solutions to their problems. The durable solutions to refugee problems include: voluntary repatriation, local integration, and resettlement. In addition, UNHCR safeguards other groups of people who have unique protection issues.

# 11 SUMMARY

## 11.1 Origins of International Protection for Refugees

Since World War I, the international community has worked together to set standards for the protection of refugees. In 1950, UNHCR was created to protect refugees and find durable solutions to their problems. The *1951 Convention* and *1967 Protocol* provide a universal definition of a refugee, establish that all signatories are bound by the principle of *nonrefoulement*, require State signatories to facilitate and cooperate in the supervisory role of UNHCR, and grant to UNHCR the responsibility for managing the protection of refugees.

## 11.2 Elements of International Protection

The international community steps forward to care for the citizens of another country when the government of that country cannot or will not protect its citizens. Traditionally, the international community did not provide protection unless the country of nationality was unable or unwilling to protect its citizens, and those citizens had crossed an international border.

In recent years, however, returnees, victims of war, stateless individuals, and internally displaced people have joined Convention refugees as beneficiaries of international protection. Individual countries, the agencies of the United Nations, international and intergovernmental organizations, voluntary agencies, non-governmental organizations, the local population, media, and refugees themselves all contribute greatly to the protection of Convention refugees and other vulnerable populations. In refugee protection, the ability of refugees to enter safely into a country of asylum without the threat of return (*refoulement*) to the country of feared persecution is of primary importance. Once entry occurs, attention turns to maintaining the safety of the refugees and treating them in accord with human rights standards.

## 11.3 International Protection Standards

The standards of refugee protection are rooted in international instruments, to which all signatory States must adhere. All individuals are entitled to respect for their basic human rights, regardless of immigration status. Some universally accepted basic rights are considered non-derogable and some are considered principles of customary international law. UNHCR and the international community monitor the actions of countries of asylum to ensure that the protection needs and human rights of refugees are respected.

## 11.4 Roles of Providers of International Protection

States, as signatories to international conventions and instruments, have the primary responsibility to protect refugees on their soil. The international community joins in the protection efforts when a particular country does not have the resources or the will to ensure the safety of refugees on its soil. UNHCR and the international community fulfill three basic needs of refugees: protection, assistance, and durable solutions. UNHCR does not provide for the needs of refugees alone. International, intergovernmental, and non-governmental organizations, along with voluntary agencies, the local community, and the media, gather information on refugee crises, provide for the safety of refugees, offer legal advice and social counseling, and assist in resettlement of refugees.

## 11.5 Protection Needs of Refugees

Agencies and entities face significant challenges in the protection of refugees. Threats to safety include discrimination, abusive arrest and detention, rape and sexual violence, forced recruitment into armed services or militias, and denial of the right to work. Furthermore, there are specific groups of refugees who are especially vulnerable to harm. These groups include women, children, and individuals residing in refugee camps of

mixed populations. Mixed populations include economic migrants, combatants, and criminals within a camp, in addition to the refugee population.

## 11.6 Refugee Solutions

The three durable solutions for refugees are voluntary repatriation, local integration, and third country resettlement. The solution preferred by most refugees is their voluntary return to their country, when conditions permit. This solution requires close monitoring of the repatriation process. The solution of local integration requires the willingness of the country of asylum to take over from the international community in protecting the rights of refugees. Local integration succeeds when refugees are offered a secure status in the country of asylum and allowed to participate fully in the new society. Resettlement, the solution of last resort, offers an option for refugees when the first two solutions are not feasible. In determining whether a refugee is an appropriate candidate for resettlement, UNHCR must evaluate the degree of harm the individual faces, the humanitarian needs of individuals, and family reunification considerations, among other factors.

## 11.7 Other UNHCR Functions

UNHCR enhances its operations through research into conditions in countries of origin and first asylum, cooperation with other entities involved in human rights monitoring and refugee protection, and training its staff, government officials, and NGO personnel on issues of refugee protection.[39]

[39] United Nations High Commissioner for Refugees, "UNHCR Washington: Resettlement."

# PRACTICAL EXERCISES

## Practical Exercise # 1

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

# OTHER MATERIALS

There are no Other Materials for this module.

## SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

## REQUIRED READING

1.

2.

## ADDITIONAL RESOURCES

1. United Nations High Commissioner for Refugees, *Resettlement Handbook* (Geneva, 2011), Chapter 6: UNHCR Resettlement Submission Categories, 55p.

2. United Nations High Commissioner for Refugees, *Resettlement Handbook* (Geneva, 2011), Chapter 5: Protection Considerations, and the Identification of Resettlement Needs, Section 5.2.2. Children and Adolescents, pp. 184-194, 10p.

3. United Nations High Commissioner for Refugees, *Resettlement Handbook* (Geneva, 2011), Chapter 7: Basic Procedures to Follow in Processing Resettlement Submissions, 84p.

## SUPPLEMENTS

**RAD Supplement – 1**

**Module Section Subheading**

## SUPPLEMENT B – ASYLUM DIVISION

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

## REQUIRED READING

1.

2.

## ADDITIONAL RESOURCES

1.

## SUPPLEMENTS

**ASM Supplement – 1**

**Module Section Subheading**

## SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

## REQUIRED READING

1. 9 FAM Appendix O, *Processing Individual Refugee Cases*, 5p. This Foreign Affairs Manual link describes the Department of State procedures for individual refugee processing.

## ADDITIONAL RESOURCES

1.

2.

## SUPPLEMENTS

**IO Supplement – 1**

**Module Section Subheading**

# LESSON PLAN OVERVIEW

Refugee Division Officer Training Course

## Introduction to the United States Refugee Admissions Program

**Field Performance Objective**: To provide the Refugee Officer (RO) with an understanding of the history and operations of the United States Refugee Admissions Program (USRAP).

**Interim Performance Objectives**:

1. Explain the history of and authority for the United States Refugee Admissions Program (USRAP)
2. Describe the annual refugee admissions consultation process
3. Examine management of RAD resources and adjudicative responsibilities within USRAP when it comes to the allocation of RAD's resources

## I. INTRODUCTION

*The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homeland, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States. The Congress further declares that it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.*

The Refugee Act of 1980, Pub. L. No. 96-212, §101(a), 94 Stat. 102 (1980) (*codified at* 8 U.S.C. §1521 note)

The United States Refugee Admissions Program (USRAP) is a humanitarian expression of U.S. domestic and foreign policy interests. It is not, as many believe, the overseas twin of the U.S. asylum program, nor is it an obligation imposed on the United States as a result of our signing the 1967 United Nations Protocol Relating to the Status of Refugees.[1] The Protocol's obligation

[1] Opened for signature January 31, 1967, 19 U.S.T. 6223 T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967)("1967 Protocol"). The Protocol adopted Articles 2-34 of the 1951 United Nations Convention Relating to the Status of Refugees. Opened for signature July 28, 1951, 189 U.N.T.S. 150, 152 (1951)("1951 Refugee Convention").

of *nonrefoulement*, or non-return, is met by the restriction on removal imposed by §241(b)(3) of the Immigration and Nationality Act (INA), which prohibits the removal of any alien to a country where his or her life or freedom would be threatened.[2] The USRAP is rather an expression of U.S. leadership in refugee protection, which serves to encourage the internationalization of refugee resettlement by example.

The influence of domestic and foreign policy interests on U.S. refugee resettlement has been the subject of debate and criticism. Yet, in passing the Refugee Act of 1980, it is clear that Congress did not intend to provide unrestricted access to U.S. resettlement, but only to those refugees of "special humanitarian concern" to the United States. By stipulating consultations between the President and the Congress as the means for determining those of special humanitarian concern, the Congress guaranteed that policy interests – both domestic and foreign – would influence the choices about who is given access to the program. Further, although the Refugee Act of 1980 broadened the scope of U.S. humanitarian concern by removing the specific geographic and ideological focus that had historically dominated U.S. refugee resettlement, it did not eliminate their influence on U.S. refugee policy. Geographic and ideological considerations, although they may shift over time, will continue to affect U.S. foreign and domestic interests and, as such, remain part of the mix of influences on the USRAP.

## II. HISTORY OF THE U.S. REFUGEE PROGRAM – PRE-1980

The resettlement of refugees by the United States is not a new phenomenon, although there was little systematic attention to refugee admission programs before the end of World War II.[3] Prior to 1980, the United States Government relied on a series of special refugee admissions programs, the U.S. visa system, and the Attorney General's parole authority to bring refugees and refugee-like individuals to the United States. The following provides a brief history of these initiatives:

### A. Displaced Persons Act of 1948[4]

In 1945, President Truman initially ordered the priority use of regular immigration quota numbers for the admission of some of the millions of persons left stranded by World War II. The Displaced Persons Act (DPA) was later enacted in response to the more than one million natives of Eastern Europe who, following World War II,[5] refused to return home to countries controlled by Communist regimes. Approximately 400,000 individuals entered the United States under the DPA and its amendments, with their admissions charged against the national immigration ceilings for their countries of origin.

---

[2] 8 U.S.C. § 1231(b); *see also* Article 33 of the 1967 Protocol.

[3] *See* T.A. Aleinikoff, D. Martin, and H. Motomura, Immigration and Citizenship: Process and Policy, p. 998 (4th Ed. West Publishing 1995). For an in-depth history on post-World War II refugee practices and legislation, *see generally* Gil Loescher and John A. Scanlan, Calculated Kindness: Refugees and America's Half-Open Door 1945-Present (Free Press: Macmillan, Inc. 1986).

[4] Pub. L. No. 80-774; 62 Stat. 1009 (1948), *amended by* Pub. L. No. 81-555, 64 Stat. 219 (1950).

[5] Directive by the President, December 22, 1945- (*reprinted in* Dept. of State Bulletin # 13)(discussed in G. Loescher & J. Scanlon).

## B. Immigration and Nationality Act of 1952 (McCarran-Walter Act)[6]

The Immigration and Nationality Act of 1952 (INA), often called the McCarran-Walter Act, was a major overhaul of the nation's immigration laws. The Act consolidated previous immigration laws into one statute, but preserved the restrictive and controversial national origins quota system. The Act also established a system of preferences for skilled workers and relatives of U.S. citizens and permanent resident aliens. Security and other screening criteria for foreign nationals seeking to enter the United States were also imposed by the Act. Given the political climate of the time, however, the INA of 1952 did not generally provide new avenues for the admission of refugees. The INA is still the basic law governing immigration, but it has been amended numerous times as discussed below.

## C. Refugee Relief Act of 1953[7]

Shortly after the expiration of the DPA, the Congress passed the Refugee Relief Act, primarily to admit persons escaping from Iron Curtain countries, although certain others were admitted as well. The legislation and its subsequent amendments allowed for approximately 217,000 refugees to be admitted outside the normal per country ceilings imposed on immigration under the INA of 1952. The Act was in effect from August 7, 1953 through December 31, 1956.

## D. Hungarian and Cuban Parole Programs

The practice of using the Attorney General's parole authority to bring refugees to the United States began on a large scale with the Soviet invasion of Hungary in 1956 and the subsequent flight of more than 200,000 Hungarians to Austria.[8] Initially, President Eisenhower announced that the United States would offer asylum to 21,500 Hungarians, with 6,500 to get visas under the Refugee Relief Act of 1953 and the remainder to be paroled. By 1958, 32,000 Hungarians had been paroled into the United States. Parole is a mechanism under immigration law for permitting non-U.S. citizens physically to enter this country for designated periods of time and usually under limited conditions, but without formal admission.[9] When Fidel Castro came to power in Cuba, parole was also used to permit entry of numerous Cuban refugees throughout the early 1960s.[10] The use of the parole authority to resettle refugees was problematic. A parolee is technically not admitted and remains constructively "at the border" unless his or her status is lawfully

---

[6] Pub. L. No. 82-313; 66 Stat. 163 (1952).
[7] Pub. L. No. 83-203; 67 Stat. 400 (1953).
[8] *See generally* T.A. Aleinikoff, et al., at p. 999; G. Loescher & J. Scanlon at pp. 50-60.
[9] The current parole authority is codified in § 212(d)(5) of the INA, 8 U.S.C. § 1182(d)(5), but it has undergone several iterations over the decades.
[10] *See generally* T.A. Aleinikoff, et al., at p. 999; G. Loescher & J. Scanlon, Calculated Kindness: Refugees and America's Half-Open Door, 1945-Present (1986).

adjusted to permanent resident or changed to some other legal category. Such limitations affected the individuals' ability to resettle firmly and ultimately, if they chose, to become citizens. Moreover, Congress was becoming increasingly concerned that the parole authority was being misused to bring in large numbers of people without specific legislative approval.[11]

## D. Refugee Escapee Act of 1957[12]

Enacted on September 11, 1957, the Refugee Escapee Act authorized the issuance of 18,656 visas that had not been used by the Refugee Relief Act of 1953. Eligibility for these visas was limited to persons who were victims of racial, religious or political persecution who came from Communist or Communist-dominated or occupied countries or from the Middle East. These ideological and geographic requirements were later reflected in the language of §203(a)(7) of the INA, which governed refugee admissions from 1965 until 1980.

## E. Refugee Fair Share Law of 1960[13]

With the passage of the Refugee Fair Share Law, the Congress formally sanctioned the use of parole as a means of bringing refugee populations to the United States. Intended to provide for the resettlement of the United States' "fair share" of refugees still remaining in refugee camps in Europe, the legislation gave the Attorney General the authority to use parole to admit 25 percent of the total number of refugees taken by other countries, and provided for their adjustment after two years of residence.

## F. 1965 Amendments to the INA[14]

The historic and far-reaching 1965 amendments to the INA included the first permanent statutory basis for the admission of refugees. New §203(a)(7) provided for the conditional entry of overseas refugees under the seventh of the new immigrant preference categories, which then controlled numerically limited immigration to the United States. The amendments permitted up to six percent of the annual immigration numbers to be allocated for refugees although they did not enter on visas, as did individuals in the other preference categories. To qualify for conditional entry under the 7th preference, persons had to have fled a Communist, Communist-dominated or Middle Eastern country and have been unable to return because of persecution on account of race, religion, political opinion or they had to have been the victim of a natural disaster. Those admitted under the 7th preference were eligible to apply for adjustment of status after two years of residence. This legislative initiative was intended by Congress to eliminate the need for

[11] Id.
[12] Pub. L. No. 85-316; 71 Stat. 643 (1957).
[13] Pub. L. No. 86-648; 74 Stat. 504 (1960).
[14] Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, §3, 79 Stat. 911, 913.

the exercise of the Attorney General's parole authority in relation to large refugee populations.

## G. Post-1965 Developments

The refugee admissions numbers provided by the numerically limited 7th preference were always inadequate to meet refugee resettlement needs. Further, the geographic and ideological requirements imposed on 7th preference admissions limited its usefulness. As a result, despite growing congressional concerns, the Attorney General continued to use the parole authority to meet U.S. refugee resettlement needs. From the 1960s to the early 1970s, the United States used parole to resettle Cubans, Chinese refugees from Hong Kong and Macao, Czechs, Soviet Jews and Ugandans. In the mid to late 1970s, parole was authorized for Chileans, Cuban and other Latin American detainees and Indochinese.

## H. Funding of the U.S. Refugee Admissions Programs

Before 1960, the United States generally donated funds to activities of international organizations that aided refugees and also to specific overseas refugee assistance programs. Direct U.S. Government assistance to refugees began in December 1960 when President Eisenhower authorized a $1 million drawdown from the President's contingency fund under the Mutual Security Act of 1954. The funds were used to establish a Cuban refugee emergency center in Miami, Florida.

In 1961, newly elected President John F. Kennedy established the Cuban Refugee Program under the Department of Health, Education and Welfare and authorized an additional $4 million from the Mutual Security contingency fund. In 1962, further financial assistance was again provided by the President's contingency fund under the Foreign Assistance Act.

In 1962 legislation advocated by the White House centralized the funding process for U.S. refugee admissions programs. The Migration and Refugee Assistance Act of 1962 reauthorized funding for continued U.S. participation in the Intergovernmental Committee for European Migration, continued U.S. contributions to the U.N. High Commissioner for Refugees and U.S. assistance to refugees. It also provided an open-ended authorization for assistance to Cuban refugees.

But while the language of the Migration and Refugee Assistance Act appeared comprehensive, it was, in fact, limited to refugee populations in the Western Hemisphere. As a result, the arrival of thousands of Vietnamese following the 1975 fall of South Vietnam required special assistance authorization in the form of the Indochina Migration and Refugee Assistance Act of 1975. The 1975 Act, subsequently amended to include Laotians, authorized assistance to or on behalf of Indochinese under the same terms as those provided by the Migration and Refugee Assistance Act of 1962. It expired on September 30, 1979.

Direct U.S. financial assistance was also provided to Soviet Jews under the Foreign Assistance Appropriations Act for FY 1979. The legislation earmarked $20 million for use by the Department of Health, Education and Welfare to establish an assistance program for Soviets and other refugees not covered by the Cuban and Indochinese programs.

## III. AUTHORITY FOR THE USRAP – THE REFUGEE ACT OF 1980[15]

In 1978, there remained a sense in the Congress that its 1965 overhaul of U.S. immigration law was incomplete, at least as it related to the admission and treatment of refugees. The flow of thousands of Indochinese parolees into the United States continued to highlight the inadequacy of the 7th preference and the resulting need for ad hoc arrangements to address refugee flows. Of particular concern was the continuing reliance on parole, which precluded formal congressional oversight of the refugee admissions process. Discussions between the Congress and the Executive Branch in 1978-79 ultimately resulted in a commitment to establish a long-range refugee policy and to correct what appeared to be a lack of coordination between the various branches of Government involved in the USRAP. This commitment was ultimately realized as the Refugee Act of 1980.

Incorporating into U.S. law a coherent and comprehensive framework for the admission of refugees, the Refugee Act of 1980 had five primary objectives: to repeal the discriminatory treatment of refugees under the geographic and ideological requirements of §203(a)(7) of the INA; to increase the numbers of refugees admitted to the United States beyond the admissions provided by the 7th preference; to provide an orderly but flexible procedure for dealing with emergency refugee situations; to require consultation with the Congress prior to refugee admissions; and to provide for federal support of the refugee resettlement process.

To eliminate the narrow focus of U.S. refugee admissions policy, the Refugee Act of 1980 introduced into U.S. law the international definition of refugee contained in the 1951 United Nations Convention Relating to the Status of Refugees. It removed the geographic and ideological requirements of §203(a)(7) of the INA that had previously required that refugees flee Communist or Middle Eastern countries. After 1980, U.S. law – INA §101(a)(42) (definition of "refugee") – required that refugees, regardless of nationality or ideology, demonstrate persecution or a well-founded fear of persecution in their countries of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group or political opinion.[16]

---

[15] Pub. L. No. 96-212; 94 Stat. 102 (1980).

[16] As discussed in later lesson plans, the refugee definition in INA § 101(a)(42) contains a number of other criteria. For example, the person must also be unable or unwilling to return to his or her country of nationality on account of persecution or well-founded fear of persecution, or if the person has no nationality, unable or unwilling to avail himself or herself of the protection of the country of last habitual residence because of persecution or a well-founded fear of persecution. The term "refugee" also does not include persons who have persecuted others. *Id.* Congress also specifically amended the refugee definition to include persons 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

In a departure from international refugee law, however, the Congress also allowed for the processing of certain refugees in their countries of persecution. INA §101(a)(42)(B) added to the international definition of refugee as follows: "in such circumstances as the President after appropriate consultation...may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which the person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social or political opinion." Introduced into U.S. law to provide for the exceptional processing of political prisoners in certain countries in Latin America, the in-country processing of refugees was, for a significant period of time in the early to mid-1990s, responsible for 75-80 percent of all U.S. refugee admissions.

Although it introduced a new definition of refugee, the Refugee Act did not mandate the structure or operations of a new refugee admissions program. It charged the Attorney General with the responsibility to make refugee determinations and the discretionary authority to admit refugees to the United States under INA §207(c)(1), but it was remarkably silent as to what the USRAP should look like on an annual basis. Setting the refugee admissions ceiling at 50,000 for the first three years of operations, the law directed that subsequent refugee admissions numbers be set by the President at levels "justified by humanitarian concerns" or "in the national interest" following consultation with the Congress, and allocated among refugees of "special humanitarian concern" to the United States. *See* INA §§207(a)(2-3); 8 U.S.C. §§1157(a)(2-3) (1980 and 2006, showing amendments). How the USRAP operated, how many refugees were to be admitted and from where were questions that were to be answered jointly by the President and the Congress.

The Congress did, however, provide considerably greater detail on the requirements for the consultative process that was intended to give greater Congressional control over U.S. refugee admissions policy. *See* INA §§207(d-e)(1980 and 2006, showing amendments). Consultations between the President and the Congress are required to take place annually if the USRAP is to continue into the next year. Absent consultation between the President and the Congress, no resettlement of refugees could occur. The Congress stipulated that such consultation would occur during hearings before the House and Senate Judiciary Committees and that the President's representative at the consultations must be a Cabinet official and appear in person.

The 1980 Act also recognized the possibility that there might be refugee emergencies unforeseen at the time of the annual consultation process. In such cases, it again instructed the President to consult with the Congress to the extent that "time and the nature of the emergency refugee situation permit," but the hearing requirement was waived if "public disclosure of the details of the proposal would jeopardize the lives or safety of individuals" *See* INA § 207(d)(3)(B)(1980).

As part of the consultations process, whether annual or emergency, the Cabinet member designated by the President to consult with the Congress was to provide the Congressional committees with a review of the refugee situation worldwide, project the involvement of the

---

resistance to a coercive population control program. *Id.* There are other requirements for determining refugee status that will be covered.

United States in this situation, discuss the reasons that the proposed admission of refugees was justified by humanitarian concerns or was in the national interest, and provide the committees with the following information:

- A description of the nature of the refugee situation;
- A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came;
- A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement;
- An analysis of the anticipated social, economic and demographic impact of their admission to the United States;
- A description of the extent to which other countries will admit and assist in the resettlement of such refugees;
- An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States; and
- Such additional information as may be appropriate or requested by members of Congress.

These concepts and requirements from the 1980 Refugee Act remain fundamental in the current INA §207, although the law has undergone certain amendments over more than 25 years since its enactment.

## IV. THE U.S. REFUGEE ADMISSIONS PROGRAM – THE CONSULTATION PROCESS

Initiated by the Department of State, the consultation process begins with discussions among several federal agencies, state governments, and private sector organizations interested/involved in the U.S. resettlement of refugees. These discussions take place as early in the fiscal year as possible, culminating in a refugee admissions proposal that, once approved by the President, is transmitted to the Judiciary Committees of the U.S. Senate and House of Representatives, specifically the House Subcommittee on Immigration and Claims and the Senate Subcommittee on Immigration. Included in this report are: a proposed worldwide refugee admissions number; the allocation of the numbers among refugees from Africa, East Asia, Europe and the former Soviet Union, Latin America and Caribbean, and South Asia; an analysis of the conditions within the countries producing the refugees; an analysis of the impact of refugee admissions on the United States; and the estimated cost of the U.S. refugee resettlement program.

Following the transmittal of the consultations document to the Congress, the Department of State (DOS), the lead agency in the consultations, works with each congressional subcommittee to

schedule hearings/meetings on the refugee program for the coming year. Under the requirements of INA §207, the consultation process requires a Cabinet-level official to appear in person at such hearings/meetings. Historically, the President's representative has almost always been the Secretary of State, although on several occasions the Attorney General has assumed this role prior to the creation and transfer of these responsibilities to the Department of Homeland Security. In recent years, consultations have been conducted in closed-door meetings between subcommittee members and the Secretary of State, rather than formal public hearings.

After discussions with the Secretary of State, both subcommittees must agree in writing to the proposal as submitted by the President (or as modified following discussion with the Secretary) if the consultation process is to continue. It is rare that the congressional subcommittees ask for changes to the admissions proposal submitted for their consideration, even if subcommittee members declare themselves to be dissatisfied with the proposal as submitted by the President.

Once the Department of State has obtained the concurrence of the Congress on the admissions proposal, that agency notifies the White House and prepares a Presidential Determination (PD) for signature by the President. For the USRAP to continue without interruption, the President must sign the PD before the end of the fiscal year. In years when the consultations process has been concluded in the final days of the fiscal year and the PD has not been signed by midnight on September 30, the legacy INS and USCIS have had to notify all ports of entry to defer the admission of any arriving approved refugee applicants until such time as a PD is in place.

Like most U.S. Government programs, the USRAP is resource dependent. The number of refugees who may be admitted to the United States is ultimately controlled by the amount of money appropriated for U.S. resettlement under the Department of State's budget. These resettlement monies are appropriated through the routine, two-year federal budget cycle, i.e., two years ahead of the fiscal year in which the admissions will occur. As a result, the parameters of the USRAP, as far as refugee admissions are concerned, are largely determined by the time the annual consultation process between the President and the Congress begins. While there is some ability to increase the number of refugee admissions as a result of the consultation process, it is extremely limited. Significant increases in refugee admissions require a supplemental appropriation to cover the related resettlement costs.

## V. MANAGING THE USRAP – ROLES AND RESPONSIBILITIES

For those who view the USRAP from the outside, it can appear to be a seamless and uncomplicated process. In reality, there are multiple players, with distinct roles and responsibilities, with complex interaction required among international, national, state and local organizations, government and nongovernment. The following provides an overview of the roles and responsibilities in the USRAP.

### A. United States Citizenship and Immigration Services (USCIS)

USCIS has a clearly defined statutory role in the USRAP. As noted earlier, INA §207 (as amended) provides the Secretary of DHS with the authority to make refugee determinations and to admit refugees to the United States. These authorities have been delegated to USCIS and the U.S. Customs and Border Protection (CBP), both components of the U.S. Department of Homeland Security (DHS). Although limited in scope, the USCIS decision-making role forms the core of the USRAP, around which other players and activities revolve.

To meet its responsibilities under the refugee program, USCIS relies on Refugee Officers (ROs), Overseas Adjudication Officers (OAOs), and domestic Asylum Officers (AOs) assigned to refugee processing activities on a temporary basis, to conduct non-adversarial interviews with refugee applicants. These USCIS officers are required by statute not only to make a refugee determination under §101(a)(42) of the INA but also to assess whether an individual who has been determined to be a refugee is eligible for U.S. resettlement, i.e., is not firmly resettled in another country, is of special humanitarian concern to the United States, and is otherwise admissible. *See* INA §207(c); 8 C.F.R. Part 207. Once an interview has been completed and the USCIS officer reaches a determination concerning eligibility under §§101(a)(42) and 207(c), USCIS' role in the processing of an individual refugee applicant is complete.

On a policy level, USCIS also has a significant voice in the annual consultation process that determines the shape and size of the USRAP each year. The Refugee, Asylum and International Operations Directorate, the USCIS organization that oversees USCIS' refugee processing responsibilities, works closely with the Bureau of Population, Refugees and Migration (PRM) at the Department of State in establishing annual program parameters, and, as necessary, in making mid-year changes/corrections to refugee processing priorities and programs.

## B. United States Department of State (USDOS)

Although it does not have an explicit statutory responsibility in the USRAP, the Department of State plays, by far, the broadest role. Starting with its leadership of the annual consultations process to its funding and oversight of refugee resettlement activities, the State Department is involved in all aspects of the USRAP, including serving as USCIS' processing partner through its contracts with the international organizations that provide pre- and post-interview support. Within the Department of State, the Bureau of Population, Refugees and Migration serves as the overall manager of the U.S. refugee admissions and resettlement programs.

The State Department also has responsibility for managing the flow of refugees into the United States, ensuring that refugee admissions stay within the worldwide and regional numbers established by the Presidential Determination. As part of this process, PRM develops and monitors refugee processing and movement schedules, and maintains statistics on refugee applicants, and those approved, admitted and awaiting interviews.

Outside the USRAP, the Department of State provides assistance to overseas refugee populations under the Migration and Refugee Assistance Act of 1962, as amended. These funds are channeled through the offices of international organizations, foreign governments and private voluntary organizations. Contributions are also made to the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC), the UN Relief and Works Agency, the UN Border Relief Operation and the International Organization for Migration (IOM).

## C. United Nations High Commissioner for Refugees (UNHCR)

As the focus of the U.S. refugee resettlement program has shifted from family reunification to identifying those at risk, the UNHCR has become an increasingly important partner in the USRAP. Included in the discussions with the Executive Branch that occur prior to consulting the Congress on refugee admissions, the UNHCR provides valuable assistance in the identification of at-risk populations in need of U.S. resettlement. On a day-to-day basis, the UNHCR, through its branch offices around the world refers refugee applicants directly to the USRAP under Priority 1 of the worldwide processing priorities. *See* RDOTC Lesson Plan – Access to the Refugee Program and Processing Priorities.

Supported by the donations of member countries, the UNHCR has served and continues to serve as the coordinator for internationalized refugee resettlement efforts, e.g., the Comprehensive Plan of Action for Indochinese. In such situations, UNHCR, negotiating with each country of first asylum and potential resettlement country, including the United States, develops and oversees the subsequent multi-national resettlement effort.

## D. Resettlement Support Centers (RSC)

Formerly known as Joint Voluntary Agencies (JVA) and Overseas Processing Entities (OPE), these entities play an essential role in the overseas processing of refugees. Under contract to the Department of State, the RSCs help refugee applicants complete their refugee applications and paperwork prior to their USCIS interviews. They also assist USCIS-approved refugee applicants to complete post-interview requirements for travel to the United States (e.g., medicals, sponsorship assurances, travel reservations). RSCs have assisted the USRAP throughout the world wherever USCIS has processed refugees.

Once refugees enter the United States, other agencies are instrumental in their initial resettlement. To provide refugees with resettlement assistance, the Department of State (PRM) has entered into Cooperative Agreements with nine agencies. Under these Cooperative Agreements, the local affiliates of the nine agencies are responsible for providing refugees with resettlement services during their first 30-90 days in the United States (those without relatives in the United States or "free cases" receive approximately 6-8 months of services). For each refugee they assist, the agency is paid a fixed stipend. This stipend, along with cash and in-kind contributions from private and other sources, is

used to provide refugees with the following services: sponsorship; pre-arrival resettlement planning; reception on arrival in the U.S.; basic needs (shelter, food, transport, etc.) support; community orientation; health assistance, employment counseling and other counseling and referral services as necessary.

The Department of State has Cooperative Agreements with the following organizations: Church World Service, Episcopal Migration Ministries; Ethiopian Community Development Council; Hebrew Immigration Aid Society; World Relief; U.S. Catholic Conference of Bishops; Lutheran Immigration & Refugee Service; U.S. Committee for Refugees and Immigrants; and the International Rescue Committee.

## E. International Organization for Migration (IOM)

Under contract to the Department of State, the IOM serves as the 'travel agent' for the USRAP, although it also performs as an RSC at certain refugee processing locations. When refugee applicants are approved, IOM arranges for their travel to the United States aboard charters or regularly scheduled airline flights. Unless their transportation has been paid for privately, IOM provides approved refugee applicants with travel loans, which they are expected to repay following their arrival in the United States. All IOM activities in support of the USRAP, including the travel loans provided to refugees, are funded by the Department of State.

## F. Department of Health and Human Services (HHS)

Through its Office of Refugee Resettlement (ORR), the HHS provides medical and cash assistance to refugees during their first eight months in the United States. The level of assistance provided varies from state to state. Like U.S. citizens, refugees are also eligible for the full range of social service programs administered by HHS if they meet those programs' income requirements.

# LESSON PLAN OVERVIEW

Refugee Division Officer Training Course

## Lautenberg Specter Adjudications

**Terminal Performance Objective:** Given a request to adjudicate refugee status for an individual whose nationality is covered by the Lautenberg Specter Amendment, the Refugee Officers (RO) will be able to appropriately interview and adjudicate these cases according to policies and procedures governing the adjudication of refugee claims under the Lautenberg Specter Amendment.

**Enabling Performance Objectives:**

1. Describe the statutory basis for Lautenberg Specter refugee adjudications.

2. Explain how to conduct an interview with an applicant whose refugee application is to be adjudicated under the Lautenberg Specter Amendment.

3. Demonstrate how refugee eligibility may be established under the three prongs of the Lautenberg Specter Amendment.

4. Describe the policy basis for procedures pertaining to granting parole to denied Lautenberg Specter applicants in the Moscow refugee program.

### I. Background

The Lautenberg Amendment[1], an amendment to the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990 sponsored by Senator Frank Lautenberg of New Jersey, established a reduced evidentiary burden for applications for refugee classification made by certain designated categories of aliens. The provision designated certain specific categories of aliens from the Soviet Union, Vietnam, Laos and Cambodia. It also gave the Attorney General the authority to designate other categories of aliens from those countries whose applications would be adjudicated under this reduced evidentiary burden. Since the creation of the Department of Homeland Security, that authority to designate additional categories now rests with the Secretary of Homeland Security.

Section 599D(a) of the Act states that a member of one of these categories "may establish, for the purposes of admission as a refugee under section 207 of the Immigration and Nationality Act, that the alien has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political

[1] The Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. No.1 0 1-167 (see attachment to Exhibit C).

opinion by asserting such a fear and asserting a credible basis for concern about the possibility of such persecution." The amendment was passed with a sunset provision but has been regularly extended on an annual basis.

Legislation[2] sponsored by Senator Arlen Specter of Pennsylvania expanded the reach of the Lautenberg Amendment to members of religious minorities from Iran. It requires that the Secretary of the Department of Homeland Security, in consultation with the Secretary of State, establish "one or more categories of aliens who are or were nationals and residents of the Islamic Republic of Iran who, as members of a religious minority in Iran, share common characteristics that identify them as targets of persecution in that state on account of race, religion, nationality, membership in a particular social group, or political opinion." On August 2, 2004, Secretary Ridge signed an order establishing five Iranian religious minorities whose applications are adjudicated under the procedures of the Lautenberg Specter Amendment (see Exhibit C). These new categories are:

1. Iranian Christians
2. Jews
3. Baha'is
4. Mandeans, and
5. Zoroastrians.

Congress did not extend this amendment; as a result, refugee processing of cases under this standard will be phased out. Officers will continue to adjudicate cases under Lautenberg Specter, however, until all cases filed before the deadline are completed.

## II. The Lautenberg Specter[3] Adjudication and the Immigration and Nationality Act (INA)

Refugee applicants who qualify for adjudication under the Lautenberg Specter Amendment are subject to the same general criteria required for all other refugee applicants. They must establish that they are:

1. of special humanitarian concern to the United States;
2. refugees pursuant to INA Section 101(a)(42);
3. not firmly resettled; and
4. otherwise admissible to the United States.

Lautenberg Specter and non-Lautenberg Specter refugee applications are differentiated by the applicant's evidentiary burden and how the cases are adjudicated. The Lautenberg Specter applicant's evidentiary burden for establishing that he or she is a refugee pursuant to INA Section 101(a)(42) *is less* than the evidentiary burden for the non-Lautenberg

---

[2] Section 213 of the Consolidated Appropriations Act, 2004, Pub. L. No.108-199.

[3] Since 2004, the Lautenberg Amendment has sometimes been referred to as the Specter Amendment. Others still use its original name, the Lautenberg Amendment. Occasionally one finds the term Specter Lautenberg Amendment in use. For clarity and accuracy in terms of the amendment's evolution, this lesson plan refers to the amendment in its present form as the Lautenberg Specter Amendment.

Specter applicant. Firm resettlement and admissibility issues are subject to the same standards in Lautenberg Specter cases as in other refugee cases.

## A. General Provisions

Once an applicant has established eligibility for access to the USRAP, the individual must establish that he or she is a refugee. In non-Lautenberg Specter cases, applicants must demonstrate that they meet all of the elements contained in the definition of refugee, INA Section 101(a)(42).[4] A Lautenberg Specter applicant must also demonstrate that he or she is a refugee, but the Lautenberg Specter Amendment provides an evidentiary shortcut for these applicants to meet their burden of establishing a well-founded fear of persecution.

## B. The Three Prongs of Lautenberg Specter

In order to establish a well-founded fear of persecution under the reduced evidentiary burden of the Lautenberg Specter Amendment, the applicant must do the following:

1. **Establish category membership.**

   The applicant must establish that he or she is a member of one of the designated categories of persons identified in the Lautenberg Specter Amendment. (The various categories and how an applicant establishes membership in a category are discussed later in this Lesson).

2. **Assert a fear of persecution.**

   The Lautenberg Specter applicant must assert that he or she has a fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The applicant need only assert a subjective fear of persecution and is not required to establish an objective fear of persecution to satisfy this step of the adjudication. Questions about whether the fear is well-founded are addressed through the third prong discussed below.

   Guidance issued soon after this legislation was first enacted in 1989 remains relevant to this determination:

[4] INA §101(a)(42)(A) contains the main elements of the refugee definition, as follows: "(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion…."

> Once category membership has been established, the applicant's reason(s) for seeking refugee status in the United States should be explored. During this part of the interview, the applicant will normally assert a fear of persecution based on one of the five protected grounds mentioned in section 101(a)(42).... [A]djudicating officers have been trained and should make special efforts to pursue a line of questioning likely to elicit this assertion. If the applicant still does not assert such a fear during the interview, or cannot establish its link to one of the five protected grounds for refugee status, the application for refugee status should be denied, notwithstanding the applicant's membership in a designated category.

Page 4 of *Policy and Procedural Guidance on Implementation of the "Lautenberg Amendment" (P.L. 101-167),* which was an attachment to a Memorandum from INS Commissioner McNary to All Overseas District Directors and Officers-in-Charge; *Adjudication of Refugee Claims of Category Applicants Under "The Lautenberg Amendment*; January 24, 1990. (See Exhibits A and B)

For example, an applicant who testifies that he or she is afraid, or has a fear, of suffering "persecution," "serious harm," or continuing acts of harassment and discrimination on account of a protected characteristic (which will normally be the same characteristic(s) that qualify the applicant for Lautenberg Specter category membership) has satisfied this prong.

**3. Assert a "credible basis for concern."**

In order to establish that the fear of persecution is well-founded, the Lautenberg Specter applicant must assert "a credible basis for concern about the possibility of such persecution." The applicant can do so by asserting:

a) Acts of mistreatment or prejudicial acts against the applicant personally on account of a protected characteristic, such as the characteristic(s) that establish the applicant's membership in the category;

b) Acts of persecution committed against similarly-situated individuals in the applicant's geographic locale; or,

c) Acts of mistreatment or prejudicial acts based on the applicant's request to leave his or her home country.

Examples of mistreatment or prejudicial acts include:

i) inability to study or practice religion or cultural heritage;
ii) denial of access to educational, vocational or technical institutions;
iii) adverse treatment in the workplace;
iv) loss of home, job or educational opportunities.

NOTE: The above examples are not intended to be comprehensive. Numerous other examples of mistreatment exist. In most instances, applicants will assert acts of mistreatment against themselves, as described above. Two or more instances of mistreatment or prejudicial acts against the applicant on account of a protected characteristic, which will normally be the same characteristic(s) that make the applicant a Lautenberg Specter category member, are sufficient to establish a credible basis for concern. Once a Lautenberg Specter applicant has credibly asserted such facts, he or she has provided sufficient evidence to show a "credible basis for concern about the possibility of such persecution," and thus established a well-founded fear of persecution on account of a protected characteristic.

### C. Worldwide Standard

Applicants who qualify for access to the USRAP and receive an interview but do not qualify under the Lautenberg Specter Amendment should then be examined under the worldwide refugee definition and evidentiary standard as well. An applicant from the Former Soviet Union, Iran, Vietnam, Cambodia or Laos may qualify for resettlement under the worldwide guidelines if he or she can credibly establish that he/she has suffered past persecution or possesses a well-founded fear of future persecution on account of the applicant's race, religion, nationality, membership in a particular social group, or political opinion, and is otherwise admissible. Analysis of the worldwide standard is not required, however, if applicants do not qualify for access to the USRAP under a designated processing priority.

## III. Guidance for Processing Lautenberg Specter Applicants

### A. General Guidance

In adjudications under Lautenberg Specter, most of the interview time will generally be spent on determining whether the applicant is a category member, whether the applicant has experienced two or more instances of mistreatment or prejudicial acts, and, if so, whether those instances were on account of a protected characteristic, with the applicant's claimed characteristic normally being the same characteristic(s) that define Lautenberg Specter category membership.

## B. Guidance for Interviewing and Considering Applicants Claiming Membership in Religion-Based Categories

Many of the challenges an RO faces in making a determination regarding an applicant's claim to be a member of one of the religion-based categories are unique to such claims. Credibility determinations, which are always challenging, can be particularly complex in religion-based claims because ROs must often judge the sincerity of an applicant's claimed religious beliefs, without judging the validity of the belief system itself. *See, e.g., Najafi v. INS*, 104 F.3d 943, 949 (7th Cir. 1997) (stating that "[d]etermination of a religious faith by a tribunal is fraught with complexity as true belief is not readily justiciable"). Additionally, ROs may have certain assumptions or biases about religious issues, which must be put aside in order to render unbiased and legally supportable credibility determinations. *See* IRFA Lesson Plan at 12-15; *see also Huang v. Gonzales*, 403 F.3d 945, 949 (7th Cir. 2005) (rejecting IJ's adverse credibility finding that was based in part on the Immigration Judge's (IJ) personal beliefs and assumptions about Catholicism).

In assessing an applicant's credibility, the RO must take into account individual circumstances. An applicant's knowledge of religious doctrine, practice, or history may depend on social, economic or educational factors, as well as the applicant's age or sex. Further, suppression of a religious group may affect religious practices and knowledge. *See Huang*, 403 F.3d at 949 (rejecting IJ's adverse credibility finding because, among other things, the IJ failed to consider that members of an illegal underground Chinese Catholic church might not be able to adhere to formal practices). Additionally, religious beliefs and practices often vary by sect, region, country and culture, and this cross-cultural context further undermines the value of "quizzing" an applicant on his or her knowledge of specific religious tenets.

Testing of the applicant's knowledge of the tenets of his or her religion may have limited value, and doctrinal testing has been strongly discouraged by the courts. For example, in *Yan v. Gonzales*, 438 F.3d 1249 (10th Cir. 2006), the court rejected the IJ's conclusion that the applicant's "rudimentary knowledge" of Christianity undermined his credibility. The court held that the IJ erred in rejecting the applicant's "highly personal and emotional testimony about his conversion to faith in Jesus Christ and his participation in Christian activities in China." *Id.* at 1253, 1255. ROs should explore the applicant's personal experiences with the religion, using a narrative form of questioning, and should reject over-reliance on "mini-catechisms" or other doctrinal tests. *See id.* at 1255; *see also* UNHCR Religion Guidelines at paras. 28-35 (discussing limited value of doctrinal testing, and suggesting a narrative form of questioning).

Additionally, ROs must use caution when assessing whether an applicant's actions appear to be inconsistent with the applicant's claimed religious beliefs. For instance, in *Huang*, the court reversed the IJ's adverse credibility finding, which was based in part on the IJ's determination that the applicant's sporadic

church attendance in the United States was inconsistent with her professed religious beliefs. *See id.*, 403 F.3d at 950.

## IV. Guidance for Processing Lautenberg Specter Applicants From the Former Soviet Union

### A. Membership in Specific Categories

**Jews:** Such applicants are required to produce documentary evidence (e.g., their own birth certificates or internal passport or the internal passports of their Jewish parents if they are listed as other than Jewish on their Soviet internal passport and if that Jewish parent is not traveling with them) to substantiate their asserted category membership.

**Evangelicals:** ROs should consider claims to membership in this category in a manner consistent with the above – **Guidance on Interviewing and Considering Applicants Claiming Membership in Religion-Based Categories**. Applicants establish category membership primarily through their credible testimony at the time of the USCIS interview. Documentary evidence of category membership may be presented but may not be substituted for credible oral testimony.

**Ukrainian Catholics and Ukrainian Autocephalous Orthodox:** When considering whether an applicant is a current member of either of these churches, which is required to establish membership in this category, the RO should gather and consider the evidence in a manner consistent with the above – **Guidance on Interviewing and Considering Applicants Claiming Membership in Religion-Based Categories.** The applicant must also establish to the satisfaction of the RO that his/her participation (or attempted participation) in these religions has been *"public"* (i.e., known or knowable to Soviet authorities and/or known to fellow parishioners), *"active"* (i.e., attendance which is not casual and which includes regular participation at organized religious meetings and holiday observances) and *"continuous"* (i.e., participation which began at least prior to calendar year 1989, and which has continued without unavoidable interruption since then); "attempted participation" means participation which was actually prevented (e.g., physically or through threats of severe consequences by Soviet authorities, or colleagues in the workplace).

### B. Public Interest Parole in the Moscow Refugee Program

1. **Policy Background.** A memo from the United States Attorney General (AG) dated August 4, 1988 established the in-country processing program in Moscow. It also set a general standard of generosity for refugee adjudicators and offered public interest parole to denied refugee applicants from the Former Soviet Union (FSU) for a limited yet unspecified period

of time, and for a limited yet unspecified number of persons: "All immigration officials involved will be as generous as possible in the application of the refugee definition.... Any (FSU applicant) not granted refugee status will be considered for entry to the United States under my parole authority. ... Following the transition period (for establishing INS at the Embassy in Moscow), I will continue to exercise my parole authority for those individuals not qualifying as refugees...."

The exercise of the AG's parole authority in the Moscow Refugee Program was initially intended to be for specific persons, during a period of time of extraordinary conditions in the Soviet Union. Conditions in the Soviet Union in the late 1980s were so extraordinary, the United States government chose to offer parole to individuals who were category members but did not possess a credible basis for concern, *and* to those persons who failed to establish their membership in one of the Lautenberg categories. The adverse conditions found in the Soviet Union in the 1980s continued into the 1990s following the collapse of the Soviet Union.

2. **Procedures for Offering Parole.** Parole is to be offered to denied Lautenberg Specter refugee applicants claiming membership in one of the FSU Lautenberg Specter categories on a case-by-case basis only. In general, factors to be considered in offering public interest parole include humanitarian grounds, family unity or public interest concerns. Barring negative circumstances such as applicant misrepresentation or fraud, denied FSU Lautenberg Specter cases should be offered public interest parole on the principle of family reunification.

3. **Withholding Offers of Parole.** There may be cases when a denied refugee applicant should not be made an offer of parole. Applicants who were determined already to be resettled in third countries and cases that have been referred to the program for reasons other than family unity or category membership ("SP" cases) and do not meet the definition of a refugee generally, should not be offered parole. Officers serving in Moscow must confer with their supervisor before denying refugee classification to any case.

## V. Guidance for Processing Lautenberg Specter Applicants from Vietnam, Laos or Cambodia

### A. Membership in Specific Categories

For refugee applicants from Vietnam, Laos or Cambodia, the following categories, incorporated from the 1983 World Wide Processing Guidelines, have been established by statute:

a) Former officials of the government in the South existing prior to the takeover in 1975, including national and local officials.

b) Former members of the military of the government in the South existing prior to the takeover in 1975.

c) Catholics.

d) Buddhist monks.

e) Persons formerly or presently employed by United States or Western institutions, or persons educated in the West.

f) Persons required after the takeover in 1975 to undergo re-education in re-education camps or labor camps, or who were imprisoned or sent involuntarily to New Economic Zones because they were considered politically or socially undesirable.

g) Ethnic Chinese.

h) Montagnards.

i) Chams.

j) Accompanying members of households of persons falling into any of the preceding categories.

An applicant who claims membership in one of the categories must establish to the satisfaction of the interviewing officer that he is a category member. Documents will be accepted to establish membership in the category, but they will not be required. If an applicant cannot present documents, the interviewing officer must assess the credibility of testimony and other evidence produced to show category membership according to normal standards for assessing credibility.

### B. Establishing a "Credible Basis for Concern" -- Mistreatment or Prejudicial Actions

As discussed above, under Lautenberg Specter, a credible basis for concern may be established by credibly asserting two or more acts of mistreatment or prejudicial actions. The following forms of repression may be considered instances of mistreatment or prejudicial actions:[5]

[5] This list is not meant to be exhaustive. Other forms of mistreatment may be sufficient to establish a credible basis for concern.

a. incommunicado detention or solitary confinement;

b. imprisonment or reeducation;

c. house arrest;

d. forced labor;

e. denial of family registration certificate;

f. denial of public employment;

g. denial of business license;

h. denial of the right to higher education;

i. adverse treatment in school or in the workplace of a significantly prejudicial nature;

j. confiscation of family residence without compensation;

k. denial of access to publicly available medical care;

l. denial of permission to travel outside the local district;

m. denial of the right to attend religious services;

n. denial of food ration card;

o. intense police surveillance or harassment;

p. extortion.

**C. Category Defining Experiences**

Some of the categories are defined by experiences that themselves might constitute persecution or discrimination, such as detention in a reeducation camp. The particular experiences used to establish category membership, however, may not also be used to establish a credible basis for concern about the possibility of persecution. Instead, the applicant must rely on other experiences to establish a credible basis for concern.

For example, if an applicant's category membership is based solely on his three years of reeducation detention, then he cannot rely on that detention to establish a

credible basis for concern.[6] Instead, he must rely on other instances of mistreatment or discrimination. Those other instances of mistreatment or discrimination, however, could have occurred during the detention. If, for example, the applicant had been beaten or otherwise mistreated two times during his reeducation detention, those instances of mistreatment could establish a credible basis for concern. But if there is another basis for category membership, (he's Catholic, for instance) then his reeducation detention could be used as an instance of persecution or mistreatment to establish a credible basis for concern.

### D. World Wide Standard

Like all Lautenberg Specter applicants, those from Vietnam, Cambodia or Laos who qualify for and receive an interview but do not qualify under the Lautenberg Specter Amendment should be examined under the worldwide refugee definition and evidentiary standard as well. Analysis of the worldwide standard is not required, however, if applicants do not qualify for access to the USRAP under a designated processing priority.

## VI. Guidance for Processing Lautenberg Specter Applicants from Iran

### A. Membership in Specific Categories

The categories of Iranian nationals designated for Lautenberg Specter processing are all Iranian minority religious groups—Iranian Christians, Jews, Baha'is, Mandeans, and Zoroastrians. In making category membership determinations, ROs should consider claims to membership in this category in a manner consistent with the above – **Guidance on Interviewing and Considering Applicants Claiming Membership in Religion-Based Categories**.

### B. Cases Denied Prior to Passage of the Consolidated Appropriations Act of 2004

The Committee Report Language that accompanied this legislation states: "Therefore, the administration should implement the provisions of section 213 of the conference report with respect to new applications, *as well as review previously denied applications for refugee applicants who have remained out-side of Iran without a viable solution after being denied refugee status.*"[7] (Italics added.) In light of this language, USCIS, on its own motion, should reopen any previously denied Iranian refugee case to determine whether it qualifies for

---

[6] If his reeducation detention constitutes persecution on account of one of the five grounds, however, he could be approved under the worldwide standard.

[7] Section 213 of the Consolidated Appropriations Act, 2004, (Pub. L. No. 108-199).

adjudication under the Lautenberg Specter Amendment. If it is determined that the applicant falls within one of the five categories listed above and was *not* previously adjudicated under the Lautenberg Specter Amendment, the case should be re-adjudicated under the amendment. ROs may grant refugee status upon conducting a file review if the case file contains sufficient credible evidence to satisfy the Lautenberg Specter standards and all other requirements of the refugee adjudication are met. Cases that cannot be granted through a file review should be re-interviewed to determine if the applicant qualifies for refugee status under the Lautenberg Amendment.

## VII. Record of Reason for Denial

Under the Lautenberg Specter Amendment, each decision to deny an application for refugee status of an alien who is within a Lautenberg category must be in writing and must state the reason for the denial. Justification of the denial should be clearly articulated on the Refugee Application Assessment, and the current standard denial letter contains sufficient options for explaining the reason for the denial.

## VIII. Security Concerns

The security clearance procedures that are normally required for refugee applicants apply to Lautenberg Specter refugee applicants as well, and must be completed prior to approving the successful applicant for travel to the United States. Because the government of Iran has sponsored terrorist groups, officers must be sensitive to any information obtained from the applicant that could pertain to a security threat. In the event that the applicant divulges information that the officer believes is related to a security threat, or the officer has any suspicions or concerns of a security nature, he or she must discuss the issue with his or her immediate supervisor or team leader as soon as possible.

# LESSON PLAN OVERVIEW

Refugee Division Officer Training Course 1, November 2012

## Refugee Corps Mission, Values, and Goals

**Terminal Performance Objective:** In working to fulfill the mission of the Refugee Affairs Division, the Refugee Officer will recognize the guiding values of the Refugee Corps and understand how the concrete goals set by management are used to measure his or her success in fulfilling the mission.

**Enabling Training Performance Objectives:**

1. Explain the mission and values of the Refugee Affairs Division (RAD).

2. Examine the goals that the Refugee Affairs Division must achieve in order to honor its values.

3. Describe the measurable targets that the Refugee Affairs Division has set to achieve its strategic goals.

### I. INTRODUCTION

The objective of this lesson is to explain the mission, values, and goals of the Refugee Corps. By reviewing these important concepts, this lesson also seeks to explain the purposes behind the demands placed on each Refugee Officer and the Refugee Corps. Understanding the conceptual framework within which the USCIS Refugee Affairs Division (RAD) operates will enable Refugee Officers to better accomplish our mission.

RAD is part of USCIS's Refugee, Asylum, and International Operations Directorate (RAIO) and shares its overarching vision:

> *With a highly dedicated and flexible workforce deployed worldwide, RAIO will excel in advancing U.S. national security and humanitarian interests by providing immigration benefits and services with integrity and vigilance and by leading effective responses to humanitarian and protection needs throughout the world.*

### II. MISSION

The mission of an organization justifies the organization's existence; if there is no mission, there is no need for the organization. RAD shares RAIO's overarching mission:

*RAIO leverages its domestic and overseas presence to provide protection, humanitarian, and other immigration benefits and services throughout the world, while combating fraud and protecting national security.*

As part of the Directorate, RAD's specific mission is to offer protection to refugees in accordance with the laws of the United States and international obligations, including the *1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, while combating fraud and protecting national security.

## III. VALUES

Organizational values represent what is fundamentally important to the organization and guide the organization in its pursuit of the mission. The mission can only be accomplished through strict adherence to these values.

In the context of the U.S. Refugee Admissions Program (USRAP), partnership and integrity are the overarching values. As public servants, we have an obligation to the public to manage our programs and our resources effectively and efficiently in pursuit of our mission to offer protection to qualified refugees, while combating fraud and protecting national security. In order for RAD to succeed in offering this protection, its policies, processes and procedures must embrace partnerships and embody integrity.

### A. Partnership

The USRAP is fundamentally premised on collaborative partnerships between governmental and non-governmental (NGO) stakeholders and international organizations, both domestically and internationally. In order to be successful, the Refugee Corps must embrace this partnership model and recognize that all the partners share our overarching mission of protecting refugees, whatever role they play in the process.

In order to be effective partners, the Refugee Corps has several tools at its disposal, including knowledge, respect, communication, and hard work. Refugee Officers are expected to be knowledgeable about the roles and responsibilities of partner agencies and organizations and to respect the work that they do, which makes our work possible. RAD strives to communicate openly and professionally with partner organizations through appropriate channels and chains of command, to seek input that facilitates our overall mission, and to respond appropriately when engaged on topics of mutual concern. Finally, the Refugee Corps is committed to performing its duties with diligence and integrity to meet its obligations as a partner and enable others to perform at their highest level.

Refugee Corps members are also expected to be good partners to one another, recognizing that the success of the program overall is premised on the accomplishments of each individual. While professionalism and collegiality are the expected norm at all times, the imperative of teamwork is heightened when working in an international setting where Refugee Corps members may face unusual challenges and unexpected circumstances.

### B. Integrity

The second key organizational value is integrity. Integrity is a multi-faceted value: it encompasses both the process by which decisions are reached and the outcome of decision-making. Moreover, it encompasses the personal characteristics of honesty and professionalism by decision-makers.

Integrity relates to the fundamental soundness of the refugee adjudication process. Procedural integrity has been built into the USRAP in myriad ways, through training, case preparation, background checks, supervisory review, and other mechanisms. Integrity goes beyond these procedural aspects to include the consistency and fairness of the adjudication itself, and it is incompatible with bias or prejudice. Decisions have integrity when they are based on all relevant facts and applicable law; when the facts and the law have been analyzed rigorously but objectively; and when all necessary procedural steps have been followed and documented. The integrity of decision-making requires vigilance against fraud and abuse of the system, but without treating any individual applicant as suspect until supporting facts have been established.

Refugee Corps officers shoulder a weighty responsibility in making refugee adjudications, and they should strive for both the substance and appearance of integrity as they conduct themselves in public and private.

## IV. GOALS

Goals embody organizational values in concrete and measurable ways. Setting tangible goals helps an organization adhere to those values. Conversely, if an organization does not set goals, its values will not be reflected in its actions, losing their importance and meaning. To adhere to our dual values of partnership and integrity, RAD has three goals: to provide access to the USRAP for refugees of special humanitarian concern; to complete high-quality adjudications on a timely basis; and to realize the President's annual admissions determination.

## A. The Goal of Providing Access to U.S. Resettlement

The Refugee Corps was established to enhance the capacity of the USRAP to quickly and efficiently respond to resettlement needs of persons of special humanitarian concern to the United States. USCIS officers – primarily but not exclusively members of the Refugee Corps – are the worldwide vanguard of the resettlement program, conducting interviews with refugee candidates to determine their eligibility for resettlement in the United States. It is a goal of RAD that no refugee who has been identified as a candidate for potential resettlement in the United States be deprived of access to the program due to the inability of USCIS officers to respond. To meet this goal, Refugee Corps officers are deployed on a continuous basis overseas to adjudicate refugee status applications for persons who qualify for access to the USRAP as designated by the President each year, in consultation with Congress.

## B. The Goal of High-Quality Adjudications on a Timely Basis

The second key goal of RAD is to complete high-quality adjudications in a timely manner. RAD's value of integrity in decision-making contains two inseparable components – quality and timeliness. Both components must be present for a process to have integrity and for results to be considered fair. A correct but belated decision and a timely but inaccurate decision are both unfair results.

1. Quality Adjudications

   One of RAD's goals is to produce high-quality adjudications. Adjudications are high quality if they meet the standards set by RAD in the qualitative areas of the adjudication process, such as interviewing, analysis, and documentation. This goal also encompasses RAD's efforts to deter, reduce, and detect fraud and to safeguard national security while offering protection to those who are truly eligible for the benefit of refugee resettlement to the United States.

   RAD demands a particularly high level of quality in our work because of the serious consequences of error in our profession. Indeed, the Refugee Corps was founded on the principle that every applicant should receive a legally sufficient, thorough, and unbiased determination. Thus, each refugee claim must be fully and accurately heard, researched, and adjudicated. Ensuring quality adjudications involves careful consideration of eligibility for admission to the United States as a refugee, including all potential grounds of inadmissibility, as well as ensuring that all appropriate background and security checks have been completed.

   RAD is making substantial investments in the development of training and information resources and is implementing a number of policies to ensure

that high-quality adjudications can be produced on a consistent basis. RAD also continues to build on and learn from past experiences and to incorporate "best practices" from those experiences into its training initiatives.

a. Investments

i. Specialized Training

- *Refugee, Asylum, and International Operations Combined Training Course (RAIO CT).* RAIO provides newly hired Asylum, Refugee, and International Operations Officers with four weeks of specialized instruction. Instructors teach and test trainees using a comprehensive curriculum with a focus on shared core immigration law, analysis, and interviewing techniques pertinent to all RAIO adjudications.

- *Refugee Division Officer Training Course (RDOTC).* RAD provides newly hired Refugee Officers with three weeks of specialized instruction for refugee adjudications. Instructors teach and test trainees using a comprehensive, carefully designed curriculum with a focus on refugee law, interviewing techniques, analysis, and procedures.

  Specialized training for Refugee Officers is crucial to our efforts to achieve quality. The importance of training to RAD is reflected in its unique administration of the RDOTC. RAD directly oversees and administers all aspects of the RDOTC and devotes a number of headquarters staff to training matters.

- *BASIC.* RAD rotates new Refugee Officers through USCIS's entry-level class for new officers, known as BASIC. This five week residential course in Dallas is part of the USCIS Academy, USCIS's overall training and workforce development program. The BASIC curriculum covers public service, immigration law, customer service, fraud, and national security.

- *Supervisory Refugee Officer Training.* RAD provides training and is developing a new training course for all Supervisory Refugee Officers (SROs). The primary focus in this course is an in-depth study of immigration

and refugee law, coupled with an examination into the ways that SROs can improve the interviewing techniques and adjudications of the officers they supervise.

- *In-Service Training.* At least once annually, RAD provides all staff with a half-day training on new procedures, legal developments, and recently-issued policy guidance

- *Pre-Departure Training.* Immediately prior to a refugee processing circuit ride, RAD provides a half-day to two-day training for both RAD and staff on temporary duty assignment (TDY) covering case profile trends, issue recognition, potential fraud issues, recent policy changes, and country conditions information particularly relevant for the upcoming circuit ride.

RAD relies heavily upon borrowed staff from other USCIS offices to meet its annual admissions targets. The two trainings below are provided to USCIS employees detailed to RAD to adjudicate refugee cases on a TDY basis.

- *Refugee Processing Training Course (RPTC)* RAD provides this two week course to TDY officers who have not received either the Asylum Officer Training Course (AOBTC) or RDOTC. This course seeks to meet the International Religious Freedom Act (IRFA) training requirements for officers conducting refugee adjudications and provides a compressed training presentation schedule of the most essential legal and procedural topics relevant to refugee processing and adjudication.

- *USRAP Overview for TDY Officers (commonly referred to as Refugees 101).* A one day or one and one half-day training provided to TDY officers that have already received AOTC or RDOTC. The training is an overview of the USRAP and the legal and procedural distinctions of refugee processing.

ii. Field Mentoring of RDOTC Graduates

Experienced HQ RAD staff accompany new Refugee Officers on their first refugee circuit ride to provide models for interviewing, case processing and decision-making. The mentors observe new officers as they progressively reach full productivity levels and provide feedback on interview techniques and decision-making to ensure that officers are equipped to meet both quantitative and qualitative expectations.

iii. Quality Assurance of Decisions.

*Headquarters Quality Assurance.* RAD's Training and Program Integrity Unit is developing a quality assurance program that will review cases to measure the current quality of refugee adjudications, identify opportunities for improvement in individual and overall performance, make recommendations to strengthen employee and program performance, and develop training programs to further promote timely, correct and consistent refugee adjudications. This level of quality assurance is aimed at ensuring consistency, especially in novel and/or complex areas of the law.

b. Policies

i. *Supervisory Review.* RAD has instituted a policy of 100 percent supervisory review of all cases. Supervisors sign off on every case to ensure that each decision is supported by the law and that proper procedures have been followed.

ii. *Performance Work Plan (PWP).* Quality elements are included in every employee's Performance Work Plan(PWPs) including refugee officers, supervisory refugee officers, Headquarters staff and Headquarters managers. Under the Refugee Officer PWP, supervisors rate Refugee Officers on critical qualitative elements of the job, including interviewing skills, decision documentation, and accurate completion of assigned work.

iii. *Hiring Practices.* RAD is committed to hiring individuals from diverse backgrounds and perspectives who are capable of performing at a very high level of competence and who are proficient in interpersonal communication, legal analysis, and technical writing. To

attract high-quality staff, RAD engages in targeted recruitment at colleges and universities and announces job vacancies both publically and internally to ensure a wide-range of candidates are reached.

*iv. Standard Operating Procedures (SOPs).* To ensure procedural compliance and consistency, RAD has issued several key standard operating procedures. RAD also regularly issues policy updates that enhance decisional quality and accuracy. By the end of FY2009, RAD will incorporate these SOPs, special policy topics, and guidelines into a comprehensive procedures manual that will guide all aspects of the refugee adjudication, ensuring standard processing of cases in all overseas offices and circuit ride locations. RAD is also working to have all of these documents available to all RAD staff in an electronic library.

2. Timely Adjudications

RAD values timely completion of cases from each Refugee Officer. An unnecessary delay in processing is distressing and unfair to the applicant and may impede timely family reunification, may risk refoulement of the applicant to the country that he or she fled, and makes the USRAP vulnerable to fraud and abuse.

A timely adjudication is one that is completed within a time frame that is considered fair based on the facts and circumstances of each case. RAD recognizes that, in order to utilize resources in an effective manner, timeliness goals should be variable due to the differing characteristics of the applicant population; however, the program also recognizes that the variance is limited by realistic expectations. Therefore, RAD has established a range of performance to describe the number of cases that a Refugee Officer is expected to complete in an average work day, depending on the characteristics of the caseload, and this range is from 4 to 8 cases per day.

RAD has implemented a number of policies to ensure that adjudications can be completed in a timely manner.

a. *Timeliness Targets.* RAD has integrated the timeliness goal into the Refugee Officer PWP. Under the PWP, supervisors rate Refugee Officers on their ability to complete assigned work in a timely manner. For most refugee case adjudications, the Refugee Officer will be expected to complete 4 to 8 cases in a given

workday, so long as a sufficient number of cases are available for interview on that workday.

b. *Reasonable Allowances.* It is RAD policy to make reasonable allowances for its timeliness goals so that our quality is not sacrificed when additional time is required to make a sound determination. The Supervisory Refugee Officer is authorized to place cases on hold if he or she determines that the case warrants additional time. Timeliness performance standards do not apply to those cases placed on hold by the supervisor, or where the supervisor finds that excused leave or other duties interfere with timely case completion.

### C. The Goal of Realizing the President's Annual Admissions Determination

Each year, the President determines the number of refugees who may be admitted to the United States, in consultation with Congress. While this annual figure serves as a legal ceiling on refugee admissions, most stakeholders in the refugee admissions community view it as a target. It is a key goal of RAD to work with our partners to achieve the annual number of refugee admissions determined by the President.

While not all of the factors relevant to achieving this admissions goal are within USCIS's control or authority, we are committed to exercising the full range of effort that is within our scope of responsibility. This means fielding teams of well-trained Refugee Corps officers on a timely basis to conduct interviews of cases that have been determined by the U.S. Department of State to be ready for adjudication.

## V. CONCLUSION

The day-to-day work of each Refugee Officer is critical to our mission to offer protection to refugees, while combating fraud and protecting national security. Refugee Officers operate in an environment premised on partnerships with governmental and nongovernmental stakeholders and must embrace a high standard of personal and professional integrity in order to succeed. A Refugee Officer's decision can significantly alter the course of a refugee applicant's life and must therefore be both accurate and timely. Making these decisions every day is not an easy task. However, given our past success, our high-caliber workforce, and our extensive training, we believe that it is a reasonable task. Our investment in training, policies, procedures, and productivity targets are in place to enable Refugee Officers to adhere to our values, achieve our goals, and successfully carry out the overall mission of the Refugee Affairs Division.

**LESSON PLAN OVERVIEW**

Refugee Division Officer Training Course

**Security Checks: CLASS, SAO, IAC and Fingerprints**

**Terminal Performance Objective:** Given the field situation of interviewing an applicant for refugee status, the Refugee Officer (RO) will be able to identify and analyze the results of security checks required by the United States Refugee Admissions Program (USRAP). In particular, the RO will be able to take appropriate adjudicative and administrative actions in response to Consular Lookout Automated Support System, Security Advisory Opinion, Inter-Agency Check and Fingerprint security check findings when adjudicating a Request for Classification as a Refugee.

**Enabling Performance Objectives:**

1. Distinguish the four refugee applicant security checks: Consular Lookout Automated Support System (CLASS), Security Advisory Opinion (SAO), Interagency Check (IAC), and Biometric (fingerprints).

2. Explain how CLASS, SAO, IAC, and Biometric security checks fit into the larger context of refugee adjudications.

3. Analyze CLASS, SAO, IAC, and fingerprint security check results to determine whether a refugee applicant has cleared all of the required security checks.

4. Assess what administrative and adjudicative actions to take in response to CLASS, SAO, IAC, and fingerprint security check results.

## I. INTRODUCTION

The following lesson plan discusses four of the security checks required as part of the refugee adjudication process. The lesson plan describes each of the security, including the data against which refugee applicants are vetted. It also explains the timing of the security checks in the refugee adjudication process. Finally, it provides information on interpreting security checks results, and the processing steps required in response to those results.

RAD has been engaged in a continuous effort to enhance the integrity of refugee adjudications. In 2005, RAD launched its Training and Program Integrity Section with designated headquarters staff devoted to ensuring the integrity of refugee processing. In 2010, the program integrity portfolio was elevated and became a new branch known as Security Vetting and Program Integrity (SVPI). SVPI efforts include the regular training of ROs, liaison within the Department of Homeland Security (DHS) and across various agencies involved in security vetting, fraud detection/ deterrence efforts and national security concerns.

## II. THE FOUR SECURITY CHECKS

There are four security checks that are standard for all refugee applicants: CLASS, SAO, IAC and Biometrics. Each of these security checks is described in this section.

### A. Consular Lookout and Support System (CLASS)

In November 2001, the Homeland Security Council mandated a number of initiatives to enhance security in the USRAP. One of these initiatives requires the Department of State (DOS), specifically the Refugee Processing Center (RPC), to conduct background checks against the CLASS database on all refugee applicants, regardless of age. CLASS contains records provided by numerous agencies and includes information on persons with visa refusals, immigration violations, criminal histories, and terrorism concerns, as well as intelligence information and child support enforcement data. In addition to containing information from DOS sources, sources for information in CLASS includes DHS (TECS/NCIC), Interpol, DEA, HHS and FBI.

CLASS name checks are initiated for each identity[1] for all refugee applicants. For each identity, an individual's name, nationality, date of birth, and place of birth is checked against CLASS. The exact name is checked as well as variations based on algorithms for transliteration and other linguistic characteristics.

[1] Identities are defined as unique name and document (e.g., national ID, passport) combinations.

### B. Security Advisory Opinion (SAO)

(b)(7)(e)

### C. Interagency Checks (IAC)

IACs are conducted on refugee applicants.

### D. Biometrics (Fingerprints/Photos)

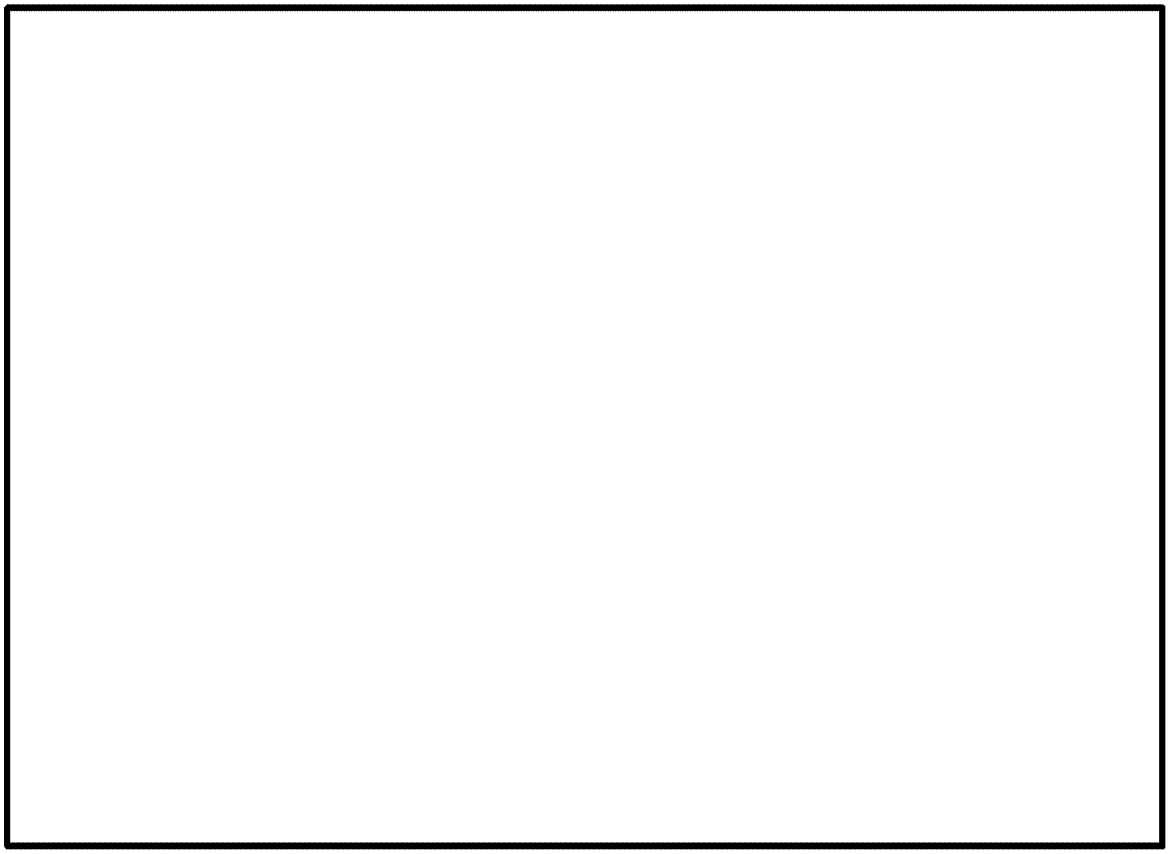
All refugee applicants age 14[2]-79 are fingerprinted prior to admission to the United States. The fingerprints are vetted against:

(b)(7)(e)

## III. TIMING OF THE SECURITY CHECKS

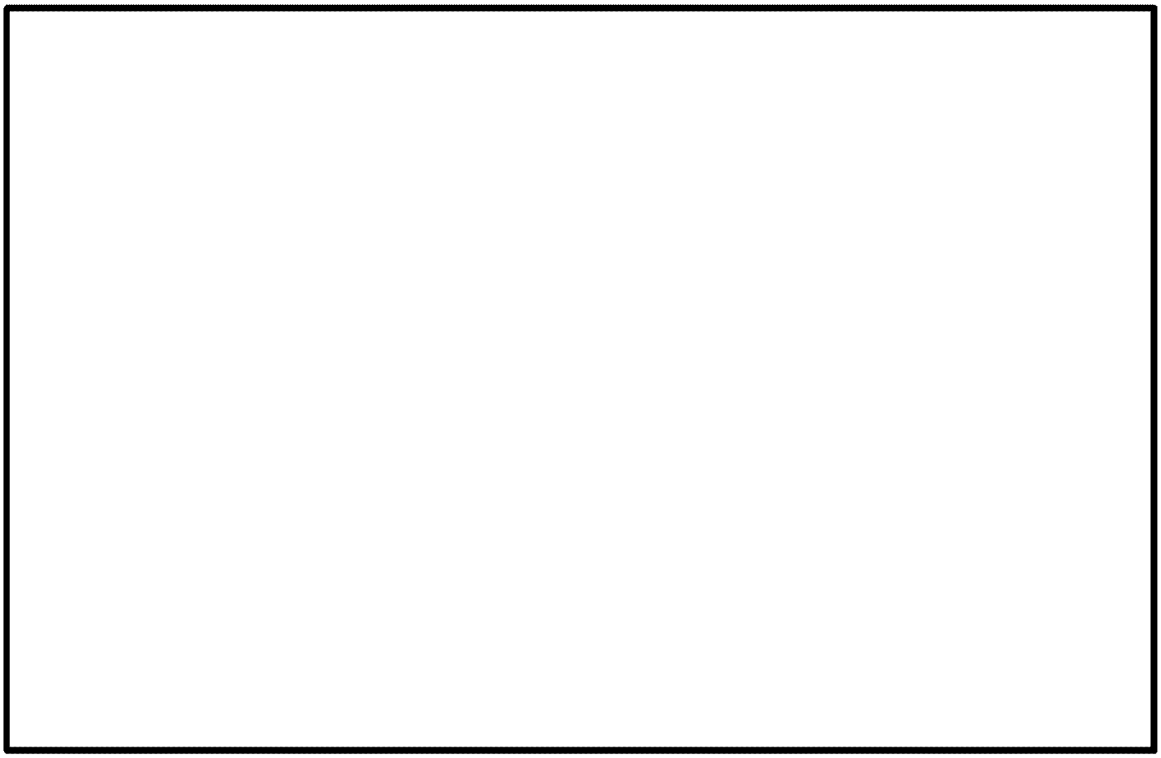
(b)(7)(e)

[2] In practice, USCIS fingerprints applicants aged 13 and older to avoid applicants "aging in" to the requirement due to the passage of time between fingerprint capture and travel.



(b)(7)(e)

## IV. CLASS HIT ADJUDICATION



[4] In some locations, USCIS has transitioned Biometrics capture to the time of prescreening. In FY2013, USCIS began developing a plan to transition Biometrics capture to the time of prescreening at all processing locations.

## V. SECURITY CHECK RESULTS

(b)(7)(e)

A matrix summarizing results codes for each security check is attached to this lesson plan.

[5] This requirement does not apply to well-known nick names, e.g., "Rick" for Richard or "Pat" for Patricia.

## ATTACHMENT – SECURITY CHECK RESULTS CODES

| | | Code | Definition |
|---|---|---|---|
| **CLASS** | *Final Results* | | |
| | | | |
| | *Pending Results* | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| **SAO** | *Final Results* | | |
| | | | |
| | | | |
| | | | |
| | *Pending Results* | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| **IAC** | *Final Results* | | |
| | | | |
| | | | |
| | *Pending Results* | | |
| | | | |
| | | | |
| | | | |
| | | | |
| **Fingerprints** | *Final Results* | | |
| | | | |
| | | | |
| | | | |
| | *Pending Results* | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

(b)(7)(e)