Lesson Plan Overview

Course	Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	Credible Fear of Persecution and Torture Determinations
Rev. Date	February 13, 2017; Effective as of Feb 27, 2017.
Lesson Description	The purpose of this lesson is to explain how to determine whether an alien subject to expedited removal or an arriving stowaway has a credible fear of persecution or torture using the credible fear standard.
Terminal Performance Objective	The Asylum Officer will be able to correctly make a credible fear determination consistent with the statutory provisions, regulations, policies, and procedures that govern whether the applicant has established a credible fear of persecution or a credible fear of torture.
Enabling Performance Objectives	1. Identify which persons are subject to expedited removal. (ACRR7)(OK4)(ACRR2)(ACRR11)(APT2) 2. Examine the function of credible fear screening. (ACRR7)(OK1)(OK2)(OK3) 3. Define the standard of proof required to establish a credible fear of persecution. (ACRR7) 4. Identify the elements of "torture" as defined in the Convention Against Torture and the regulations that are applicable to a credible fear of torture determination (ACRR7) 5. Describe the types of harm that constitute "torture" as defined in the Convention Against Torture and the regulations. (ACRR7) 6. Define the standard of proof required to establish a credible fear of torture. (ACRR7) 7. Identify the applicability of bars to asylum and withholding of removal in the credible fear context. (ACRR3)(ACRR7)
Instructional Methods	Lecture, practical exercises
Student Materials/ References	Lesson Plan; Procedures Manual, Credible Fear Process (Draft); INA § 208; INA § 235; 8 C.F.R. §§ 208.16-18; 8 C.F.R. § 208.30; 8 C.F.R. § 235.3. Credible Fear Forms: Form I-860: Notice and Order of Expedited Removal; Form I-867-A&B: Record of Sworn Statement; Form I-869: Record of Negative Credible Fear Finding and Request for Review by

	Immigration Judge; Form I-863: Notice of Referral to Immigration Judge; Form I-870: Record of Determination/Credible Fear Worksheet; Form M-444: Information about Credible Fear Interview
Method of Evaluation	Written test
Background Reading	1. Immigration and Naturalization Service, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312 (March 6, 1997). 2. Bo Cooper, Procedures for Expedited Removal and Asylum Screening under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 29 CONN. L. REV. 1501, 1503 (1997). 3. Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (February 19, 1999). 4. Immigration and Naturalization Service, Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (November 13, 2002). 5. Customs and Border Protection, Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877 (August 11, 2004). 6. U.S. Committee on International Religious Freedom, Study on Asylum Seekers in Expedited Removal – Report on Credible Fear Determinations, (February 2005). 7. Customs and Border Protection, Treatment of Cuban Asylum Seekers at Land Border Ports of Entry, Memorandum for Directors, Field Operations, (Washington, DC: 10 June 2005). 8. Joseph E. Langlois, Asylum Division, Office of International Affairs, Increase of Quality Assurance Review for Positive Credible Fear Determinations and Release of Updated Asylum Officer Basic Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations, Memorandum to Asylum Office Directors, et al. (Washington, DC: 17 April 2006). 9. Joseph E. Langlois, Asylum Division, Refugee, Asylum and International Operations Directorate, Revised Credible Fear Quality Assurance Review Categories and Procedures, Memorandum to Asylum Office Directors, et al. (Washington, DC: 23 December 2008).

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

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

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

Critical Tasks

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

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I. INTRODUCTION

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

II. BACKGROUND

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

INA § 235(a)(2); § 235 (b)(1).

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

INA § 235(a)(1).

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

Those aliens subject to expedited removal who indicate an intention to apply for asylum, a fear of persecution or torture, or a fear of return to their home country are referred to asylum officers to determine whether they have a credible fear of persecution or torture. An asylum officer will then conduct a credible fear interview to determine if there is a significant possibility that the alien can establish eligibility for asylum under section 208 of the INA. Pursuant to regulations implementing the Convention Against Torture (CAT) and the Foreign Affairs Reform

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

and Restructuring Act of 1998, if an alien does not establish a credible fear of persecution, the asylum officer will then determine whether there is a significant possibility the alien can establish eligibility for protection under the Convention Against Torture through withholding of removal or deferral of removal.

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

A. Aliens Subject to Expedited Removal

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

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

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

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

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

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

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

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

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

removal upon termination of their parole.

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

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

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

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

5. Aliens who have been apprehended within 100 air miles of any U.S. international land border, who have not been admitted or paroled, and who have not established to the satisfaction of an immigration officer (typically a Border Patrol Agent) that they have been physically present in the U.S. continuously for the 14-day period immediately prior to the date of encounter.

Customs and Border Protection, Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004); Department of Homeland Security, Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 Fed. Reg. 4902 (Jan. 17, 2017), as corrected in Department of Homeland Security, Eliminating

Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 Fed. Reg. 8431 (Jan. 25, 2017).

B. Aliens Seeking Admission Who are Exempt from Expedited Removal

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

The following categories of aliens are exempt from expedited removal:

1. Stowaways

   INA § 235(a)(2).

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

2. Persons granted asylum status under INA section 208

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

   8 C.F.R. § 235.3(b)(5)(iii).

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

   8 C.F.R. § 235.3(b)(5)(iii).

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

   8 C.F.R. § 235.3(b)(5)(ii).

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

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

8 C.F.R. § 235.3(b)(3).

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

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

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

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

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

8 C.F.R. § 208.30(e)(6).

C. Historical Background

1. In 1991, the Immigration and Naturalization Service (INS) developed the credible fear of persecution standard to screen for possible refugees among the large number of Haitian migrants who were interdicted at sea during the mass exodus following a *coup d'etat* in Haiti.

The credible fear standard as it is applied to interdicted migrants outside the United States is beyond the scope of this lesson plan.

2. Prior to implementation of the expedited removal provisions of IIRIRA, credible fear interviews were first conducted by INS trial attorneys and later by asylum officers, to assist the district director in making parole determinations for detained aliens.

3. In 1996, the INA was amended to allow for the expedited removal of certain inadmissible aliens, who would not be entitled to an immigration hearing or further review unless they were able to establish a credible fear of persecution.

At the outset, expedited removal was mandatory for "arriving aliens," and the Attorney General was given the discretion to designate applicability to certain other aliens who have not been admitted or paroled and who have not established to the satisfaction of an immigration officer continuous physical presence in the United States for the two-year period immediately prior to the date of the inadmissibility determination. Initially, expedited removal was only applied to "arriving aliens."

Immigration and Naturalization Service, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10313 (Mar. 6, 1997).

4. The credible fear screening process was expanded to include the credible fear of torture standard with the promulgation of regulations concerning the Convention against Torture, effective March 22, 1999.

Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999); 8 C.F.R. § 208.30(e)(3).

5. Designation of other groups of aliens for expedited removal

   a. In November 2002, the Department of Justice expanded the application of the expedited removal provisions of the INA to certain aliens who arrived in the United States by sea, who have not been admitted or paroled and who have not been physically present in the United States continuously for the two year-period prior to the inadmissibility determination.

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

   b. On August 11, 2004, DHS further expanded the application of expedited removal to aliens determined to be inadmissible under sections 212 (a)(6)(C) or (7) of the INA who are physically present in the U.S. without having been admitted or paroled, who are apprehended within 100 air miles of the U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the apprehension.

INA §212(a)(6)(C), (a)(7); Customs and Border Protection, Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004).

   c. On January 17, 2017, DHS published a notice to apply the November 13, 2002 expanded application of expedited removal, and the August 11, 2004 expanded application of expedited removal, to Cuban citizens and nationals, who had previously been exempt.

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

Security, Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 Fed. Reg. 8431 (Jan. 25, 2017).

6. The expedited removal provisions of the INA require that all aliens subject to expedited removal be detained through the credible fear determination until removal, unless found to have a credible fear of persecution, or a credible fear of torture. However, the governing regulation permits the parole of an individual in expedited removal, in the exercise of discretion, if such parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

INA § 235(b)(1)(B)(iii)(IV).

8 C.F.R. § 235.3(b)(2)(iii).

III. FUNCTION OF CREDIBLE FEAR SCREENING

In applying the credible fear standard, it is critical to understand the function of the credible fear screening process. As explained by the Department of Justice when issuing regulations adding Convention Against Torture screening to the credible fear process, the process attempts to "to quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch.... If an alien passes this threshold-screening standard, his or her claim for protection...will be further examined by an immigration judge in the context of removal proceedings under section 240 of the Act. The screening mechanism also allows for the expeditious review by an immigration judge of a negative screening determination and the quick removal of an alien with no credible claim to protection."

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

"Essentially, the asylum officer is applying a threshold screening standard to decide whether an asylum [or torture] claim holds enough promise that it should be heard through the regular, full process or whether, instead, the person's removal should be effected through the expedited process."

Bo Cooper, Procedures for Expedited Removal and Asylum Screening under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 29 CONN. L. REV. 1501, 1503 (1997).

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

A. Definition of Credible Fear of Persecution

According to statute, the term credible fear of persecution means

that "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208 [of the INA]."

INA § 235(b)(1)(B)(v).

B. Definition of Credible Fear of Torture

Regulations provide that the applicant will be found to have a credible fear of torture if the applicant establishes that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to 8 C.F.R. § 208.16 or § 208.17.

8 C.F.R. § 208.30(e)(3).

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

A. Burden of Proof / Testimony as Evidence

See RAIO Training Module, Evidence.

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

Because of the non-adversarial nature of credible fear interviews, while the burden is always on the applicant to establish eligibility, there is a shared aspect of that burden in which asylum officers have an affirmative duty to elicit all information relevant to the legal determination. The burden is on the applicant to establish a credible fear, but asylum officers must fully develop the record to support a legally sufficient determination.

An applicant's testimony is evidence to be considered and weighed along with all other evidence presented. Often times, in the credible fear context of expedited removal and detention, an applicant will not be able to provide additional evidence corroborating his or her otherwise credible testimony. An applicant may establish a credible fear with testimony alone if that testimony is detailed, consistent, and plausible.

INA § 208(b)(1)(B)(ii).

According to the INA, the applicant's testimony may be sufficient to sustain the applicant's burden of proof if it is "credible, is persuasive, and refers to specific facts." 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,

INA § 208(b)(1)(B)(ii).

persuasive, and … specific" test in order to establish his or her burden of proof without corroboration. Therefore, the terms "persuasive" and "specific facts" must have independent meaning above and beyond the first term "credible." An applicant may be credible, but nonetheless fail to satisfy his or her burden to establish the required elements of eligibility. "Specific facts" are distinct from statements of belief. When assessing the probative value of an applicant's testimony, the asylum officer must distinguish between fact and opinion testimony and determine how much weight to assign to each of the two forms of testimony.

After developing a sufficient record by eliciting all relevant testimony, an asylum officer must analyze whether the applicant's testimony is sufficiently credible, persuasive, and specific to be accorded sufficient evidentiary weight to meet the significant possibility standard.

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

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

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

8 C.F.R. §§ 208.16(c)(3)(iii), (iv).

B. Credible Fear Standard of Proof: Significant Possibility

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

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

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

When interim regulations were issued to implement the credible fear process, the Department of Justice described the credible fear

Immigration and Naturalization Service,

"significant possibility" standard as one that sets "a low threshold of proof of potential entitlement to asylum; many aliens who have passed the credible fear standard will not ultimately be granted asylum." Nonetheless, in the initial regulations, the Department declined suggestions to "adopt regulatory language emphasizing that the credible fear standard is a low one and that cases of certain types should necessarily meet that standard."

Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10317-20 (Mar. 6, 1997).

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

See U.S. Committee on International Religious Freedom, Study on Asylum Seekers in Expedited Removal – Report on Credible Fear Determinations, pg. 170 (Feb. 2005); UNHCR, A Thematic Compilation of Executive Committee Conclusions, pp. 438-40, 6th Ed., June 2011. "Not manifestly unfounded" claims are (1) "not clearly fraudulent" and (2) "not related to the criteria for the granting of refugee status." 142 CONG. REC. H11071, H11081 (daily ed. 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").

While a mere possibility of success is insufficient to meet the credible fear standard, the "significant possibility" standard does not require the applicant to demonstrate that the chances of success are more likely than not.

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

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

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

Id.

In sum, "the credible fear 'significant possibility' standard of proof can be best understood as requiring that the applicant 'demonstrate a substantial and realistic possibility of succeeding,' but not requiring the applicant to show that he or she is more likely than not going to succeed when before an immigration judge."

Joseph E. Langlois. Asylum Division, Office of International Affairs, Increase of Quality Assurance Review for Positive Credible Fear Determinations and Release of Updated Asylum Officer Basic Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations, Memorandum to Asylum Office Directors, et al. (Washington, DC: 17 April 2006).

C. Important Considerations in Interpreting and Applying the Standard

1. The "significant possibility" standard of proof required to establish a credible fear of persecution or torture must be applied in conjunction with the standard of proof required for the ultimate determination on eligibility for asylum, withholding of removal, or protection under the Convention Against Torture.

   For instance, in order to establish a credible fear of torture, an applicant must show a "significant possibility" that he or she could establish eligibility for protection under the Convention Against Torture, i.e. a "significant possibility" that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. This is a higher standard to meet than for an applicant attempting to establish a "significant possibility" that he or she could establish eligibility for asylum based upon a well-founded fear of persecution on account of a protected characteristic, i.e. a "significant possibility" that he or she could establish a "reasonable possibility" of suffering persecution on account of a protected characteristic if returned to his or her home country.

2. Questions as to how the standard is applied should be considered in light of the nature of the standard as a screening standard to identify persons who could qualify for asylum or protection under the Convention against Torture, including when there is reasonable doubt regarding the outcome of a credible fear determination.

3. In determining whether the alien has a credible fear of persecution or a credible fear of torture, the asylum officer shall consider whether the applicant's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.

8 C.F.R. § 208.30(e)(4).

4. Similarly, where there is:

   a. disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue; or,

   b. the claim otherwise raises an unresolved issue of law; and,

   c. there is no DHS or Asylum Division policy or guidance on the issue, then

   generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.

D. Identity

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

See RAIO Training Module, Refugee Definition.

VI. CREDIBILITY

A. Credibility Standard

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

INA § 235 (b)(1)(B)(v).

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

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

The U.S. Supreme Court has held that to properly consider the totality of the circumstances, "the whole picture… must be taken

See RAIO Training Module, Credibility; see also Matter

into account." The Board of Immigration Appeals (BIA) has interpreted this to include taking into account the whole of the applicant's testimony as well as the individual circumstances of each applicant.

of B-, 21 I&N Dec. 66, 70 (BIA 1995); Matter of Kasinga, 21 I&N Dec. 357, 364 (BIA 1996).

B. Evaluating Credibility in a Credible Fear Interview

1. General Considerations

See RAIO Training Module, Credibility.

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

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

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

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

See RAIO Training Module, Credibility.

a. Identifying Credibility Concerns

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

Section 208 of the Act provides a non-exhaustive list of

INA § 208(b)(1)(B)(iii); see

factors that may be used in a credibility determination in the asylum context. These include: internal consistency, external consistency, plausibility, demeanor, candor, and responsiveness.

also RAIO Training Module, Credibility, for a more detailed discussion of these factors.

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

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

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

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

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

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

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

claim:

(i) trauma the applicant has endured;
(ii) passage of a significant amount of time since the described events occurred;
(iii) certain cultural factors, and the challenges inherent in cross-cultural communication;
(iv) detention of the applicant;
(v) problems between the interpreter and the applicant, including problems resulting from differences in dialect or accent, ethnic or class differences, or other differences that may affect the objectivity of the interpreter or the applicant's comfort level; and
(vi) unfamiliarity with speakerphone technology, the use of an interpreter the applicant cannot see, or the use of an interpreter that the applicant does not know personally.

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

Asylum officers must ensure that persons with potential biases against applicants on the grounds of race, religion, nationality, membership in a particular social group, or political opinion are not used as interpreters. See International Religious Freedom Act of 1998, 22 U.S.C. § 6473(a); RAIO Training Module, IRFA (International Religious Freedom Act).

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

See RAIO Training Module, Credibility.

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

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

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

   The sworn statement completed by CBP (Form I-867A/B) is

See 8 C.F.R. § 235.3(b)(4) (stating that if an applicant indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the "examining immigration officer shall

not intended, however, to record detailed information about any fear of persecution or torture. The interview statement is intended to record whether or not the individual has a fear, not the nature or details surrounding that fear. However, in some cases, the asylum officer may find that the CBP officer did, in fact, gather additional information from the applicant regarding the nature of his or her claim. In such cases, the applicant's prior statements can inform the asylum officer's line of questioning in the credible fear interview, and any inconsistencies between these prior statements and the statements being made during the credible fear interview should be probed and assessed.

record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern," and should then refer the alien for a credible fear interview).

A number of federal courts have cautioned adjudicators to keep in mind the circumstances under which an alien's statement to a CBP official is taken when considering whether an applicant's later testimony is consistent with the earlier statement. For instance, the Seventh Circuit noted,"'airport interviews…are not always reliable indicators of credibility.'" In addition, the Fourth Circuit identified the different purposes of CBP's interview for the sworn statement and the asylum process: "the purpose of these [sworn statement] interviews is to collect general identification and background information about the alien. The interviews are not part of the formal asylum process."

Moab v. Gonzales, 500 F.3d 656, 660 (7th Cir. 2007) (internal citations omitted).

Qing Hua Lin v. Holder, 736 F.3d 343, 353 (4th Cir. 2013).

Some factors to keep in mind include: 1) whether the questions posed at the port of entry or place of apprehension were designed to elicit the details of an asylum claim, and whether the immigration officer asked relevant follow-up questions; 2) whether the alien was reluctant or afraid to reveal information during the first meeting with U.S. officials because of past abuse; and 3) whether the interview was conducted in a language other than the applicant's native language.

See, e.g., Balasubramanrim v. INS, 143 F.3d 157 (3d Cir. 1998); Lin Lin Tang v. U.S. *Att'y Gen.*, 578 F.3d 1270, 1279-80 (11th Cir. 2009); c.f. Ye Jian Xing v. Lynch, 845 F.3d 38, 44-45 (1st Cir. 2017) (while not requiring specifically enumerated factors for examining the reliability of the sworn statement, noting that an interpreter was used and Ye understood the questions asked); Joseph v. Holder, 600 F.3d 1235, 1243 (9th Cir. 2010) (in examining statements in a prior bond hearing, noting, "[w]e have rejected adverse credibility findings that relied on differences between statements a petitioner made during removal proceedings and those made during less

formal, routinely unrecorded proceedings.");.

The Second Circuit has advised: "If, after reviewing the record of the [CBP] interview in light of these factors and any other relevant considerations suggested by the circumstances of the interview, the…[agency] concludes that the record of the interview and the alien's statements are reliable, then the agency may, in appropriate circumstances, use those statements as a basis for finding the alien's testimony incredible. Conversely, if it appears that either the record of the interview or the alien's statements may not be reliable, then the…[agency] should not rely solely on the interview in making an adverse credibility determination."

Ramsameachire v. Ashcroft, 357 F.3d 169, 179-81 (2d Cir. 2004) (holding that the BIA was entitled to rely on fundamental inconsistencies between the applicant's airport interview statements and his hearing testimony where the applicant was provided with an interpreter, given ample opportunity to explain his fear of persecution in a careful and non-coercive interview, and signed and initialed the typed record of statement).

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

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

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

D. Documenting a Credibility Determination

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

2. The officer must specify in the written case analysis the basis for the negative credibility finding. In the negative credibility context, the officer must note any portions of the testimony

found not credible, including the specific inconsistencies, lack of detail or other factors, along with the applicant's explanation and the reason the explanation is deemed not to be reasonable.

3. If information that impugns the applicant's testimony becomes available after the interview but prior to serving the credible fear determination, a follow-up interview must be scheduled to confront the applicant with the derogatory information and to provide the applicant with an opportunity to address the adverse information. Unresolved credibility issues should not form the basis of a negative credibility determination.

VII. ESTABLISHING A CREDIBLE FEAR OF PERSECUTION

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

A. General Considerations in Credible Fear

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

1. An applicant will be found to have a credible fear of persecution if there is a significant possibility the applicant can establish eligibility for asylum under section 208 of the Act.

2. In general, a finding that there is a significant possibility that the applicant experienced past persecution on account of a protected characteristic is sufficient to satisfy the credible fear standard. This is because the applicant in such a case has shown a significant possibility of establishing that he or she is a refugee under section 208 of the Act and a full asylum hearing provides the appropriate venue to evaluate whether or not the applicant merits a favorable exercise of discretion to grant asylum.

   However, if there is evidence so substantial that there is no significant possibility of future persecution or other serious harm or that there are no reasons to grant asylum based on the severity of the past persecution, a negative credible fear determination may be appropriate.

3. When an applicant does not claim to have suffered any past harm or where the evidence is insufficient to establish a

significant possibility of past persecution under section 208 of the Act, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution on account of a protected characteristic under section 208 of the Act.

B. Past Persecution

See RAIO Training Module, Persecution.

1. Severity of Harm: For a credible fear of persecution, there must be a significant possibility the applicant can establish that the harm the applicant experienced was sufficiently serious to amount to persecution.

   a. There is no requirement that an individual suffer serious injuries to be found to have suffered persecution. 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.

   b. Serious threats made against an applicant may constitute persecution even if the applicant was never physically harmed.

   c. Violations of "core" or "fundamental" human rights, prohibited by international law, may constitute harm amounting to persecution.

   d. While less preferential treatment and other forms of discrimination and harassment generally are not considered persecution, discrimination or harassment may amount to persecution if the adverse practices accumulate or increase in severity to the extent that it leads to consequences of a substantially prejudicial nature. Asylum officers should evaluate the entire scope of harm experienced by the applicant to determine if he or she was persecuted, taking into account the individual circumstances of each case.

   e. Generally, a brief detention, for legitimate law enforcement reasons, 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. Evidence of mistreatment during detention also may establish persecution.

f. To rise to the level of persecution, economic harm must be deliberately imposed and severe.

g. Psychological harm alone may rise to the level of persecution. 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.

h. Rape and other severe forms of sexual harm constitute harm amounting to persecution, as they are forms of serious physical harm.

i. Harm to an applicant's family member or another third party may constitute persecution of the applicant where the harm is serious enough to amount to persecution, and also where the persecutor's motivation in harming the third party is to act against the applicant.

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

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

a. Nexus analysis requires officers to 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.

b. A "punitive" or "malignant" intent is not required for harm to constitute persecution. Persecution can consist of objectively serious harm or suffering that was inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intended the victim to experience the harm as harm.

See Matter of Kasinga, 21 I&N Dec. 357, 366-67 (BIA 1996); Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997).

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

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

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

f. Particular Social Groups: The area of law surrounding particular social groups is evolving rapidly, and it is important for asylum officers to be informed about current DHS and Asylum Division guidance, as well as current case law and regulatory changes.

To determine whether the applicant belongs to a viable particular social group where there are no precedent decisions on point, asylum officers must analyze the facts using the BIA test for evaluating whether a group meets the definition of a particular social group:

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

(ii) Second, the group must be defined with particularity; it "must be defined by characteristics that provide a clear benchmark for determining who falls within the group."

(iii) Third, the group must be socially distinct within

See RAIO Training Module, Nexus – Particular Social Group for a non-exhaustive list of precedent decisions that have identified certain groups that are particular social groups and other groups that were found not to be particular social groups based on the facts of each case.

See Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014); Matter of W-G-R-, 26 I&N

the society in question. Social distinction involves examining whether "those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." Social distinction relates to society's, not the persecutor's, perception, though the persecutor's perceptions may be relevant to social distinction

Dec. 208 (BIA 2014).

Matter of M-E-V-G-, 26 I&N Dec. 227, 239 (BIA 2014).

3. Persecutor: For a credible fear of persecution, there must be a significant possibility the applicant can establish that the entity that harmed the applicant (the persecutor) is either an agent of the government or an entity that the government is unable or unwilling to control.

Id. at 238.

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

Id. at 242.

   b. No government can guarantee the safety of each of its citizens or control all potential persecutors at all times. A determination of whether a government is unable to control the entity that harmed the applicant requires evaluation of country of origin information and the applicant's circumstances. 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. In order to establish a significant possibility of past persecution, the applicant is not required to demonstrate that the government was unable or unwilling to control the persecution on a nationwide basis. The applicant may meet his or her burden with evidence that the government was unable or unwilling to control the persecution in the specific locale where the applicant was persecuted.

See RAIO Training Module, Persecution.

   c. To demonstrate that the government is unable or unwilling to protect an 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. Reasonable

explanations for not seeking government protection include evidence that the government has shown itself unable or unwilling to act in similar situations or that the applicant would have increased his or her risk by affirmatively seeking protection. In determining whether an applicant's failure to seek protection is reasonable, asylum officers should consult and consider country of origin information, in addition to the applicant's testimony.

C. Well-founded Fear of Persecution

See RAIO Training Module, Well Founded Fear.

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

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

    a. The applicant satisfies the subjective element if he or she credibly articulates a genuine fear of return. Fear has been defined as an apprehension or awareness of danger.

    b. The applicant will meet the credible fear standard based on a fear of future harm if there is a significant possibility that he or she could establish that there is a reasonable possibility that he or she will be persecuted on account of a protected ground upon return to his or her country of origin.

3. The Mogharrabi Test: Matter of Mogharrabi lays out a four-part test for determining well-founded fear. To establish a credible fear of persecution on account of a protected characteristic based on future harm, there must be a significant possibility that the applicant can establish each of the following elements:

Matter of Mogharrabi , 19 I&N Dec. 439 (BIA 1987).

    a. Possession (or imputed possession of a protected characteristic)

(i) The applicant must possess, or be believed to possess, a protected characteristic that the persecutor seeks to overcome. The BIA later modified this definition and explicitly recognized that a "punitive" or "malignant" intent is not required for harm to constitute persecution. The BIA concluded that persecution can consist of objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm.

See Matter of Kasinga, 21 I&N Dec. 357, 366-67 (BIA 1996) (explaining that because FGM was used "at least in some significant part" to overcome a protected characteristic of the applicant, the persecution the applicant fears is "on account of" her status as a member of the defined social group); Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997).

(ii) This analysis requires officers to 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.

(iii) For cases where no nexus to a protected ground is immediately apparent, the asylum officer in credible fear interviews must ask questions related to all five grounds to ensure that no nexus issues are overlooked.

(iv) Asylum officers have an affirmative duty to elicit all information relevant to the nexus determination. Officers should make reasonable inferences, keeping in mind the difficulty, in many cases, of establishing with precision a persecutor's motives.

(v) To determine whether the applicant belongs to a viable particular social group where there are no precedent decisions on point, asylum officers must analyze the facts using the BIA test for evaluating whether a group meets the definition of a particular social group.

b. Awareness (the persecutor is aware or could become aware the applicant possesses the characteristic)

(i) Relevant lines of inquiry include: how someone would know or recognize that the applicant had the protected characteristic and how the persecutor would know that the applicant had returned to his or her country.

(ii) The applicant is not required to hide his or her possession of a protected characteristic in order to avoid awareness.

c. Capability (the persecutor has the capability to persecute the applicant)

(i) If the persecutor is a governmental entity, asylum officers should consider the extent of the government's power or authority and whether the applicant can seek protection from another government entity within the country.

(ii) If the persecutor is a non-governmental entity, relevant factors include: the extent to which the government is able or willing to control the entity, whether the government is able to or would want to protect the applicant; whether the applicant reported the non-governmental actor to the police; and whether the police or government could or would offer any protection to the applicant.

(iii) The extent to which the persecutor has the ability to enforce his or her will throughout the country is also relevant when evaluating whether the persecutor is capable of persecuting the applicant.

d. Inclination (the persecutor has the inclination to persecute the applicant)

(i) Factors to consider when evaluating inclination include: any previous threats or harm from the persecutor, the persecutor's treatment of individuals similarly situated to the applicant who have remained in the home country or who have returned to the home country, and any time passed between the last threats received and flight from his or her home country.

(ii) For both capability and inclination, if the applicant is unable to answer questions regarding whether the persecutor is capable or inclined to persecute him or her, the asylum officer may use country of origin information to help determine the persecutor's capability and inclination to persecute the applicant.

4. Pattern or Practice

   a. The applicant need not show that he or she will be singled out individually for persecution, if the applicant shows a significant possibility that he or she could establish:

      (i) There is a pattern or practice of persecution on account of any of the protected grounds of a group of persons similarly situated to the applicant.

      (ii) The applicant is included in and is identified with the persecuted group, such that a reasonable person in the applicant's position would fear persecution.

See RAIO Training Module, Well Founded Fear.

8 C.F.R. § 208.13(b)(2)(iii).

5. Persecution of Individuals Closely Related to the Applicant

   The persecution of family members or other individuals closely associated with the applicant may provide objective evidence that the applicant's fear of future persecution is well-founded, even if there is no pattern or practice of persecution of such individuals. On the other hand, continued safety of individuals similarly situated to the applicant may, in some cases, be evidence that the applicant's fear is not well-founded. Furthermore, the applicant must establish some connection between such persecution and the persecution the applicant fears.

6. Threats without Harm

   A threat (anonymous or otherwise) may also be sufficient to establish a well-founded fear of persecution. The evidence must show that the threat is serious and that there is a reasonable possibility the threat will be carried out.

7. Applicant Remains in Country after Threats or Harm

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

applicant.

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

8. Return to Country of Persecution

An applicant's return to the country of feared persecution generally weakens the applicant's claim of a well-founded fear of persecution. It may indicate that the applicant does not possess a genuine (subjective) fear of persecution or that the applicant's fear is not objectively reasonable. Consideration must be given to the reasons the applicant returned and what happened to the applicant once he or she returned. Return to the country of feared persecution does not necessarily defeat an applicant's claim.

9. Internal Relocation

a. In cases in which the feared persecutor is a government or is government-sponsored, there is a presumption that there is no reasonable internal relocation option. This presumption may be overcome if a preponderance of the evidence shows that, under all the circumstances, the applicant could avoid future persecution by relocating to another part of the applicant's country and that it would be reasonable to expect the applicant to relocate.

8 C.F.R. § 208.13(b)(2)(ii); 8 C.F.R. § 208.13(b)(3)(ii).

b. If the persecutor is a non-governmental entity, there must be a significant possibility that the applicant can demonstrate that there is no reasonable internal relocation option.

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

(i) Determine if an applicant could avoid future persecution by relocating to another part of the

applicant's home country. If the applicant will not be persecuted in another part of the country, then:

(ii) Determine if an applicant's relocation, under all the circumstances, would be reasonable.

d. In determining the reasonableness of internal relocation in relation to a well-founded fear claim, asylum officers should consider the following factors:

(i) Whether the applicant would face other serious harm that may not be inflicted on account of one of the five protected grounds in the refugee definition, but is so serious that it equals the severity of persecution;
(ii) Any ongoing civil strife such as a civil war occurring in parts of the country;
(iii) Administrative, economic, or judicial infrastructure that may make it very difficult for an individual to live in another part of the country;
(iv) Geographical limitations that could present barriers to accessing a safe part of a country or where an individual would have difficulty surviving due to the geography;
(v) Social and cultural constraints such as age, gender, health, and social and familial ties or whether the applicant possess a characteristic, such as a particular language or a unique physical appearance, that would readily distinguish the applicant from the general population and affect his or her safety in the new location; and
(vi) any other factors specific to the case that would make it unreasonable for the applicant to relocate should be considered.

There is no requirement that an applicant first attempt to relocate in his or her country before flight. However, the fact that an applicant lived safely in another part of his or her country for a significant period of time before leaving the country may be evidence that the threat of persecution does not exist countrywide, and that the applicant can reasonably relocate within the country to avoid future persecution.

D. Multiple Citizenship

Persons holding multiple citizenship or nationalities must

See RAIO Training Module,

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

Refugee Definition, for more detailed information about determining an applicant's nationality, dual nationality, and statelessness.

Although the applicant would not be eligible for asylum unless he or she establishes eligibility with respect to all countries of citizenship or nationality, he or she might be entitled to withholding of removal with respect to one country and not the others. Therefore, the protection claim must be referred for a full hearing to determine this question.

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

E. Statelessness/Last Habitual Residence

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

VIII. ESTABLISHING A CREDIBLE FEAR OF TORTURE

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

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

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

A. Definition of Torture

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

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

B. General Considerations

1. U.S. regulations require that several elements be met before an act is found to constitute torture. Because credible fear of torture interviews are employed as "screening mechanisms to quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch," parts of the torture definition that require complex legal and

8 C.F.R. §§ 208.18(a)(1)-(8).

Immigration and Naturalization Service, Regulations Concerning the Convention Against Torture,

factual analyses may be more appropriately considered in a full hearing before an immigration judge.

64 Fed. Reg. 8478 (Feb. 19, 1999).

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

See section VI., Credibility, above, regarding establishing credibility.

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

8 C.F.R. § 208.18(a)(5).

   b. the harm constitutes severe pain or suffering;

   c. the torturer is a public official or other person acting in an official capacity, or someone acting at the instigation of or with the consent or acquiescence of a public official or someone acting in official capacity; and

Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture. 8 C.F.R. § 208.18(a)(2).

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

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

8 C.F.R. § 208.18(a)(6).

8 C.F.R. § 208.18(a)(3).

C. Specific Intent

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

8 C.F.R. §§ 208.18(a)(1), (5).

2. The specific intent requirement is met when the evidence shows that an applicant may be specifically targeted for punishment or intentionally singled out for harsh treatment that may rise to the level of torture.

3. The Convention Against Torture does not require that the torture be connected to any of the five protected characteristics identified in the definition of a refugee, or

any other characteristic the individual possesses or is perceived to possess.

D. Degree of Harm

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

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

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

3. Any harm must be evaluated on a case-by-case basis to determine whether it constitutes torture. Whether harm constitutes torture often depends on the severity and cumulative effect.

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

8 C.F.R. § 208.18(a)(4).

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

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

   c. The threat of imminent death; or

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

E. Identity of the Torturer

1. For an act to constitute torture, the applicant must establish that it is more likely than not that the harm he or she fears would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

8 C.F.R. § 208.18(a)(1).

2. Harm by a Public Official

See ADOTC Lesson Plan, Reasonable Fear of Persecution and Torture Determinations for a more extensive discussion on this element of CAT eligibility.

   a. Generally, in the credible fear context, if there is a significant possibility the applicant can establish that it is more likely than not that he or she was or would be harmed by a public official, the applicant has met the public official requirement for a credible fear of torture.

   b. The term "public official" is broader than the "government" or "police" and can include any person acting in an official capacity or under color of law. A public official can include any person acting on behalf of a national or local authority.

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

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

   d. A public official is acting in an official capacity when "he misuses power possessed by virtue of law and made possible only because he was clothed with the authority of law." To establish whether a public official is acting in under the color of law, the applicant must establish a nexus between the public official's authority and the harmful conduct inflicted on the applicant by the public official. Such an inquiry is fact intensive and includes considerations like "whether the officers are on duty and in uniform, the motivation behind the officer's actions and whether the officers had access to

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

the victim because of their positions, among others." The Fifth Circuit also addressed "acting in an official capacity" by positing "[w]e have recognized on numerous occasions that acts motivated by an officer's personal objectives are 'under color of law' when the officer uses his official capacity to further those objectives."

Id. at 901.

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

3. Acquiescence

   a. When the "torturer" is not a public official, a successful CAT claim requires that a public official or other person acting in an official capacity instigates, consents, or acquiesces to the torture.

   b. Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

8 C.F.R. § 208.18(a)(7).

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

136 CONG. REC. at S17,491 (daily ed. Oct. 27, 1990); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Doc. No. 101-30, at 9 (1990); see also S. Hrg 101-718 (Jan. 30, 1990), Statement of Mark Richard, Dep. Asst. Attorney General, DOJ Criminal Division, at 14.

      (ii) While circuit courts of appeals are split with regards to the BIA's "willful acceptance" phrase in favor of the more precise "willful blindness," for purposes of threshold credible fear screenings, asylum officers must use the willful blindness standard.

   c. There is no acquiescence when law enforcement does not breach a legal responsibility to intervene to prevent torture.

   d. In the context of government consent or acquiescence, the court in Ramirez-Peyro v. Holder reiterated its prior holding that "use of official authority by low level officials, such a[s] police officers, can work to place actions under the color of law even when they act

8 C.F.R. § 208.18(a)(7).

without state sanction." Therefore, even if country conditions show that a national government is fighting against corruption, that fact will not necessarily preclude a finding of consent/acquiescence by a local public official.

Ramirez-Peyro v. Holder, 574 F.3d 893, 901 (8th Cir. 2009).

e. Evidence that private actors have general support in some sectors of the government, without more, may be insufficient to establish that the officials would acquiesce to torture by the private actors.

4. Consent or Acquiescence vs. Unable or Unwilling to Control

See Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 354-55 (5th Cir. 2002).

a. The public official requirement under CAT is distinct from the inquiry into a government's ability or willingness to control standard applied under the refugee definition.

b. A finding that a government is unable to control a particular person(s) is not dispositive of whether a public official would instigate, consent or acquiesce to the feared torture.

c. A more relevant query is whether or not a public official who has a legal duty to intervene would be unwilling to do so. In these circumstances, the public official would also have to be aware or deliberately avoid being aware of the harm in order for the action or inaction to qualify as acquiescence under CAT.

Reyes-Sanchez v. U.S. Atty. Gen., 369 F.3d 1239 (11th Cir. 2004) ("That the police did not catch the culprits does not mean that they acquiesced in the harm.")

d. The willingness in certain levels of a government to combat harm is not necessarily responsive to the question of whether torture would be inflicted with the consent or acquiescence of a public official. In De La Rosa v. Holder, the Second Circuit stated, "[i]n short, it is not clear to this Court why the preventative efforts of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the CAT. Where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture would seem neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question of whether torture would be 'inflicted by or at the instigation of or with the consent or acquiescence of a

De La Rosa v. Holder, 598 F.3d 103, 110 (2d Cir. 2010).

public official or other person acting in an official capacity.'"

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

Pieschacon-Villegas v. Attorney General, 671 F.3d 303, 312 (3d Cir. 2011); Gomez-Zuluaga v. Attorney General, 527 F.3d 330, 351 (3d Cir. 2008).

F. Past Harm

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

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

Credible evidence of past torture is strong evidence in support of a claim for protection based on fear of future torture. For that reason, an applicant who establishes that he or she suffered past torture will establish a credible fear of torture, unless changes in circumstances are so substantial that the applicant has no significant possibility of future torture as a result of the change.

G. Internal Relocation

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

8 C.F.R. § 1208.16(c)(3)(ii).

withholding of removal or deferral of removal.

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

8 C.F.R. § 208.16(c)(3)(ii).

Maldonado v. Holder, 786 F.3d 1155 (9th Cir. 2015) (overruling Hassan v. Ashcroft, 380 F.3d 1114, 1164 (9th Cir. 2004) ("Section 1208.16(c)(2) does not place a burden on an applicant to demonstrate that relocation within the proposed country of removal is impossible because the IJ must consider all relevant evidence; no one factor is determinative. See § 1208.16(c)(3)(i)–(iv)….Nor do the regulations shift the burden to the government because they state that the applicant carries the overall burden of proof.").

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

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

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

8 C.F.R. § 208.16(c)(3)(iv).

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

IX. APPLICABILITY OF BARS TO ASYLUM AND WITHHOLDING OF REMOVAL

Please consult the appropriate RAIO Training Module for a full discussion on mandatory bars.

A. No Bars Apply

Pursuant to regulations, evidence that the applicant is, or may be, subject to a bar to asylum or withholding of removal does not have an impact on a credible fear finding.

8 C.F.R. § 208.30(e)(5).

B. Asylum Officer Must Elicit Testimony

Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether or not a bar to asylum or withholding applies. The immigration judge is responsible for finally adjudicating whether or not the applicant is barred from receiving asylum or withholding of removal.

INA § 208(b)(2); INA § 241(b)(3).

There are no bars to a grant of deferral of removal to a country where the applicant would be tortured.

8 C.F.R. § 208.17(a).

Information should be elicited about whether the applicant:

1. participated in the persecution of others;
2. has been convicted by a final judgment of a particularly serious crime (including an aggravated felony), and constitutes a danger to the community of the US;

INA § 208(b)(2)(B)(i).

3. is a danger to the security of the US;
4. is subject to the inadmissibility or deportability grounds relating to terrorist activity as identified in INA section 208(b)(2)(A)(v);
5. has committed a serious nonpolitical crime;
6. is a dual or multiple national who can avail himself or herself of the protection of a third state; and,

This bar and the firm resettlement bar are not bars to withholding or deferral of removal. See INA § 241(b)(3).

7. was firmly resettled in another country prior to arriving in the United States.

C. Flagging Potential Bars

The officer must keep in mind that the applicability of these bars requires further evaluation that will take place in the full hearing before an immigration judge if the applicant otherwise has a credible fear of persecution or torture. In such cases, the officer should consult a supervisory officer, follow procedures on "flagging" such information for the hearing, and prepare the appropriate paperwork for a positive credible fear finding. Officers may be asked to prepare a memorandum to file outlining the potential bar that may be triggered. Although positive credible fear determinations that involve a possible mandatory bar no longer require HQ review, supervisory officers may use their

Procedures Manual, Credible Fear Process (Draft); Joseph E. Langlois. Asylum Division, Refugee, Asylum and International Operations Directorate. Revised Credible Fear Quality Assurance Review Categories and Procedures, Memorandum to Asylum Office Directors, et al. (Washington, DC: 23 Dec.

discretion to forward the case to HQ for review. 2008).

X. OTHER ISSUES

A. Treatment of Dependents

8 C.F.R. § 208.30(b).

A spouse or child of an applicant may be included in the alien's credible fear evaluation and determination, if the spouse or child: arrived in the United States concurrently with the principal alien; and desires to be included in the principal alien's determination. USCIS maintains discretion under this regulation not to allow a spouse or child to be included in the principal's credible fear request.

Any alien also has the right to have his or her credible fear evaluation and determination made separately, and it is important for asylum pre-screening officers to question each member of the family to be sure that, if any member of the family has a credible fear, his or her right to apply for asylum or protection under CAT is preserved. When questioning family members, special attention should be paid to the privacy of each family member and to the possibility that victims of domestic abuse, rape and other forms of persecution might not be comfortable speaking in front of other family members.

The regulatory provision that allows a dependent to be included in a principal's determination does not change the statutory rule that any alien subject to expedited removal who has a credible fear has the right to be referred to an immigration judge.

B. Attorneys and Consultants

8 C.F.R. § 208.30(d)(4).

The applicant may consult with any person prior to the credible fear interview. The applicant is also permitted to have a consultant present at the credible fear interview. Asylum officers should determine whether or not an applicant wishes to have a consultant present at the credible fear interview. Although an alien is permitted by regulation to have a consultant present at a credible fear interview, the availability of a consultant cannot unreasonably delay the process. A consultant may be a relative, friend, clergy person, attorney, or representative. If the consultant is an attorney or representative, he or she is not required to submit a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, but may submit one if he or she desires.

8 C.F.R. § 208.30(d)(4); Procedures Manual, Credible Fear Process (Draft).

C. Factual Summary

For each credible fear interview, the asylum officer must create a summary of material facts as stated by the applicant. At the conclusion of the interview, the asylum officer must review the summary with the applicant and provide the applicant with an opportunity to correct any errors therein. The factual summary and its review should be contemporaneously recorded at the end of the asylum officer's interview notes.

8 C.F.R. § 208.30(d)(6).

XIII. SUMMARY

A. Expedited Removal

In expedited removal, certain aliens seeking admission to the United States are immediately removable from the United States by the Department of Homeland Security, unless they indicate an intention to apply for asylum or express a fear of persecution or torture or a fear of return to their home country. Aliens subject to expedited removal are not entitled to an immigration hearing or further review unless they are able to establish a credible fear of persecution or torture.

B. Function of Credible Fear Screening

The purpose of the credible fear screening process is to identify persons subject to expedited removal who might ultimately be eligible for asylum under section 208 of the INA or withholding of removal or deferral of removal under the Convention Against Torture.

C. Credible Fear Standard of Proof: Significant Possibility

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

The "significant possibility" standard of proof required to establish a credible fear of persecution or torture must be applied in conjunction with the standard of proof required for the ultimate determination on eligibility for asylum, withholding of removal, or protection under the Convention Against Torture.

The asylum officer shall consider whether the applicant's case presents novel or unique issues that merit consideration in a full

hearing before an immigration judge.

Where there is disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue; or the claim otherwise raises an unresolved issue of law; and, there is no DHS or Asylum Division policy or guidance on the issue, then generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.

D. Credibility

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

E. Establishing a Credible Fear of Persecution

In general, a finding that there is a significant possibility that the applicant experienced past persecution on account of a protected characteristic is sufficient to satisfy the credible fear standard. However, if there is evidence so substantial that there is no significant possibility of future persecution or other serious harm or that there are no reasons to grant asylum based on the severity of the past persecution, a negative credible fear determination may be appropriate.

When an applicant does not claim to have suffered any past harm or where the evidence is insufficient to establish a significant possibility of past persecution under section 208 of the Act, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution on account of a protected characteristic under section 208 of the Act.

F. Establishing a Credible Fear of Torture

In order to be eligible for withholding or deferral of removal under CAT, an applicant must establish that it is more likely than not that he or she would be tortured in the country of removal. Therefore, a significant possibility of establishing eligibility for withholding or deferral of removal is necessarily a greater burden than establishing a significant possibility of eligibility for asylum.

After establishing that the applicant's claim would be found credible, the applicant satisfies the credible fear of torture

standard where there is a significant possibility that he or she could establish in a full withholding of removal hearing that: (a) the torturer specifically intends to inflict severe physical or mental pain or suffering; (b) the harm constitutes severe pain or suffering; (c) the torturer is a public official or other person acting in an official capacity, or someone acting at the instigation of or with the consent or acquiescence of a public official or someone acting in official capacity; and (d) the applicant is in the torturer's custody or physical control. Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. However, sanctions that defeat the object and purpose of the Convention are not lawful sanctions. Harm arising out of such sanctions may constitute torture.

Credible evidence of past torture is strong evidence in support of a claim for protection based on fear of future torture. For that reason, an applicant who establishes that he or she suffered past torture will establish a credible fear of torture, unless changes in circumstances are so substantial that the applicant has no significant possibility of future torture as a result of the change.

Under the Convention Against Torture, the burden is on the applicant to show that it is more likely than not that he or she will be tortured, and one of the relevant considerations is the possibility of internal relocation.

G. Other Issues

While the mandatory bars to asylum and withholding of removal do not apply to credible fear determinations, asylum officers must elicit and make note of all information relevant to whether or not a bar to asylum or withholding applies.

A spouse or child of an applicant may be included in the alien's credible fear evaluation and determination, if the spouse or child: arrived in the United States concurrently with the principal alien; and desires to be included in the principal alien's determination.

The applicant may consult with any person prior to the credible fear interview. The applicant is also permitted to have a consultant present at the credible fear interview. A consultant may be a relative, friend, clergy person, attorney, or representative.

For each credible fear interview, the asylum officer must create a summary of material facts as stated by the applicant and review

the summary with the applicant.

U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

OVERVIEW OF THE FRAUD DETECTION AND NATIONAL SECURITY DIRECTORATE (FDNS)

TRAINING MODULE

DATE (See schedule of revisions): 10/16/2020

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

OVERVIEW OF THE FRAUD DETECTION AND NATIONAL SECURITY DIRECTORATE (FDNS)

Training Module

MODULE DESCRIPTION

This lesson introduces you to the Fraud Detection and National Security Directorate (FDNS) and describes how FDNS officers may assist you in your adjudications by addressing fraud, national security and public safety concerns.

TERMINAL PERFORMANCE OBJECTIVE(S)

In working to fulfill the mission of the Refugee, Asylum, and International Operations Directorate (RAIO), you, as an officer at RAIO, will recognize the role that FDNS plays in ensuring the integrity of our adjudications, and understand that you can refer cases involving fraud, national security, and public safety issues to your local FDNS team.

ENABLING PERFORMANCE OBJECTIVES

1. Describe the mission of FDNS.
2. Examine the role of FDNS officers within the RAIO Directorate.
3. Explain the relationship between RAIO and FDNS in the adjudications process.

INSTRUCTIONAL METHODS

Presentation, Discussion

METHOD(S) OF EVALUATION

N/A

REQUIRED READING

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

CRITICAL TASKS

SOURCE:

Task/ Skill #	Task Description
OK9	Knowledge of FDNS functions and responsibilities
IRK1	Knowledge of the appropriate points of contact to receive FDNS assistance or guidance

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
3/8/2016	Entire Lesson Plan	Published	RAIO Training
7/17/2018	FDNS Overview – FDNS structure	Updates to HQFDNS structure and USCIS Mission Statement	Jennifer Kline, RAIO FDNS; RAIO Training
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training
10/16/2020	Entire Lesson Plan	Separated Fraud and FDNS Overview Lesson Plans; streamlined and simplified FDNS Overview content	RAIO FDNS; RAIO Training

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SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS 14

SUPPLEMENT B – ASYLUM ADJUDICATIONS 15

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

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

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

1. INTRODUCTION

USCIS was created by statute on March 1, 2003, as a part of the formation of the Department of Homeland Security (DHS). The immigration benefit services functions of the legacy Immigration and Naturalization Service (INS) were assigned to USCIS, while INS's investigations and enforcement functions were assigned to U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP). This reorganization partially addressed General Accounting Office (now the Government Accountability Office – referred hereafter as GAO) concerns[1] regarding INS' dual and seemingly conflicting service and enforcement missions. However, with this division, USCIS was not delegated any of the investigative, enforcement, and intelligence capabilities necessary to independently prosecute cases of immigration benefit fraud.

In 2004, USCIS created the Fraud Detection and National Security Directorate (FDNS) in accordance with a Congressional recommendation to establish an organization "responsible for developing, implementing, directing, and overseeing the joint USCIS-ICE anti-fraud initiative and conducting law enforcement/background checks on every applicant, beneficiary, and petitioner prior to granting immigration benefits."[2]

FDNS Officers are embedded alongside adjudicators across USCIS offices, including those in RAIO.

[1] GAO-02-66: Immigration Benefit Fraud: Focused Approach Is Needed to Address Problems (issued January 31, 2002).

[2] Conference Report, Fiscal Year 2005 Appropriations Act.

2. FDNS Overview

FDNS fulfills the USCIS mission of enhancing both national security and the integrity of the legal immigration system by: (1) Identifying threats to national security and public safety posed by those seeking immigration benefits; (2) detecting, pursuing, and deterring immigration benefit fraud; (3) identifying and removing systemic vulnerabilities in the process of the legal immigration system; and (4) acting as USCIS's primary conduit for information sharing and collaboration with other governmental agencies. FDNS also oversees a strategy to promote a balanced operation that distinguishes USCIS's administrative authority, responsibility, and jurisdiction from ICE's criminal investigative authority.

FDNS integrates the efforts of law enforcement, intelligence, and overseas assets in support of USCIS operations and mission-critical functions. By integrating its mission, goals, and objectives throughout USCIS, FDNS promotes process integrity, security, and public safety without compromising operational efficiency.

FDNS supports RAIO adjudicators by vetting public safety and national security concerns and conducts administrative investigations where fraud is suspected.

2.1 FDNS Mission

As a major component of the Department of Homeland Security, USCIS has the mission of "administer[ing] the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values."[3] The abilities to detect and deter fraud and to perform screening that identifies threats to national security and public safety are essential components in upholding the integrity of the immigration process. The FDNS Directorate develops and maintains anti-fraud, screening and background checks, and intelligence and information-sharing programs to facilitate this mission.

The FDNS mission is to "safeguard the integrity of the nation's lawful immigration system by leading agency efforts to combat fraud, detect national security and public safety threats, and maximize law enforcement and Intelligence Community partnerships."[4]

2.1.1 Improve Anti-Fraud Capabilities

FDNS officers routinely research fraud leads referred to them by adjudicators. FDNS officers investigate perpetrators of a variety of fraud, and, when appropriate, request that ICE open a criminal investigation. Under limited circumstances, FDNS officers can assist adjudicators with suspected fraud by submittind (b)(7)(E)

[redacted]

[3] USCIS Mission Statement.

[4] FDNS Mission Statement.

(b)(7)(E)

[redacted]

2.1.2 Strengthen National Security

FDNS officers support adjudicators in cases with national security concerns in several ways and at various points in the adjudicative process. For example, if an FDNS officer identifies national security concerns in a case during FDNS prescreening, the FDNS officer may assist the adjudicator in interview preparation. FDNS officers also [redacted] (b)(7)(E)

[redacted]

2.1.3 Address Public Safety Concerns

FDNS officers also work closely with adjudicators and help coordinate with the appropriate division of ICE or other law enforcement agencies when there are matters implicating public safety. As with national security cases, FDNS officers may assist adjudicators by identifying public safety concerns in prescreening, obtaining additional information, and vetting public safety-related background check hits. One category of public safety cases is Egregious Public Safety (EPS). An EPS case is defined as any case where information indicates the alien is under investigation for, has been arrested for (without disposition), or has been convicted of any of the following:

- Murder, rape, or sexual abuse of a minor as defined in INA § 101(a)(43)(A);
- Illicit trafficking in firearms or destructive devices as defined in INA § 101(a)(43)(C);
- Offenses relating to explosive materials or firearms as defined in INA § 101(a)(43)(E);
- Crimes of violence for which the term of imprisonment imposed or where the penalty for a pending case is at least one year as defined in INA § 101(a)(43)(F);
- An offense relating to the demand for or receipt of ransom as defined in INA § 101(a)(43)(H);
- An offense relating to child pornography as defined in INA § 101(a)(43)(I);
- An offense relating to peonage, slavery, involuntary servitude, or trafficking in persons as defined in INA § 101(a)(43)(K)(iii);
- An offense relating to alien smuggling as described in INA § 101(a)(43)(N);
- Human Rights Violators, known or suspected street gang members, or Interpol hits; or
- Re-entry after an order of exclusion, deportation, or removal subsequent to conviction for a felony where a Form I-212, Application for Permission to Reapply for Admission into the U.S. after Deportation or Removal, has not been approved.

[redacted] (b)(7)(E)

2.2 Headquarters FDNS

Within USCIS, Headquarters FDNS (HQFDNS) develops and maintains policies and procedures that govern the detection of fraud and threats to national security or public safety in requests for immigration benefits. HQFDNS also works closely with other USCIS components to carry out the mission. The Field Operations (FOD), Service Center Operations (SCOPS), and RAIO Directorates all have FDNS officers embedded at headquarters and in field offices and service centers. These directorates implement operational policies and procedures developed by HQFDNS that address fraud, national security, and public safety concerns.

HQFDNS consists of multiple divisions responsible for setting policies related to USCIS' anti-fraud, national security, and public safety activities.[6] Among other functions HQFDNS provides guidance, procedures, and advice to the USCIS operational directorates by:

- Establishing the agency's Fraud Detection Standard Operating Procedures to assist with detecting, deterring, and preventing benefit fraud;
- Maintaining the agency's National Background and Identities Checks Operating Procedures (NaBISCOP) handbook, which provides overarching baseline requirements for all USCIS background and security checks, incorporating all applicable USCIS policies and procedures related to USCIS background and security checks;
- Managing the agency's Controlled Application Review and Resolution Program (CARRP) to handle cases with national security concerns; and
- Representing USCIS within the Intelligence Community and assisting USCIS with information sharing regarding fraud and national security concerns.

3. RAIO'S FDNS PROGRAM

RAIO and FDNS have taken important steps to strengthen RAIO's ability to detect and address fraud, national security, and public safety concerns and to facilitate information sharing in our global operating environment.

3.1 FDNS Presence in RAIO

Currently, there are FDNS officers working to support RAIO within:

- RAIO HQ FDNS Program Office
- International and Refugee Affairs Division (IRAD)
    - HQ Security Vetting and Program Integrity (SVPI) Branch

[6] See USCIS Connect Page for information about the FDNS Directorate; see also the HQFDNS Organization Chart.

  - Refugee and International Operations (RIO) Field Office
  - International Field Offices
- Asylum Division
  - Asylum HQ FDNS Branch
  - Asylum Field Offices

3.1.1 HQ RAIO FDNS Program Office

RAIO supports strong FDNS programs in each of its divisions. Because many of our fraud, national security, public safety, intelligence, and information sharing needs require a coordinated approach that is consistent with the FDNS mission and guidance, RAIO created an FDNS Program Office at the directorate level to enhance effectiveness, promote directorate-wide objectives, and help coordinate the FDNS work within RAIO's operational divisions.

3.1.2 International and Refugee Affairs Division

IRAD (HQ) has a team of FDNS officers in the Security Vetting and Program Integrity (SVPI) Branch who assist with the development of procedures, guidance, and training materials related to fraud, national security, and public safety concerns and engage in liaison work with our vetting partners.

The FDNS teams embedded in the SVPI Section of the Refugee and International Operations (RIO) Field Office provide operational support in cases involving fraud, national security, and public safety issues to Refugee Officers and to RAIO's overseas officers.

FDNS officers assigned internationally perform a variety of duties, including document verification, an activity that supports adjudications across all USCIS directorates, including RAIO.

3.1.3 Asylum Division

FDNS officers in the asylum field offices work closely with local management, in addition to Supervisory Asylum Officers and Asylum Officers. In 2015, the Asylum Division established an FDNS Branch within Asylum Headquarters to develop operational guidance and provide technical support to Asylum FDNS personnel and Asylum Division managers.

3.2 FDNS Officer Roles and Responsibilities

The roles and responsibilities of RAIO's FDNS Supervisory Immigration Officers (SIOs) and Immigration Officers (IOs) are similar across our divisions and field offices. Despite these similarities, due to our different operating environments, there remain distinct differences which are outlined by division and role in memorandum.[7] Regardless of location, the role of the FDNS teams in RAIO is to support adjudicators by providing subject matter expertise and assistance in cases involving fraud, national security, and/or public safety concerns.

[7] See Roles and Responsibilities of Fraud Detection and National Security Personnel in the Refugee, Asylum and International Operations Directorate. September 24, 2019.

3.3 FDNS's Role

FDNS endeavors to support adjudicators throughout the adjudicative process for cases with fraud, public safety, and national security concerns. FDNS activities may vary by office due to staffing, resources, and local office priorities. FDNS activities that support adjudicators may include regular trainings on FDNS issues, prescreening prior to interview, FDNS duty officer support to assist adjudicators in real time, and case review post-interview. (b)(7)(E)

3.4 Your Role

When potential fraud, national security, and/or public safety concerns arise in a case that has been assigned to you, you should approach your local FDNS team pre-interview or, if the issue arises post-interview, you may utilize the referral process for FDNS to review the potential fraud, national security, and/or public safety concerns you have flagged. Your local FDNS team will assess your referral, determine the best course of action, and communicate the results back to you for consideration in your final adjudicative decision.

Consult with your supervisor and your local FDNS team to familiarize yourself with FDNS pre-screening measures and/or ongoing investigations that may aid in the adjudication of your case(s).

4. SUMMARY

Ensuring the security and integrity of the United States' lawful immigration system is an integral part of the USCIS mission. Vigilance in detecting and combatting immigration benefit fraud, identifying threats to national security and public safety, and mitigating risk to the immigration system is a shared responsibility among all RAIO personnel. In addition to ensuring that case adjudications meet all legal, regulatory, and procedural standards, adjudicators are responsible for identifying potential fraud indicators and threats to national security and public safety through personal interviews (where applicable), background, identity and security checks, and file review. In the course of adjudication, if an adjudicator becomes aware of any fraud, national security, intelligence equities, and/or public safety concern(s), after consultation and review by his or her first-line supervisor, the adjudicator will follow established policies and procedures for proper referral of cases to an FDNS Immigration Officer (FDNS IO) for additional review and possible administrative investigation.

PRACTICAL EXERCISES

There are no practical exercises for this module.

OTHER MATERIALS

There are no other materials for this module.

SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

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

SUPPLEMENTS

There are no International and Refugee Adjudications supplements.

SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

SUPPLEMENTS

There are no Asylum supplements.

U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

FRAUD IN THE CONTEXT OF RAIO ADJUDICATIONS

TRAINING MODULE

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

FRAUD IN THE CONTEXT OF RAIO ADJUDICATIONS

Training Module

MODULE DESCRIPTION

This lesson plan is designed to introduce RAIO officers to the types of fraud that may be encountered in RAIO adjudications and the steps that adjudicators must take to safeguard the integrity of our mission.

TERMINAL PERFORMANCE OBJECTIVE(S)

Given a request for benefits, you will be able to reliably identify possible fraud indicators in the record, develop the record regarding such indicators, and describe the elements of a well-articulated fraud referral to FDNS.

ENABLING PERFORMANCE OBJECTIVES

1. Identify the role of the RAIO adjudicator in fraud detection
2. Describe possible fraud indicators Officers may encounter in RAIO adjudications
3. Utilize resources and strategies for addressing possible fraud indicators
4. Understand the requirements of a well-articulated fraud referral to FDNS
5. Recognize and understand primary fraud detection resources

INSTRUCTIONAL METHODS

Presentation, Discussion, Practical Exercises

METHOD(S) OF EVALUATION

Multiple Choice Exam

REQUIRED READING

1. GAO-17-706 Refugee - Actions Needed by State Department and DHS to Further Strengthen Applicant Screening Process and Assess Fraud Risks, published July 2017. Read "Highlights" and "Recommendations" sections only – full report not required.

2. GAO-16-50 Asylum - Additional Actions Needed to Assess and Address Fraud Risks, published December 2015. Read "Highlights" and "Recommendations" sections only – full report not required.

3. Written testimony of USCIS Director Francis Cissna for a House Committee on the Judiciary, Subcommittee on Immigration and Border Security hearing titled "Oversight of the United States Refugee Admissions Program." Published October 26, 2017.

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

(b)(7)(E)

4. Written Testimony of Alejandro M. Mayorkas, Director, U.S. Citizenship and Immigration Services, for a Hearing on Safeguarding the Integrity of the Immigration Adjudication Process, before the House Committee on the Judiciary Subcommittee on Immigration Policy and Enforcement, dated February 15, 2012.

5. Written Testimony of Sarah M. Kendall, Associate Director, Fraud Detection and National Security Directorate, U.S. Citizenship and Immigration Services, for a Hearing on the Aftermath of Fraud By Immigration Attorneys, before the House Committee on the Judiciary Subcommittee on Immigration Policy and Enforcement, dated July 24, 2012.

Additional Resources – International and Refugee Adjudications (b)(7)(E)

Additional Resources – Asylum Adjudications (b)(7)(E)

2. Combined DHS Written Testimony for a Hearing on Asylum Abuse: Is It Overwhelming Our Borders? Before House Committee on the Judiciary. December 2013.

3. Hearing: Asylum Fraud: Abusing America's Compassion? Subcommittee on Immigration and Border Security (Committee on the Judiciary). February 11, 2014.

CRITICAL TASKS

SOURCE:

Task/ Skill #	Task Description
OK9	Knowledge of Fraud Detection and National Security (FDNS) functions and responsibilities
ILR16	Knowledge of the relevant laws and regulations for requesting and accepting evidence
ILR20	Knowledge of different standards of proof
ILR24	Knowledge of policies and procedures for FDNS Overseas Verification
ILR25	Knowledge of policies and procedures for FDNS Fraud Referral
IRK1	Knowledge of the appropriate points of contact to receive FDNS-assistance or guidance
IRK5	Knowledge of fraud detection resources (e.g. [redacted] (b)(7)(E)
IRK6	Knowledge of strategies and techniques of identifying potential counterfeit and fraudulent documents or information
IRK7	Knowledge of CIS fraud prevention resources
IRK8	Knowledge of document security features
IRK9	Knowledge of the policies and procedures for reporting benefit fraud
RI6	Skill in identifying information trends and patterns
RI8	Skill in identifying possible fraud indicators
C5	Skill in recognizing and reacting to non-verbal cues
DM2	Skill in applying legal, policy, and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
3/8/2016	Entire Lesson Plan	Published	RAIO Training
7/17/2018	FDNS Overview – FDNS structure	Updates to HQFDNS structure and USCIS Mission Statement	[redacted] (b)(6) RAIO FDNS; RAIO Training
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training
10/16/2020	Entire Lesson Plan	Changes reflect updates in GAO report on possible types of fraud and updated examples of each fraud type	RAIO FDNS; RAIO Training
01/13/2021	Section 2.5.2.	Edits to section on Fraudulent Documents to reflect updates from [redacted] (b)(7)(E)	RAIO FDNS

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SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS 37

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

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

1. INTRODUCTION

Fraud poses a significant challenge to the integrity of U.S. Citizenship and Immigration Services (USCIS) programs. As an adjudicator, you will encounter fraud in the course of your work. The commission of fraud in an application or petition can render an applicant or beneficiary ineligible for the benefit sought and is also a criminal offense.[1] Immigration benefit fraud threatens the national security and public safety of the U.S. by creating a vulnerability which may enable bad actors to gain entry to and remain in the United States. Further, immigration benefit fraud displaces resources needed to adjudicate bona fide benefit requests and contributes to backlogs that delay benefits for those who are legitimately eligible for RAIO benefits.

For these reasons, you must understand the meaning of the term "fraud" and how to address fraud in RAIO adjudications.

This lesson plan is designed to equip you with the skills necessary to reliably identify possible fraud indicators, develop a record of these indicators, and articulate an actionable fraud referral to your local Fraud Detection and National Security ("FDNS") team.

This lesson plan, however, is not designed to make you an expert on fraud and its detection. You must consult with your local FDNS Immigration Officers (FDNS IOs) for more specific information on local trends and guidance on how to handle specific instances of fraud you may encounter.

1.1 Fraud and the RAIO Directorate

While benefit fraud can occur in all USCIS adjudications, applicants for benefits such as refugee status, asylum, or parole represent unique populations. In many cases, applicants have little or no corroborating documentation, and may rely solely on testimony in support of their claims, which presents unique challenges in identifying fraud. Furthermore, refugees, asylees, and their derivative family members are eligible to apply for lawful permanent resident status and, ultimately, citizenship. Consequently, identifying possible indicators of fraud during the asylum

[1] INA § 275; 18 U.S.C. § 1546.

and refugee process is essential to prevent an otherwise ineligible individual from becoming a legal permanent resident or U.S. citizen. Finally, applications for humanitarian parole are generally adjudicated within a short time period and do not require in-person interviews, so they must be carefully vetted through background, identity, and security checks as well as document reviews.

RAIO's international presence helps detect fraud and national security concerns at the most critical stage – prior to an individual's arrival in the U.S. FDNS officers assigned internationally perform a variety of duties, including document verification, an activity that supports adjudications across all USCIS directorates, including RAIO.

Each of the RAIO divisions has dedicated HQ staff to develop and expand program policies and procedures to deter fraud and enhance RAIO's ability to identify national security concerns. Furthermore, the experiences of the field in detecting fraud help form the basis for the continued evolution of fraud policies and procedures.

2. FRAUD OVERVIEW

It is important to understand your role as an officer in the fraud detection and prevention process and how to work most effectively with the FDNS teams in your local offices. In addition to identifying possible indicators of fraud in your adjudications and determining their impact on eligibility, you play a critical role in the larger fraud prevention efforts of USCIS by referring suspected fraud to FDNS for further investigation.

2.1 Sources of Authority

The Secretary of DHS maintains broad authority to administer and enforce the Immigration and Nationality Act (INA) and all other laws relating to naturalization and immigration. The Secretary has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including but not limited to alleged fraud with respect to applications or determinations and make recommendations for prosecutions, or other appropriate action when deemed advisable.[2] Immigration officers also have the "power to administer oaths and to take and consider evidence" in matters related to requests for immigration benefits or the enforcement of the INA.[3]

USCIS and U.S. Immigration and Customs Enforcement (ICE) maintain concurrent authority to investigate fraud involving immigration benefits available under the INA. USCIS refers articulated suspicions of fraud, particularly large-scale fraud schemes, to ICE for criminal investigation. If ICE declines a USCIS referral or does not communicate a decision on whether

[2] Department of Homeland Security Delegation Number: 0150.1, dated June 5, 2003.

[3] INA § 235(d)(3).

to accept the referral within 60 days, FDNS may refer the matter to other law enforcement agencies or take administrative action as deemed appropriate by the local FDNS team.[4]

Applications, petitions, and requests submitted to USCIS are signed under penalty of perjury, and they authorize USCIS to verify the information provided before and after adjudication.[5]

2.2 Definition of Fraud and Willful Misrepresentation

INA § 212(a)(6)(c)(i) states that any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

In the USCIS context, fraud is defined as a willful misrepresentation of the truth or concealment of a material fact in order to obtain a benefit for which one would otherwise not be qualified.[6] An FDNS Statement of Findings with a fraud found determination encompasses both willful misrepresentation and fraud.

Willful Misrepresentation

Inadmissibility based on willful misrepresentation requires that all the following elements be met:

- The applicant/beneficiary misrepresented or concealed some fact;
- The misrepresentation or concealment was willful;
- The fact was material to the immigration benefit being sought; and
- The individual made the misrepresentation by some means to an authorized official of the U.S. Government.

Evidence of intent to deceive is not a required element.

Willful misrepresentations in the RAIO context also include when applicants authorize individuals to make false statements in immigration benefit applications on their behalf. In cases like these, the applicant's signature on the application establishes a strong presumption that the

[4] Memorandum of Agreement between USCIS and ICE on the Investigation of Immigration Benefit Fraud, entered on September 25, 2008.

[5] INA §§ 103, 205, 214; 8 C.F.R. §§ 103, 204, 205, 207, 208, 214.

[6] See Fraud SOP, p.6. Note that "fraud" as defined in the SOP covers all activities that would render an alien inadmissible under INA § 212 (a)(6)(C)(i), which provides that aliens who seek to procure, have sought to procure, or have procured an immigration benefit by "fraud or willful misrepresentation of a material fact" are inadmissible. As used in this section of the statute, "fraud" also requires that the applicant have had the intent to deceive the official and that the official to whom the misrepresentation is made have believed and acted upon the misrepresentation. See Matter of Kai Hing Hui, 15 I&N Dec. 288, 290 (BIA 1975); Matter of G-G-, 7 I&N Dec. 161 (BIA 1956); https://www.uscis.gov/policy-manual/volume-8-part-j-chapter-2.

applicant knows of and has assented to the contents of the application. The applicant can rebut this presumption by establishing fraud, deceit, or other wrongful acts by the individual who prepared the application.[7]

When you find possible willful misrepresentation indicators that cannot be resolved through testimony, you must refer the matter to your local FDNS team prior to making any adjudicative decision.

Fraud

Inadmissibility based on fraud requires that a person knowingly made a false representation of a material fact with the intent to deceive the U.S. government and that the U.S. government official believed and acted upon the false representation by granting the benefit.[8]

For a person to be inadmissible for having procured entry, a visa, other documentation, or any other benefit under the INA by fraud, the FDNS Immigration Officer must find that all the following elements apply:

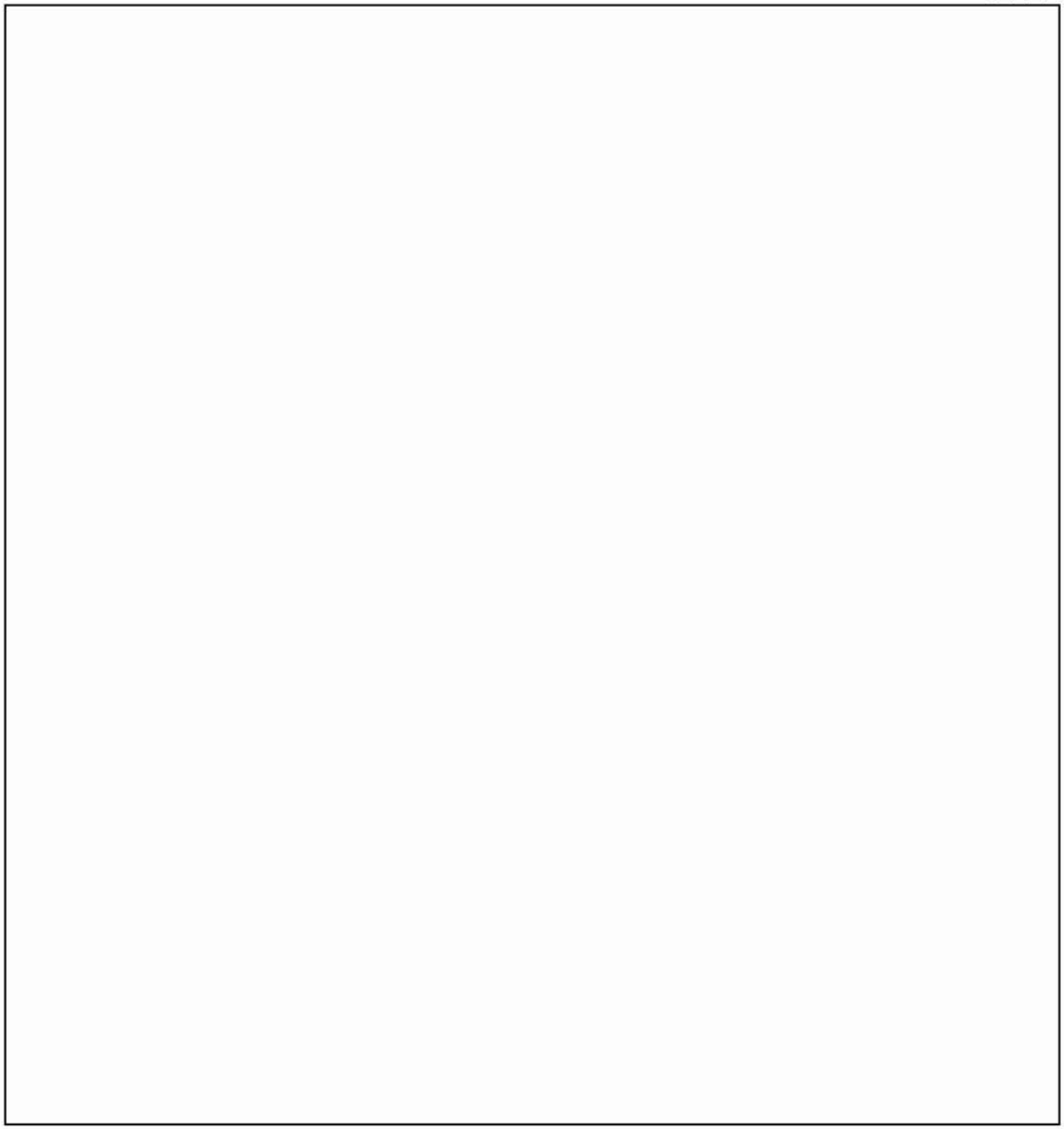
- The applicant/beneficiary misrepresented or concealed some fact;
- The misrepresentation or concealment was willful;
- The fact was material to the immigration benefit being sought; and
- The individual made the misrepresentation by some means to an authorized official of the U.S. Government.
- The false representation was made with the intent to deceive a U.S. government official authorized to act upon the request (generally an immigration or consular officer); and
- The U.S. government official believed and acted upon the false representation by granting the benefit.

When you suspect that fraud is present in the case you are adjudicating, you must refer the matter to your local FDNS team prior to making any adjudicative decision. If the referral is accepted, FDNS will attempt to verify whether the information provided in the filing is true and correct. At the conclusion of an investigation, FDNS will memorialize its findings with a Statement of Findings (SOF) that makes an investigative fraud finding of either fraud found or fraud not found. The SOF may also include findings of another agency's administrative or criminal investigation. If an FDNS Officer advises you that he or she has made an investigative fraud finding, you as the adjudicator will then review the investigative fraud findings to determine whether the findings are material to the immigration benefit.

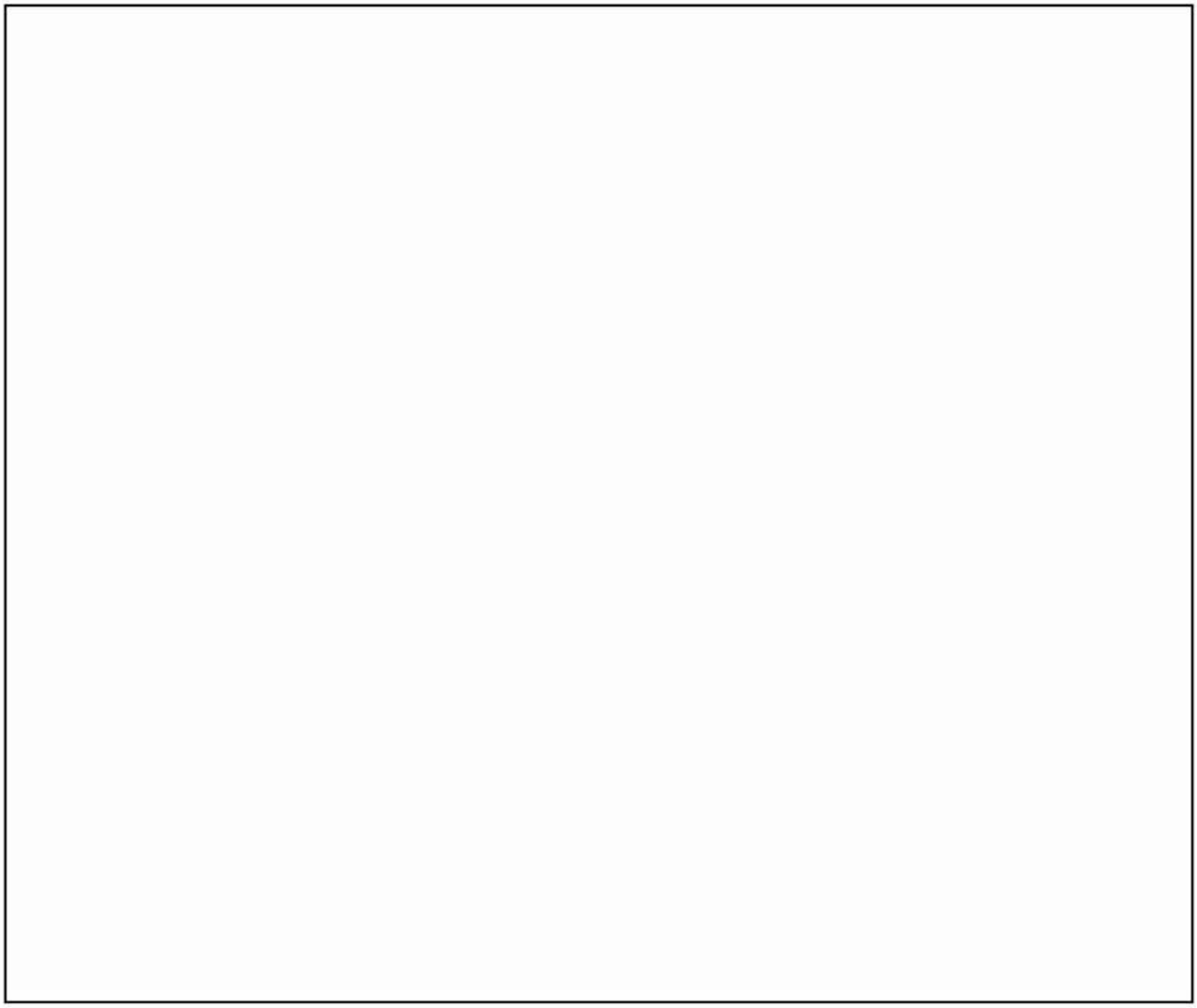
2.3 Possible Fraud Indicators

[7] Matter of A.J. VALDEZ and Z. VALDEZ, 27 I&N Dec. 496 (BIA 2018)
[8] See USCIS Policy Manual. Chapter 2, Overview of Fraud and Willful Misrepresentation https://www.uscis.gov/policy-manual/volume-8-part-j-chapter-2

Possible fraud indicators vary from case to case. The presence of possible fraud indicators alone is not confirmation of fraud nor can adjudicators make findings of fraud. Adjudicators must identify the possible fraud indicators in the record, develop testimony related to these indicators, and refer fraud concerns to FDNS for investigation if these indicators remain unresolved after developing testimony. Below is a non-exhaustive list of possible fraud indicators. These possible indicators suggest different categories of fraud, which will be discussed later in the lesson plan. (b)(7)(E)



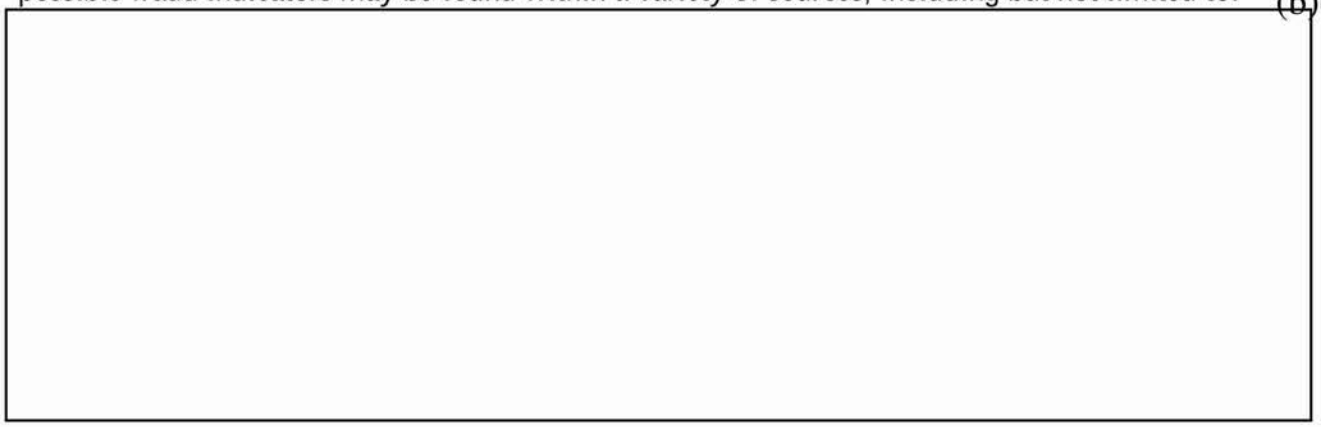
(b)(7)(E)



2.4 Where Possible Fraud Indicators Are Found

Many possible fraud indicators are based on inconsistencies in the record or responses during interviews. Through preparation and careful file review before, during, and after an interview, possible fraud indicators may be found within a variety of sources, including but not limited to:

(b)(7)(E)



The applicant must be informed of any inconsistency that is material to eligibility for the benefit sought and be given an opportunity to resolve such inconsistency with a reasonable explanation or independent objective evidence.[9] Deconfliction with your local FDNS team prior to entering a decision is critical to ensure that any possible ongoing fraud investigation is not jeopardized.

It is possible for the record to have an inconsistency that is not material to the requested benefit or for the applicant to have a reasonable explanation. Therefore, not all inconsistencies warrant a fraud referral or fraud finding.

Examples

An immaterial inconsistency may be between the benefit requested and other information available to USCIS, for example: (b)(7)(E)

2.5 Types of Fraud Found in RAIO Adjudications

Fraud types found in RAIO adjudications include:

Adjudicators may encounter more than one type of fraud in a case.

2.5.1 Fraud in the Claim

Examples

2.5.2 Document Fraud

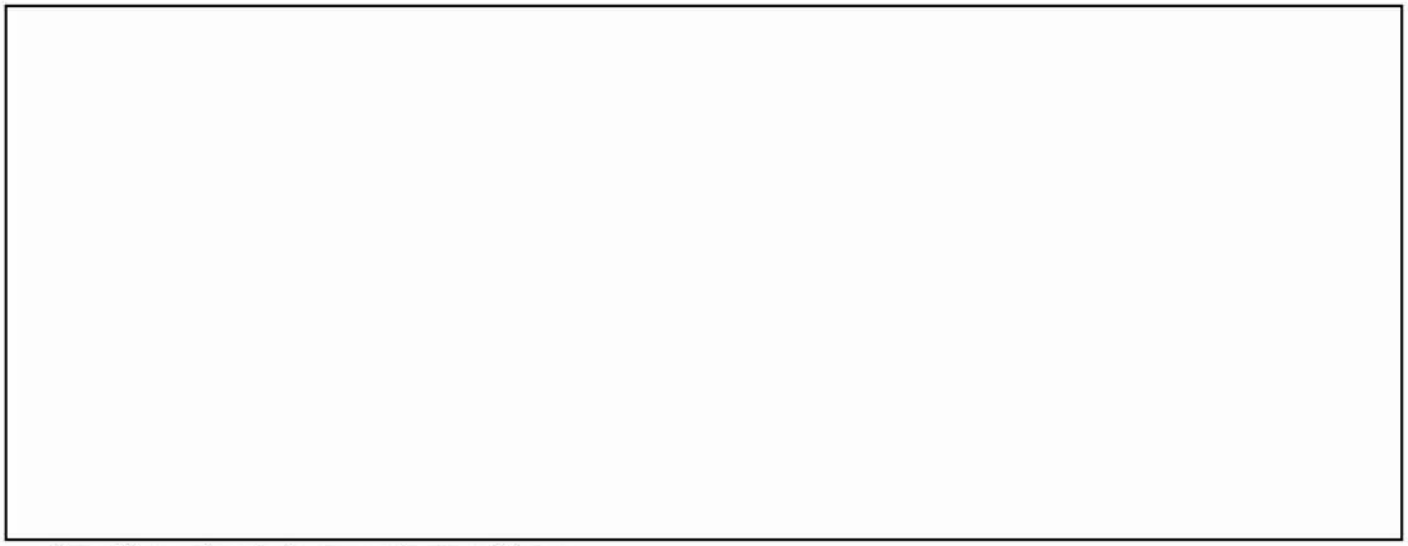
(b)(7)(E)

Examples

Examples

Examination of original documents

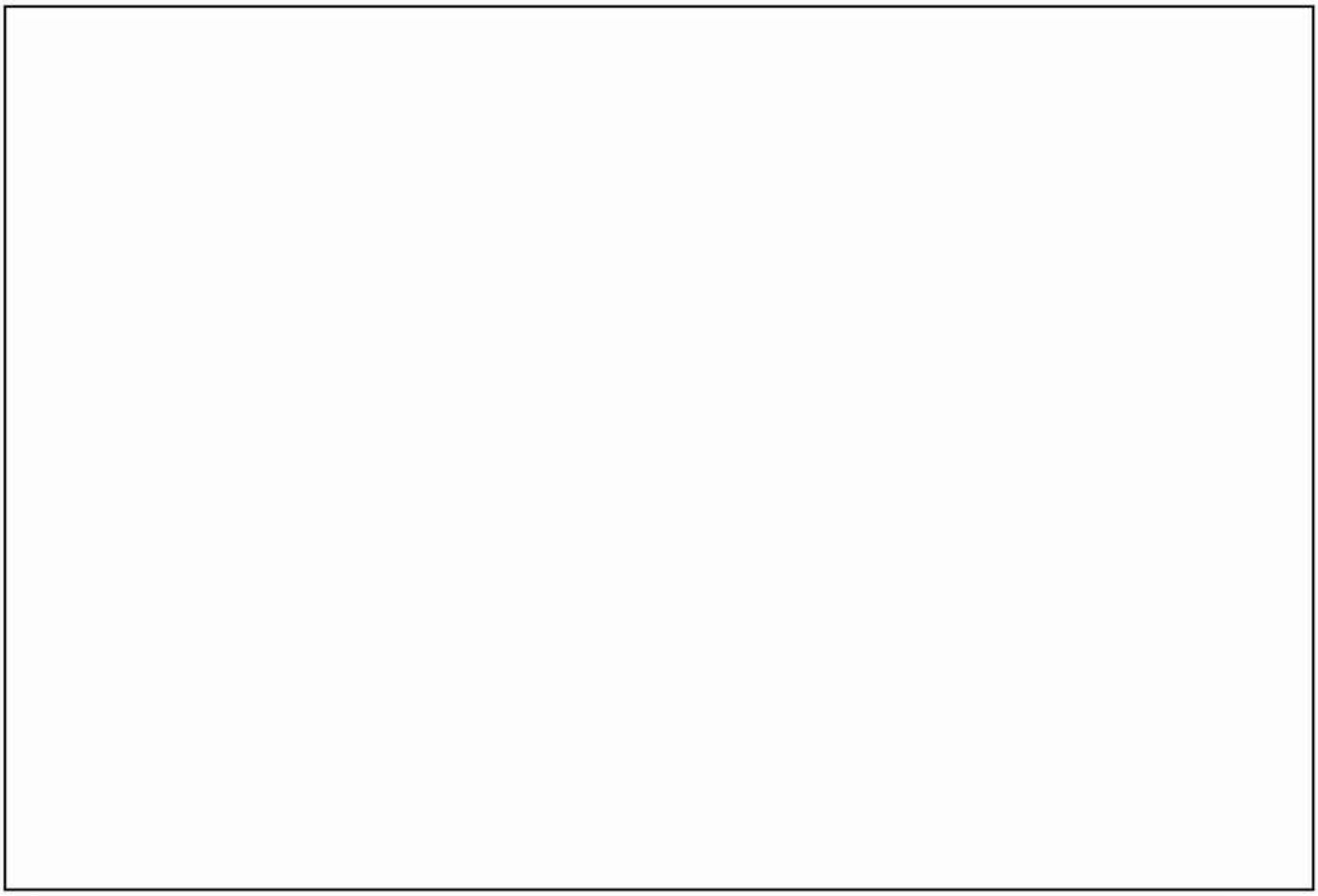
(b)(7)(E)



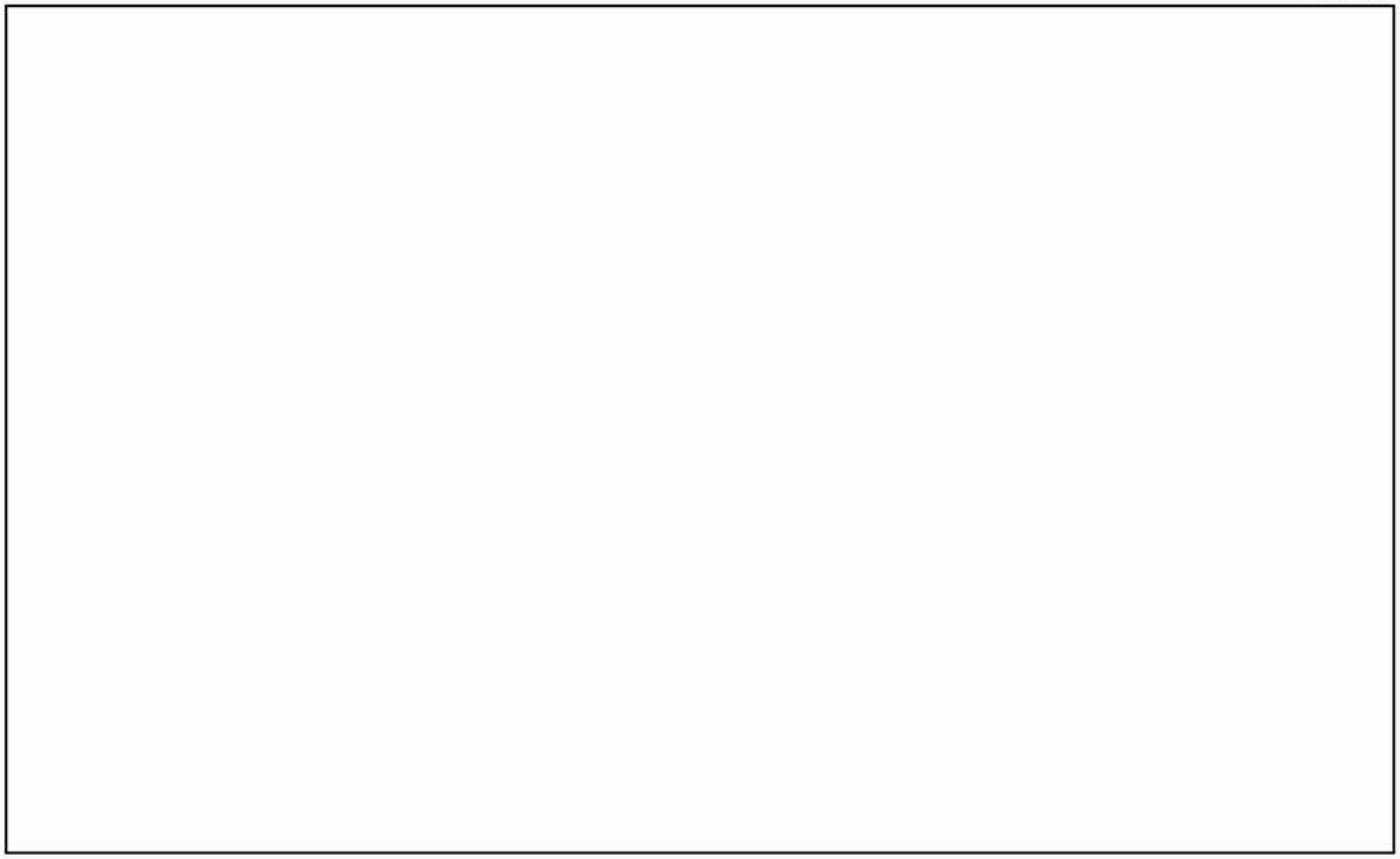
Questions about documentary evidence

You must reasonably inquire about the content, origin, and authenticity of each relevant document submitted in support of any application for a benefit. You must also record the applicant's responses in the interview notes. Questions about documentary evidence should elicit, at a minimum, the following information:

(b)(7)(E)



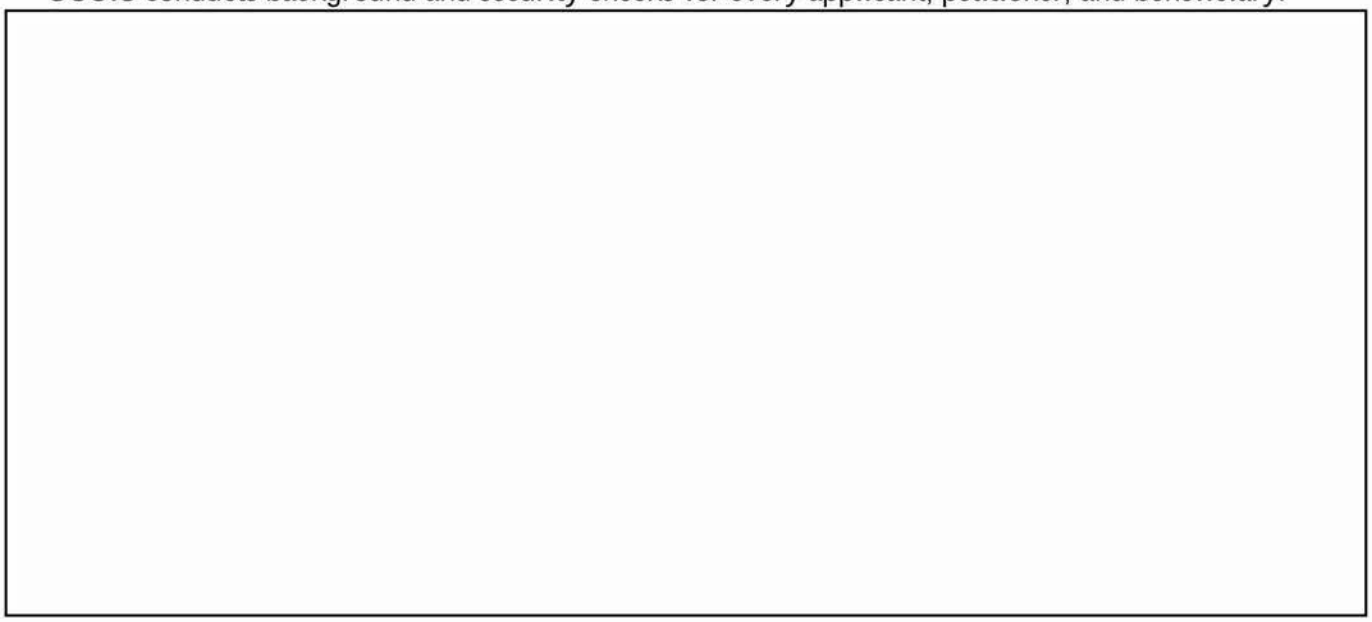
(b)(7)(E)



2.5.3 Identity Fraud

Identity fraud is the use of false biographic information in order to appear eligible for a benefit or to mask some disqualifying information that may materially affect eligibility for a benefit.

USCIS conducts background and security checks for every applicant, petitioner, and beneficiary. (b)(7)(E)



(b)(7)(E)

Questions about identity

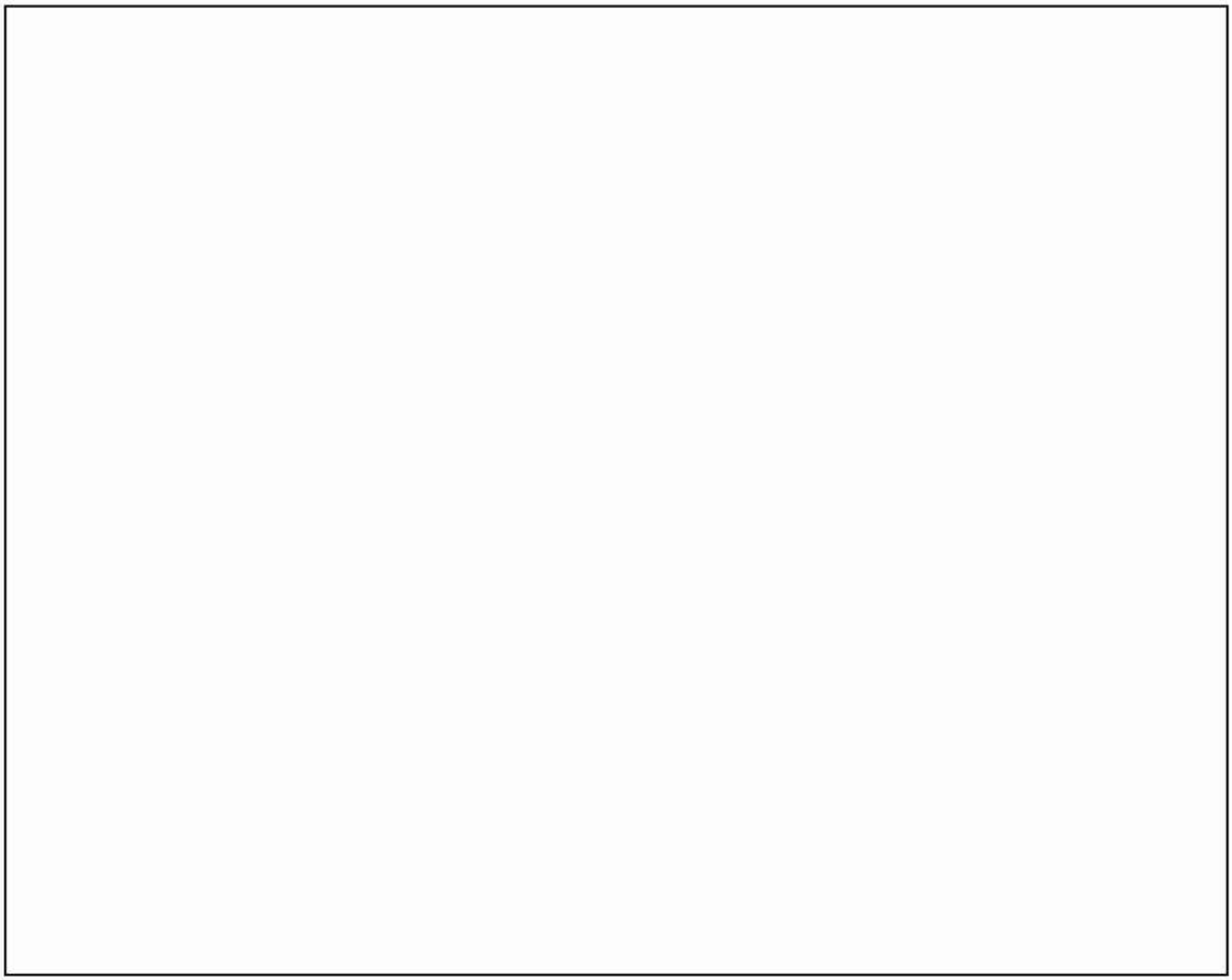
Examples of questions which may assist in discovering a true or additional identity could be:

Examples

2.5.4 Relationship Fraud

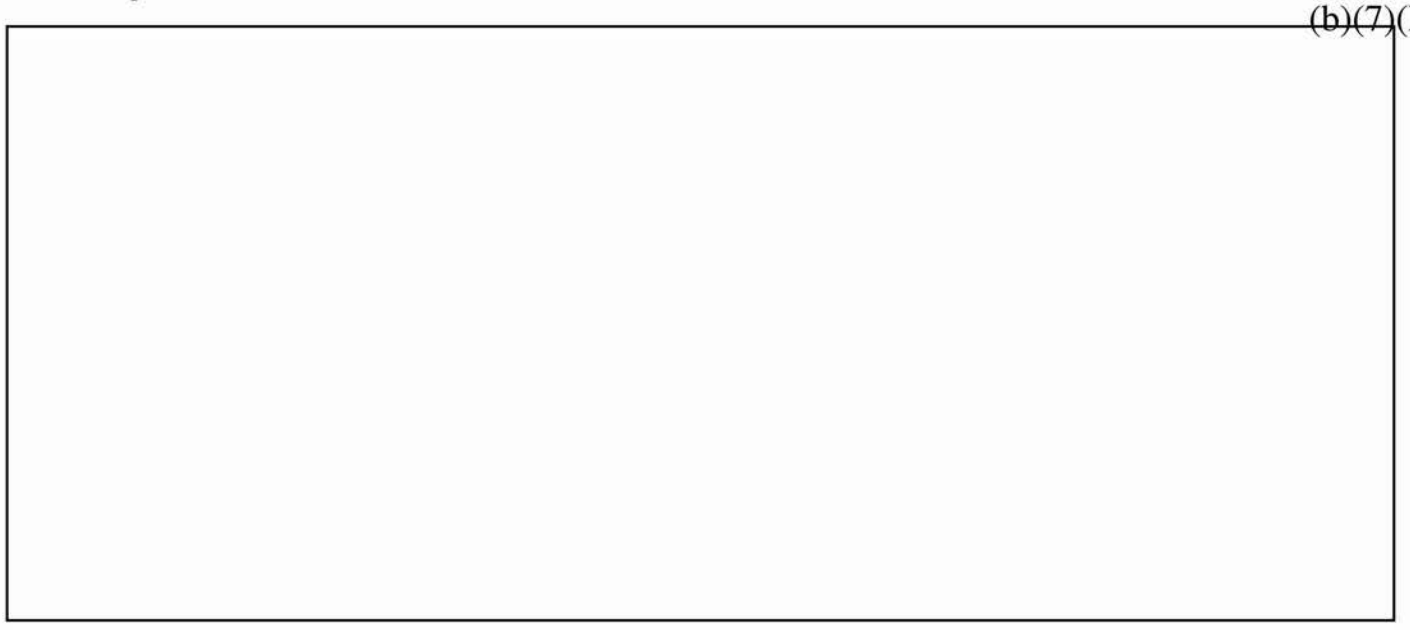
(b)(7)(E)

(b)(7)(E)



Examples

(b)(7)(E)



(b)(7)(E)

2.5.5 Fraud to Conceal Public Safety or National Security Risks

(b)(7)(E)

Examples

2.5.6 Immigration Service Provider Fraud

(b)(7)(E)

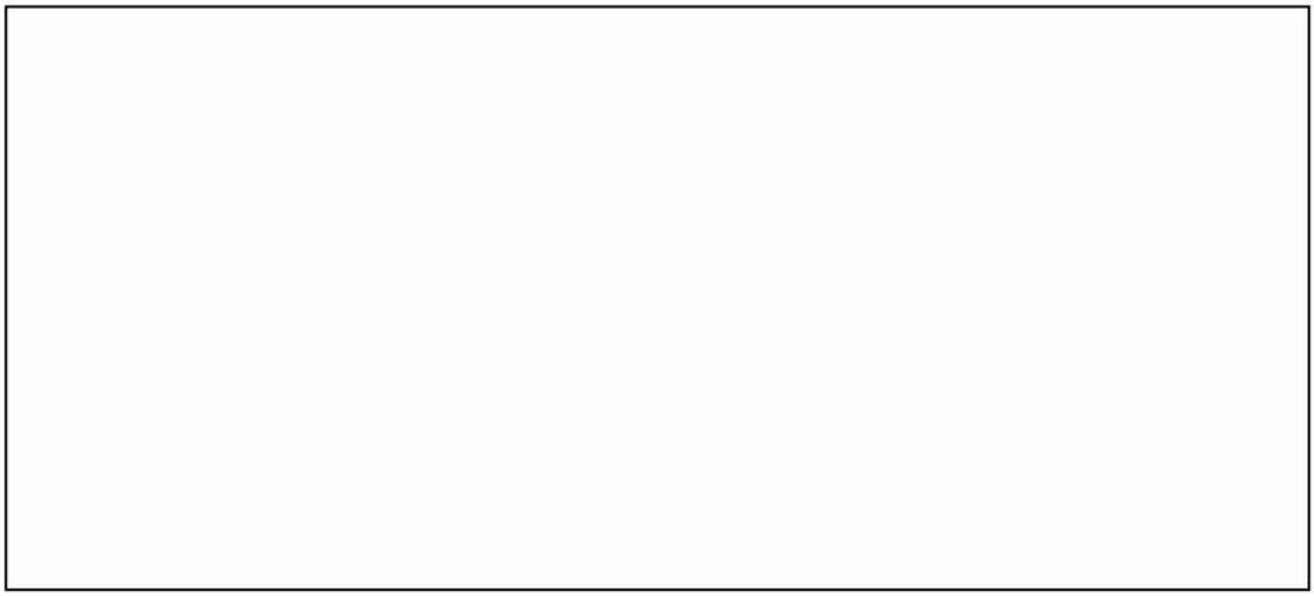
Examples

(b)(7)(E)

2.5.7 Jurisdiction Fraud

(b)(7)(E)

(b)(7)(E)



2.5.8 Access Fraud

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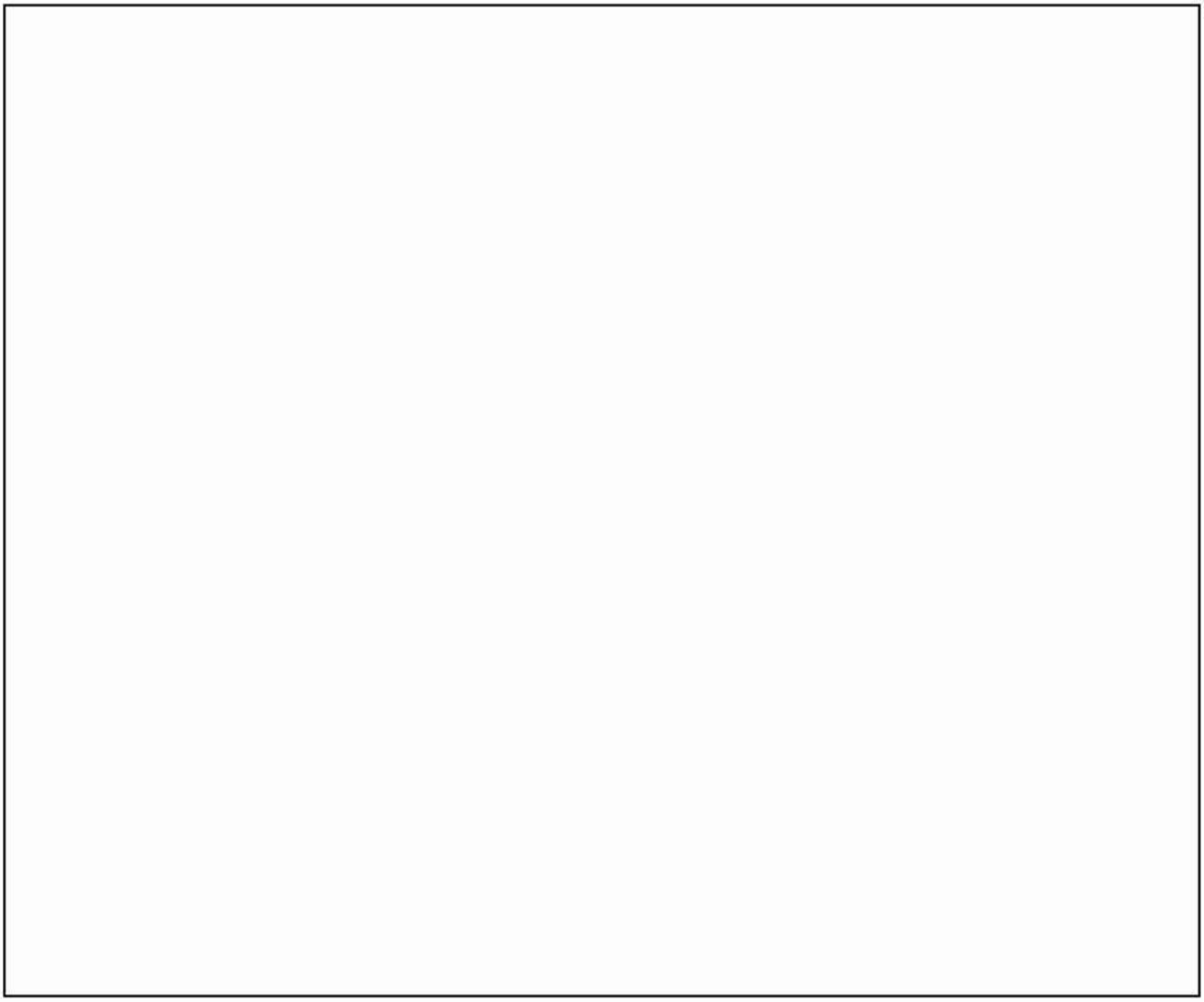


Examples

2.6 Fraud Referral

When a USCIS adjudicator identifies possible fraud indicators in a filing, the adjudicator refers that filing to FDNS to conduct an administrative investigation. The fraud referral is the mechanism through which fraud concerns are referred to FDNS. For FDNS to accept a fraud referral, the referral needs to be well-articulated and provide enough context for FDNS to determine whether the fraud concern is material and actionable.

There is often a misconception that fraud referrals require a substantial amount of time to write. This is incorrect. A fraud referral should be a brief summary of the fraud concern but provide just enough context so that the reviewing officer does not need to re-read substantial portions of the A-file to understand the concern.

(b)(7)(E)

Example 1:

	Effective Example	Ineffective Example

(b)(7)(E)

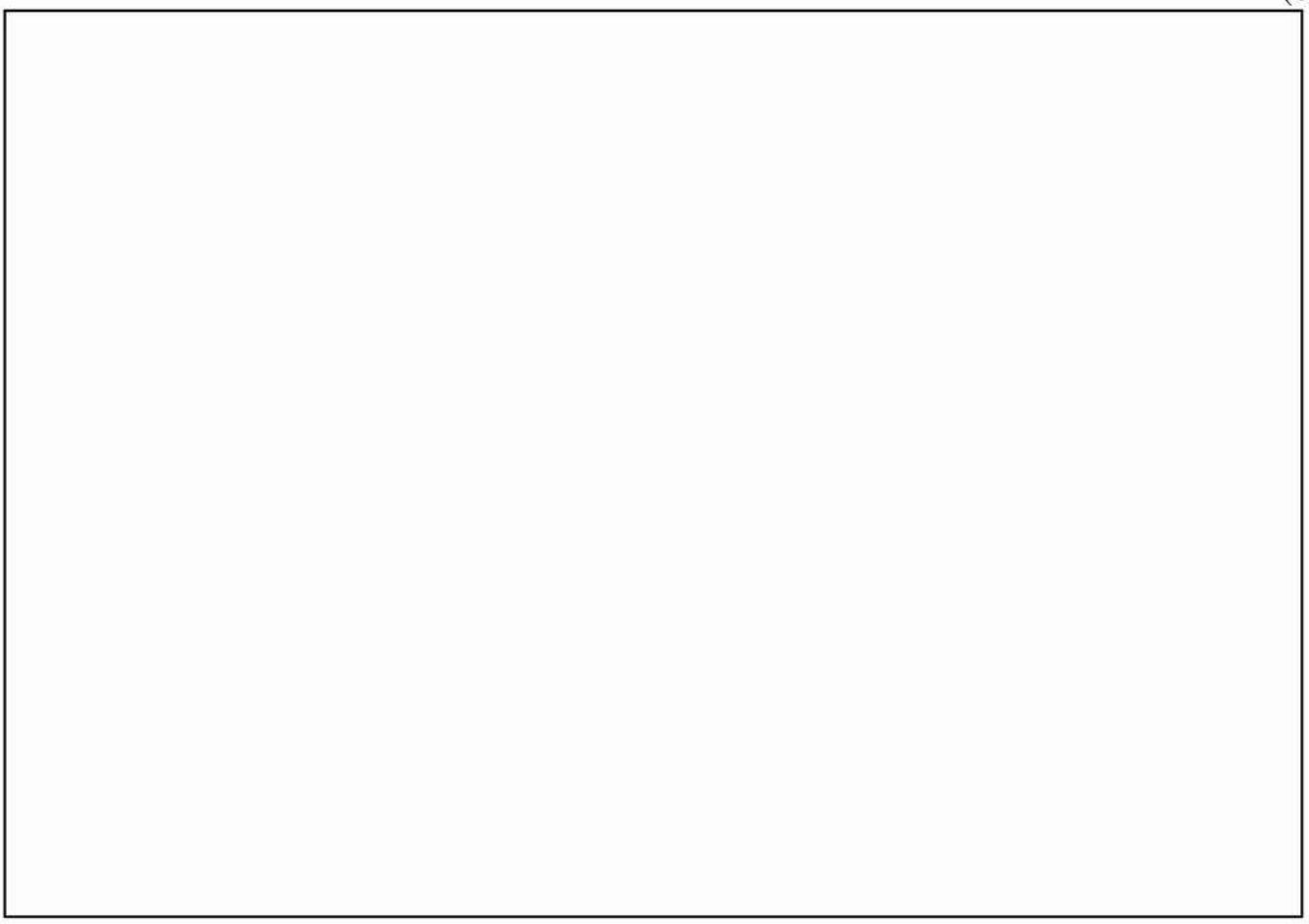
(b)(7)(E)

Example 2:

	Effective Example	Ineffective Example

(b)(7)(E)

(b)(7)(E)



3. SUMMARY

Our mission is to administer benefits to those who are eligible for protection while also ensuring the integrity of RAIO's programs. You play a key role in the adjudications process and in the successful implementation of RAIO's anti-fraud initiatives.

You can also take immediate steps to address suspected fraud in your cases, such as carefully reviewing applications and supporting documentation and asking detailed questions at the time of the interview about possible indicators of fraud. RAIO officers may submit a fraud referral for any petition or application during any phase of adjudication. Consult with your supervisor and FDNS before, during (if possible), and after your interview to help you address suspected fraud indicators. Complete a fraud referral and continue communicating with FDNS as they investigate your case.

PRACTICAL EXERCISES

There are no practical exercises for this module.

OTHER MATERIALS

There are no other materials for this module.

SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

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

REQUIRED READING

(b)(7)(E)

ADDITIONAL RESOURCES

SUPPLEMENTS

There are no International and Refugee Adjudications supplements.

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SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

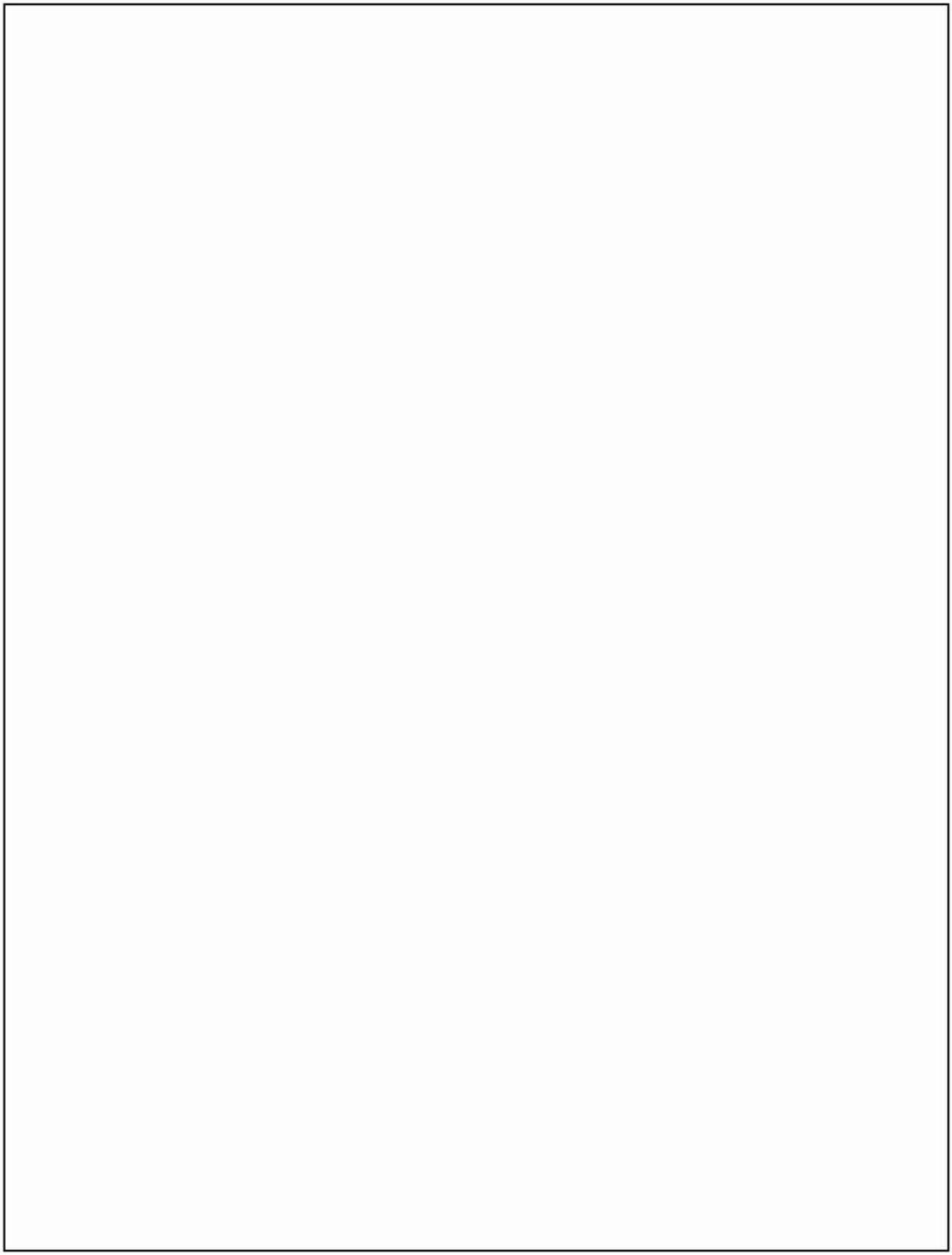
REQUIRED READING

1. Lynden Melmed, Chief Counsel, USCIS. Authority of Asylum Officers to Retain Fraudulent Documents or Documents Fraudulently Obtained. Memorandum to Lori Scialabba, Associate Director, RAIO and Greg Smith, Acting Associate Director, National Security and Records Verification. (Washington, DC: November 30, 2007). 4 p.

2. Ted H. Kim, Acting Chief, Asylum Division, US Citizenship and Immigration Service. Fact Sheet on Confidentiality and Fact Sheet Attachment. Memorandum to Asylum Office Directors and Deputy Directors. (Washington, DC: October 18, 2012). 8 p.

ADDITIONAL RESOURCES

(b)(7)(E)



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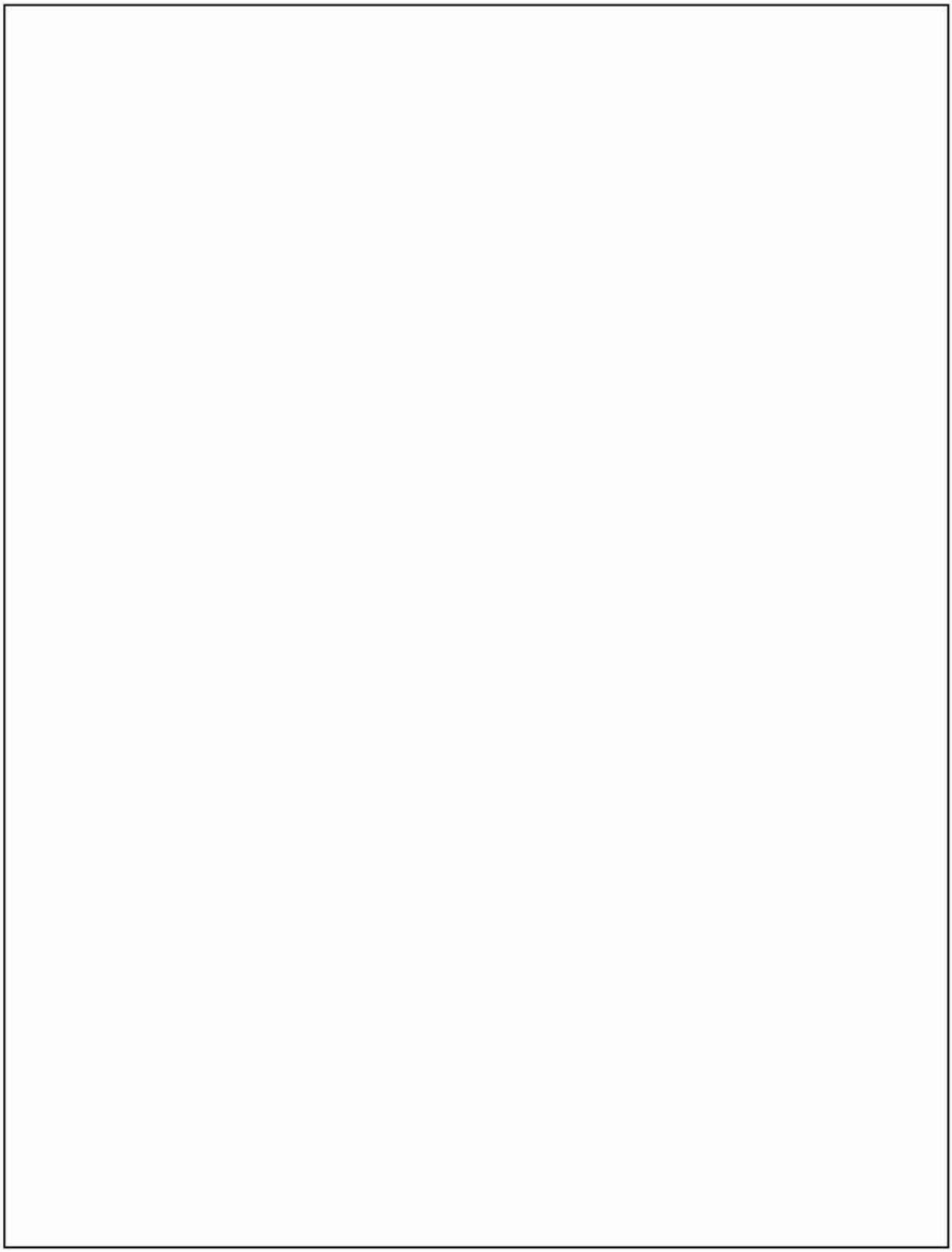

SUPPLEMENTS

Asylum Adjudications Supplement – Fraud in Asylum Adjudications

Effects of Fraud on an Asylum Claim

- Providing fraudulent evidence such as false testimony or fraudulent documents to support an asylum claim has implications for evaluating the applicant's credibility and whether the applicant has met his/her burden of proof.[23]
- An applicant who submits fraudulent evidence should be given the opportunity to explain the submission.
- The failure to provide a reasonable explanation may be grounds for an adverse credibility finding, a referral to FDNS, and possible administrative or criminal charges.
  - For an adverse credibility finding, the fraudulent evidence must be considered under the "totality of the circumstances" standard as required by the REAL ID Act.[24]
  - If the fraudulent evidence is discounted, the officer may find that the applicant has failed to meet his or her burden of proof.[25]
  - Please see the RAIO Training Module, Credibility for a discussion of the REAL ID Act and its use of the "totality of the circumstances" standard rather than "materiality" in establishing credibility and burden of proof issues. The totality of the circumstances standard applies to issues of fraud as well as other credibility issues present in an applicant's claim, when making a credibility determination.

[23] For further discussion of burden and standards of proof, see RAIO Training Module, Evidence.

[24] See INA § 208(b)(1)(B)(iii).

[25] See INA § 208(b)(1)(B)(ii) ("In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record.").

Asylum Adjudications Supplement – **Consequences of Fraud in the Asylum Program**

Termination of Asylum

Source of Authority: 8 C.F.R. § 208.24

- When fraud is discovered after asylum has been granted, asylum can generally be terminated if the alien has not yet adjusted to legal permanent resident (LPR) status.
- The Prima Facie standard is required to issue a Notice of Intent to Terminate (NOIT).
- The burden shifts to USCIS to establish one or more of the termination grounds by a preponderance of the evidence.

  Please note: As of 8/7/2012, Asylum Offices operating in the Ninth Circuit (ZLA, ZSF, and ZCH (Idaho Only)) have suspended direct terminations processing until further notice, based on the court decision in Nijjar v. Holder, 689 F. 3d 1077 (9th Cir. 2012). Affected offices may still issue a Notice of Intent to Terminate (NOIT) to set in motion consideration of the termination grounds by the Executive Office for Immigration Review (EOIR), in coordination with ICE OPLA.

  For more information on Termination procedures please see the AAPM III.V Termination of an Asylum Approval.

Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	Mandatory Bars to Asylum
Rev. Date	May 9, 2013
Lesson Description	This lesson describes prohibitions on applying for asylum, exceptions to those prohibitions, and the circumstances that require denial or referral of an asylum application, even when an applicant establishes that he or she is otherwise eligible for asylum.
Terminal Performance Objective	Given a request for asylum to adjudicate, the asylum officer will be able to determine when an applicant is ineligible to apply for asylum and when a refugee is ineligible for a grant of asylum.
Enabling Performance Objectives	1. Locate the sections of the INA and regulations that apply to grounds for mandatory denials of asylum. (ACRR3) (AAS6) (ACCR4) 2. Identify the grounds of ineligibility to apply for asylum, and the exceptions to those grounds. (AIL4) 3. Indicate who is subject to a mandatory denial or referral of asylum. (ACRR3) 4. Describe the factors to consider in determining whether an individual is firmly resettled. (ACRR3) 5. Identify policies and procedures for handling criminal issues. (ACRR3) (CD38)
Instructional Methods	Lecture; discussion; practical exercises
Student Materials/ References	Lesson Plans; INA; 8 C.F.R. §208; INS v. Aguirre-Aguirre, 526 U.S. 415 (1999)
Methods of Evaluation	Practical exercise; Written test
Background Reading	1. Agreement Between the Government of the United States of America and the Government of Canada for the Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (Dec. 5, 2002), 5 pp.; Final Rule on the Implementation of the Agreement, 69 FR 69480, November 29, 2004, 12 pp. 2. Walter D. Cadman. Investigations Branch, Office of Field Operations. Investigative Referral of Suspected Human Rights Abusers, Memorandum to District Directors, et al. (Washington, DC: Sept. 28, 2000), 2p.

3. Joseph E. Langlois. Asylum Division, Office of International Affairs. Known or Suspected Human Rights Abusers, Memorandum to Asylum Office Directors, et al. (Washington, DC: Sept. 11, 2000), 5p.

4. Joseph E. Langlois. Asylum Division, Office of International Affairs. Procedures for Contacting HQASM on Terrorist Cases, Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 3, 2002), 2p.

5. Joseph E. Langlois. Asylum Division, Office of International Affairs. Procedures for Implementing the One-Year Filing Deadline and Processing Cases Previously Denied by EOIR, Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 4, 2002), 11 p.

6. Michael A. Pearson. Office of Field Operations. Human Rights Abuse Memorandum of Understanding, Memorandum to Regional Directors, et al. (Washington, DC: Sept. 29, 2000), 19p.

7. Chris Sale. Office of the Deputy Commissioner. AEDPA Implementation Instruction #3: The Effects of AEDPA on Various Forms of Immigration Relief, Memorandum to Management Team (Washington, DC: 6 August 1996), 9 p. plus attachments

8. Jeffrey Weiss. Office of International Affairs. Processing Claims Filed By Terrorists Or Possible Terrorists, Memorandum to Asylum Office Directors, HQASM Staff (Washington, DC: 1 October 1997), 2 p.

9. Johnny N. Williams. Office of Field Operations. Interagency Border Inspection System Records Check, Memorandum to Regional Directors, et al. (Washington, DC: 2 July 2002), 4 p. plus attachment.

10. James W. Ziglar. Office of the Commissioner. New Anti-Terrorism Legislation, Memorandum for Regional Directors and Regional Counsel (Washington, DC: 31 October 2001), 8p.

11. United Nations High Commissioner for Refugees, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees. HCR/GIP/03/05, 4 September 2003, 9 pp.

12. Joseph E. Langlois. USCIS Asylum Division. Updates to Asylum Officer Basic Training Course Lessons as a Result of Amendments to the INA Enacted by the REAL ID Act of May 11, 2005, Memorandum to Asylum Office Directors, et al. (Washington, DC: 11 May 2006), 8 pp.

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

CRITICAL TASKS

1. Knowledge of mandatory bars and inadmissibilities to asylum eligibility (ACRR3)
2. Knowledge of policies and procedures for one year filing deadline (ACRR4)
3. Knowledge of criteria for refugee classification. (CD20)
4. Knowledge of policies and procedures for handling criminal issues (CD38)
5. Skill in analyzing complex issues to identify appropriate responses or decisions (CD127)

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I. INTRODUCTION

This lesson describes prohibitions on applying for asylum, exceptions to those prohibitions, and the circumstances that require denial or referral of an asylum application, even when an applicant establishes that he or she is otherwise eligible for asylum. Prohibitions on applying for asylum and circumstances that require denial or referral of otherwise eligible applicants are known collectively as "bars." There are bars to applying for asylum and bars to eligibility for asylum.
This lesson only introduces the bar to applying for asylum more than one year after the date of last arrival (the one-year filing deadline), and the bar to applying based on availability of a safe third country. Both of these subjects are covered in greater detail in the asylum lessons, One-Year Filing Deadline and Safe Third Country Threshold Screening. This lesson will provide more detailed information on the bar to applying for asylum based on a Previous Denial of an Asylum Claim.

This lesson will also provide a brief review of the bars to eligibility that are covered in RAIO training modules Analyzing The Persecutor Bar, National Security, and Firm Resettlement.

This lesson will provide a more detailed discussion of bars to eligibility based on criminal activity.

You are not required to memorize all of the specific crimes listed as bars to asylum. Rather, you should become familiar with the broad category of crimes that preclude a grant of asylum, and the issues that must be considered when adjudicating the claim of an applicant who may have been involved in criminal activity.

In general, the process for interview of an asylum-seeker does not change when examining the possibility that a mandatory bar applies. However, there are certain instances when the asylum officer must switch to Question-and-Answer, Sworn Statement style interview notes. This is discussed in greater detail in the RAIO training module Interviewing - Note-Taking.

II. OVERVIEW OF BARS

1951 Convention relating to the Status of Refugees, Art. 1.F; UNHCR Handbook, paras. 140, 147-63

The 1951 Convention relating to the Status of Refugees gives State signatories the authority to deny protection to certain refugees who are determined to be "persons who are not considered to be deserving of international protection," and persons deemed "not in need of

international protection." Specifically, the Convention does not apply to any person with respect to whom there are serious reasons for considering that he or she committed certain crimes (crime against peace, war crime, crime against humanity, or serious nonpolitical crime outside the country of refuge), or has been guilty of acts contrary to the purposes and principles of the United Nations.

In accordance with these provisions, United States law contains provisions that prohibit the granting of asylum (and/or withholding of removal) to certain individuals based on criminal activities and national security reasons. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) on September 30, 1996, Congress significantly revised the law relating to eligibility to apply for and to be granted asylum. Prior to the IIRIRA, the only bar to applying for asylum was conviction of an aggravated felony. A change occurred with enactment of IIRIRA so that a conviction of an aggravated felony is a bar to being granted asylum. Other circumstances discussed below are bars to applying for asylum. Consequently, an asylum applicant who applies for asylum on or after April 1, 1997 must first demonstrate eligibility to apply for asylum before the merits of the claim will be adjudicated.

INA § 208(b)(2)(B)(i). This is discussed in section IV.B below.

In addition, Congress identified new mandatory bars to eligibility for asylum and codified in statute grounds for ineligibility that previously were found only in regulation.

Because the IIRIRA amendments to section 208 of the INA apply only to asylum applications filed on or after April 1, 1997, three new prohibitions on applying for asylum and the new substantive ineligibility grounds apply only to applications filed on or after April 1, 1997.

A. Overview of Bars to Applying for Asylum

Pursuant to regulation, only the BIA, an immigration judge or asylum officer may make the determination as to whether an applicant is prohibited from applying for asylum. Therefore, the Service Centers will continue to accept asylum applications in affirmative cases, regardless of whether it appears that an applicant is barred from applying. The applicant will be scheduled for an asylum interview, and an asylum officer will interview the applicant to determine whether a prohibition on filing is applicable, and if so, whether an exception exists.

8 C.F.R. § 208.4(a)(1)

Generally, an asylum seeker cannot apply for asylum on or after April 1, 1997, if any of the following three circumstances apply:

INA § 208(a)(2); 8 C.F.R. § 208.4(a)

- The asylum seeker could be returned to a "safe" third country, pursuant to a bilateral or multilateral agreement.

As will be discussed below, the first bar only

- The asylum seeker submitted an application more than one year after arrival in the United States or after April 1, 1998, whichever is most recent in time.

applies to certain applicants arriving from Canada, who are seeking credible or reasonable fear interview, and there are exceptions for all three bars.

- The asylum seeker previously has been denied asylum by an immigration judge or the BIA.

Conviction of an aggravated felony is a prohibition on filing for asylum applications submitted between November 20, 1990 and April 1, 1997.

B. Overview of Mandatory Bars to a Grant of Asylum

There are six statutory grounds (mandatory bars) that render an applicant ineligible for asylum, even if the applicant may be a "refugee" within the meaning of section 101(a)(42)(A) of the Act.

INA §§ 208(b)(2)(A); Note that the statute provides that the Attorney General may establish by regulation additional limitations on a grant of asylum. INA § 208(b)(2)(C).

Each bar is outlined below, and will be discussed in more detail in the rest of the lesson plan.

- Persecution of others on account of one of the protected characteristics in the refugee definition
- Conviction of a particularly serious crime, including an aggravated felony

By definition, a persecutor cannot be a "refugee." The second sentence of INA § 101(a)(42) specifically excludes persecutors from the refugee definition.

- Commission of a serious nonpolitical crime outside the United States prior to arrival in the U.S.
- Reasonable grounds exist for regarding the applicant a danger to the security of the United States
- Participation in terrorist activities or status as a representative of certain terrorist organizations
- Firm resettlement

III. BARS TO APPLYING FOR ASYLUM

Only applicants who submit applications for asylum on or after April 1, 1997, are subject to the following bars to applying for asylum.

A. Safe Third Country

INA § 208(a)(2)(A).

If it is determined that the asylum seeker can be removed to a "safe third country," he or she cannot apply for asylum, unless the Attorney General finds it in the public interest for the applicant to remain in the United States.

Each of the following requirements must be met before this bar can be applied:

1. There must be a bilateral or multilateral agreement for removal with the third country;

2. The applicant's life or freedom would not be threatened on account of a protected ground in the third country; and

3. The applicant must have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection in the third country.

Please refer to Asylum Lesson Plan, Safe Third Country Threshold Screening, for a detailed discussion of the applicability and exceptions related to this bar to filing for asylum.

B. One-Year Filing Deadline

An asylum seeker cannot apply for asylum more than one year after the date of arrival in the United States. The one-year period is calculated from the date of the applicant's last arrival in the United States or April 1, 1997, whichever is most recent in time. Please refer to Asylum Lesson Plan, One-Year Filing Deadline, for a detailed discussion of the applicability and exceptions related to this bar to filing for asylum.

INA § 208(a)(2)(B); 8 C.F.R. § 208.4(a)(2)(ii). The Asylum Division provided a 2-week grace period when this provision was implemented and thus does not refer as untimely any I-589 applications filed before April 16, 1998.

C. Previous Denial of Asylum

An asylum seeker cannot apply for asylum if he or she has previously applied for and been denied asylum by an immigration judge (IJ), or the Board of Immigration Appeals (BIA) (collectively EOIR), unless the asylum seeker demonstrates to the satisfaction of the adjudicator changed circumstances that materially affect asylum eligibility. A previous denial of asylum by an asylum officer is not a bar to applying for asylum.

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

See Joseph E. Langlois, Asylum Division, Office of International Affairs. Procedures for Implementing the One-Year Filing Deadline and Processing Cases Previously Denied by EOIR, Memorandum to Asylum Office Directors, et al. (Washington, DC:

Jan. 4, 2002).

1. Jurisdiction

In most cases in which an applicant has been denied asylum by an IJ or the BIA, the Asylum Division does not have jurisdiction over a subsequently filed Form I-589, Application for Asylum and for Withholding of Removal, because a charging document has been served on the applicant and filed with EOIR. Therefore, unless the applicant left the United States after the denial, the application would fall under EOIR's exclusive jurisdiction under 8 C.F.R. § 208.2(b) and 8 C.F.R. § 208.2(b).

Note: The "Previous Denial of Asylum" procedures do not apply to an individual who entered the US illegally after having been removed, deported, or excluded, or after having left the US under an order of removal, deportation, or exclusion, and is therefore subject to reinstatement of the prior order. For procedures involving reinstatements of prior orders, see Affirmative Asylum Procedures Manual, section III.S, Reinstatement of Prior Order.

There are five circumstances in which the Asylum Program has jurisdiction over an I-589 filed after an IJ or BIA has denied the applicant asylum. In the first three circumstances, the applicant must have left the United States after having been denied asylum by an IJ or the BIA, returned to the United States, and then submitted the I-589 with USCIS. The last two circumstances relate only to Unaccompanied Alien Children (UACs) and are a result of the Trafficking Victims Protection Reauthorization Act.

Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Staff, Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (HQRAIO 120/12a) (25 March 2009).

a. The applicant was removed from or departed the United States under an order of removal, deportation, or exclusion, and subsequently made a legal entry.

Because the final order was executed, EOIR no longer has jurisdiction and, because the subsequent entry was legal, the applicant is not subject to reinstatement of the final order under INA § 241(a)(5).

b. The applicant departed the United States after the expiration of a voluntary departure period, thus becoming subject to a removal order and subsequently

made a legal entry; or

c. The applicant departed the United States before the expiration of a voluntary departure period, and subsequently made a legal or illegal entry.

USCIS has jurisdiction because no final order was entered (therefore reinstatement is not an issue), and there has been a departure and re-entry since the applicant was placed in proceedings (therefore, EOIR no longer has exclusive jurisdiction under 8 C.F.R § 208.2).

d. A UAC in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has never submitted a Form I-589, may file for asylum with USCIS.

e. For an individual in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has previously submitted a Form I-589 while a UAC, USCIS may have initial jurisdiction.

Please see the RAIO Module *Children's* Claims and the Asylum lesson One-Year Filing Deadline for a more detailed explanation of cases involving Unaccompanied Alien Children.

2. Determination of changed circumstances

a. Definition

The definition of "changed circumstances" applied in the one-year filing deadline analysis is the same as the definition of "changed circumstances" as applied when analyzing whether the applicant may be permitted to apply for asylum after being denied asylum by an IJ or the BIA. The changed circumstances must materially affect the applicant's eligibility for asylum and may include changes in the country of persecution or changes relating to the applicant in the United States, including changes in U.S. law.

INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a)(4); and see Asylum lesson, One-Year Filing Deadline, section Changed Circumstances

The difference in the analysis is that to overcome the previous denial bar the changed circumstance must have occurred since the applicant was denied asylum by the IJ or BIA.

Note: The one-year filing deadline analysis requires that the changed circumstance have occurred after April 1, 1997.

Example: In 1995, an applicant claimed that he feared that he would be forcibly sterilized should he return to China. In January 1996 he was denied asylum by an IJ. He was granted voluntary departure by the IJ, left before the expiration period, and re-entered the country without inspection in August 1998. He files a second application for asylum. He establishes that there are changed

circumstances since his prior denial that materially affect his eligibility for asylum (i.e. the codification of persecution based on resistance to a coercive population control program as persecution on account of political opinion by IIRIRA in 1996) and has, therefore, overcome the bar to applying after a previous denial.

Example: An applicant claiming that she would be persecuted on account of her political opinion should she be returned to Panama was denied asylum by an IJ in 2010. After departing the US under voluntary departure, she returned in 2012. She claims that since the time that she was denied asylum by the judge, she has had increased health problems relating to diabetes and can receive proper care only in the United States. Her illness does not amount to a changed circumstance materially affecting her eligibility for asylum and does not overcome the previous denial bar to applying.

b. Standard of proof

See RAIO module, Evidence.

The standard of proof for demonstrating this exception is "to the satisfaction of" the adjudicator.

3. Review of previous decision

The entire file, including the prior application, supporting documentation, and the previous assessment or decision, must be reviewed prior to making a determination on whether the applicant is eligible to apply for and be granted asylum. Whenever possible, the case should be assigned to the officer who made the original decision.

a. Prior denial by asylum officer

As indicated above, a prior denial by an asylum officer is not a bar to applying for asylum. Changed circumstances need not be established for the asylum claim to be considered on its merits. Nevertheless, in such cases, substantial deference should be accorded to prior determinations as to previously established facts, including credibility findings, unless a clear error is present.

b. Prior denial by EOIR

Findings of fact made by EOIR, including credibility determinations, must be upheld and cannot be

reconsidered. The application of law to the applicant's original case also must be upheld, unless the applicant establishes changed law materially affecting his or her eligibility for asylum. The applicant has already had an opportunity to appeal the IJ's decision, and the asylum officer is not in a position to give a new hearing on issues that were or should have been raised on appeal.

4. Interview

In order to determine whether there are changed circumstances that materially affect the applicant's eligibility for asylum, the asylum officer interviews the applicant and reviews the record regarding the previous application for a thorough understanding of the basis for the applicant's claim. The asylum officer need not re-visit the details of the original asylum claim, unless it is necessary to the determination of asylum eligibility once the applicant has established changed circumstances. Therefore, the asylum interview focuses on whether any changed circumstances have occurred after the applicant was denied asylum by EOIR that may materially affect the applicant's eligibility for asylum, and any information needed to make an asylum eligibility determination if changed circumstances are established.

5. Written analysis

Where a changed circumstance exception is found, the analysis, whether in a NOID or an assessment to refer or grant, must include a statement as to why the applicant was previously denied asylum, an explanation of the changed circumstances and their materiality to the applicant's eligibility for asylum, and an analysis of the merits of the claim to asylum in light of the changed circumstances.

If a changed circumstance exception is not found, the analysis in the assessment to refer or NOID requires a description of any changed circumstances that might have been claimed by the applicant, a description of and citation to country conditions (if applicable), and an explanation of why those circumstances are not changed circumstances or why they do not materially affect the applicant's asylum eligibility. In this case, the analysis does not require a full account of all material facts or an analysis of the applicant's claim.

6. One-Year Filing Deadline

Applicants who file an application for asylum on or after April 1, 1997, are subject to the one-year filing deadline rule, including those who were previously denied asylum by an IJ or the BIA. However, please note that the one year filing deadline does not apply to UACs.

INA § 208(a)(2)(B); 8 C.F.R. § 208.4(a).

See RAIO Module: *Children's* Claims, Asylum Supplement.

The analysis of the one-year filing deadline for those who were previously denied asylum will be identical to that for all other applicants.

See generally Asylum lesson, One-Year Filing Deadline.

a. Filing timely

As explained above, for the Asylum Division to have jurisdiction over an asylum application filed by an individual who was previously denied asylum by an IJ or the BIA, the individual must have left the United States and made a re-entry subsequent to the denial of asylum.

Section III.C.1., Jurisdiction, above, lists the situations when the Asylum Division has jurisdiction over an applicant previously denied asylum.

To determine whether the applicant timely filed, the officer compares the date of the applicant's entry subsequent to the denial of asylum to the date the second asylum application was filed to determine whether the individual filed the application within one year after the date of last arrival.

See Asylum Lesson, One-Year Filing Deadline, section IV.

Example: Consider the same applicant from China in the example above. Recall that he was denied asylum by an IJ in January 1996, and after departing voluntarily, he re-entered the country illegally in August 1998. He filed an application for asylum in December 1999. Recall that he established that there are changed circumstances since his prior denial that materially affect his asylum eligibility (i.e., the codification of persecution based on resistance to a coercive population control program as persecution on account of political opinion by IIRIRA in 1996), overcoming the previous denial bar to applying. However, his application was not timely filed (16 months after last arrival). The officer must then determine whether the applicant has established a changed or extraordinary circumstance exception to the one-year filing deadline.

b. Exceptions to the one-year filing deadline

An applicant previously denied asylum who files an application for asylum more than one year after his or her last arrival may still be eligible for asylum if he or

See Asylum lesson, One-Year Filing Deadline, section Exceptions to the One-

she can establish eligibility for an exception to the one-year filing deadline. Year Rule

(i) Changed circumstances

If an applicant establishes a changed circumstance that excuses a prior denial of asylum, that same circumstance may qualify as an exception to the one-year filing deadline as well, provided that the changed circumstance occurred on or after April 1, 1997 and the application was filed within a reasonable period of time given the circumstances. See Asylum lesson, One-Year Filing Deadline, section Changed Circumstances.

Example: An ethnic Albanian from Kosovo who feared persecution on account of his nationality was denied asylum by an IJ in March 1997. The applicant timely departed under voluntary departure and re-entered the US illegally in December 1997. The applicant filed for asylum in July 1999 (an untimely filing). The applicant established an exception to the previous denial bar on the basis of a substantial increase in hostilities against ethnic Albanians in Kosovo that began in mid-1998, developed into ethnic cleansing in early 1999, and culminated in an attack on his town by Serbian police in April 1999. Because the worsening of conditions is material to the applicant's asylum eligibility, this also serves as a changed circumstance exception to the one-year filing deadline, provided that the applicant files within a reasonable period given the circumstances.

Example: Consider the same Chinese applicant above. He established a changed circumstance exception to the previous denial bar to applying (statutory change in the definition of refugee based on resistance to a coercive population control program). However, this changed circumstance does not provide an exception to the one-year filing deadline because it did not occur after April 1, 1997. See Asylum lesson, One-Year Filing Deadline, section Changed Circumstances, General Considerations.

(ii) extraordinary circumstances

Extraordinary circumstances do not provide an exception to the bar to applying for asylum after a See Asylum lesson, One-Year Filing

prior denial. However, if the changed circumstance that overcomes the previous denial bar does not apply as a changed circumstance exception to the one-year filing deadline, the asylum officer must consider whether there are extraordinary circumstances that are material to the filing deadline.

Deadline, section Extraordinary Circumstances

Example: Again consider the Chinese applicant above. In May 1999 he was seriously injured in a factory accident that required him to be hospitalized until September 1999. The timing and degree of injury constitute an extraordinary circumstance directly related to the delay in filing and, therefore, would serve as an extraordinary circumstance exception to the one-year filing deadline, so long as the applicant files for asylum within a reasonable period of time after he recovers from the accident.

c. Filing within a reasonable period of time

Once an applicant who applied untimely has established the requisite changed or extraordinary circumstances, a determination must be made as to whether the application was filed within a reasonable period of time given those circumstances. This requirement applies equally to applicants previously denied asylum who file more than one year after the date of last entry.

8 C.F.R. §§ 208.4(a)(4)(ii) and (5); See Asylum lesson, One-Year Filing Deadline, section Filing within a Reasonable Period of Time, Overview.

Example: Consider the applicant from Kosovo. He established a changed circumstance that materially affects his claim to asylum. This changed circumstance may provide an exception to both the prior denial bar and the one-year filing deadline bar, if the applicant filed his application within a reasonable period of time, given the circumstances. Though hostilities began about one year before he filed his application, it was the police attack on his town in April 1999 that crystallized his fear and brought him to file an application for asylum. Filing within three months of the occurrence of the changed circumstance generally would be considered a reasonable period of time.

7. Dependents

A denial of the principal applicant's asylum application does not prohibit an included dependent from filing a subsequent, separate asylum application.

8 C.F.R. § 208.14(f).

IV. BARS TO ELIGIBILITY FOR ASYLUM

A. Persecution of Others

"The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." In addition, the statute specifically prohibits the Attorney General from granting asylum to such a person.

INA § 101(a)(42); § 208(b)(2)(A)(i).

The statutory exclusion of persecutors from the refugee definition means that even if an applicant has been persecuted in the past, or has a well-founded fear of future persecution on account of one of the protected grounds, he or she cannot be said to have "met the definition of a refugee" if he or she is also found to be a persecutor.

It had long been held that the persecutor bar applies even if the alien's assistance in persecution was coerced or otherwise the product of duress. However, the Supreme Court in Negusie v. Holder requested that such an understanding be revisited. Specifically, the Supreme Court held that the BIA misapplied the Supreme Court's prior decision in Fedorenko (based on a reading of similar language in the Displaced Persons Act) as mandating that whether an alien is compelled to assist in persecution is immaterial for persecutor-bar purposes and remanded the case for agency interpretation of the statute in the first instance. The BIA has yet to issue a decision in the Negusie remand. However, DHS and DOJ are jointly developing regulations addressing possible exceptions to the persecutor bar based on duress and other factors. Until the BIA publishes a decision on the issue, or relevant regulatory guidance is issued, cases involving the persecution of others under coercion or duress should be held.

Matter of Rodriguez-Majano, 19 I. & N. Dec. 811 (1988) citing, Fedorenko v. United States, 449 U. S. 490 (1981).

Negusie v. Holder, 555 U.S. 511 (2009).

See the RAIO Module, Analyzing The Persecutor Bar for an in-depth discussion on the definition and application of the persecutor bar.

B. Conviction of Particularly Serious Crime

Asylum may not be granted to an applicant who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community.

INA § 208(b)(2)(A)(ii).

1. Filing date

This bar applies regardless of the filing date of the asylum application; however, the filing date determines the type of crimes included in this category.

8 C.F.R. §§ 208.13(c)(1) and (2)(A).

If the application was filed before November 29, 1990, then an aggravated felony is not automatically considered a particularly serious crime.

See Section IV.B.6.a., Aggravated Felonies, below.

If the application was filed before April 1, 1997, then the conviction must have occurred in the United States. If the application was filed on or after April 1, 1997, then the conviction may have occurred either inside or outside of the United States.

2. Basic elements

   a. convicted by a final judgment

   b. crime is "particularly serious"

   c. the applicant constitutes a danger to the community

3. Definition of "conviction"

For immigration purposes, a conviction exists if each of the following requirements are met:

INA § 101(a)(48)(A).

   a. a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and

   b. the court has ordered some form of punishment, penalty, or restraint on a person's liberty; and

   c. the conviction must be final. A conviction is final, for immigration purposes, if direct appellate review has either been waived or exhausted

Matter of Polanco, 20 I&N Dec. 894 (BIA 1994).

If in doubt about the finality of a conviction, a Supervisory Asylum Officer should contact the USCIS Office of Chief Counsel or ICE OPLA, as appropriate.

4. Juvenile convictions

Conviction as a juvenile will not constitute a conviction for a particularly serious crime under the INA, if the applicant is

Matter of Ramirez-Rivero, 18 I&N Dec.

under 16 years of age or was tried as a juvenile (while 16 to18 years of age). However, commission of the crime may be a basis to exercise discretion to deny or refer the asylum request.

135, 137-39 (BIA 1981); see RAIO Module, Discretion.

5. What constitutes a particularly serious crime

a. aggravated felonies

By statute, all aggravated felonies are considered particularly serious crimes for purposes of evaluating asylum eligibility.

INA § 208(b)(2)(B)(i). See Section b, "Other Crimes – general" below. Note: The particularly serious crime discussion contained herein is applicable only to asylum decision-making and is inapplicable to withholding of removal, a topic outside the scope of this lesson.

Given that the bar to asylum is for a conviction of a "particularly serious crime," the key inquiry for asylum officers is not whether the offense meets the definition of an aggravated felony, but whether the offense can be considered "particularly serious." As a practical matter, most particularly serious crimes encountered in asylum interviews will be aggravated felonies.

In order to determine if the particularly serious crime bar is applicable, the asylum officer should first consider whether the conviction is of a crime specifically identified by statute or precedent case law as an aggravated felony or otherwise as a particularly serious crime. If no such identification is available, officers must consider whether the conviction meets the defining characteristics of a "particularly serious crime." In general, when cases where the issue of a possible bar arises, guidance should be sought from supervisors, headquarters quality assurance and the USCIS Office of the Chief Counsel or ICE Office of the Principal Legal Advisor, as appropriate.

Prior to IIRIRA, the commission and conviction dates of the crime determined which definition of aggravated felony applied. As a result of IIRIRA, the current definition of aggravated felony at INA § 101(a)(43) applies regardless of commission or conviction date.

The list of crimes statutorily designated to be aggravated felonies is contained in section 101(a)(43) of the INA. Some are specific crimes, while others are more general (e.g., murder vs. crime of violence). Some crimes are not aggravated felonies unless a sentence of particular length or a certain amount of money is involved. Therefore, it is necessary to consider the sentence in such cases.

Note that it is not important to memorize statutory provisions defining and describing aggravated felonies. Instead, given information that the applicant was arrested, it is critical to acquire as much information as possible about whether there was a conviction, upon what charge or charges that conviction rested and what the sentence was. You should also gather information concerning the

circumstances underlying the facts of the crime, but be aware that the aggravated felony determination may, depending on the circumstances, rest solely on the record of conviction (regardless of the underlying facts).

A term of imprisonment for purposes of the INA is defined as including "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." Therefore, someone who has been sentenced to a term of imprisonment for a certain term, but whose sentence is deferred if a period of probation is successfully completed, is still considered "sentenced" to that term of imprisonment.

INA § 101(a)(48)(B).

The aggravated felony definition applies to convictions for violations of either state or federal law. It also applies to convictions in violation of a foreign law, so long as the term of imprisonment was completed within the previous 15 years.

INA § 101(a)(43).

(i) Drug related offenses

In assessing whether a state drug related conviction constitutes an aggravated felony under 18 USC § 924(c)(2) the U.S. Supreme Court held that conduct made a felony under state law but a misdemeanor under the Controlled Substances Act (CSA) is not a "felony punishable under the Controlled Substances Act" for INA purposes. A state offense comes within the quoted phrase only if it prohibits conduct punishable as a felony under the CSA.

Lopez v. Gonzales, 549 U.S. 47 (2006). Finding that a South Dakota misdemeanor conviction for aiding and abetting another person's possession of cocaine is not a felony punishable under the CSA and is therefore not a drug trafficking crime within the meaning of 18 U.S.C. § 924(c)(2).

But, the reverse is not true. A state misdemeanor conviction cannot be elevated to an aggravated felony conviction just because the same facts would support felony charges under the CSA. The Supreme Court rejected an attempt to extend Lopez where the government argued that "conduct punishable as a felony should be treated as the equivalent of a felony conviction when the underlying conduct could have been a felony under federal law." The court ruled that even though federal law provides for enhanced sentencing for a simple possession drug offense where there is a prior conviction, a simple possession misdemeanor conviction under state law, where there was no mention of any prior conviction included in the charges, could not be considered an aggravated felony just because the alien

Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010).

could have been charged as a felon in federal court. The court reasoned that the statute "limits the Attorney General's cancellation authority only when the noncitizen has actually been convicted of a[n] aggravated felony - not when he merely could have been convicted of a felony but was not." (internal quotation marks omitted).

(ii) "Crime of violence"

Leocal v. Ashcroft, 543 U.S. 1 (2004) holding that a Florida conviction for DUI causing serious bodily injury does not have a mens rea requirement, and *therefore is not a "crime of violence" under the* Act.

In determining whether an offense is a "crime of violence" under 18 USC §16, the Supreme Court held that a statute which punishes negligent or accidental conduct cannot be said to involve the "use" of physical force against the person or property of another, and therefore is not an aggravated felony.

In order to determine whether the conviction of a particular offense amounts to a "crime of violence" the officer must look to the requirements of the criminal statute and evaluate whether it includes a mens rea requirement. Mens Rea is the legal term used for the mental state required for culpability under a statute.

EXCEPTION: If an application was filed prior to November 29, 1990, the conviction of an aggravated felony does not constitute a mandatory bar to asylum. Consequently, the asylum officer must analyze the circumstances of the conviction in such cases to determine whether it constitutes a particularly serious crime.

Matter of A-A-, 20 I&N Dec. 492 (BIA 1992).

b. other crimes – general

INA § 208(b)(2)(B)(i). Delgado v. Mukasey, 546 F.3d 1017 (9th Cir. 2008); Matter of N-A-M-, 24 I&N Dec. 336 (BIA 2007).

The INA designates that all aggravated felonies are, per se, particularly serious crimes, but does not limit the consideration of what is a particularly serious crime to aggravated felonies. It is important to remember that even after a determination is made that a conviction is for a crime that is not an aggravated felony, the officer must still determine whether the conviction is for a particularly serious crime.

The determination as to whether a crime (other than an aggravated felony) is "particularly serious" is most often made on a case-by-case basis. The factors to consider are the following:

Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982); Matter of B-, 20 I&N Dec. 427, 430 (BIA 1991); Matter of L-S-J-, 21 I&N Dec. 973, 974-75 (BIA 1997); Mahini v. INS, 779 F.2d 1419, 1421 (9th Cir. 1986); Yousefi v. INS, 260 F.3d 318 (4th Cir. 2001)(criteria valid but not properly applied).

(i) the nature of the conviction;

(ii) the sentence imposed;

(iii) the circumstances and underlying facts of the conviction; and

(iv) whether the type and circumstances of the crime indicate that the alien will be a danger to the community.

See Section IV.B.7., Danger to the Community, below, and note that this element involves somewhat circular reasoning, since conviction of a PSC necessarily leads to a finding that the alien is a danger to the community.

A single conviction of a misdemeanor normally is not a particularly serious crime.

Matter of Juarez, 19 I&N Dec. 664 (BIA 1988).

Crimes of violence are normally particularly serious crimes. The term "crime of violence" means--
(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (definition).

Note that a crime does not have to be a crime of violence to constitute a particularly serious crime. In Matter of R-A-M-, 25I&N Dec. 657 (BIA 2012), the BIA found that possession of child pornography constituted a particularly serious crime.

6. Danger to the community

As a matter of law, an individual who has been convicted in the United States of a particularly serious crime constitutes a danger to the community.

Matter of U-M-, 20 I&N Dec. 327 (BIA 1991) (affirmed, Urbina-Mauricio v. INS, 989 F.2d 1085 (9th Cir. 1993)); Choeum v. INS, 129 F.3d 29 (1st Cir. 1997).

7. Examples

Note: Many of these examples are taken from cases decided before IRIIRA broadened the list of crimes considered aggravated felonies. They remain valid examples of particularly serious crimes but for the most part are also aggravated felonies under IRIIRA.

a. assault with a dangerous weapon

Matter of D-, 20 I&N Dec. 827 (BIA 1994); Matter of Juarez, 19 I&N Dec. 664 (BIA 1988).

Note, however, that assault with a deadly weapon was found not to be a particularly serious crime in a case involving a single, misdemeanor offense.

b. drug trafficking

INA § 101(a)(43)(B); see Matter of Y-L-, A-G- & R-S-R-, 23 I&N 270 (AG 2002) drug trafficking is also presumptively a particularly serious crime for purposes of withholding of removal. The Attorney General ruled that the presumption would only be overcome in "the most extenuating circumstances" that were "both extraordinary and compelling."

Generally a drug trafficking conviction constitutes an aggravated felony and therefore a particularly serious crime as a matter of law for asylum purposes. Even if there is some question as to whether a particular drug offense constitutes an aggravated felony, it is likely to meet the criteria for a particularly serious crime described above and thus bar the applicant from asylum eligibility.

c. battery with a dangerous weapon, or aggravated battery

Matter of D-, 20 I&N Dec. 827 (BIA 1994); Matter of B-, 20 I&N Dec. 427 (BIA 1991).

d. rape

INA § 101(a)(43)(A); see Matter of B-, 20 I&N Dec. 427 (BIA 1991).

e. sexual abuse of a minor

INA § 101(a)(43)(A); U.S. v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993); Matter of Small, 23 I&N Dec. 448 (BIA 2002).

Sexual abuse or attempted sexual abuse of a minor constitutes an aggravated felony and therefore a particularly serious crime for asylum purposes. Misdemeanor sexual abuse of a minor also has been found to constitute an aggravated felony (and a particularly serious crime for asylum purposes).

f. armed robbery

Matter of D-, 20 I&N Dec. 827 (BIA 1994); Matter of L-S-J-, 21 I&N Dec. 973 (BIA 1997).

g. theft offenses (including receipt of stolen property) or burglary offenses

INA § 101(a)(43)(G); Matter of Garcia-Garrocho, 19 I&N Dec. 423 (BIA 1986); Matter of Frentescu, 18 I&N Dec. 244; Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990).

Theft offenses (including receipt of stolen property) or burglary offenses for which the term of imprisonment is at least one year constitute aggravated felonies and therefore particularly serious crimes for asylum purposes. A theft offense, for which alien may be removed, includes the crime of "aiding and abetting" a theft offense. Note that burglary may also constitute a particularly serious crime if it involves a threat to an individual.

Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007) (holding that a conviction under a California statute prohibiting taking a vehicle without consent was a "theft offense," for which alien could be removed)

h. kidnapping (aggravated)

Groza v. INS, 30 F.3d 814 (7th Cir. 1994).

i. murder and manslaughter

Dor v. Dist. Dir., INS, 697 F.Supp. 694 (S.D.N.Y. 1988); Matter of C-, 20 I&N Dec. 529 (BIA 1992); Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994); Ahmetovic v. INS, 62 F.3d 48 (2d Cir. 1995).

Murder constitutes an aggravated felony and therefore a particularly serious crime for asylum purposes. Manslaughter (including involuntary) has also been found to be a particularly serious crime.

8. Dependents

8 C.F.R. § 208.21(a).

This bar also applies independently to a spouse or child who is included in an asylum applicant's request for asylum and who was convicted of a particularly serious crime. In some cases, a principal applicant may be granted asylum, and a dependent referred or denied because he or she was convicted of a particularly serious crime.

C. Commission of Serious Nonpolitical Crime

INA § 208(b)(2)(A)(iii).

Asylum may not be granted if there are serious reasons to believe that the applicant committed a serious nonpolitical crime outside the United States before arriving in the United States.

1. Filing Date

Previously, this was a mandatory bar to

This mandatory bar to asylum was added by the IIRIRA and therefore applies only to applications filed on or after April 1,

1997. However, when adjudicating a request for asylum filed before April 1, 1997, the commission of a serious nonpolitical crime may be considered as a serious adverse factor in the exercise of discretion.

withholding of deportation, but not asylum.

See RAIO Module, Discretion.

2. Definition

   a. A "serious nonpolitical crime" has been defined as a crime that:

      (i) was not committed out of genuine political motives,

      (ii) was not directed toward the modification of the political organization or structure of the state, and

      (iii) in which there is no direct, causal link between the crime committed and its alleged political purposes and object.

McMullen v. INS, 788 F.2d 591, 595 (9th Cir. 1986), citing Guy Goodwin-Gill, The Refugee in International Law, 60-61 (1983).

   b. A "serious nonpolitical crime" need not be as serious as a "particularly serious crime."

Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982)

   c. Even if the crime was committed out of genuine political motives, it should be considered a serious nonpolitical crime if the act is grossly out of proportion to the political objective or if it is of an atrocious or barbarous nature.

Matter of E-A-, 26 I&N Dec. 1, 3, 5 (BIA 2012) (although the applicant and his group never caused any physical injury to anyone, they placed innocent people at substantial risk); McMullen v. INS, 788 F.2d 591, 595 (9th Cir. 1986); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999); Chay-Velasquez v. Ashcroft, 367 F.3d 751 (8th Cir. 2004).

3. Requirements

   a. There is no requirement that the serious nonpolitical crime resulted in a conviction. The lack of conviction means that this bar can really only be discovered through the interview process, as there will probably not be any documentation. However, the adjudicator needs to find probable cause to believe that the crime was committed.

McMullen v. INS, 788 F.2d 591, 599 (9th Cir. 1986); Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980).

Probable cause means that there is a reasonable basis to believe that the crime was committed.

Example: While a Coptic Christian from Egypt was on a flight en route from Egypt to United States, the Egyptian authorities notified the Department of State that the individual was wanted in Egypt allegedly for having committed a murder there just hours before his departure. The Second Circuit upheld the immigration judge's determination that there were serious reasons to believe that the applicant had committed a serious non-political crime. The immigration judge supported his finding with documentation of the charges against the applicant, including: a warrant for the applicant's arrest; a police report indicating that the applicant's fingerprints were found at the murder scene and that the applicant was seen soon after the murder with an injured hand and a bloody shirt; and a report that the blood on the recovered shirt was found to match that of the victim. Evidence presented by the applicant that there were some irregularities in the Egyptian police reports and that Coptic Christians have been wrongfully accused of crimes was insufficient to compel a finding that he was framed by the Egyptian authorities, and thus the Second Circuit found that the immigration judge supported the determination that the applicant was barred from asylum.

Khouzam v. Ashcroft, 361 F.3d 161, 164 (2d Cir. 2004).

b. The crime must have been committed outside the United States.

c. The applicant need not have personally carried out the act of harm ("pulled the trigger"). For example, providing logistical and physical support that enables others to carry out terrorist acts against ordinary citizens suffices.

McMullen v. INS, 788 F.2d 591, 599 (9th Cir. 1986); Matter of E-A-, 26 I&N Dec. 1, 7 (BIA 2012) (noting that the applicant was not a "mere bystander" and that his involvement and participation "materially contributed" to the groups destructive behavior).

4. Recruitment of Child Soldiers

The Child Soldiers Accountability Act of 2008 (CSAA), effective as of October 3, 2008, creates both criminal and immigration prohibitions on the recruitment or use of child soldiers. Specifically, the CSAA establishes a ground of inadmissibility at section 212(a)(3)(G) of the INA and a ground of removability at section 237(a)(4)(F) of the INA.

Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). See also Lori Scialabba and Donald Neufeld, USCIS, Initial Information Concerning

These parallel grounds set forth that "[a]ny alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code" is inadmissible and is removable.

the Child Soldiers Accountability Act, Public Law No. 110-340, Memorandum to Field Leadership (Washington, DC: 31 December 2008). CSAA, sec. 2(b)-(c).

The statute also requires that DHS and DOJ promulgate regulations establishing that an alien who is subject to these grounds of inadmissibility or removability "shall be considered an alien with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime," and is therefore ineligible for asylum pursuant to INA section 208(b)(2)(A)(iii). The regulations remain in the process of being developed and promulgated. In the interim, the Congressional intent in enacting the CSAA, as well as the nature of the serious crime of the use of child soldiers, should be considered in determining whether an applicant is subject to the serious nonpolitical crime bar. Note that the statute does not exempt children from the applicability of this ground, even where they were recruited as children themselves.

CSAA, sec. 2(d)(1). See Asylum lesson, Guidelines *for Children's Asylum* Claims, VI.E.4. Note: this is accurate at this time of posting; however, this lesson will be superseded by the RAIO training module Guidelines for *Children's Claims.*

5. Dependents

This bar also applies independently to a spouse or child who is included in an asylum applicant's request for asylum and who has committed a serious nonpolitical crime outside the United States before arriving in the United States. In some cases, a principal applicant may be granted asylum, while his or her dependent (who committed a serious nonpolitical crime) is denied or referred because he or she is subject to a mandatory bar.

8 C.F.R. § 208.21(a).

D. Security Risk

Asylum may not be granted if there are reasonable grounds to believe that the applicant is a danger to the security of the United States.

INA § 208(b)(2)(A)(iv).

See the RAIO module National Security for an in-depth discussion on the definition and application of the security risk bar.

E. Terrorists

1. Background on terrorist legislation, as applied to asylum adjudication

See Jeffery Weiss, Asylum Division. Processing Claims Filed by Terrorists or Possible Terrorists, Memorandum to Asylum Office Directors (Washington, DC: 1 October 1997), 2 p.

The Anti-terrorist and Effective Death Penalty Act of 1996 (AEDPA), which came into effect on April 24, 1996, provided that any individual who falls within certain terrorist provisions in the INA is ineligible for asylum, unless it is determined that there are not reasonable grounds to believe that the individual is a danger to the security of the United States.

See Chris Sale. Office of the Deputy Commissioner. AEDPA Implementation Instruction #3: The Effects of AEDPA on Various Forms of Immigration Relief, Memorandum to Management Team (Washington, DC: 6 August 1996), 13 p.

The IIRIRA re-designated the sub-clauses of INA § 212(a)(3)(B) and expanded the terrorist grounds for ineligibility for asylum.

The PATRIOT Act of 2001 expanded grounds of inadmissibility based on terrorism, broadened the definition of "terrorist activity," added two definitions of "terrorist organization," and added a separate ground of inadmissibility for those who have associated with a terrorist organization. The Act retained the exception to the ineligibility for those individuals who fall under sub-clause (IV) of 212(a)(3)(B)(i).

See Ziglar, James W. Office of the Commissioner. New Anti-Terrorism Legislation, Memorandum for Regional Directors and Regional Counsel (Washington, DC: 31 October 2001), pp. 2-3.

The Intelligence Reform and Terrorism Prevention Act of 2004 amended the provisions in INA § 219 for the designation of foreign terrorist organizations by the Department of State.

Intelligence Reform and Terrorism Prevention Act of 2004 § 7119, PL 108-458, 118 Stat. 3638.

The REAL ID Act of 2005 further broadened the categories of individuals who are inadmissible for terrorist activities by including those who have received military-type training from or on behalf of a terrorist organization and broadening the inadmissibility ground regarding espousing terrorist activity to no longer require that the individual hold a "position of prominence." The statute also limited the affirmative defense to the inadmissibility for "engaging in terrorist activity" through soliciting things of value, soliciting individuals for membership in, or for providing material support for an undesignated terrorist organization to require the alien to "demonstrate by clear and convincing evidence that he did not know, and reasonably could not have known, that the organization was a terrorist organization."

REAL ID Act of 2005 §103(a); see RAIO module National Security

The statute also revised the Patriot Act's inadmissibility provision for material support to a terrorist organization and added INA § 212(d) to create an inapplicability provision for the material support ground, as well as for individuals or

representatives of terrorist organizations who endorse or espouse terrorist activity.

2. Grounds of ineligibility

INA § 208(b), as amended by the REAL ID Act, prohibits the granting of asylum to anyone who: — INA § 208(b)(2)(A)(v).

a. has engaged in terrorist activity; — INA § 212(a)(3)(B)(i)(I).

b. a consular officer or the Attorney General knows, or has reasonable grounds to believe, is engaged in or is likely to engage after entry in any terrorist activity; — INA § 212(a)(3)(B)(i)(II).

Note: An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered to be engaged in a terrorist activity. INA § 212(a)(3)(B)(i)(V).

c. has, under any circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity; — INA § 212(a)(3)(B)(i)(III).

d. is a representative of — INA § 212(a)(3)(B)(i)(IV).

(i) a foreign terrorist organization, as defined in section 212(a)(3)(B)(vi) or — INA § 212(a)(3)(B)(i)(IV)(aa).

(ii) a political, social, or other group that endorses or espouses terrorist activity; — INA § 212(a)(3)(B)(i)(IV)(bb).

e. is a member of a terrorist organization designated under Section 219 of the INA or otherwise designated through publication in the Federal Register under INA Section 212(a)(3)(B)(vi)(II); — INA § 212(a)(3)(B)(i)(V).

e. is a member of a terrorist organization described in INA section 212(a)(3)(B)(vi)(III) (undesignated terrorist organization), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

g. endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization; — INA § 212(a)(3)(B)(i)(VII); INA §237(a)(4)(B). Note that this ground does not require that the

statements be made under circumstances indicating an intention to cause death or serious bodily harm.

h. has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization

INA § 212(a)(3)(B)(i)(VIII); INA § 237(a)(4)(B); "military-type training is defined in 18 U.S.C. § 2339D(c)(1). Note that an exemption to the terrorist bar exists for those who received military type training under duress.

i. is the spouse or child of an alien who is inadmissible under INA § 212(a)(3)(B), if the activity causing the alien to be found inadmissible occurred within the past five years unless the spouse or child:

INA § 212(a)(3)(B)(ii).

(i) did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(ii) the consular officer or the Attorney General has reasonable grounds to believe the spouse or child has renounced the activity causing the alien to be found inadmissible under this section; or

j. who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States.

INA § 212(a)(3)(F); INA § 237(a)(4)(B).

See the RAIO lesson National Security for an in-depth discussion on the definitions of the terms relating to terrorism and the application of the terrorist bar.

F. Firm Resettlement

An applicant who was firmly resettled in another country prior to arriving in the United States may not be granted asylum.

INA § 208(b)(2)(A)(vi)

Note: This bar does not

apply to derivatives. See 8 C.F.R. § 208.21(a).

1. History

The firm resettlement bar is founded on two of the cessation clauses of the United Nations Convention Relating to the Status of Refugees. The Refugee Convention states that the convention ceases to apply to an individual who "has acquired a new nationality, and enjoys the protection of the country of his new nationality", or to an individual "who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

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

The firm resettlement bar has been part of United States refugee law from its inception, as a mandatory bar in The Displaced Persons Act of 1948. In a 1957 revision of the INA, the firm resettlement bar was dropped from the Act, but US courts continued to apply it as a discretionary factor. After passage of the Refugee Act of 1980, interim regulations were enacted that made firm resettlement a regulatory bar in affirmative asylum cases. When the final asylum regulations were adopted in 1990, firm resettlement was made a regulatory bar for all adjudicators. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress codified firm resettlement as a statutory bar.

A very detailed history of the firm resettlement bar can be found in Matter of A-G-G-, 25 I&N Dec. 486 (BIA 2011).

2. Definition

An applicant "is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." Note that, in order for the bar to apply, the entry into another nation must be after the events that caused the applicant to be a refugee.

8 C.F.R. § 208.15.

Please refer to RAIO Module, Firm Resettlement, for a detailed discussion of the applicability and exceptions related to this bar to eligibility for asylum.

a. Finally, if the applicant is found to have received an offer of permanent resettlement, the burden shifts to the

applicant to establish, by a preponderance of the evidence, that an exception to firm resettlement applies, pursuant to 8 C.F.R. §§ 208.15(a) and (b). If the applicant is able to meet his or her burden of proof that an exception applies, the applicant may be granted asylum.

3. Special Issues

There are a number of issues concerning the application of the firm resettlement bar that have arisen over the years. Some issues that may arise are:

a. Length of time spent in the third country

The length of time an applicant spends in a third country does not by itself establish firm resettlement. Firm resettlement occurs only after the applicant has been offered some form of enduring lawful status in that country. However, length of time is a factor to consider, particularly in determining whether the applicant cannot be considered firmly resettled because entry into the third country was a necessary consequence of flight. Refer to section 2.a above.

b. Offer of firm resettlement

The Ninth Circuit has held that to meet its burden of proving that an offer of firm resettlement exists the USCIS must present either direct evidence of an offer of permanent resettlement or, if such evidence cannot be obtained, indirect evidence of such an offer. Indirect factors may include the applicant's length of stay in the third country, intent to remain in the country and the social and economic ties developed during such stay. Relying on Abdille v. Ashcroft, 242 477 (3d Cir. 2001), the Court indicated that the indirect evidence used to establish firm resettlement must "rise to a sufficient level of clarity and force."

The Third Circuit, in Abdille v. Ashcroft, indicated in dicta that non-offer based factors, such as the length of the applicant's residence in a third country or the extent of the applicant's social and economic ties to the country, provide circumstantial evidence of a formal offer of some type of permanent resettlement and can serve as a surrogate for direct evidence of an offer.

The BIA further addressed evidence of firm resettlement in the holding of Matter of D-X- & Y-Z-, 25 I&N Dec. 664 (BIA

2012). In this decision, the BIA provides a straightforward approach with a strong presumption of firm resettlement when the applicant provides facially valid documentation of permission to reside and work indefinitely in a country. The decision makes clear that the mere fact that the document was obtained fraudulently does not invalidate the presumption. A number of circuit court cases support that "facially valid" documentation of residence status is enough to establish a presumption of firm resettlement, where there is no evidence that such status would be invalidated by the country of firm resettlement. In D-X- & Y-Z-, the female applicant had left and reentered the country where she had fraudulently obtained residence status, using the fraudulently obtained documents. While the Board does not in this decision explicitly discuss the importance of any evidence about whether the irregularities in the document render it vulnerable to invalidation, this case in fact involved evidence that the fraudulently obtained document was not invalidated, as the applicant was able to reenter the country using the documents.

4. Entry into the third country

While the focus of the analysis is on the existence of an offer of permanent residence, the plain language of the regulation makes clear that, in order for the offer to be effective, the applicant must have entered into the country at some point while the offer was available. The offer will be considered effective if, for example, the applicant entered into the country after the offer was made, and while it was still active, or, for example, the offer was made after the applicant initially entered the country, but while the applicant was still there, unless the applicant's entry into that country was a necessary consequence of his or her flight from persecution and he or she remained in that country only as long as necessary to arrange onward travel without establishing significant ties in that country.

Again, please refer to RAIO Module, Firm Resettlement, for a detailed discussion of such special issues as they relate to the firm resettlement bar.

V. BURDEN AND STANDARD OF PROOF

A. Mandatory Bars to Applying for Asylum

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

1. One-year filing deadline

The applicant must demonstrate by clear and convincing evidence that the application has been filed within 1 year after the date the applicant arrived in the United States,

or

demonstrate to the satisfaction of the Attorney General (the asylum officer or immigration judge) the existence of changed circumstances that materially affect eligibility for asylum or extraordinary circumstances that resulted in the delay.

Reminder: The one-year filing period is calculated from 4/1/97 or arrival in U.S., whichever is more recent in time. See Asylum Lesson, One-Year Filing Deadline, section Calculating the One-Year Period.

2. Previous denials

If an applicant has previously been denied asylum by an IJ or the BIA, the applicant must demonstrate to the satisfaction of the Attorney General (asylum officer or immigration judge) the existence of changed circumstances that materially affect eligibility for asylum.

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

3. Explanation

The "clear and convincing" standard has been defined as a degree of proof that will produce "a firm belief or conviction as to allegations sought to be established." It is higher than the preponderance standard used in civil cases, but lower than the "beyond a reasonable doubt" standard in criminal cases.

To demonstrate "to the satisfaction of the Attorney General" that an exception applies, means that it must be reasonable for the asylum officer to conclude that the exception applies.

See *Black's Law* Dictionary, 5th Ed.; see RAIO Module, Evidence.

B. Mandatory Bars to Asylum

If the evidence indicates that a ground for mandatory denial or referral exists, then the applicant has the burden of proving by a preponderance of the evidence that the ground does not apply.

8 C.F.R. § 208.13(c); See also Cheo v. INS, 162 F.3d 1227 (9th Cir. 1998) (where evidence indicates applicant was firmly resettled, burden is on applicant to establish the contrary); Maharaj v. Gonzales, 450 F. 3d 961 (9th Cir. 2006) (the burden shifts to the applicant only when USCIS has presented sufficient evidence that the statutory bar applies).

A fact is established by a preponderance of the evidence, if the adjudicator finds, upon consideration of all the evidence, that it is more likely than not that the fact is true (in other words, there is more than a 50% chance that the fact is true).

See RAIO Module, Evidence.

VI. MANDATORY NATURE OF BARS

If it is determined that a mandatory bar applies, the asylum officer has no discretion to grant asylum to the applicant, even though the applicant may otherwise be eligible. As the term itself indicates, denial in such cases is mandatory. Therefore, the asylum request must be referred or denied, as appropriate.

When a mandatory bar to asylum applies, the asylum officer does NOT weigh that adverse factor against the risk of future persecution as with the exercise of discretion.

VII. DEPENDENTS

When a principal alien is granted asylum, his or her spouse and/or children, as defined in the Act, also may be granted asylum if accompanying, or following to join, unless it is determined that the spouse or child is ineligible for asylum under section 208(b)(2)(A)(i), (ii), (iii), (iv) or (v) of the Act for applications filed on or after April 1, 1997, or under 8 C.F.R. § 208.13(c)(2)(i)(A), (C), (D), (E), or (F) for applications filed before April 1, 1997.

8 C.F.R. § 208.21(a).

In other words, with the exception of firm resettlement, all the bars to granting asylum that apply to principal applicants apply equally to dependents. For example, if a dependent was convicted of an aggravated felony, the dependent is barred from a grant of asylum, even if the principal is granted. However, if the dependent was firmly resettled in a third country, the dependent is not barred from receiving a derivative grant of asylum if the principal is granted.

VIII. SUMMARY

A. Bars to Applying for Asylum

The following bars to applying for asylum are applicable only to applications filed on or after April 1, 1997. Only asylum officers, immigration judges, and the Board of Immigration Appeals can determine whether a prohibition on filing applies.

1. The asylum seeker could be returned to a "safe" third country.

   There is an agreement between the United States and Canada,

but the agreement only applies to aliens at land border ports of entry and those transiting through one country when being removed by the other country. It does not apply to affirmative asylum adjudications.

2. The asylum seeker waited more than one year after arrival in the United States to apply.

   The filing date is calculated from April 1, 1997 or the date of last arrival, whichever is most recent in time. This bar does not apply to UACs nor does it apply if the applicant establishes changed circumstances that materially affect eligibility, or extraordinary circumstances relating to the delay.

3. The asylum seeker previously has been denied asylum by an immigration judge or the BIA.

   This bar does not apply if the applicant demonstrates changed circumstances that materially affect asylum eligibility.

B. Mandatory Bars to Eligibility for Asylum

The following are mandatory bars to a grant of asylum:

1. Persecution of others on account of one of the protected characteristics in the refugee definition

2. Conviction of a particularly serious crime, including an aggravated felony

   If the application was filed on or after April 1, 1997, the conviction may have occurred either inside or outside the United States.

3. Commission of a serious nonpolitical crime outside the United States prior to arrival in the United States

   This bar does not apply to asylum applications filed prior to April 1, 1997, but may be a basis for a discretionary denial or referral.

4. Risk to the security of the United States

   Any case in which the asylum officer believes the applicant may present a risk to the security of the United States must be sent to Asylum Headquarters for review.

5. Engaging in terrorist activities or status as a representative of certain terrorist organizations

   An applicant cannot be granted asylum if he or she has engaged, is engaging, or is likely to engage in terrorist activity; has incited terrorist activity indicating an intention to cause death or serious bodily harm; is a representative of either a designated terrorist organization or a group whose endorsement of acts of terrorist activity undermines the efforts of the United States to reduce or eliminate terrorist activities; or has used his or her position of prominence in an country to endorse or espouse terrorist activity.

6. Firm resettlement

   An applicant is considered firmly resettled if the applicant, after becoming a refugee, entered into another country with, or while there received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement when in that country.

   An applicant was not firmly resettled if entry was necessary to flight, the applicant remained only to arrange onward travel, and the applicant developed no significant ties; or the conditions of residence were substantially restricted.

C. Burden of Proof

1. Prohibition on Filing

   The applicant must establish by clear and convincing evidence that he or she applied for asylum within one year after arrival in the U.S., unless an exception applies.

   If a bar to filing applies, the applicant must demonstrate to the satisfaction of the adjudicator that an exception applies.

2. Bars to asylum

   If the evidence indicates that a ground for mandatory denial of asylum applies, the applicant must prove by a preponderance of the evidence that a mandatory bar does not apply.

D. Mandatory Nature of Bars

If it is determined that a mandatory bar applies, the asylum officer has no discretion to grant asylum to the applicant, even though the applicant may otherwise be eligible.

E. Dependents

The spouse or child of an asylum applicant cannot be granted derivative asylum status if a mandatory bar, other than firm resettlement, applies to the spouse or child.

U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

NATIONAL SECURITY, PART 1

TRAINING MODULE

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

NATIONAL SECURITY, PART 1

TRAINING MODULE

MODULE DESCRIPTION:

This module provides guidance on the proper analysis, adjudication, and processing of cases with national security issues. Although the term "national security" includes cases involving terrorism-related inadmissibility grounds (TRIG) as set forth in INA § 212(a)(3)(B), the adjudication and processing of cases with TRIG issues is discussed in a separate module. This module addresses non-TRIG national security issues and details the agency's Controlled Application Review and Resolution Program (CARRP). For complete guidance on national security issues, please refer to both this module and the National Security, Part 2 (TRIG) module.

TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing, you (the officer) will conduct appropriate pre-interview preparation to identify national security (NS) indicators and concerns and elicit all relevant information from an applicant with regard to NS indicators and concerns. 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 prior, current, or planned involvement in, or association with, an activity, individual, or organization described in certain security-related inadmissibility grounds or bars, and properly adjudicate such a case. You will be able to understand the CARRP process.

ENABLING PERFORMANCE OBJECTIVE(S)

1. Identify the appropriate security-related INA grounds under which an alien may be inadmissible/barred from the immigration benefit sought.
2. Explain the purpose of the CARRP process.
3. Explain the steps involved in processing national security cases.

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4. Analyze fact patterns to identify national security indicators and determine if an articulable link to a national security-related inadmissibility ground or bar exists.

5. Analyze the facts and relevant law and policy to make a legally sufficient decision on a case involving a national security issue.

INSTRUCTIONAL METHODS

- Interactive presentation
- Discussion
- Practical exercises

METHOD(S) OF EVALUATION

- Multiple-choice exam
- Observed practical exercises

REQUIRED READING

1. INA §§ 212(a)(3)(A), (B), and (F).
2. INA §§ 237(a)(4)(A) and (B).
3. Memorandum, Policy for Vetting and Adjudicating Cases with National Security Concerns, Jonathan R. Scharfen, Deputy Director (April 11, 2008).
4. Memorandum, Additional Guidance on Issues Concerning the Vetting and Adjudication of Cases Involving National Security Concerns, Michael Aytes, Acting Deputy Director (February 6, 2009).
5. Policy Memorandum, Revision of Responsibilities for CARRP Cases Involving Known or Suspected Terrorists (PM-602-0042) (July 26, 2011) and associated Supplemental Guidance.
6. Memorandum, Testimony-Based National Security Indicators and Concerns, Jennifer Higgins, Associate Director, Refugee, Asylum and Interntional Operations Directorate (September 9, 2019).

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

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ADDITIONAL RESOURCES

1. See USCIS TRIG ECN site for memos, legal guidance, legislation and other adjudicative resources.

2. Operational Guidance for Vetting and Adjudicating Cases with National Security Concerns, signed by Domestic Operations Acting Associate Director Donald Neufeld, Attachment A - Guidance for Identifying National Security Concerns (April 24, 2008).

3. Memorandum, Handling Potential National Security Concerns with No Identifiable Records, Steve Bucher, Associate Director of Refugee, Asylum and International Operations (August 29, 2012).

4. Memorandum, Updated Instructions for Handling (b)(7)(E) Records, Office of the Director (May 23, 2012).

Additional Resources – International and Refugee Adjudications

Additional Resources – Asylum Adjudications

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)
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)
TIS3	Knowledge of Customs and Border Protection TECS database (3)
TIS11	Knowledge of the national security-related resources on the ECN (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)
RI11	Skill in handling, protecting, and disseminating information (e.g., sensitive and confidential information) (4)
RI10	Skill in identifying national security issues (4)

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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 national security-related resources on the ECN (4)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
OK9	Knowledge of Fraud Detection and National Security (FDNS) functions and responsibilities (2)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
10/26/2015	Throughout document	Updated broken links and citations; added new TRIG exemptions; minor formatting changes; added new case law	RAIO Training, RAIO TRIG Program
10/22/2018	Throughout document	Removed material specific to TRIG; updated links; where appropriate and practical, edited language to parallel TRIG lesson plan changes; Reorganized structure; revised/edited materials for accuracy, clarity, and consistency	RAIO Training, RAIO FDNS, RAIO TRIG
9/11/2019	Required Reading	Added 9/9/19 NS memo to required readings	RAIO Training
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training

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

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

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

1 INTRODUCTION

This lesson plan covers the relevant law regarding 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 national security (NS) indicators (also a term of art). 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 issues 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 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.

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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 to individuals based on national security reasons through either an inadmissibility ground (in the context of refugee or international adjudications) or a security/terrorism bar (in the context of asylum adjudications).

National Security Bars to Asylum

Under INA § 208(b)(2)(A) (bars to asylum), asylum may not be granted if, among other things, there are reasonable grounds to believe that the applicant is a danger to the security of the United States or if the applicant would be found inadmissible or deportable under any of the security and related grounds of removability.[1]

National security issues are a primary consideration in USCIS adjudications, because a central mission of USCIS is to protect the integrity of the U.S. immigration system. 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.

2.1 National Security Authorities

The INA contains various security-related grounds of inadmissibility, grounds of deportability, and mandatory bars to asylum. These provisions form the basis of the national security authorities discussed in this lesson plan.

2.1.1 Security-Related Inadmissibility Grounds

- 212(a)(3)(A)(i) Espionage, Sabotage, Export of Goods, Technology or Sensitive Information from the U.S.
- 212(a)(3)(A)(ii) Unlawful Activity
- 212(a)(3)(A)(iii) Overthrow of U.S. Government

[1] INA §§ 208(b)(2)(A)(iv), (v); *see 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).

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- 212(a)(3)(B) Terrorist Activity
- 212(a)(3)(C) Adverse Foreign Policy Consequences
- 212(a)(3)(D) Affiliation with Communist or Totalitarian Party
- 212(a)(3)(E) Nazi Persecution, Genocide, Torture, Extrajudicial Killing
- 212(a)(3)(F) Association with Terrorist Organizations
- 212(a)(3)(G) Recruitment or Use of Child Soldiers

2.1.2 Security-Related Deportability Grounds

- 237(a)(4)(A)(i) Espionage, Sabotage, Export of Goods, Technology or Sensitive Information from the U.S.
- 237(a)(4)(A)(ii) Criminal Activity which Endangers Public Safety or National Security
- 237(a)(4)(A)(iii) Overthrow of U.S. Government
- 237(a)(4)(B) Terrorist Activity
- 237(a)(4)(C) Adverse Foreign Policy Consequences
- 237(a)(4)(D) Nazi Persecution, Genocide, Torture, Extrajudicial Killing
- 237(a)(4)(E) Severe Violations of Religious Freedom
- 237(a)(4)(F) Recruitment or Use of Child Soldiers

This lesson plan will focus on the security-related provisions found at INA §§ 212(a)(3)(A), (B), and (F) (inadmissibility grounds) and 237(a)(4)(A) and (B) (deportability grounds). Note that INA §§ 212(a)(3)(B) and (F) and § 237(a)(4)(B) are terrorism-related inadmissibility and deportability grounds. For additional information on these grounds, refer to the National Security, Part 2 (TRIG) Lesson Plan.

2.1.3 Mandatory Bars to Asylum

Although inadmissibilities do not apply to asylum adjudications, INA § 208(b)(2)(A) incorporates the security-related inadmissibilities into the analysis of the security-related bars to asylum:

- INA 208(b)(2)(A)(iv) Danger to the Security of the United States
- INA 208(b)(2)(A)(v) Terrorist Activity

2.1.4 Burden and Standard of Proof

The applicant has the burden of proof to establish that he or she is not subject to a security-related bar or inadmissibility. You must evaluate the evidence indicating a security-related bar or inadmissibility by the relevant standard of proof for the adjudication you are performing. A refugee applicant must prove that he or she is "clearly and beyond a doubt entitled to be admitted."[2] In the asylum context, if the evidence indicates that a ground for a mandatory denial or referral exists, then the applicant has the burden of proving by a preponderance of the evidence that the ground does not apply. (See section below: Asylum Adjudications Supplement—Burden and Standard of Proof).

2.1.5 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, though not required, a principal applicant *may* be granted and his or her dependent/derivative denied or referred because the dependent/derivative is inadmissible or barred for a national security-related reason.[3] Generally, if a principal applicant is denied because he or she is inadmissible or subject to a bar, his or her derivatives or dependents are also denied.

2.2 National Security Terminology

2.2.1 Controlled Application Review and Resolution Program (CARRP)

CARRP is the USCIS policy for identifying, evaluating, and processing cases with NS concerns to mitigate threats.

2.2.2 National Security (NS) Concern

An *NS concern* exists when an individual or organization has been determined to have an *articulable link* 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

[2] *See* INA § 235(b)(2)(A); *Matter of Jean*, 23 I&N Dec. 373, 381 (AG 2002).

[3] 8 C.F.R. § 208.21(a); INA § 207(c)(2)(A).

(B). This includes, but is not limited to, terrorist activity; espionage; sabotage; and the illegal transfer of goods, technology, or sensitive information. The officer should consider the *activities, individuals, and organizations* described in INA §§ 212(a)(3)(A), (B), and (F), and 237(a)(4)(A) and (B) as examples of *indicators* of an NS concern and for determining whether an NS concern exists.[4] This determination requires that the case be handled in accordance with CARRP policy outlined in the memorandum issued April 11, 2008.

2.2.3 National Security Indicator

A national security indicator is preliminary evidence that suggests an activity, characteristic, or association requires further review to evaluate if an NS concern exists in the totality of the circumstances.[5]

2.2.4 Articulable Link

An articulable link exists when you can express, in a few sentences, a *clear connection* between the individual[6] and an activity, individual, or organization described in the relevant INA national security ground of inadmissibility or deportability. [7]

2.2.5 Known or Suspected Terrorist (KST)

KST is a category of individuals who have been nominated and accepted for placement in the *Terrorist Screening Database (TSDB)*, are on the Terrorist Watch List, and have a specially coded lookout posted in *TECS*, and/or *CLASS*.[8] A KST in TECS has a record number beginning with a "P" for person and ending in a "B10," and should indicate that the individual is a "Known Terrorist" or "Suspected Terrorist." [9]

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[redacted]

[4] Operational Guidance for Vetting and Adjudicating Cases with National Security Concerns, signed by Domestic Operations Acting Associate Director Donald Neufeld, Attachment A - Guidance for Identifying National Security Concerns (April 24, 2008).

[5] *See* Memorandum, Policy for Vetting and Adjudicating Cases with National Security Concerns, Jonathan R. Scharfen, Deputy Director (April 11, 2008).

[6] In this context, "individual" means an applicant, petitioner, beneficiary, or derivative family member. *Id.*

[7] *See id.*

[8] You may also find indications that an individual is a KST in other background, identity, and security check systems.

[9] National Background, Identity, and Security Check Operating Procedures, FDNS, Appendix E: Glossary of Terms - Recently Updated (April 2018) (emphasis added). Note that a B10 hit is not always a KST. B10s with exclusion codes 99 and 50 are non-KSTs.

[10] *Id.*

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2.2.6 Non-Known or Suspected Terrorist (Non-KST)

Non-KST encompasses all other NS concerns, regardless of source, including but not limited to: associates of KST(s), unindicted co-conspirators, terrorist organization members, persons involved with providing material support to terrorists or terrorist organizations, and agents of foreign governments.[14]

2.2.7 Fraud Detection and National Security (FDNS) Terminology

[14] *Id.*

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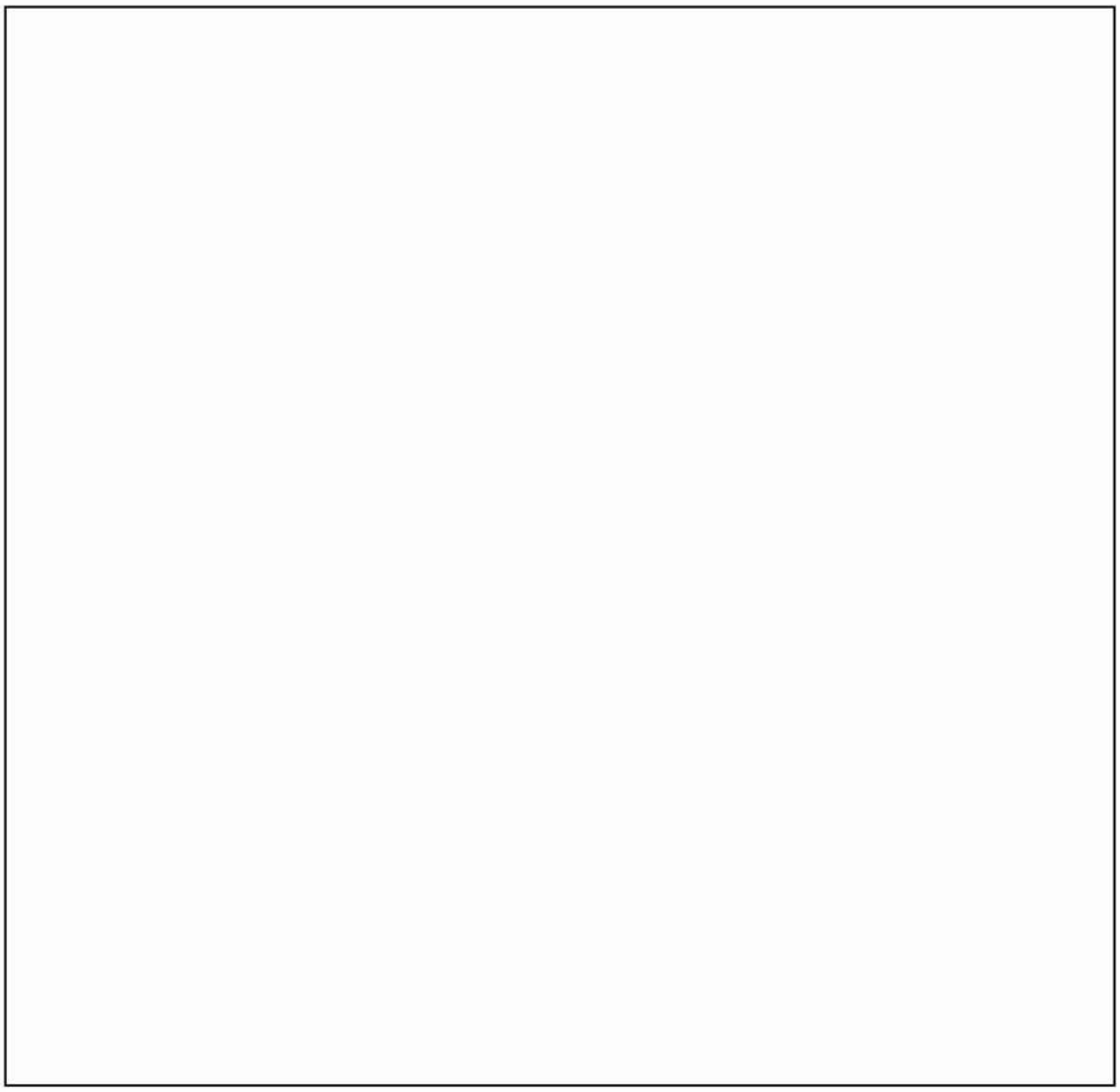

3 CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM (CARRP)

CARRP is the agency-wide four-step process that provides a disciplined approach to identify, record, vet, and adjudicate applications and petitions with NS concerns. Some procedures are different for the divisions (see International and Refugee Adjudications Supplement – Required Reading; Asylum Adjudications Supplement – Required Reading, ISCPM, Section VIII, Cases

[16] Id.

[17] Id.

Involving Terrorism or Threats to National Security), but the general CARRP workflow is as follows:

Step 1: **Identification of a National Security Concern**
Step 2: **Internal Vetting & Eligibility Assessment**
Step 3: **External Vetting**
Step 4: **Final Adjudication**

The steps of the CARRP process are not necessarily linear and may be repeated. At any stage of the adjudicative process, deconfliction may be necessary before taking action on a KST or Non-KST NS concern to ensure that planned adjudicative activities do not compromise or impede an ongoing investigation or other record owner interest.[19] When there is no record owner, FDNS officers within your division must take steps to determine whether there is a pending law enforcement investigation or intelligence interest associated with the applicant and deconflict with that agency prior to you taking any adjudicative action. If deconfliction reveals no pending investigation or intelligence interest, you and FDNS must perform any required actions pursuant to the CARRP process prior to final adjudication.

You will play a major role in step 1 (identification) and step 2 (internal vetting & eligibility assessment). Step 3 (external vetting) will be handled primarily by FDNS officers. Step 4 (final adjudication) is completed by the appropriate RAIO adjudicator. Deconfliction is handled by Asylum FDNS or SVPI.

3.1 Identifying National Security Concerns (CARRP Step 1)

The following sections discuss how USCIS identifies and categorizes national security concerns.

3.1.1 Types of National Security (NS) Concerns

USCIS categorizes individuals or organizations who pose NS concerns into two types:

- Known or Suspected Terrorists (KSTs)
- Non-Known or Suspected Terrorists (Non-KSTs)

KSTs and Non-KSTs may be subject to TRIG. Please refer to the National Security, Part 2 (TRIG) Lesson Plan.

KSTs

All KSTs are NS concerns, regardless of any other factors.

[19] *Id.*

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KSTs are a category of individuals who:

- Have been nominated and accepted for placement in the Terrorist Screening Database (TSDB) and
- Have a specially coded lookout posted in TECS, the National Crime Information Center (NCIC) and/or the State Department's Consular Lookout Automated Support System (CLASS)

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Non-KSTs

Any subject that is not a positive match to the TSDB but still poses an NS concern is a Non-KST.

This category of NS Concerns can include but is not limited to:[22]

- Agents of foreign governments
- Unindicted co-conspirators
- Associates of KSTs
- Terrorist organization members
- Persons involved in providing material support to terrorists or terrorist organizations
- Persons involved in other terrorist activity[23]

[22] Policy for Vetting and Adjudicating Cases with National Security Concerns, Attachment A - Guidance for Identifying National Security Concerns (April 11, 2008).

[23] For information on how to handle terrorism-related inadmissibility and deportability grounds, see the RAIO Training module, National Security, Part 2 (TRIG).

3.1.2 Identifying Non-KST National Security Concerns

Everyone shares the responsibility to identify indicators of NS concerns as early as possible. An NS indicator is preliminary evidence that suggests an activity, characteristic,[24] or association requires further development to evaluate if an NS concern exists in the totality of the circumstances.[25] These indicators may be identified at any stage of the adjudication process and through a variety of means including, but not limited to, security and systems checks, file review, in-person interviews, and law enforcement referrals. Once you identify an NS indicator, you must first confirm whether the indicator relates to the applicant, petitioner, beneficiary or derivative. Then you must gather additional information and use it to determine whether there is sufficient evidence to establish an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in certain security-related inadmissibility grounds or bars. You may gather this additional information through open source research, interviewing, and coordination with supervisors or FDNS, who may run additional security checks.

In order to establish an articulable link, you must be able to describe in a few simple sentences a clear connection between a person and an activity described in INA §§ 212(a)(3)(A), (B), or (F) or 237(a)(4)(A) or (B). "Articulable" is defined as capable of being expressed, explained or justified based on objective information – it must be more than a feeling or a hunch.

In addition, you must examine the *totality of the circumstances* in determining whether an articulable link exists.[26] The totality of the circumstances encompasses all information in the record, including testimony, evidence submitted in support of the application, background, identity, and security checks, COI research, open source records, and any other information relied upon in the adjudication.

3.1.3 Indicators of National Security (NS) Concerns

NS indicators include information that suggests a connection to activities, individuals and organizations described in the security-related inadmissibility and deportability grounds.

- INA §§ 212(a)(3)(A) and 237(a)(4)(A) – related to espionage, sabotage, export from the U.S. of goods, technology, or sensitive information or other unlawful activity

- INA §§ 212(a)(3)(B) and 237(a)(4)(B) – Terrorism-related inadmissibility grounds and definitions

[24] Some examples of characteristics that could be considered NS indicators could include: scars, burns, bullet marks, or sudden, unexplained wealth.

[25] *See* Memorandum, Policy for Vetting and Adjudicating Cases with National Security Concerns, Jonathan R. Scharfen, Deputy Director (April 11, 2008).

[26] *See id.*

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- INA § 212(a)(3)(F) – Association with terrorist organizations

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) –Money laundering
- § 212(a)(6)(C)(i) – Fraud and willful misrepresentation
- § 221(i) – Revocation of visas or other documents
- § 235(c) – Removal of aliens inadmissible on security and related grounds

3.1.4 Where You May Encounter NS Indicators

You should review all sources of information available to you for NS indicators, which can include, but are not limited to, the following:

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3.2 Internal Vetting and Eligibility Assessment (CARRP Step 2)

Internal vetting and eligibility assessment is a thorough review of the record associated with the application or petition to determine if the individual is eligible for the benefit sought, to obtain any relevant information to support the adjudication, and in some cases, to further examine the nature of the NS concern.[29]

3.2.1 Interviewing Considerations and Preparation

This section provides information to help you recognize possible NS indicators from an interview or file review. Information about an applicant's activities may not be available from

[29] *See* Memorandum, Policy for Vetting and Adjudicating Cases with National Security Concerns, Jonathan R. Scharfen, Deputy Director (April 11, 2008).

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Issues for Examination in the Interview/Analysis

[32] Many examples of these indicators come from past presentations by the ICE National Security Integration Center (NSIC), Office of Investigations.

3.2.2 Certain Education, Training, Technical Skills, or Employment

In addition to an applicant's background in one of the skills listed below (or other similar skills), you should consider

3.2.3 Interaction with People/Organizations of Concern

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3.2.4 Engaged, or Suspected of Engaging, in Certain Criminal Activities

3.2.5 Possession of Documents

3.2.6 Unexplained Travel or Travel to Areas of Concern

3.2.7 Financial Irregularities

3.2.8 Unaccounted-for Gaps of Time

3.2.9 Fraudulent Documents

3.3 External Vetting (CARRP Step 3)

External vetting is generally conducted when the NS concern remains after internal vetting/eligibility assessment and the application is otherwise approvable. It requires close coordination with law enforcement agencies, the Intelligence Community, and/or other record owners. External vetting is conducted by FDNS.[35] You should not undertake external vetting.

When external vetting is required, it must be completed by FDNS prior to final adjudication.

3.4 Final Adjudication (CARRP Step 4)

This is the final decision on the case. This determination is made only after all other necessary steps of the CARRP process have been completed.

If the NS concern remains upon completion of all required vetting you must:

- Evaluate the results of the vetting;

[35] Policy Memorandum, Revision of Responsibilities for CARRP Cases Involving Known or Suspected Terrorists, Office of the Director, USCIS (July 26, 2011).

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- Obtain any additional relevant information (e.g., via a request for evidence, an interview, a re-interview, etc.); and

- Determine the individual's eligibility for the benefit sought.[36]

All of the information obtained during the CARRP process is evaluated to determine if the NS concern has been resolved or confirmed, whether the application/petition should be approved or denied/referred, and when appropriate, whether to proceed with removal, rescission, termination, or revocation of an immigration benefit.

If the individual is ineligible for the benefit sought, the application or petition must be denied/referred. If the vetting process results in a finding that the NS concern no longer exists, and if the individual is otherwise eligible for the benefit sought, the application or petition may be approved.

Cases with unresolved NS concerns generally cannot be approved without division HQ's concurrence, and for KSTs, concurrence of USCIS senior leadership and HQFDNS.

3.5 Documentation Relating to NS Concerns

You must properly document all NS concerns, in line with your division's policy and guidance.[37] FDNS will document NS concerns in FDNS-DS, a system that is owned by USCIS/FDNS and used by FDNS-IOs.

4 CONCLUSION

RAIO plays a critical role in preserving the integrity of our immigration benefits programs. It is critical for you to properly assess each case in consideration of possible national security concerns and to follow the relevant procedures for processing these cases through CARRP.

5 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 and USCIS policy.

[36] Id.

[37] The FDNS-DS SOP can be found on the ECN.

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5.1 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. An NS concern exists if there is an articulable link between the applicant and 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).[38]

5.2 Interviewing National Security Cases (b)(7)(E)

When preparing to interview an applicant, you must be mindful

5.3 CARRP

The Controlled Application Resolution and Review Program (CARRP) is the 4-step process through which USCIS vets and adjudicates national security cases.

The steps of CARRP are: (1) Identify NS Concerns; (2) Internal Vetting and Eligibility Assessment; (3) External Vetting; (4) Final Adjudication.

Deconfliction is a term used to describe coordination between USCIS and another government agency owner of NS information (the record owner) to ensure that planned adjudicative activities (e.g., interview, request for evidence, site visit, decision to grant or deny a benefit, and timing of the decision) do not compromise or impede an ongoing investigation or other record owner interest.

FDNS-IOs play a critical role in processing and vetting NS concerns.

[38] See Memorandum, Policy for Vetting and Adjudicating Cases with National Security Concerns, Jonathan R. Scharfen, Deputy Director (April 11, 2008).

OTHER MATERIALS

6 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 NS issues. 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.

6.1 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.

6.2 USCIS TRIG ECN

The RAIO TRIG Branch maintains a comprehensive, one-stop shop for resources on TRIG issues on the USCIS TRIG ECN. [redacted] (b)(7)(E)

6.3 USCIS Fraud Detection and National Security Directorate

In support of the overall USCIS mission, the Fraud Detection and National Security Directorate (FDNS) was created to enhance the integrity of the legal immigration system, detect and deter benefit fraud, and strengthen national security.

FDNS 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.

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 FDNS's ECN.

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6.4 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.[39]

The HSIFL Forensic Section conducts scientific examinations of documentary evidence and its representatives testify to their findings as expert witnesses in judicial proceedings.

Under the "Alerts" section of the HSIFL 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. USCIS has a designated liaison located at the HSIFL to facilitate communications between USCIS and HSI.

6.5 Liaison with Other DHS Entities

Other entities within USCIS and DHS provide legal guidance and investigative support for these national security 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.

[39] Mission Statement, Homeland Security Investigations Forensic Laboratory, ICE Office of Intelligence, available at http://www.ice.gov/hsi-fl/.

SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

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

REQUIRED READING

1. Standard Operating Procedure for National Security Concerns in Refugee Cases ("RAD CARRP SOP"), RAD Policy (March 2018).

2. Adjudicative Aid for Cases Involving National Security Indicators and National Security Concerns ("RAD CARRP Lines of Inquiry"), RAD Policy (March 2018).

3. Memorandum, Guidance for International Operations Division on the Vetting, Deconfliction, and Adjudication of Cases with National Security Concerns, Alanna Ow, Acting Chief, International Operations (April 28, 2008) and Attachment A – Guidance for Identifying National Security Concerns.

4. Memorandum, Processing of Refugee Cases with National Security Concerns, Barbara Strack (Chief, RAD) and Joanna Ruppel (Chief, IO) (November 19, 2008).

ADDITIONAL RESOURCES

1. Memorandum, Updated Background Identity and Security Check Requirements for Refugee/Asylee Following-to Join Processing, Joanna Ruppel, Chief, International Operations (March 29, 2011).

SUPPLEMENTS

International and Refugee Adjudications Supplement

The CARRP Process

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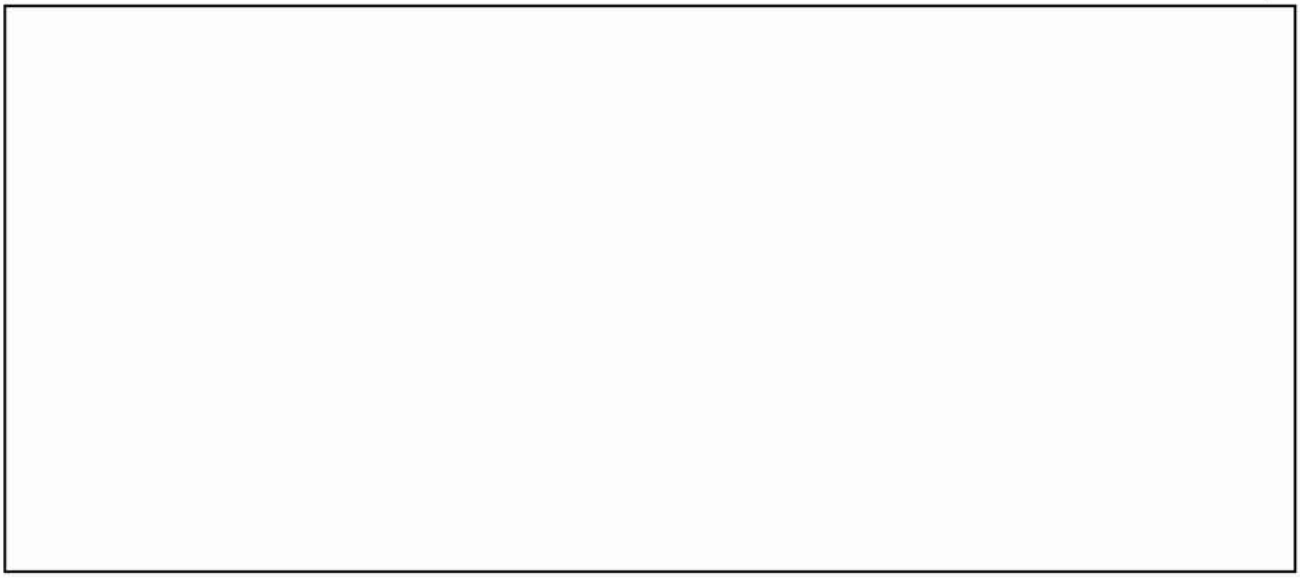

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SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

REQUIRED READING

1. Updated Instructions for Handling (b)(7)(E) 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. Memorandum, Issuance of Revised Section of the Identity and Security Checks Procedures Manual Regarding Vetting and Adjudicating Cases with National Security Concerns (ISCPM) (HQRAIO 120/9.3a), Joseph Langlois, Chief, Asylum Division (May 14, 2008).

ADDITIONAL RESOURCES

1. Matter of R-S-H-, 23 I&N Dec. 629 (BIA 2003).

SUPPLEMENTS

Asylum Adjudications Supplement

Use of Discretion when a Bar Does Not Apply

There may be some cases involving a national security matter 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.[40]

[40] See 8 C.F.R. § 208.14(b); Matter of H-, 21 I&N Dec. 337, 347 (BIA 1996); Matter of A-H-, 23 I&N Dec. 774, 780 (AG 2005) (discretionary denial upheld where applicant had evaded U.S. taxes and had connections to FIS in Algeria and Islamic groups that committed human rights violations); Kalubi v. Ashcroft, 364 F.3d 1134, 1139 (9th Cir.

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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.[41] 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."[42] All discretionary denials and referrals are submitted to Asylum HQ for review. Please see RAIO Training module, Discretion, for further guidance.

Asylum Adjudications Supplement

Note Taking – National Security

Asylum Division procedures require that officers take notes in a sworn statement format when:

- There are serious reasons for considering the applicant a threat to national security

The use of the sworn statement is crucial because an applicant's admission may be used as a basis to institute deportation or removal proceedings against him or her, or as a basis for DHS to detain the applicant.

For further explanation and requirements, see RAIO Module, Interviewing - Note-Taking, including the Asylum Adjudications Supplement, and the Affirmative Asylum Procedures Manual (AAPM).

AsylumAdjudications Supplement

2004) (holding that all relevant favorable and adverse factors must be considered and weighed, and that "a factor that falls short of the ground of mandatory denial is not for that reason alone excluded from consideration as an adverse factor for the discretionary, entitlement prong.").

[41] Matter of Pula, 19 I&N Dec. 467 (BIA 1987); Matter of H-, 21 I&N Dec. at 347-48.

[42] Matter of Pula, 19 I&N Dec. at 474; Matter of Kasinga, 21 I&N Dec. 357, 367 (BIA 1996).

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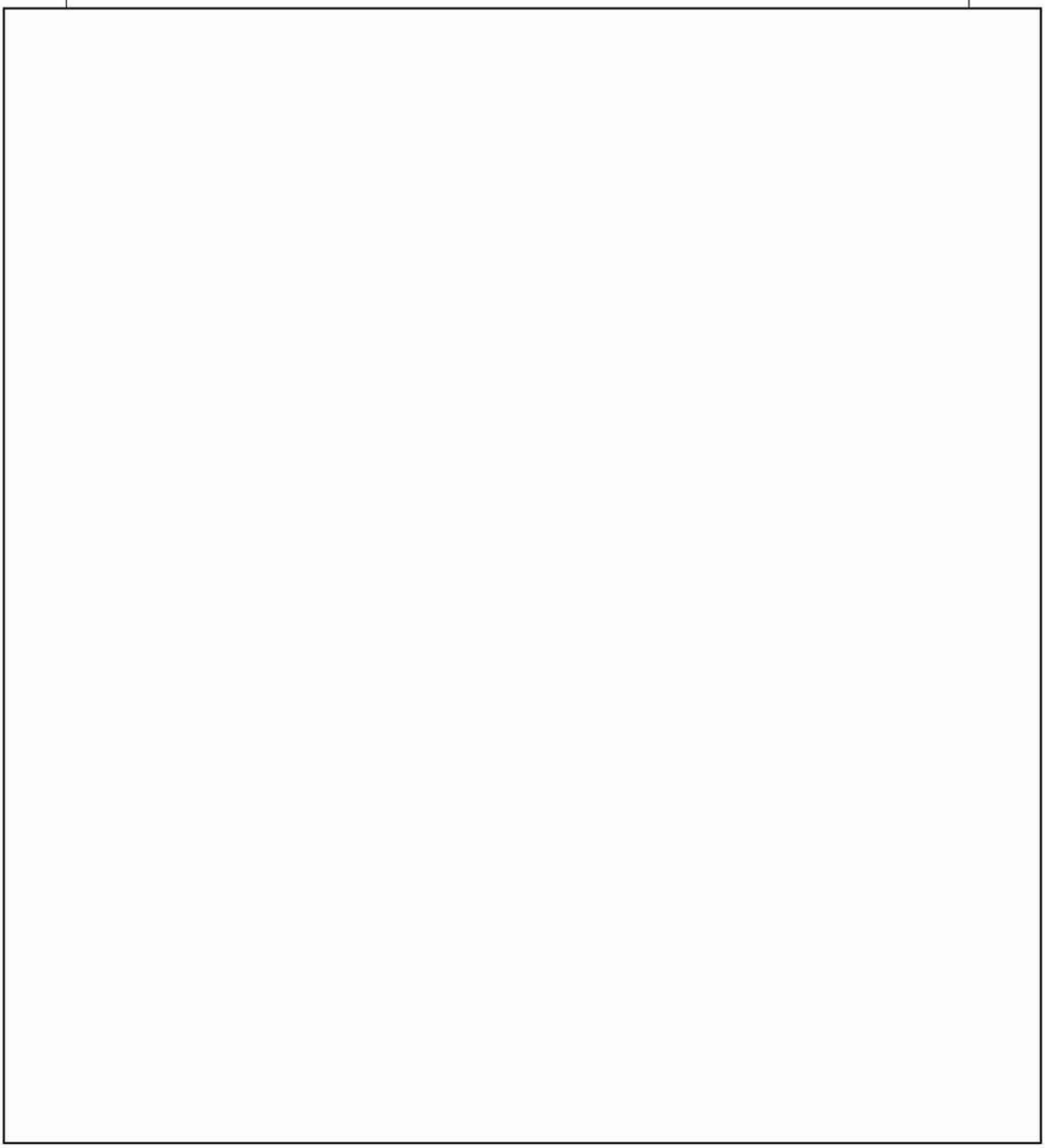
KST Handling Requirements (b)(7)(E)



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Asylum Adjudications Supplement

Cases Requiring HQASM Review

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(b)(7)(E)

Asylum Adjudications Supplement

Burden and Standard of Proof

If the evidence indicates that a ground for a mandatory denial or referral exists, then the applicant has the burden of proving by a preponderance of the evidence that the ground does not apply. A fact is established by a preponderance of the evidence, if the adjudicator finds, upon consideration of all of 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). For further guidance on mandatory bars, see the Asylum Lesson Plan, Mandatory Bars to Asylum.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

NATIONAL SECURITY, PART 2: TERRORISM-RELATED INADMISSBILITY GROUNDS (TRIG)

TRAINING MODULE

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

NATIONAL SECURITY, PART 2: TERRORISM-RELATED INADMISSBILITY GROUNDS (TRIG)

TRAINING MODULE

MODULE DESCRIPTION:

This module provides an overview of the terrorism-related inadmissibility grounds (TRIG) and their impact on RAIO adjudications.

TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing and adjudicating cases, you (the officer) will identify terrorism-related inadmissibility grounds (TRIG) indicators, elicit all relevant information from an applicant to correctly determine if the applicant is subject to a TRIG or mandatory bars, where appropriate determine whether an exemption is available, document your findings in the file appropriately, and make a legally sufficient final decision.

ENABLING PERFORMANCE OBJECTIVE(S)

1. Properly identify designated terrorist organizations ("Tier I" and "Tier II"), and analyze whether a group meets the definition of an undesignated terrorist organization ("Tier III").
2. Apply the INA § 212(a)(3)(B) TRIG inadmissibility grounds/bars.
3. Apply statutory exceptions to TRIG.
4. Explain the exemptions available for TRIG.
5. Analyze the facts and relevant law to make a legally sufficient decision in a case involving TRIG.

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INSTRUCTIONAL METHODS

- Interactive presentation
- Discussion
- Practical exercises

METHOD(S) OF EVALUATION

- Multiple-choice exam
- Observed practical exercises

REQUIRED READING

1. INA § 212(a)(3)(B).

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

1. See USCIS TRIG ECN site for memos, legal guidance, legislation and other adjudicative resources.
2. Memorandum, Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds, Michael L. Aytes, Acting Deputy Director (July 28, 2008).
3. See USCIS TRIG ECN Home Page for TRIG Exemption Worksheet.
4. Memorandum, Collecting Funds from Others to Pay Ransom to a Terrorist Organization, Dea Carpenter, Deputy Chief Counsel (February 6, 2008).
5. *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006).
6. Nicholas J. Perry, *The Breadth and Impact of the Terrorism-Related Grounds of Inadmissibility of the INA*, 06-10 Immigr. Briefings 1, Oct. 2006.

Additional Resources – International and Refugee Adjudications

Additional Resources – Asylum Adjudications

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR13	Knowledge of inadmissibilities (4)
ILR23	Knowledge of bars to immigration benefits (4)
ILR27	Knowledge of policies and procedures for terrorism-related grounds of inadmissibility (TRIG) (4)
IRK2	Knowledge of the sources of relevant country conditions information (4)
IRK13	Knowledge of internal and external resources for conducting research (4)
TIS2	Knowledge of the USCIS TRIG ECN (4)
RI3	Skill in conducting research (e.g., legal, background, country conditions) (4)
RI9	Skill in identifying inadmissibilities and bars (4)
RI10	Skill in identifying national security issues (4)
DM2	Skill in applying legal, policy, and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
RI6	Skill in identifying information trends and patterns (4)
RI11 OK9	Skill in handling, protecting, and disseminating information (e.g., sensitive and confidential information)

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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
10/26/2015	Throughout document	Updated broken links and citations; added new TRIG exemptions; minor formatting changes; added new case law	RAIO Training, RAIO TRIG Program
10/22/2018	Throughout document	Separated TRIG and National Security Lesson Plans; streamlined TRIG sections; added updated case law and policy guidance; fixed links.	RAIO Training; RAIO TRIG Branch
7/22/2019	Throughout document	Corrected minor typos and formatting issues.	RAIO Training
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training

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

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

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

1 INTRODUCTION

This lesson plan covers the relevant law regarding the terrorism-related inadmissibility grounds (TRIG) as they pertain to RAIO adjudications. In doing so, this lesson plan provides the information you need to understand TRIG, identify cases with TRIG issues, and properly adjudicate and process them.

2 TRIG OVERVIEW

The INA prohibits granting most immigration benefits to individuals with certain associations with terrorist organizations or who have engaged in certain types of activities. Officers overseas encounter these prohibitions directly through the terrorism-related inadmissibility grounds codified at section 212(a)(3)(B) of the Immigration and Nationality Act (INA). Depending upon how an asylum applicant entered the United States, an asylum applicant may be subject to either the section 212 inadmissibility provisions or the section 237 deportability provisions, which incorporate the TRIG provisions by reference. Although an asylum applicant is generally not required to be found admissible to establish eligibility for a grant of asylee status, the mandatory bar to asylum found at INA § 208(b)(2)(A)(v) also incorporates the TRIG provisions by reference, making all of the section 212(a)(3)(B) terrorism-related inadmissibility grounds mandatory bars to asylum. Therefore, this lesson plan focuses on the TRIG provisions codified at INA § 212(a)(3)(B).

USCIS's mission includes protecting the integrity of the U.S. immigration system, which requires careful consideration of TRIG matters. As part of the determination of statutory

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eligibility for an immigration benefit, you must examine each case for TRIG issues and determine whether a TRIG bar or inadmissibility applies.

3 IDENTIFYING TRIG ISSUES

As noted above, the terrorism-related inadmissibility grounds are found at INA § 212(a)(3)(B). These grounds include statutory definitions for terrorist activity, engaging in terrorist activity, and terrorist organizations.

- "Terrorist activity" is defined in INA § 212(a)(3)(B)(iii)[1];
- Conduct that constitutes "engag[ing] in terrorist activity" is defined under INA § 212(a)(3)(B)(iv);[2] and
- "Terrorist organization[s]" are defined in INA § 212(a)(3)(B)(vi).[3]

3.1 Where You May Encounter TRIG Indicators

TRIG indicators may be encountered at any stage of the adjudication process. The following is a non-exhaustive list of places where TRIG indicators are often encountered: (b)(7)(E)

[redacted]

[1] For definition, see also Section 7.2, below: "Terrorist Activity" Defined.

[2] For definition, see also Section 7.3, below: "Engage in Terrorist Activity" Defined.

[3] For expanded definition, see also Section 6, below: TRIG – "Terrorist Organization" Defined. (b)(7)(E)

[redacted]

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4 INTERVIEWING CONSIDERATIONS AND PREPARATION

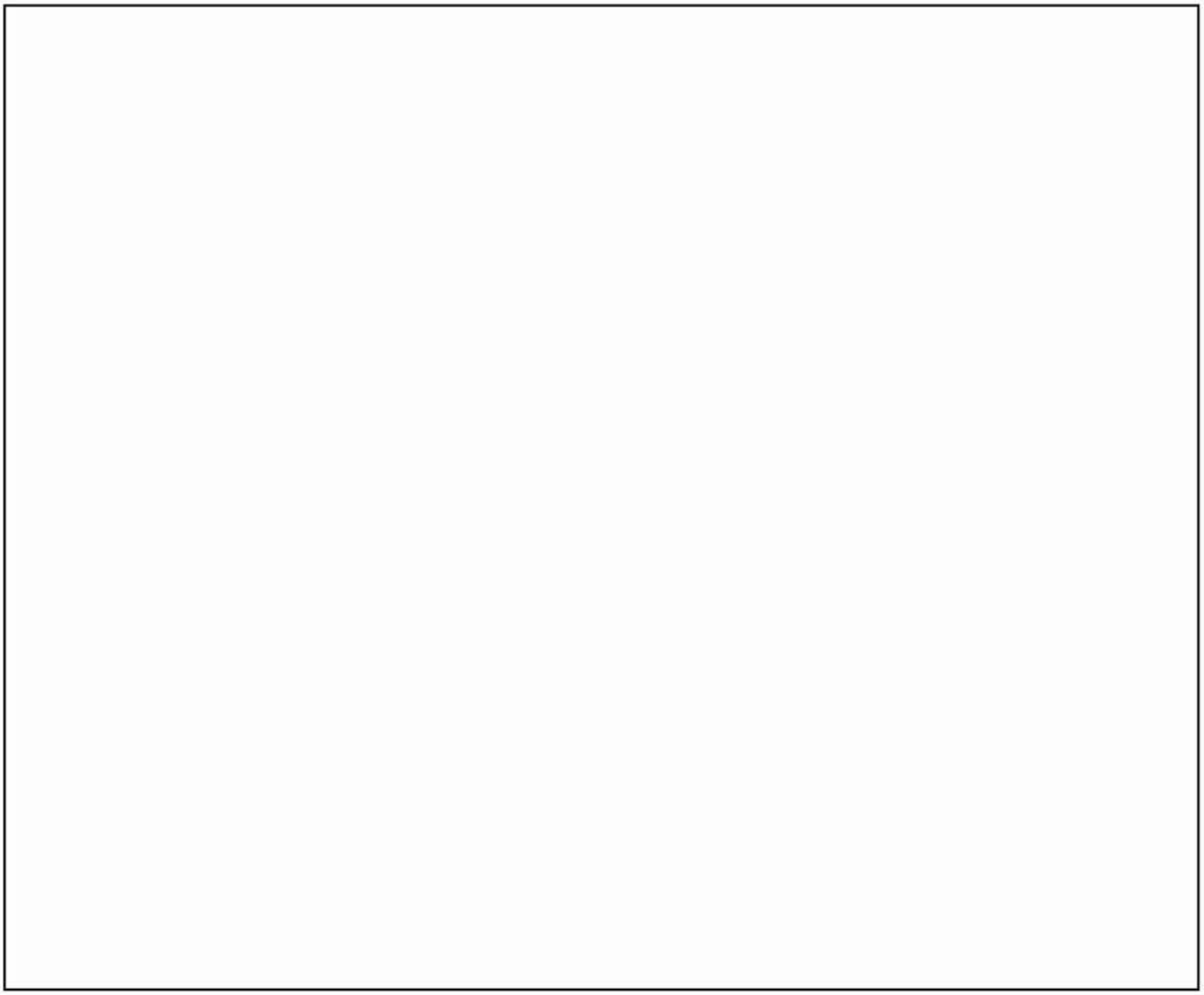
Relevant Questions

4.1 Association with People/Organizations of Described in INA § 212(a)(3)(B).

- Connection to an unknown political or social organization[5]
- Associated with, or accused of involvement in, a terrorist organization

Relevant Questions

Relevant Questions



Relevant Questions

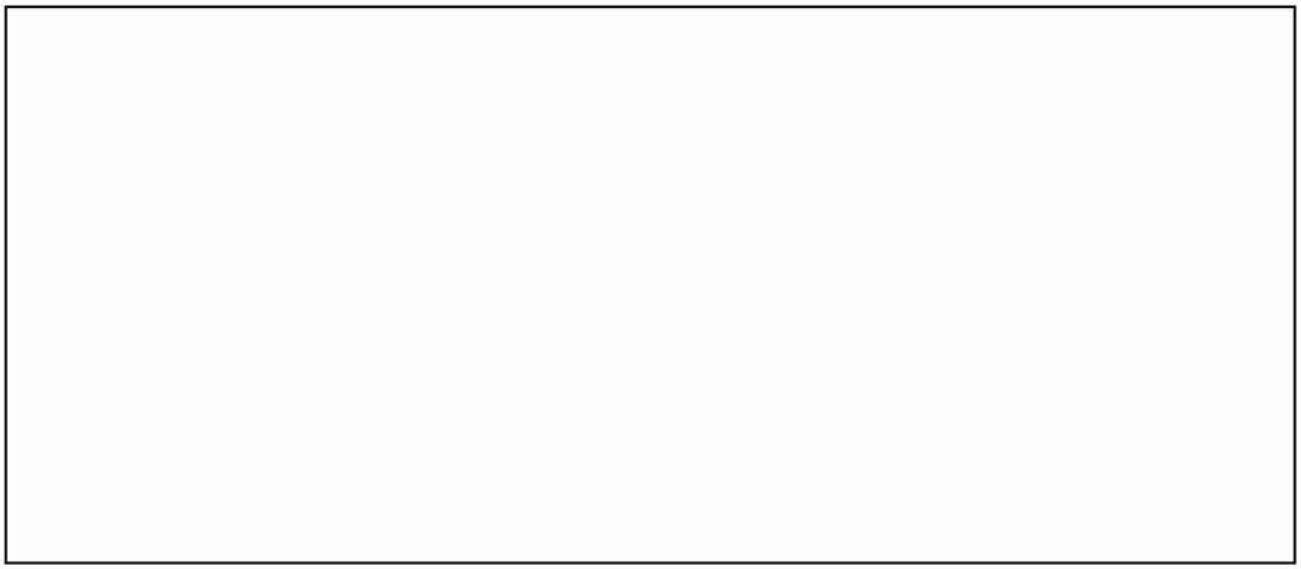
4.2 Engaged in, or Suspected of Engaging in, Terrorist Activities

Relevant Questions

4.3 Connection to Areas Known to Have Terrorist Activity

Relevant Questions

Relevant Questions



5 THE TERRORISM-RELATED INADMISSIBILITY GROUNDS (TRIG)

As previously noted, the terrorism-related inadmissibility grounds are found at INA § 212(a)(3)(B). This section has a long and complex history, and is the subject of various policy memoranda and determinations by executive branch agencies, as well as decisions by the courts. Because of this complexity, and because TRIG touches upon issues of national security, foreign relations, and interagency cooperation, it is vital for you to properly identify and adjudicate TRIG issues. The purpose of this section is to familiarize you with TRIG generally, so that you can identify TRIG issues in the context of RAIO adjudications. After having done so, you will know how to fully develop the factual record and to properly analyze and adjudicate any applicable TRIG issues.

This lesson plan will first explore the INA definition of a "terrorist organization."

6 TRIG – "TERRORIST ORGANIZATION" DEFINED

Many of the general terrorism-related inadmissibility grounds refer to "terrorist organizations." There are three categories, or "tiers," of terrorist organizations defined in the INA.[6] These three tiers are explained below.

[6] INA § 212(a)(3)(B)(vi).

6.1 Categories or "Tiers" of Terrorist Organizations

- **Tier I (Foreign Terrorist Organizations (FTO)):**[7] a foreign organization designated by the Secretary of State under INA § 219 after a finding that the organization engages in terrorist activities or terrorism. In addition, pursuant to legislation, the Taliban is considered to be a Tier I organization for purposes of INA § 212(a)(3)(B);[8]

- **Tier II (Terrorist Exclusion List (TEL)):**[9] an organization otherwise designated by the Secretary of State as a terrorist organization, after finding that the organization engages in terrorist activities; or

- **Tier III ("Undesignated" Terrorist Organizations):**[10] a group of two or more individuals, whether organized or not, that engages in, or has a subgroup[11] that engages in terrorist activities. (The definition of "engage in terrorist activity" is found at INA § 212(a)(3)(B)(iv) and is discussed below.) (b)(7)(E)

[redacted]

6.2 Foreign Terrorist Organization Designation under INA § 219 (Tier I)

6.2.1 Authority

Under INA § 219, the Secretary of State is authorized to designate an organization as a foreign terrorist organization. The Secretary of State is required to notify congressional leaders in advance of making such a designation.[12]

The designation does not become effective until its publication in the *Federal Register*, and the designation will remain effective until revoked by an act of Congress or by the Secretary of State.

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[7] INA § 212(a)(3)(B)(vi)(I). For more information, see Section 6.2, below: Foreign Terrorist Organization Designation under INA § 219 (Tier I).

[8] Consolidated Appropriations Act, 2008 (CAA), Pub. L. 110-161, 121 Stat. 1844, Division J, Title VI, § 691(d) (Dec. 26, 2007).

[9] INA § 212(a)(3)(B)(vi)(II). For more information, see Section 6.3, below: Terrorist Exclusion List (Tier II).

[10] INA § 212(a)(3)(B)(vi)(III). For more information, see Section 6.4, below: Undesignated Terrorist Organizations.

[11] *See* Department of State guidance on what constitutes a subgroup, 9 FAM 302.6-2(B)(3)(h).

[12] INA § 219(a)(2)(A)(i).

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6.2.2 Definition

The Secretary of State is authorized to designate an organization as a terrorist organization if the Secretary finds that:

- The organization is a foreign organization;
- The organization engages in terrorist activity (as defined in INA § 212(a)(3)(B)) or terrorism (as defined in 22 U.S.C. § 2656f(d)(2)), or retains the capability and intent to engage in terrorist activity or terrorism[13]; and
- The terrorist activity or terrorism of the organization threatens the security of U.S. nationals or the national security of the United States.[14]

6.2.3 Organizations Currently Designated as Foreign Terrorist Organizations (FTOs)[15]

On October 8, 1997, the Secretary of State published the first list of Tier I terrorist organizations in the *Federal Register*. Most of the organizations were re-designated in October 1999 and October 2001. The Secretary of State has also designated groups as terrorist organizations in separate *Federal Register* Notices each year since 1999.

Foreign terrorist organizations designated by the Secretary of State include, among others, al-Qa'ida, Boko Haram, Communist Party of the Philippines/New People's Army (CPP/NPA), Basque Homeland and Freedom (ETA), Hamas, Hizballah, the Islamic State of Iraq and the Levant (ISIL, ISIS, or IS), Liberation Tigers of Tamil Eelam (LTTE), Revolutionary Armed Forces of Colombia (FARC), and Shining Path.

The current FTO list can be found on the Department of State Bureau of Counterterrorism's homepage at https://www.state.gov/j/ct/list/index.htm. You should check this site on a regular basis for the most current version of the list as additional organizations may be designated at any time.

The Taliban is not listed as an FTO on the State Department's website because it was not designated by the State Department under INA § 219. Rather, under § 691(b) of the

[13] *See* *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1243-1244 (D.C. Cir. 2003) (finding that an organization's admission to participation in attacks on government buildings and assassinations was sufficient to support a finding that the group was engaged in "terrorist activity.")

[14] INA § 219(a)(1).

[15] *See* U.S. Department of State, Office of Counterterrorism, Fact Sheet: Foreign Terrorist Organization Designation (Washington, DC, September 1, 2010).

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Consolidated Appropriations Act, 2008, Congress provided that the Taliban shall be considered to be a Tier I terrorist organization.[16]

6.3 Terrorist Exclusion List (Tier II)

6.3.1 Authority

The USA PATRIOT Act added, and the REAL ID Act amended, two additional categories of "terrorist organizations" to INA § 212.[17] The Secretary of State, in consultation with or upon the request of the Secretary of Homeland Security or the Attorney General, may designate as a terrorist organization an organization that "engages in terrorist activity" as described in INA § 212(a)(3)(B)(iv)(I-VI). Unlike Tier I organizations, there is no requirement that the organization endanger U.S. nationals or U.S. national security.

The Terrorist Exclusion List (TEL) designation is effective upon publication in the *Federal Register*. The organizations that have been designated through this process are referred to collectively as the "Terrorist Exclusion List."

6.3.2 Organizations Currently Designated on the Terrorist Exclusion List (Tier II)

There are 58 organizations currently designated as terrorist organizations under INA § 212(a)(3)(B)(vi)(II).

The Department of State maintains the Terrorist Exclusion List at: https://www.state.gov/j/ct/rls/other/des/123086.htm. However, while organizations may be removed from the list, the Department of State is no longer adding organizations to this list.

6.4 Undesignated Terrorist Organizations (Tier III)

Any group of two or more individuals may constitute a "terrorist organization" under the INA even if not designated as such under INA § 219 or listed on the TEL, if they meet the requirements below.

6.4.1 Definition

Under INA § 212(a)(3)(B)(vi)(III), a group of two or more individuals, whether organized or not, meets the definition of a "terrorist organization" if the group engages in terrorist activity, or has a subgroup that engages in terrorist activity.

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[16] Consolidated Appropriations Act, 2008, *supra*, note 8. The Taliban is the only group to date that Congress has stated shall be considered as a Tier I terrorist organization and the only one that does not appear on the FTO list.

[17] INA § 212(a)(3)(B)(vi)(II) (created by § 411(a)(1)(G) of the USA PATRIOT Act of 2001, and amended by § 103(c) of the REAL ID Act).

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For example, looking to the definitions contained in the INA of "engaging in terrorist activity" and "terrorist activity," an organization meets the definition of a terrorist organization if it illegally uses explosives, firearms, or other weapons (other than for mere personal monetary gain), with intent to endanger the safety of individuals or to cause substantial damage to property. This broad definition covers most armed resistance groups and makes no exceptions for groups aligned with U.S. interests.[18] Note that there is no exception for groups using "justifiable" force. In Matter of S-K-, the BIA rejected the applicant's argument that there is an exception to the "terrorist organization" definition for groups that use justifiable force to repel attacks by forces of an illegitimate regime. The BIA's review of the statutory language led it to conclude "that Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters,' and it did not intend to give [the BIA] discretion to create exceptions for members of organizations to which our Government might be sympathetic."[19] Similarly, in Khan v. Holder, the U.S. Court of Appeals for the Ninth Circuit considered and rejected the applicant's argument that the statute contains an exception for organizations that use force against military targets that is permitted under the international law of armed conflict.[20]

On the other hand, organizations whose violent activities include the use of weapons or dangerous devices solely for mere personal monetary gain fall within the statutory exception at INA § 212(a)(3)(B)(iii)(V)(b).

According to guidance from the Department of State, a group is a "subgroup" of another organization if there are reasonable grounds to believe that either the group as a whole or its members are affiliated with the larger group, and the group relies upon the larger group, in whole or in part, for support or to maintain its operations. If there is such a relationship, and the subgroup engages in terrorist activity, then both groups are terrorist organizations.[21]

However, the U.S. Court of Appeals for the Third Circuit has held that an entity may not be deemed a Tier III terrorist organization unless its leaders authorized terrorist activity commited by its members.[22] Evidence of authorization may be direct or circumstantial,

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[18] INA §§ 212(a)(3)(B)(iii) and (iv); see Matter of S-K-, 23 I&N Dec. 936, 940 (BIA 2006) (declining to adopt a "totality of circumstances" test to the question of whether a group is engaged in "terrorist activity."); see also Sections 7.2 and 7.3, below: "Terrorist Activity" Defined and "Engaging in Terrorist Activity" Defined.

[19] Matter of S-K-, 23 I&N Dec. at 941 (upholding the IJ's determination that the Chin National Front, an armed organization that uses land mines in fighting against the Burmese government, met the INA definition of an undesignated terrorist organization).

[20] Khan v. Holder, 584 F.3d 774, 784-785 (9th Cir. 2009).

[21] See 9 FAM 302.6-2(B)(3)(h).

[22] Uddin v. Attorney General, 870 F.3d 282, 289-90 (3rd Cir. 2017). The ruling in Uddin involved a group which is a major political party in the country at issue, and which does not have an armed wing. However, significant political violence in the country at issue is common, and multiple political parties in that country are implicated in violent

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and authorization may be reasonably inferred from, among other things, the fact that most of an organization's members commit terrorist activity or from a failure of a group's leadership to condemn or curtail its members' terrorist acts.[23] Similarly, the U.S. Court of Appeals for the Seventh Circuit has noted that an organization is not a terrorist organization simply because some of its members have engaged in terrorist activity "without direct or indirect authorization."[24] The activity must be "authorized, ratified, or otherwise approved or condoned by the organization" in order for the organization to be considered to have engaged in terrorist activity.[25]

6.5 Groups Excluded from the Tier III Definition by Statute

As a result of the broad reach of the statute and its application to groups that are sympathetic to the United States or that have previously assisted the United States, Congress enacted section 691(b) of the Consolidated Appropriations Act, 2008 (CAA). The CAA stated that the following groups *shall not be considered to be terrorist organizations* on the basis of any act or event occurring *before* December 26, 2007:[26]

- Karen National Union/Karen National Liberation Army (KNU/KNLA)
- Chin National Front/Chin National Army (CNF/CNA)
- Chin National League for Democracy (CNLD)
- Kayan New Land Party (KNLP)
- Arakan Liberation Party (ALP)
- Tibetan Mustangs
- Cuban Alzados (groups opposed to the Communist government of Cuba)
- Karenni National Progressive Party (KNPP)

activity carried out by members. The nature of the group at issue in *Uddin* likely influenced the court's ruling. The issue of authorization will be less problematic with a group whose aims clearly included the use of violence, such as a group which was largely made up of individuals who engaged in combat, or a group which had an armed wing.

[23] *Uddin*, 870 F.3d at 292. The court noted that conclusive proof that the leaders of a group explicitly sign off on each individual terrorist act at issue is not required.

[24] *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008).

[25] *Id.*

[26] Consolidated Appropriations Act, 2008, *supra*, note 8, § 691(b).

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- appropriate groups affiliated with the Hmong[27]
- appropriate groups affiliated with the Montagnards (includes the Front Unifié de Lutte des Races Opprimées (FULRO))[28]
- African National Congress (ANC)[29]

(Hereinafter, this list will be referred to as the "CAA groups" in this lesson plan.)

In December 2014, Congress enacted section 1264 of the National Defense Authorization Act (NDAA) for Fiscal Year 2015, which provides that two major Kurdish political parties in Iraq are excluded from the definition of "terrorist organization":[30]

- Kurdish Democratic Party (KDP)
- Patriotic Union of Kurdistan (PUK)

The NDAA provision is not time-limited. As a result, unlike the CAA groups, the KDP and the PUK are not considered to be terrorist organizations for activities occurring *at any time*.

In August 2018, Congress enacted the John S. McCain National Defense Authorization Act for Fiscal Year 2019.[31] Pursuant to the 2019 NDAA, the Rwandan Patriotic Front (RPF)/Rwandan Patriotic Army (RPA) are excluded from the definition of an undesignated (Tier III) terrorist organization for any period before August 1, 1994, and INA § 212(a)(3)(B) shall not apply to an alien with respect to any activity by the alien in association with the RPF/RPA before August 1, 1994. Thus, there is no time period during which RPF/RPA is considered a Tier III organization.

6.5.1 Discretionary Exemption Provision for Terrorist Organizations

The INA provides the Secretaries of State and Homeland Security, in consultation with the Attorney General and each other, the authority to conclude, in their sole and unreviewable discretion, that an organization will not be considered a terrorist organization under INA § 212(d)(3)(B)(i). However, the Secretary of Homeland Security

[27] Appropriate groups may be established through country condition reports to show that a subgroup is affiliated with the Hmong or Montagnards. *See also* Exercises of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, October 5, 2007 (FULRO and Hmong).

[28] Consolidated Appropriations Act, 2008, *supra*, note 8, § 691(b).

[29] On July 1, 2008, Congress amended the CAA to add the African National Congress. Pub. L. no. 110-257.

[30] National Defense Authorization Act for Fiscal Year 2015, Pub. L. no. 113-291, 128 Stat. 3292, § 1264(a)(1) (2014).

[31] John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. no. 115-232, 132 Stat. 1636 (Aug. 13, 2018).

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may not exempt a group from the definition of an undesignated terrorist organization if the group:

- engaged in terrorist activity against the United States;
- engaged in terrorist activity against another democratic country; or
- has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians.

To date, this authority *has not* been exercised. However, as explained in Section 9 below, TRIG Exemption Authority, the Secretary of Homeland Security *has* exercised the authority not to apply certain *provisions* of INA § 212(a)(3)(B) to individual aliens based on specific activities or associations with certain groups.

6.5.2 Recognized Foreign Governments Not Considered Tier III Organizations

As a general matter, INA § 212(a)(3)(B) does not apply to activity of a recognized and duly constituted foreign government within the definition of "terrorist activity" or "engaging in terrorist activity." Political parties that participate in or have representation in a government are not considered synonymous with the government of a country for purposes of this determination.

Also, entities in *de facto* control of an area are not recognized as the government of that area for the purposes of TRIG.

If you have questions as to whether an entity should be considered the government for purposes of this determination or other questions related to this issue, please contact your supervisor for referral of the issue to the TRIG point of contact (POC) for your Division.

7 TERRORISM-RELATED INADMISSIBILITY GROUNDS

7.1 Statute – INA §212(a)(3)(B)(i) – The Inadmissibility Grounds

The terrorism-related inadmissibility grounds (TRIG) are found at INA § 212(a)(3)(B)(i) and are described in detail below. The terrorism related deportability ground at INA § 237(a)(4)(B), as amended by the REAL ID Act of 2005, incorporates all of the terrorism-related inadmissibility grounds at INA § 212(a)(3)(B) and INA § 212(a)(3)(F) (related to association with terrorist organizations and an intent while in the United States to engage

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in activities that could endanger the welfare, safety or security of the United States).[32] Therefore, these grounds of inadmissibility are also grounds of deportability.[33]

The terrorism-related grounds of inadmissibility under INA § 212(a)(3)(B) apply to an alien who:

I. Has engaged in terrorist activity – INA § 212(a)(3)(B)(i)(I);[34]

II. A consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity – INA § 212(a)(3)(B)(i)(II);

III. Has, under any circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity – INA § 212(a)(3)(B)(i)(III);[35]

IV. Is a [current] representative[36] of – INA § 212(a)(3)(B)(i)(IV):

(aa) A terrorist organization (as defined in INA §212(a)(3)(B)(vi)) – INA § 212(a)(3)(B)(i)(IV)(aa);[37] or

(bb) A political, social, or other group that endorses or espouses terrorist activity – INA § 212(a)(3)(B)(i)(IV)(bb);[38]

V. Is a [current] member of a Tier I or II terrorist organization – INA § 212(a)(3)(B)(i)(V);[39]

VI. Is a [current] member of a Tier III terrorist organization, unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and

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[32] INA § 212(a)(3)(F) requires consultation between DHS (given this authority under the Homeland Security Act of 2002) and the Department of State. Therefore USCIS rarely applies this ground of inadmissibility.

[33] INA § 237(a)(4)(B) ("Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.") (codified at 8 U.S.C. § 1227(a)(4)(B)).

[34] See Sections 7.2 and 7.3, below: "Terrorist Activity" Defined and "Engaging in Terrorist Activity" Defined.

[35] See 9 FAM 302.6-2(B)(3)(f).

[36] For purposes of the terrorist provisions in the INA, "representative" is defined as "an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity." INA § 212(a)(3)(B)(v).

[37] See Section 6, above: "Terrorist Organization" Defined.

[38] Note that this ground of inadmissibility is written in the present tense but that prior representation raises the possibility that this ground, or other grounds of inadmissibility, may apply.

[39] INA § 237(a)(4)(B); see Section 6, above: "Terrorist Organization" Defined. Note: The Taliban should be considered a Tier I terrorist organization pursuant to Section 691(d) of the Consolidated Appropriations Act, 2008.

should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(i)(VI).[40] (b)(7)(E)

[redacted]

[40] See Section 6, above: "Terrorist Organization" Defined.

[41] 9 FAM 302.6-2(B)(3)(e).

[42] Id.; see also Viegas v. Holder, 699 F.3d 798, 804 (4th Cir. 2012).

VII. Endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization – INA § 212(a)(3)(B)(i)(VII);[44]

VIII. Has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization – INA § 212(a)(3)(B)(i)(VIII);

- "Military-type training" is defined at 18 U.S.C. § 2339D(c)(1) to include: "training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction . . . "[45]
- NOTE: On January 7, 2011, the Secretary exercised her discretionary authority under INA § 212(d)(3)(B)(i) to exempt individuals who have received military-type training under duress from the application of this ground of inadmissibility.[46]

IX. Is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years – INA § 212(a)(3)(B)(i)(IX)[47];

To qualify as a "child," the individual must be unmarried and under 21 years of age.

NOTE: This ground only applies to current spouses and does not apply if the applicant is divorced from the TRIG actor or if the TRIG actor is deceased.

[44] See Section 7.3, below: "Engage in Terrorist Activity" Defined.

[44] Note that this ground, unlike INA § 212(a)(3)(B)(i)(III), does not require that the statements be made under circumstances indicating an intention to cause death or serious bodily harm.

[45] 18 U.S.C. § 2339D(c)(1).

[46] See 76 Fed. Reg. 14418-01 (March 16, 2011) and Section 9.4.1, below: Situational Exemptions – Duress-Based.

[47] In addition, under this provision, an alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization (PLO) is considered to be engaged in terrorist activity.

EXCEPTION: The provision above does not apply to a spouse or child – INA § 212(a)(3)(B)(ii):

- who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or
- whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

7.2 "Terrorist Activity" Defined

Many of the terrorism-related inadmissibility grounds under INA § 212(a)(3)(B)(i) refer to "terrorist activity" or "engaging in terrorist activity." Terrorist activity and engaging in terrorist activity are separately defined at INA §§ 212(a)(3)(B)(iii) and (iv), respectively.

"Terrorist activity" is defined as any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

- The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle) – INA § 212(a)(3)(B)(iii)(I);
- The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained – INA § 212(a)(3)(B)(iii)(II);
- A violent attack on an internationally protected person or upon the liberty of such person– INA § 212(a)(3)(B)(iii)(III);

  An "internationally protected person" is defined by statute as:

  - a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or
  - any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization, who at the time and place concerned is entitled pursuant to international law to special protection against attack on his person, freedom, or dignity, and any member of his family then forming part of his household;[48]

[48] 18 U.S.C. § 1116(b)(4).

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- An assassination – INA § 212(a)(3)(B)(iii)(IV);

- The use of any – INA § 212(a)(3)(B)(iii)(V):

  - Biological, chemical, or nuclear weapon – INA § 212(a)(3)(B)(iii)(V)(a); or

  - Explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain) – INA § 212(a)(3)(B)(iii)(V)(b);

  With intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property;

- A threat, attempt, or conspiracy to do any of the above – INA § 212(a)(3)(B)(iii)(VI).

7.3 "Engage in Terrorist Activity" Defined

"Engaging in terrorist activity" means, in an individual capacity or as a member of an organization:

- To commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity – INA § 212(a)(3)(B)(iv)(I);

- To prepare or plan a terrorist activity – INA § 212(a)(3)(B)(iv)(II);

- To gather information on potential targets for terrorist activity – INA § 212(a)(3)(B)(iv)(III);

- To solicit funds or other things of value for – INA § 212(a)(3)(B)(iv)(IV):

  - a terrorist activity – INA § 212(a)(3)(B)(iv)(IV)(aa);

  - a Tier I or Tier II terrorist organization – INA § 212(a)(3)(B)(iv)(IV)(bb);[49] or

  - a Tier III (undesignated) terrorist organization, unless the solicitor can demonstrate by clear and convincing evidence that he or she did not know, and should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(iv)(IV)(cc);[50]

    NOTE: Collecting funds or other items of value from others in order to pay ransom to a terrorist or a terrorist organization, in order to obtain the release of a third person, does not constitute solicitation of funds for a terrorist activity or for

[49] Referring to terrorist organizations described in INA § 212(a)(3)(B)(vi)(I) and (II).

[50] Referring to terrorist organizations described in INA § 212(a)(3)(B)(vi)(III).

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an organization. However, payment of ransom to a terrorist organization generally has been considered to fall under the material support ground of inadmissibility (discussed below).[51]

- To solicit any individual:
  - To engage in conduct otherwise described as engaging in terrorist activity – INA § 212(a)(3)(B)(iv)(V)(aa);
  - for membership in a Tier I or Tier II terrorist organization – INA § 212(a)(3)(B)(iv)(V)(bb); or
  - for membership in a Tier III (undesignated) terrorist organization, unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(iv)(V)(cc); or
- To commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds, or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training – INA § 212(a)(3)(B)(iv)(VI):
  - For the commission of a terrorist activity – INA § 212(a)(3)(B)(iv)(VI)(aa);
  - To any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity – INA § 212(a)(3)(B)(iv)(VI)(bb);
  - To a Tier I or Tier II terrorist organization – INA § 212(a)(3)(B)(iv)(VI)(cc);
  - To a Tier III (undesignated) terrorist organization (a group of two or more individuals which engages in or has a subgroup that engages in terrorist activity), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization – INA § 212(a)(3)(B)(iv)(VI)(dd).

Guidance on Self-Defense: USCIS interprets INA § 212(a)(3)(B) not to include lawful actions taken in self-defense under threat of imminent harm, provided the action was considered lawful under the law of the country where it occurred, and under U.S. federal and state laws. The analysis is complicated and requires research of foreign laws. If you

[51] Memorandum, Collecting Funds from Others to Pay Ransom to a Terrorist Organization, Dea Carpenter, USCIS Deputy Chief Counsel, to Lori Scialabba, RAIO Associate Director (Feb. 6, 2008).

have a case in which the self-defense exception may apply, please contact your Division POC for TRIG-related issues. If this issue arises during your interview, you should elicit as much detail as possible about the incident in question, including what kind of force the applicant used, why he or she believed such force was necessary, and other relevant circumstances of the incident. You should include this information in your query to your Division POC, who will provide further guidance.

8 TRIG - MATERIAL SUPPORT

Providing material support is not in and of itself a ground of inadmissibility – it is one of the ways in which an individual may "engage in terrorist activity" under INA § 212(a)(3)(B)(iv) (specifically, INA § 212 (a)(3)(B)(iv)(VI)). That is, an individual who has provided material support to a terrorist organization is inadmissible under INA § 212(a)(3)(B)(i)(I) as an alien who "has engaged in a terrorist activity," as described in INA § 212(a)(3)(B)(iv)(VI).

8.1 Statutory Examples of Material Support

The INA provides the following non-exhaustive list of examples which would constitute "material support":[52]

- Safe house
- Transportation
- Communications
- Funds
- Transfer of funds or other material financial benefit
- False documentation or identification
- Weapons (including chemical, biological, or radiological weapons)
- Explosives
- Training

Beyond these examples, the INA does not define the meaning of "affords material support."

The statutory list is not an exhaustive list of what constitutes material support.[53]

[52] INA § 212(a)(3)(B)(iv)(VI).

[53] Singh-Kaur v. Ashcroft, 385 F.3d 293, 298 (3d Cir. 2004) ("Use of the term 'including' suggests that Congress intended to illustrate a broad concept rather than narrowly circumscribe a term with exclusive categories.").

8.2 Factors Relating to "Material Support"

8.2.1 Amount of Support

The amount of support provided need not be large or significant. For example, in *Singh-Kaur v. Ashcroft,* the U.S. Court of Appeals for the Third Circuit upheld the BIA's determination that a Sikh applicant who gave food to and helped to set up tents for a Tier III terrorist organization had provided "material support" under INA § 212(a)(3)(B)(iv)(VI).[54]

The court looked to the plain meaning of the terms "material" ("[h]aving some logical connection with the consequential facts" or "significant" or "essential") and "support" ("[s]ustenance or maintenance; esp., articles such as food and clothing that allow one to live in the degree of comfort to which one is accustomed") when evaluating the BIA's interpretation of the statute. Based on the plain language of the terms and the non-exhaustive nature of the list of examples provided in the statute, the court found that the BIA's interpretation that the definition of "material support" included the provision of food and setting up tents was not manifestly contrary to the statute.[55]

The U.S. Court of Appeals for the Fourth Circuit in *Viegas v. Holder* found that "there is no question that the type of activity in which Viegas engaged comes within the statutory definition of material support. The issue was whether Viegas's activities qualified as "material."[56] The court went on to hold that the petitioner's support (paying dues monthly for four years and hanging posters) was sufficiently substantial standing alone to have some effect on the ability of the Front for the Liberation of the Enclave of Cabinda, an undesignated terrorist organization, to accomplish its goals.[57]

In *Alturo v. U.S. Att'y Gen.*, the U.S. Court of Appeals for the Eleventh Circuit upheld the BIA's determination that an applicant who had given annual payments of $300 to the United Self-Defense Forces of Colombia (AUC), a Tier I terrorist organization at the time of the payments, had provided material support. The Court explained, "The BIA's legal determination[] that the funds provided by Alturo constitute 'material support' [is a] permissible construction[] of the INA to which we must defer. The INA broadly defines 'material support' to include the provision of 'a safe house, transportation, communications, *funds*, transfer of funds, or other material financial benefit, false documentation or identification, weapons…explosives, or training,' and the BIA

[54] Singh-Kaur, 385 F.3d at 300-301.

[55] *Id.* at 298 (quoting *Black's Law Dictionary* (7th ed. 1999)). In reaching this conclusion, the court noted that the BIA reasonably interpreted the terrorist grounds of inadmissibility to cover a wider range of actions than do the criminal provisions regarding material support to a terrorist organization codified at 18 U.S.C. § 2339A. *See id.*

[56] Viegas, 699 F.3d at 803.

[57] *Id.*

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reasonably concluded that annual payments of $300 over a period of six years was not so insignificant as to fall outside that definition."[58]

Although the courts that have considered the issue have generally agreed with the government's position that there is no exception for minor or "de minimis" material support implicit in the statute, certain applicants who have provided "limited" or "insignificant" material support to a Tier III organization may be eligible for an exemption. *See* Section 9.4.5, below: Situational Exemptions – Certain Limited Material Support and Insignificant Material Support.

8.2.2 To Whom/For What the Material Support was Provided

The material support provision applies when the individual afforded material support for the commission of a "terrorist activity" to someone who has committed or plans to commit a terrorist activity or to a terrorist organization.[59]

8.2.3 Use of Support

How the terrorist organization uses the support provided by the applicant is irrelevant to the determination of whether the support is material. For example, in *Matter of S-K-*, the BIA found that Congress did not give adjudicators discretion to consider whether an applicant's donation or support to a terrorist or terrorist organization was used to further terrorist activities.[60] It may, however, be relevant to the application of an exemption.

8.2.4 Applicant's Intent

The applicant's intent in providing the material support to an individual or terrorist organization is also irrelevant to the determination of whether the support is material.[61] It may, however, be relevant to the application of an exemption.

8.2.5 Relationship of Material Support Provision to Membership in a Terrorist Organization

Current membership in a terrorist organization is a distinct ground of inadmissibility, and is not, in and of itself, equivalent to the provision of material support.[62] While a member of a terrorist organization may have committed an act that amounts to material support to that group (such as paying dues), membership and support are two distinct grounds that should be analyzed separately.

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[58] *Alturo v. U.S. Att'y Gen.*, 716 F.3d 1310, 1314 (11th Cir. 2013).

[59] *See Singh-Kaur*, 385 F.3d at 298; INA §§ 212(a)(3)(B)(iv)(VI)(aa)-(dd)).

[60] *Matter of S-K-*, 23 I&N Dec. at 944.

[61] *Id.* at 943 (pointing out that the statute requires only that the applicant provide material support to a terrorist organization, without requiring an intent on the part of the provider).

[62] INA §§ 212(a)(3)(B)(i)(V)-(VI).

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8.2.6 Household Chores

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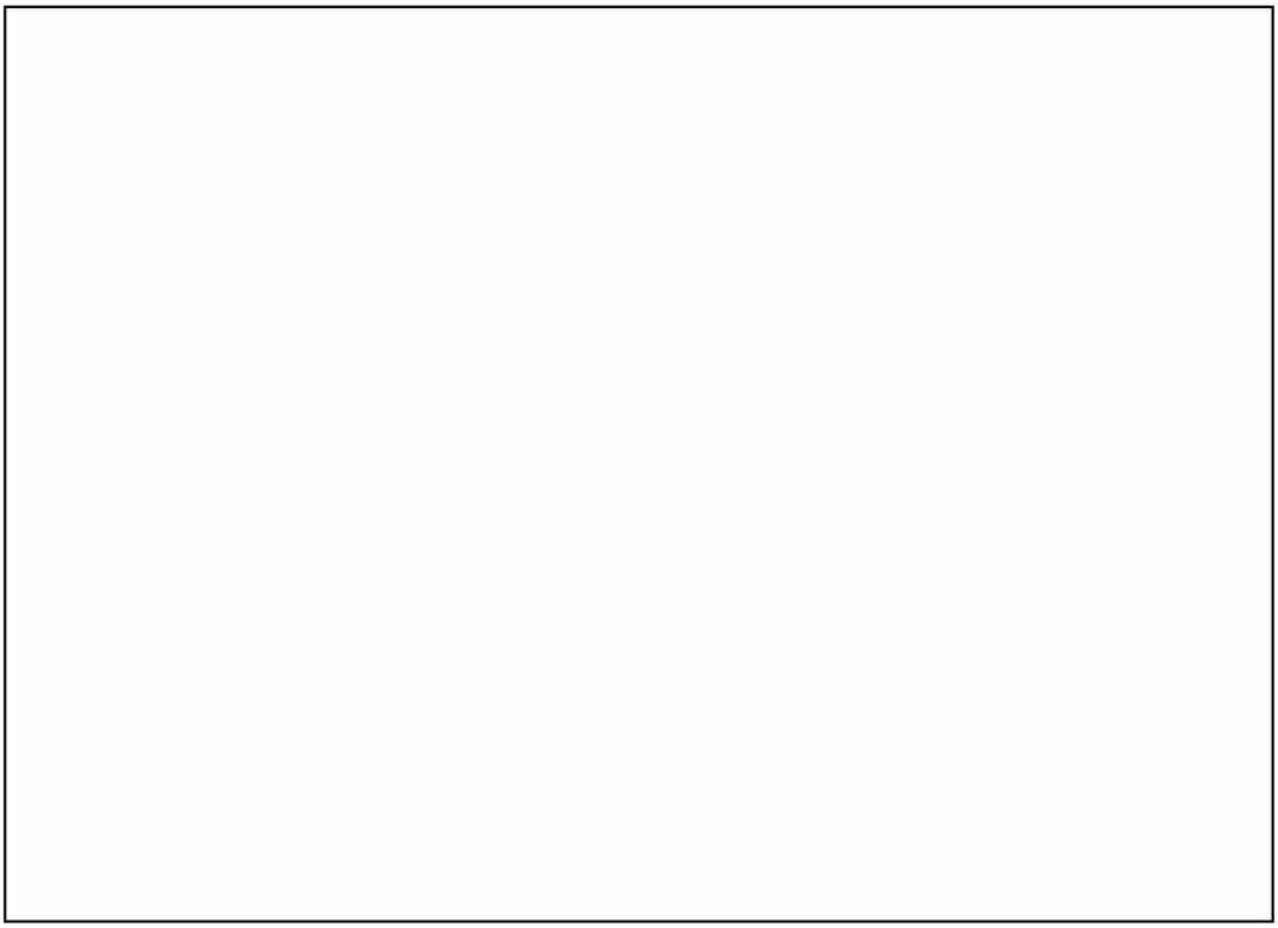

8.2.7 Ransom

Payment of ransom to a terrorist organization is considered material support, and any applicant who directly contributed to the ransom will be inadmissible. However, some of the acts or activities that often occur in response to a terrorist organization's demand for a ransom payment are not considered material support. The following are some examples that make this distinction:

Activity that is considered material support:

- Payment or contributing items of value toward the ransom payment (e.g., giving money or selling jewelry), either directly or through an intermediary
- Delivering the ransom payment

Activity that, in and of itself, is not considered material support:

[63] *See Matter of A-C-M-*, 27 I&N Dec. 303 (BIA 2018).

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- While being held captive, calling others to ask them to pay the terrorist organization in exchange for release
- While being held captive, giving phone numbers of friends or relatives to the captors, so that the captors could call and make demands for ransom payment
- Negotiating the ransom amount
- Collecting contributions toward the ransom payment from others

As noted previously in Section 7.3, the act of collecting contributions toward the ransom is also not considered solicitation under INA § 212(a)(3)(B)(iv)(IV). To be inadmissible for solicitation, the activities must be *for* a terrorist activity or *for* a terrorist organization, which is distinct from requesting or collecting ransom money to secure the release of the individual held captive.

8.2.8 Duress

Some advocates have argued that there is an implicit exception in the statute for individuals who provided material support to a terrorist organization under duress—that is, that individuals who were forced to give material support to a terrorist organization are not inadmissible. DHS has taken the position, based on the plain language of the statute and the exemption authority given to the Secretary of State and the Secretary of Homeland Security, that there is no statutory duress exception. However, since early 2007, a secretarial exemption has been available for certain applicants who have provided material support under duress. While these applicants are inadmissible, DHS may decide not to apply the ground of inadmissibility that pertains to them as a matter of discretion.[64]

Four circuit courts of appeals have upheld unpublished BIA decisions holding that the statute does not contain an implied duress exception. In *Annachamy v. Holder*, the U.S. Court of Appeals for the Ninth Circuit held that "the statutory framework makes clear that no exception was intended." The Court noted that the text of the statute does contain an explicit exception for those applicants who did not know or should not reasonably have known that the organization to which they provided material support was a Tier III terrorist organization and that the inadmissibility ground for membership in the Communist party contains an explicit exception; thus, the Court reasoned, if Congress had intended the statute to contain a duress exception to the material support provision, it would have explicitly included one.[65] Likewise, the U.S. Courts of Appeals for the Third, Fourth, and Eleventh Circuits have found that the BIA's construction of the statute to

[64] Exemptions are also available for military-type training under duress and solicitation under duress. *See* Section 9.4.1, below: Situational Exemptions – Duress-Based.

[65] *Annachamy v. Holder*, 733 F.3d 254, 260-261 (9th Cir. 2013), *amending and superseding Annachamy v. Holder*, 686 F.3d 729 (9th Cir. 2012), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014).

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include material support provided under duress was permissible and deferred to its interpretation.[66]

In *Matter of M-H-Z-*, the BIA clarified that, under its interpretation of the statute, both *voluntary and involuntary* conduct fall under the definition of "material support," and held that there is no implied duress exception.[67] The BIA's decision is controlling on this issue. In its review of *Matter of M-H-Z*, the U.S. Court of Appeals for the Second Circuit held that the BIA's interpretation of the material support bar was permissible and deferred to the Board's interpretation that the material support bar does not contain an explicit or an implied duress exemption.[68]

In cases where you find that an applicant has provided material support to a terrorist organization under duress, you must find that this ground of inadmissibility does apply, but consider whether the applicant has established his or her eligibility for the situational duress exemption. For more information, *see* Section 9.4.1, below, Situational Exemptions – Duress-Based.

(b)(7)(E)

8.2.9 Material Support Lines of Inquiry

[redacted]

[66] *Barahona v. Holder*, 691 F.3d 349, 353 (4th Cir. 2012); *Alturo v. U.S. Att'y Gen*, 716 F.3d 1310, 1314 (11th Cir. 2013); *Sesay v. Att'y Gen. of U.S.*, 787 F.3d 215, 222 (3d Cir. 2015).

[67] *Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016).

[68] *Hernandez v. Sessions*, 884 F.3d 107, 109 (2d Cir. 2018).

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8.3 Lack of Knowledge Exceptions

8.3.1 Exception for Tier IIIs Only (Membership, Solicitation and Material Support)

There is an exception for some of the TRIG provisions related to Tier III organizations if the applicant can "demonstrate by clear and convincing evidence that he did not know, and reasonably should not have known, that the organization was a terrorist organization."[69] This lack of knowledge exception refers to knowledge of the group's activities, and in particular, knowledge that the group engages in activities of the type that qualify as "engaging in terrorist activity" under INA § 212(a)(3)(B)(iv). The applicant does not, however, need to know that the group meets the definition of an undesignated terrorist organization under INA § 212(a)(3)(B)(vi)(III) to be found inadmissible.[70]

This exception applies to:

- members of;
- those who solicit funds, things of value, or members for; and
- those who provide material support to;

Tier III terrorist organizations only.

If the applicant can show by "clear and convincing" evidence that he or she did not know, and should not reasonably have known, that the organization was a terrorist organization,[71] these grounds of inadmissibility do not apply. Note that there is both a

[69] INA §§ 212(a)(3)(B)(i)(VI), (B)(iv)(IV)(cc), (B)(iv)(V)(cc), (B)(iv)(VI)(dd).

[70] *American Academy of Religion v. Napolitano*, 573 F.3d 115, 132 (2d. Cir. 2009).

[71] INA § 212(a)(3)(B)(iv)(VI)(dd); *see* Section 7.4, below: Undesignated Terrorist Organization (Tier III); *see also Matter of S-K-*, 23 I&N Dec. at 941-942; *Viegas*, 699 F.3d at 802-803 (upholding the BIA's finding that the applicant "reasonably should have known" his organization was engaged in violent activities despite his lack of specific information about his own faction); *Khan*, 584 F.3d at 785 (holding that the applicant's admission that he knew a wing of his organization was dedicated to armed struggle and evidence of media reports of violent attacks committed by his organization were sufficient to support a finding that he knew or reasonably should have known it was a terrorist organization).

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subjective (did not know) and an objective (should not reasonably have known) component to this exception.

"Clear and convincing" evidence is that degree of proof, that, though not necessarily conclusive, will produce a "firm belief or conviction" in the mind of the adjudicator.[72] It is higher than the "preponderance of the evidence" standard, and lower than "beyond a reasonable doubt."[73]

This exception does not apply to Tier I or Tier II organizations. This exception also does not apply to "representatives" of undesignated terrorist organizations.[74]

(b)(7)(E)

In order to determine whether a lack of knowledge is reasonable, you must consider:

[redacted]

[72] *Matter of Carrubba*, 11 I&N Dec. 914, 917-18 (BIA 1966); *see also Matter of Patel*, 19 I&N Dec. 774, 783 (BIA 1988).

[73] For more information about standards and burdens of proof, see RAIO Training module, *Evidence*.

[74] INA § 212(a)(3)(B)(v) ("Representative" defined).

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8.3.2 Exception for All Tiers (Material Support Only)

Additionally, under the material support provision, INA § 212(a)(3)(B)(iv)(VI), there is an exception that if the applicant did not know or reasonably should not have known that he or she *afforded material support*, the applicant would not be inadmissible.

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9 TRIG EXEMPTION AUTHORITY

9.1 General

INA § 212(d)(3)(B)(i), as created by the 2005 REAL ID Act and revised by the Consolidated Appropriations Act, 2008, includes a discretionary exemption provision for certain INA § 212(a)(3)(B) grounds of inadmissibility. This exemption authority can be exercised by the Secretary of Homeland Security or the Secretary of State after consultation with each other and the Attorney General.[76]

Exemptions issued to date fall into one of three categories: "group-based" exemptions, which pertain to associations or activities with a particular group or groups; "situational" exemptions, which pertain to a certain activity, such as providing material support or medical care; and "individual" exemptions, which pertain to a specific applicant.

Once the Secretary of Homeland Security signs a new exemption authority, USCIS releases the exemption document along with a corresponding policy memorandum, which provide further guidance to adjudicators on implementing the new discretionary exemption.

In each of the exercises of exemption authority to date that are either group-based or situational, the Secretary of Homeland Security delegated to USCIS the authority to determine whether a particular alien meets the criteria required for the exercise of the exemption.

(b)(7)(E)

[76] INA § 212(d)(3)(B)(i). For some specific examples of the Secretary's exercise of discretion under this provision, see USCIS Fact Sheets.

9.2 Criteria

9.2.1 Threshold Requirements

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9.2.2 Specific Additional Exemption Requirements

9.2.3 Totality of the Circumstances

9.3 Group-Based Exemptions

9.3.1 Named Groups in the Consolidated Appropriations Act, 2008 (CAA)

As explained in Section 6.5 above, the Consolidated Appropriations Act, 2008 (CAA) named ten groups that are excluded from the definition of a "terrorist organization." The ten groups are comprised of six ethnic rebel groups in Burma, two U.S.-backed anti-Viet

[77] If you have questions about whether an applicant poses a danger to the safety and security of the United States, consult with a local Fraud Detection and National Security (FDNS) IO and/or your supervisor in accordance with local operating procedures.

[78] The existing exercises of authority and policy memoranda for TRIG exemptions can be found on the TRIG Exemptions page of the USCIS TRIG ECN.

Cong groups, the CIA-backed Tibetan resistance group based in Mustang, and the anti-Castro Alzados in Cuba. The African National Congress (ANC), an anti-apartheid South African party, was added to the CAA groups through a subsequent amendment. The language of the CAA's exclusion provides that the named groups "shall not be considered" terrorist organizations on the basis of any act or event that occurred prior to December 26, 2007.[79]

The CAA's statutory exclusion only partially mitigated the immigration consequences for applicants who have activities and/or associations with the CAA groups. Applicants who would otherwise have been inadmissible for their activities and/or associations with a CAA group will receive "automatic relief" from any TRIG provision in which the term "terrorist organization" is an element. However, automatic relief does not cover the TRIG provisions in which the term "terrorist organization" is not an element. As a consequence, group exemptions were authorized for certain "covered activities" in connection with the ten groups named in the CAA.[80]

Automatic relief: The CAA groups are not considered "terrorist organizations" per the CAA. As such, the TRIG provisions that include the term "terrorist organization" will not apply to applicants with activities and/or associations with the CAA groups. This is referred to as "automatic relief." A TRIG exemption worksheet is not required.

Time limitation to automatic relief: As a result of the statutory construction of the CAA's exclusion, any of the named groups that have re-engaged in "terrorist activity" on or after December 26, 2007 will no longer be covered by the CAA exclusion as of that date. In other words, if any of the CAA groups commits a terrorist activity on or after December 26, 2007, it will be considered a Tier III undesignated terrorist organization as of that date. According to reporting, the KNU/KNLA, KNPP, and ALP have re-engaged in terrorist activity.

CAA group-based exemptions: The following group-based exemption authorities were authorized in addition to the "automatic relief" provisions of the CAA.

Date authorized: June 18, 2008 (separate exemptions authorized for each of the ten CAA groups)

Groups included:

- Karen National Union/Karen National Liberation Army (KNU/KNLA)
- Chin National Front/Chin National Army (CNF/CNA)
- Chin National League for Democracy (CNLD)

[79] Consolidated Appropriations Act, 2008, supra, note 8, § 691(b).

[80] See 73 Fed. Reg. 34770-34777 (June 18, 2008); see also Memorandum to Associate Directors, et al., Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity Inadmissibility Grounds, Michael L. Aytes, Acting Deputy Director, USCIS (July 28, 2008).

- Kayan New Land Party (KNLP)
- Arakan Liberation Party (ALP)
- Tibetan Mustangs
- Cuban Alzados (groups opposed to the Communist government of Cuba)
- Karenni National Progressive Party (KNPP)
- appropriate groups affiliated with the Hmong
- appropriate groups affiliated with the Montagnards (includes the Front Unifié de Lutte des Races Opprimées (FULRO))

(b)(7)(E)

9.3.2 Iraqi Group Exemptions and the National Defense Authorization Act of 2014 (NDAA)

As explained in Section 6.5 above, two Iraqi groups were excluded from the definition of a "terrorist organization" by the National Defense Authorization Act for Fiscal Year 2015 (NDAA): the Kurdish Democratic Party (KDP), led by Masoud Barzani, and the Patriotic Union of Kurdistan (PUK), led by Jalal Talabani.

Unlike the CAA, the NDAA excluded the KDP and PUK from the definition of a terrorist organization without any conditions or restrictions, meaning that the exclusion applies at all times – past, present, and future. Applicants who would otherwise have been inadmissible for their activities and/or associations with the KDP or PUK will receive "automatic relief" from any TRIG provision in which the term "terrorist organization" is an element. However, automatic relief does not cover the TRIG provisions in which "terrorist organization" is not an element.

Automatic relief: The KDP and PUK are not considered "terrorist organizations" as per the NDAA. As such, the TRIG provisions that include the term "terrorist organization" will not apply to applicants with activities and/or associations with the KDP or PUK. This is referred to as "automatic relief." A TRIG exemption worksheet is not required. For any TRIG activity related to the KDP or PUK that is not covered by automatic relief, a group exemption is available. (Note that automatic relief is not applicable to the Iraqi National Congress, although it has a group exemption, as explained below.)

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Iraqi group-based exemptions: The following group-based exemption authorities were authorized in addition to the "automatic relief" provisions for the KDP and PUK.

Date authorized: September 21, 2009[81] (separate exemptions authorized for the three groups)

Additional requirements: The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons.

The INC meets the definition of a Tier III terrorist organization due to its activities in opposition to Saddam Hussein and Baath Party rule, as did the KDP and PUK prior to their statutory exclusion from the definition by the NDAA.

[81] See Memorandum to USCIS Field Leadership, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities Related to the INC, KDP, and PUK, Lauren Kielsmeier, Acting Deputy Director, USCIS (January 2010).

9.3.3 All Burma Students' Democratic Front (ABSDF)

Date authorized: December 16, 2010[83]

Covered activity: All activities and/or associations with ABSDF (except for current engagement or future intent to engage in terrorist activity)

Additional requirements: The applicant must not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.

The ABSDF has operated for many years in defiance of Burma's military government through political activism and armed rebellion. Due to activities carried out by the organization, the ABSDF meets the definition of a Tier III terrorist organization.

9.3.4 Kosovo Liberation Army (KLA)

Date authorized: June 4, 2012[84]

Covered activity: Solicitation, material support, and receipt of military-type training.

Additional requirements: (1) The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests; and (2) The applicant must not have been subject to an indictment by an international tribunal.

The KLA was an Albanian insurgent organization which sought the separation of Kosovo from Yugoslavia in the 1990s. Due to its activities, the KLA meets the definition of a Tier III terrorist organization.

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[83] Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 76 Fed. Reg. 2131-01 (January 12, 2011); *see also* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities and Associations Relating to the All Burma Students' Democratic Front (ABSDF), USCIS Office of the Director (PM-602-0025) (Dec. 29, 2010).

[84] Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 77 Fed. Reg. 41895-01 (July 16, 2012), *see also* Policy Memorandum, Implementation of New Discretionary Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Kosovo Liberation Army (KLA), USCIS Office of the Director (PM-602-0068) (July 5, 2012).

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9.3.5 AISSF-Bittu Faction

Date authorized: October 18, 2010[85]

Covered activity: Material support

Additional requirements: The applicant must not have not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.

The AISSF was initially formed in the early 1940s to help promote the Sikh religion and to establish an independent Sikh nation. The AISSF-Bittu Faction transformed itself from a militant outfit during the Sikh insurgency of the 1980s and early 1990s into something akin to an interest or lobbying group. Due to the violent activities carried out by the organization, the AISSF-Bittu Faction meets the definition of a Tier III terrorist organization.

9.3.6 Farabundo Marti National Liberation Front (FMLN) and Nationalist Republican Alliance (ARENA)

Date authorized: April 3, 2013[86] (separate exemptions authorized for each group)

Covered groups:
- Farabundo Martí para la Liberación Nacional, or Farabundo National Liberation Front (FMLN)
- Alianza Republicana Nacionalista, or Nationalist Republican Alliance (ARENA)

Covered activity: All activities and/or associations with FMLN or ARENA (except for current engagement or future intent to engage in terrorist activity)

Additional requirements: (1) The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests; and (2) The applicant must not have engaged in terrorist

[85] *See* Exercise of Authority Under INA § 212(d)(3)(B)(i), 76 Fed. Reg. 2130-02 (January 12, 2011); *see also* Policy Memorandum, Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) for Material Support to the All India Sikh Students Federation-Butti Faction (AISSF-Bittu), USCIS Office of the Director (PM-602-0024) (December 29, 2010).

[86] *See* Exercise of Authority Under INA § 212(d)(3)(B)(i), 78 Fed Reg. 24225-01 and 24225-02 (April 24, 2013); *see also* Policy Memorandum, Implementation of New Discretionary Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Farabundo Marti National Liberation Front (FMLN) or to the Nationalist Republican Alliance (*Alianza Republicana Nacionalista*, or ARENA), USCIS Office of the Director (PM-602-0082) (May 22, 2013).

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activity outside the context of civil war activities directed against military, intelligence, or related forces of the Salvadoran government.

The FMLN was formed in 1980 as a left-wing armed guerrilla movement, while the ARENA was formed in 1981 as a right-wing political party that used death squads to support its agenda. The two movements fought on opposite sides of the Salvadoran Civil War, and due to their violent activities, they met the definition of a Tier III organization during that time.

9.3.7 Oromo Liberation Front (OLF)

Date authorized: October 2, 2013[87]

Covered activity: Voluntary solicitation, material support, and military-type training.

Additional requirements: (1) The applicant must **either**:

- have been admitted as a refugee, granted asylum, or had a pending asylum or refugee application on or before October 2, 2013;

or

- be the beneficiary of an I-730 Refugee/Asylee Relative Petition filed at any time by a petitioner who was admitted as a refugee or granted asylum on or before October 2, 2013;

(2) The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests; and
(3) The applicant must not have engaged in terrorist activity outside the context of civil war activities directed against military, intelligence, or related forces of the Ethiopian government.

The OLF is an opposition group founded in 1973 which engaged in violent conflict with the Ethiopian government. It falls within the definition of a Tier III organization because of its violent activities.

[87] *See* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Oromo Liberation Front (OLF), USCIS Office of the Director (PM-602-0096) (December 31, 2013).

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9.3.8 Tigray People's Liberation Front (TPLF)

Date authorized: October 17, 2013[88]

Covered activity: Voluntary solicitation, material support, and military-type training.

Additional requirements: The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.

The TPLF is a political party founded in 1975 in Ethiopia, as an opposition group. It was engaged in violent conflict with the Ethiopian government from then until 1991. It qualified as a Tier III organization during that period because of its violent activities. On May 27, 1991, the TPLF, with other parties, succeeded in overthrowing the Ethiopian government and became part of the ruling coalition in the new government. Since that time, its activities would likely not fall within the Tier III definition. Therefore, after that date, an exemption is likely not required.

9.3.9 Ethiopian People's Revolutionary Party (EPRP)

Date authorized: October 17, 2013[89]

Covered activity: Voluntary solicitation, material support, and military-type training.

Additional requirements: The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.

The EPRP is a leftist political party founded in 1972 in Ethiopia. It was engaged in violent conflict with successive Ethiopian governments and other parties from then until 1993. It qualified as a Tier III organization during that period because of its violent activities.

Although the EPRP continues to oppose the Ethiopian government, it has not engaged in any documented acts of violence since approximately January 1, 1993, and does not

[88] *See* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Tigrayan People's Liberation Front (TPLF), USCIS Office of the Director (PM-602-0101) (June 15, 2014).

[89] *See* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Ethiopian People's Revolutionary Party (EPRP), USCIS Office of the Director (PM-602-0100) (June 15, 2014).

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appear to fall within the definition of a Tier III terrorist organization after that date. Thus, an exemption is likely not required for later associations or activities.

9.3.10 Eritrean Liberation Front (ELF)

Date authorized: October 17, 2013[90]

Covered activity: Voluntary solicitation, material support, and military-type training.

Additional requirements: (1) The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests; and (2) *If the applicant's activity or association with the ELF occurred prior to January 1, 1980*, then the applicant must **either**:

- have been admitted as a refugee, granted asylum, or had an asylum or refugee application pending on or before October 2, 2013;

or

- be the beneficiary of an I-730 Refugee/Asylee Relative Petition filed at any time by a petitioner who was admitted as a refugee or granted asylum on or before October 2, 2013.

The ELF is a leftist political party founded in 1960 in Ethiopia with the goal of achieving Eritrean independence. It was engaged in violent conflict with successive Ethiopian governments and other parties from then through 1991. It met the defintion of a Tier III organization during that period because of its violent activities.[91]

The ELF no longer operates, and it has not engaged in any documented acts of violence since approximately January 1, 1992. Therefore, it generally is not considered a Tier III organization after that date. Thus, the exemption is likely not required for later associations or activities.

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[90] *See* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for Activities and Associations Relating to the Eritrean Liberation Front (ELF), USCIS Office of the Director (PM-602-0099) (June 15, 2014); *see also* Exercise of Authority Under INA § 212(d)(3)(B)(i), 78 Fed. Reg. 66037-01 (November 4, 2013).

[91] *See Haile v. Holder*, 658 F.3d 1122, 1127 (9th Cir. 2011) (upholding an Immigration Judge's finding that the ELF constituted a terrorist organization). Note that the applicant in this case testified that the ELF continued to engage in violent activities at least up to 2002.

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9.3.11 Democratic Movement for the Liberation of Eritrean Kunama (DMLEK)

Date authorized: October 17, 2013[92]

Covered activity: Voluntary solicitation, material support, and military-type training.

Additional requirements: The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests.

The DMLEK is an armed group in Eritrea founded in 1995 in opposition to the Eritrean government. It has been engaged in violent conflict with that government since its founding. It qualifies as a Tier III organization because of its violent activities.

9.3.12 Certain Burmese Groups

Date authorized: March 11, 2016[93]

Groups included:

- All Burma Muslim Union
- Arakan Army
- Hongsawatoi Restoration Army / Party
- Kachin Independence Army
- Kachin Independence Organization
- Karen National Defense Organization
- Karenni Nationalities People's Liberation Front
- Kawthoolei Muslim Liberation Front
- Kuki National Army
- Mon National Liberation Army
- Mon National Warrior Army
- Myeik-Dawei United Front
- National Democratic Front
- National United Party of Arakan
- New Democratic Army Kachin
- New Mon State Party

[92] *See* Exercise of Authority Under INA § 212(d)(3)(B)(i), 78 Fed. Reg. 66037-02 (November 4, 2013); *see also* Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for the Democratic Movement for the Liberation of Eritrean Kunama (DMLEK), USCIS Office of the Director (PM-602-0098) (June 15, 2014).

[93] *See* Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 81 Fed. Reg. 21891-01 (Apr. 13, 2016); *see also* Policy Memorandum, Implementation of the Discretionary Exemption Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for Certain Burmese Groups, USCIS Office of the Director (PM-602-0135) (June 2, 2016).

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(b)(7)(E)

- Parliamentary Democracy Party
- Ramanya Restoration Army
- Shan State Army
- Zomi Reunification Organization/Zomi Revolutionary Army

9.3.13 Afghan Civil Servants

NOTE: This exemption was signed by the Secretary of Homeland Security and Secretary of State, but has not yet been implemented by USCIS. Therefore, you should not apply this exemption until further notice.

On January 18, 2017, the Secretary of Homeland Security, in consultation with the Attorney General and Secretary of State, authorized an exemption for Afghan nationals who were employed in civil service positions while the Taliban was in power from September 27, 1996 through December 22, 2001. Due to the limitation on the exemption authority at INA § 212(d)(3)(B)(i), which prohibits exemptions from being granted for certain voluntary associations and activities with Tier I and Tier II organizations,[94] the adjudicator must assess the nature and context of the applicant's employment.

In addition to the threshold requirements listed in Section 9.2.1, the applicant must not have voluntarily and knowingly engaged in terrorist activity on behalf of the Taliban. The applicant's employment must not have directly advanced the Taliban's political or ideological agenda, and the applicant must have reasonably believed that to decline or depart from employment would prevent the applicant from being able to sustain important activities of daily life, subject the applicant or his or her family to physical or other harm, or would subject the applicant to comparably compelling circumstances such that the applicant reasonably believed that he or she could not decline or leave the employment.

[94] INA § 212(d)(3)(B)(i) prohibits exemptions for voluntary service as a member or representative of a Tier I/II organization, voluntarily and knowingly engaging, endorsing, espousing, or persuading others to endorse/espouse/support terrorist activity for a Tier I/II organization, and voluntarily receiving military-type training from or on behalf of a Tier I/II organization.

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9.4 Situational Exemptions

"Situational" exemptions apply to specified activities with a terrorist organization.

9.4.1 Duress-Based

Some situational exemptions require that the activity have taken place under duress, requiring examination of the duress factors to determine eligibility for the exemption.

If duress is required for exemption eligibility, then testimony covering all duress factors must be elicited and analyzed. Duress has been defined, at a minimum, as a reasonably-perceived threat of serious harm.[95] In general, the duress factors include: (b)(7)(E)

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There are three types of duress-based exemptions:

Material Support under Duress – INA § 212(a)(3)(B)(iv)(VI)

Date authorized: February 26, 2007 (for Tier III)[96]

[96] *See* Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9958-01 (February 26, 2007).

April 27, 2007 (for Tier I and Tier II)[97]

Covered activity: Material support under duress

Additional requirements: n/a

The material support under duress exemptions are by far the most commonly utilized exemption in USCIS adjudications. As noted above, material support is defined broadly and even small amounts of food, supplies, etc. constitute material support.[98] Material support under duress to Tier I, II, or III terrorist organizations may be exempted.

Military-Type Training under Duress – INA § 212(a)(3)(B)(i)(VIII)

Date authorized: January 7, 2011[99]

Covered activity: Receipt of military-type training under duress from or on behalf of any organization that, at the time the training was received, was a terrorist organization.

Additional requirements: The applicant must establish that he or she has not received training that poses a risk to the U.S. or U.S. interests (e.g., training on production or use of a weapon of mass destruction, torture, or espionage).

Military-type training under duress may be exempted if it is from or on behalf of a Tier I, II or III terrorist organization. You must analyze the organization's activities to determine whether it met the definition of a terrorist organization at the time the alien received the training.[100]

18 U.S.C. § 2339D(c)(1) states that "military-type training" includes training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm, or other weapon, including any weapon of mass destruction (as defined in 18 U.S.C § 2232a(c)(2)). Please note that marching in

[97] See Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26138-02 (April 27, 2007).

[98] See Section 8, above: TRIG – Material Support.

[99] See Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 76 Fed. Reg. 14418-01 (March 16, 2011).

[100] Policy Memorandum, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for the Receipt of Military-Type Training under Duress, USCIS Office of the Director (PM-602-0030) (Feb. 23, 2011).

formation and physical exercise do not meet the statutory definition of military-type training.

This exemption does not apply to the use of weapons in combat. If an applicant received military-type training under duress and also participated in combat, he or she would not be eligible for this exemption, even if the combat took place under duress.

Solicitation under Duress – INA § 212(a)(3)(B)(iv)(IV)(bb) and (cc) only and INA § 212(a)(3)(B)(iv)(V)(bb) and (cc) only

Date authorized: January 7, 2011[101]

Covered activity: Solicitation under duress of funds or other things of value for a terrorist organization, and solicitation under duress of individuals for membership in a terrorist organization.

Additional requirements: n/a

The solicitation of funds or other things of value (under INA § 212(a)(3)(B)(iv)(IV)(bb) for Tier I and Tier II terrorist organizations and § 212(a)(3)(B)(iv)(IV)(cc) for Tier III terrorist organizations) and the solicitation of individuals for membership (under INA § 212(a)(3)(B)(iv)(V)(bb) for Tier I and Tier II terrorist organizations and § 212(a)(3)(B)(iv)(V)(cc) for Tier III terrorist organizations) may be exempted.

Note that neither the solicitation of funds or other things of value for a terrorist activity (INA § 212(a)(3)(B)(iv)(IV)(aa)) nor the solicitation of individuals to engage in terrorist activity (§ 212(a)(3)(B)(iv)(V)(aa)) is covered by this exemption.

9.4.2 Voluntary Medical Care

Date authorized: October 13, 2011[102]

Covered activity: Voluntary medical care provided to individuals engaged in terrorist activities, undesignated terrorist organizations, or

[101] *See* Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 76 Fed. Reg. 14419-01 (March 16, 2011); *see also* Policy Memorandum, Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For the Soliciation of Funds or Members under Duress, USCIS Office of the Director (PM-602-0031) (Feb. 23, 2011).

[102] *See* Exercise of Authority Under the Immigration and Nationality Act, 76 Fed. Reg. 70463-03 (November 14, 2011); *see also* Policy Memorandum, Implementation of New Exemption Under INA Section 212(d)(3)(B)(i) for the Provision of Material Support in the Form of Medical Care, USCIS Office of the Director (PM-602-0052) (Nov. 20, 2011).

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members of terrorist organizations, except for medical care on behalf of a Tier I or Tier II terrorist organization.

Additional requirements: N/A

Medical care provided to members of a terrorist organization, to a terrorist organization, or to an individual the alien knows or reasonably should have known[103] has committed or plans to commit a terrorist activity, would render an applicant inadmissible in spite of the oaths of commitment to serve patients that are often taken by medical professionals. (For those individuals who provided medical care under duress, (b)(7)(E)

To address this, the Secretary of Homeland Security authorized this exemption to allow USCIS not to apply the material support inadmissibility provision to certain aliens who provided medical care to persons associated with terrorist organizations or the members of such organizations. This exemption is limited to the voluntary provision of medical care, which includes:

- Services provided by and in the capacity of a medical professional, such as physician, nurse, dentist, psychiatrist or other mental health care provider, emergency room technician, ambulance technician, medical lab technician, or other medical-related occupation; and

- Related assistance by non-medical professionals providing, for example, emergency first aid services to persons who have engaged in terrorist activity (e.g., Good Samaritans and first aid givers).

This exemption does not apply to the provision of medical supplies independent of the provision of medical care or medical advice. Nor does the exemption apply to transportation of an injured individual to a hospital or other location for medical treatment independent of the provision of any medical care or first aid. Both of these activities would fall under the provision of material support. These provisions of material support may, however, qualify for other exemptions such as the Certain Limited Material Support Exemption or the Insignificant Material Support Exemption.

Medical care on behalf of a Tier I or II Organization: INA § 212(d)(3)(B)(i) explicitly prohibits the exercise of exemption authority for aliens who "voluntarily and knowingly engaged in . . . terrorist activity on behalf of" a Tier I or II organization (emphasis added). Therefore, medical care cannot be exempted when the applicant provided the care voluntarily and knowingly on behalf of a Tier I or II organization. For example, this

[103] If the medical professional did not and reasonably should not have known that the patient he or she was treating was a member of a terrorist organization or involved in terrorist activities, then the inadmissibility/bar would not apply.

would include situations in which a medical provider serves as a staff physician for a Tier I or II organization, or provides medical care to an organization's members in order to abet the group's pursuit of its terrorist aims. Note that medical care **on behalf of** a Tier I or Tier II organization is distinct from medical care provided to members of a Tier I or Tier II organization when the provider has no association with the Tier I or Tier II organization.

[redacted]

9.4.3 Limited General Exemption

The Limited General Exemption applies to certain aliens who had already been granted an immigration benefit in the United States as of August 10, 2012, or who are beneficiaries of an I-730 Refugee/Asylee Relative petition filed at any time by a petitioner who was granted asylum or refugee status on or before August 10, 2012. Therefore, this exemption is primarily utilized outside of RAIO adjudications.

Date authorized: August 10, 2012[104]

Covered activity: [redacted]

Additional requirements: [redacted]

[redacted]

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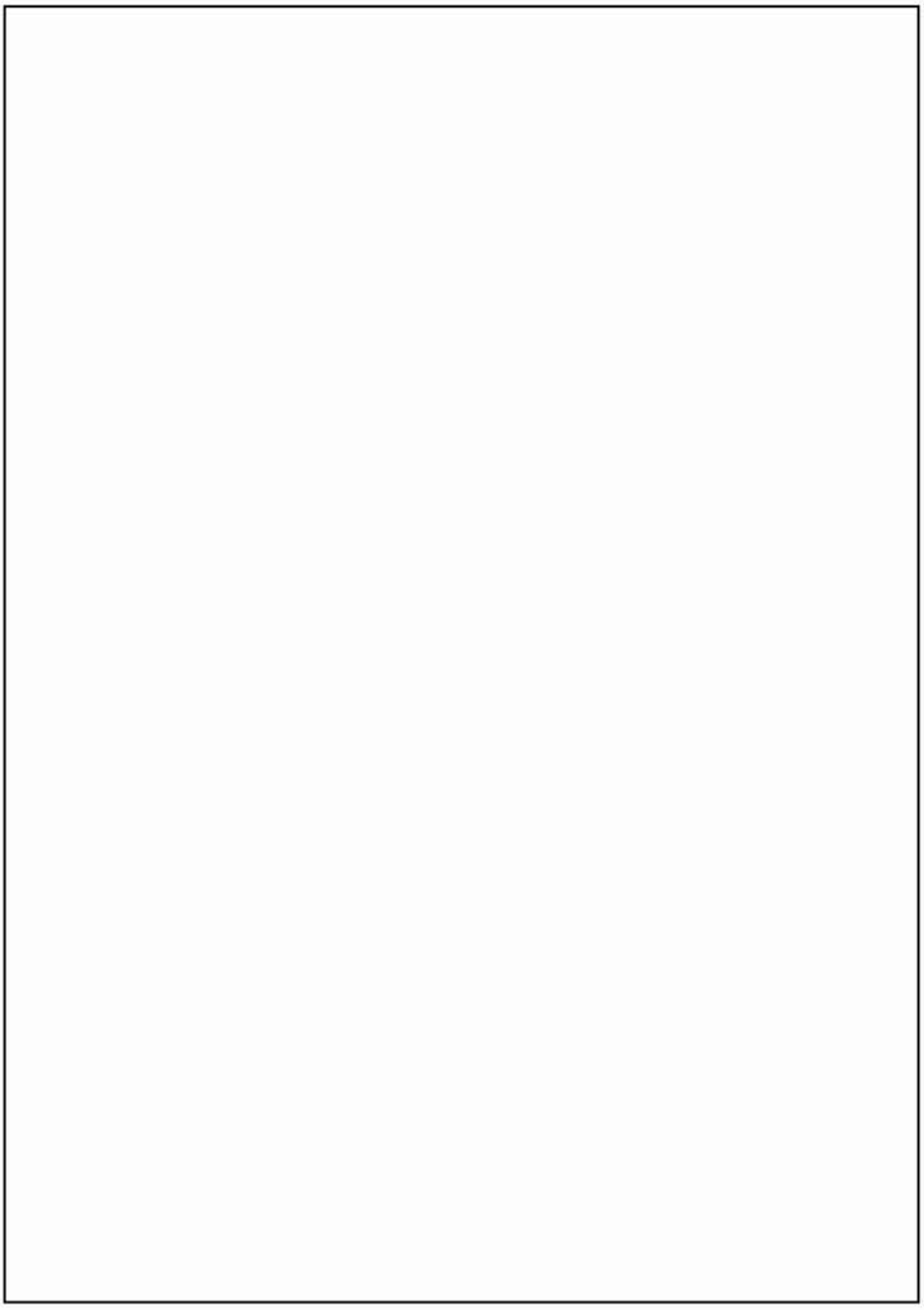

9.4.4 Iraqi Uprisings

Date authorized: August 17, 2012[105]

[105] *See* Exercise of Authority Under INA § Sec. 212(d)(3)(B)(i), 77 Fed. Reg. 51545-02 (Aug. 24, 2012); *see also* Policy Memorandum, Implementation of New Exemption Under Immigration and Nationality Act (INA) Section 212(d)(3)(B)(i) for Participation in the Iraqi Uprisings, USCIS Office of the Director (PM-602-0076) (Nov. 12, 2012).

Covered activity:	Any activity or association relating to the uprisings against the government of Saddam Hussein in Iraq between March 1 through April 5, 1991.
Additional requirements:	(1) The applicant must not have participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons not affiliated with Saddam Hussein's regime from March 1 through April 5 of 1991, or U.S. interests; and (2) The applicant must not have engaged in terrorist activity, not otherwise exempted, outside the context of resistance activities directed against Saddam Hussein's regime from March 1 through April 5 of 1991.

The "Iraqi Uprisings" is a term used to refer to a period of revolt in southern and northern Iraq between March 1 and April 5, 1991.[106] The uprisings in the south and north are popularly referred to as the Shi'a and Kurdish uprisings, respectively. Although these groups are different, their rebellion was fueled by the common belief that Saddam Hussein and his security forces were vulnerable following defeat by the allied forces in the Persian Gulf War.[107] Although the rebels achieved momentary victories, they were rapidly defeated by Iraqi government forces led by the Republican Guard.

9.4.5 Exemptions for Certain Limited Material Support (CLMS) and Insignificant Material Support (IMS)

Date authorized:	February 5, 2014[108] (separate exemptions authorized for CLMS and IMS)
CLMS covered activity:	Limited material support related to a Tier III terrorist organization that involves: (1) certain routine commercial transactions; (2) certain routine social transactions; (3) certain humanitarian assistance; or (4) sub-duress pressure.
IMS covered activity:	Insignificant material support related to a Tier III terrorist organization.

[106] Human Rights Watch, *Endless Torment: The 1991 Uprising in Iraq and its Aftermath* (1992).

[107] *Id.*

[108] Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 6914-01 (Feb. 5, 2014); Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 6913-02 (Feb. 5, 2014).

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Additional requirements: CLMS only – (1) The applicant must not have provided the material support with any intent or desire to assist any terrorist organization or terrorist activity; or
IMS only – (1) The applicant must not have provided the material support with any intent of furthering the terrorist or violent activities of the individual or organization; and
Both CLMS and IMS – The applicant must not have provided material support:
(2) That the applicant knew or reasonably should have known could directly be used to engage in terrorist or violent activity;
(3) To any individual who the applicant knew or reasonably should have known had committed or planned to commit a terrorist activity on behalf of a Tier I/II designated terrorist organization;
(4) To terrorist activities that the alien knew or reasonably should have known targeted noncombatants, U.S. citizens, or U.S. interests;
(5) That the alien knew or reasonably should have known involved providing weapons, ammunition, explosives, or their components / transportation / concealment; and
(6) In the form of giving military-type training.

Both exemptions require that the applicant not have provided material support that he or she knew or reasonably should have known could be used directly to engage in violent or terrorist activity. Therefore, if an applicant has provided any quantity of weapons, explosives, ammunition, military-type training, or other types of support that are generally understood to be used for violent or terrorist activity, the applicant will, in general, not be eligible for either the CLMS or the IMS exemption. On the other hand, providing support such as food, water, or shelter that is generally not directly used for violent activity will usually not disqualify an applicant from consideration for these exemptions.[109]

The CLMS exemption is intended to cover otherwise eligible applicants for visas or immigration benefits who provided certain types of limited material support to an Tier III terrorist organization, or to a member of such an organization, or to an individual the applicant knew or reasonably should have known has committed or plans to commit a terrorist activity. The support provided must have been incidental to routine commercial transactions, routine social transactions, certain humanitarian assistance, or in

[109] Policy Memorandum, Implementation of the Discretionary Exemption under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Certain Limited Material Support, USCIS Office of the Director (PM-602-0112) (May 8, 2015); Policy Memorandum, Implementation of the Discretionary Exemption under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Insignificant Material Support, USCIS Office of the Director (PM-602-0113) (May 8, 2015).

response to substantial pressure that does not rise to the level of duress (**"sub-duress pressure"**).[110]

Routine commercial transactions are transactions in which the applicant could or would engage in the ordinary course of business. To be a routine commercial transaction, the transaction must have occurred on substantially the same terms as other transactions of the same type regardless of the parties to the transaction. A commercial transaction is not routine if it is motivated by the status, goals, or methods of the organization or the applicant's connection to the organization or conducted outside the course of the applicant's business activities.[111] To qualify as a routine commercial transaction, an applicant must have been the provider of goods and/or services, and not the customer.

Routine social transactions are transactions that satisfy and are motivated by specific, compelling, and well-established family, social, or cultural obligations or expectations. A routine social transaction is not motivated by a generalized desire to "help society" or "do good." It involves support no different than the support that the applicant would provide under similar circumstances to others who were not members of undesignated terrorist organizations.[112]

Certain humanitarian assistance is aid provided with the purpose of saving lives and alleviating suffering, on the basis of need and according to principles of universality, impartiality, and human dignity. It seeks to address basic and urgent needs such as food, water, temporary shelter, and hygiene, and it is generally triggered by emergency situations or protracted situations of conflict or displacement. It does not include development assistance that seeks the long-term improvement of a country's economic prospects and chronic problems such as poverty, inadequate infrastructure, or underdeveloped health systems.[113]

When an applicant has provided material support that may be considered "certain humanitarian assistance" in association with a humanitarian organization, vetting of that organization may be required. If you interview an applicant who has provided "certain humanitarian assistance" in association with a humanitarian organization, you should elicit as much detail as possible about the activity in question, including the time and location of the activity, as well as name and location of the organization. You must discuss the case

[110] Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 6914-01 (Feb. 5, 2014).

[111] Policy Memorandum, Implementation of the Discretionary Exemption under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Certain Limited Material Support, USCIS Office of the Director (PM-602-0112) (May 8, 2015).

[112] Id.

[113] Id.

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with your supervisor, who will then raise the case to your Division's TRIG POC, before you proceed with the adjudication.

Sub-duress pressure is a reasonably perceived threat of physical or economic harm, restraint, or serious harassment, leaving little or no reasonable alternative to complying with a demand. Pressure may be considered sub-duress pressure if providing the support is the only reasonable means by which the applicant may carry out important activities of his or her daily life. The pressure must come, either entirely or in combination with other factors, from the organization to which the applicant provided support.[114]

In order for the CLMS exemption to apply, the applicant, in providing material support, must not have intended or desired to assist any terrorist organization or terrorist activity.[115]

Insignificant Material Support

The IMS exemption is intended to cover otherwise eligible applicants for visas or immigration benefits who provided insignificant amounts of material support to an Tier IIIterrorist organization, or to a member of such an organization, or to an individual the applicant knew or reasonably should have known has committed or plans to commit a terrorist activity.

Insignificant material support is support that (1) is minimal in amount and (2) the applicant reasonably believed would be inconsequential in effect. In order to determine whether support is minimal, you must consider and evaluate its relative value, fungibility, quantity and volume, and duration and frequency.[116] Material support is "inconsequential in effect" if the actual or reasonably foreseeable impact of the support and the extent to which it enabled the organization or individual to continue its mission or his or her violent or terrorist activity was, at most, insignificant. It is not "inconsequential in effect" if it could prove vital to furthering the aims of an organization by meeting a particularized need at the time the support was provided or involved more than very small amounts of fungible support given with the intention of supporting non-violent ends.

For the IMS exemption to apply, the applicant must not have provided the material support with the intent of furthering the terrorist or violent activities of the individual or organization.[117]

For additional guidance on the application of the CLMS and IMS exemptions, contact your your Division's TRIG POC.

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[114] Id.

[115] Exercise of Authority Under Section 212(d)(3)(B)(i), 79 Fed. Reg. 6914-01 (Feb. 5, 2014).

[116] Policy Memorandum, Implementation of the Discretionary Exemption under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Insignificant Material Support, USCIS Office of the Director (PM-602-0113) (May 8, 2015).

[117] Exercise of Authority Under Section 212(d)(3)(B)(i), 79 Fed. Reg. 6913-02 (Feb. 5, 2014).

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9.5 Procedures

9.5.1 212(a)(3)(B) Exemption Worksheet

9.5.2 Processing Cases

More than One Terrorism-Related Ground of Inadmissibility

Denials / Referrals

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10 LEGAL ANALYSIS

10.1 Burden and Standard of Proof

When there is evidence, testimonial or otherwise, indicating that an applicant is subject to TRIG, the burden is on the applicant to establish eligibility by the standard of proof required for the benefit he or she is seeking. The burden of proof refers to the duty of one party to prove a fact, while the standard of proof refers to the amount of evidence required to prove that fact.

In asylum cases, an applicant must establish by a preponderance of the evidence that he or she is not subject to any bars.[118]

In refugee adjudications, where evidence indicates an applicant may be subject to a ground of inadmissibility, including TRIG, the applicant must establish clearly and beyond doubt that the inadmissibility ground does not apply in order to be eligible for refugee status (see International and Refugee Adjudications Supplement— Burden and Standard of Proof for TRIG Inadmissibility Grounds).[119]

10.2 Documentation Relating to TRIG Issues

You must properly document all TRIG-related issues in a case, in line with policy and guidance (see Asylum Adjudications Supplement—Note Taking – National Security).

10.3 Dependents/Derivatives

TRIG inadmissibilities and bars also apply independently to any relative who is included in an applicant's request for an immigration benefit. In some instances, a principal applicant may be granted the benefit sought and his or her dependent/derivative may be denied the benefit sought or referred to immigration court because the dependent/derivative is subject to TRIG.[120]

11 CONCLUSION

As the United States continues to face national security threats, RAIO plays a critical role in defending the homeland by maintaining the integrity of our immigration benefit programs. In this regard, it is critical for you to properly assess each case in consideration of possible TRIG issues and to follow your division's procedures for processing these cases.

---

[118] INA § 208(b)(1)(B)(i); 8 C.F.R. §§ 208.13(a) and (c)(2)(ii).

[119] INA § 235(b)(2)(A).

[120] 8 C.F.R. § 208.21(a); INA § 207(c)(2)(A).

12 SUMMARY

U.S. immigration laws contain provisions to prevent individuals who may be involved in terrorist activities from receiving immigration benefits. As an adjudicator, you will identify potential TRIG issues and process those cases in accordance with these laws.

12.1 Interviewing TRIG Cases

12.2 Terrorism-Related Inadmissibility Issues

An applicant is ineligible to receive most immigration benefits if the individual is described in any of the terrorism-related inadmissibility grounds unless an exemption is available and granted by USCIS. In addition to rendering inadmissible those seeking admission to the United States, the terrorism-related inadmissibility grounds are bars to asylum.

12.2.1 Terrorist Organizations

Under the INA, there are three catergories of terrorist organization, sometimes referred to as "tiers." Tier I designated terrorist organizations appear on the Foreign Terrorist Organizations (FTO) list while Tier II designated terrorist organizations are on the Terrorist Exclusion List (TEL). A Tier III undesignated terrorist organization is any group of two or more individuals that, whether organized or not, engages in terrorist activity, or has a subgroup that engages in terrorist activity. Depending on whether the organization is a designated terrorist organization or an undesignated terrorist organization, there are distinct immigration consequences.

12.2.2 Terrorism-Related Inadmissibility Grounds

The terrorism-related inadmissibility grounds are listed at INA § 212(a)(3)(B)(i)(I)-(IX).

12.2.3 Material Support

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[redacted]

12.2.4 TRIG Exemption Authority

INA § 212(d)(3)(B)(i), as revised by the 2005 REAL ID Act and the Consolidated Appropriations Act, 2008, includes a discretionary exemption provision for certain terrorism-related inadmissibility grounds under INA § 212(a)(3)(B). This exemption authority can be exercised by the Secretary of Homeland Security or the Secretary of State after consultation with each other and the Attorney General.[121]

13 RESOURCES

At various points during your interview preparation, you may encounter indicators that require additional research to make sure you can conduct an informed, thorough interview of a case with potential TRIG issues. [redacted] (b)(7)(E)

[redacted]

13.1 USCIS TRIG ECN

The RAIO TRIG Branch maintains a comprehensive, one-stop shop for resources on TRIG issues. This resource is available through the USCIS TRIG ECN.

13.2 USCIS Refugee, Asylum and International Operations Research Unit (RAIO Research Unit)

The RAIO Research Unit's Country of Origin Information (COI) research papers are a good starting point for officers. RAIO Research Unit (RRU) products include specific COI that may be helpful when adjudicating cases involving TRIG. The RRU products may be accessed through the RAIO Research Unit ECN page.

In accordance with each Division's established procedures, you may submit queries to the RRU (email to RAIOResearch@uscis.dhs.gov) when additional country conditions information is required to reach a decision in a case.

[121] INA § 212(d)(3)(B)(i). For some specific examples of the Secretary's exercise of discretion under this provision, *see* USCIS Fact Sheets.

13.3 USCIS Fraud Detection and National Security Directorate

In support of the overall USCIS mission, the Fraud Detection and National Security Directorate (FDNS) was created to enhance the integrity of the legal immigration system, detect and deter benefit fraud, and strengthen national security.

The RAIO FDNS ECN provides a repository of open source intelligence and publications relating to national security in the "Country Specific Resources" and "News & Bulletins" sections.

13.4 Department of State

The Department of State's Office of Counterterrorism maintains a body of resource information on its website, which includes country reports on terrorism.

13.5 RAIO COI Tool

The RAIO COI Tool is a practical, data-driven tool designed to assist officers interviewing Syrian refugee applicants by providing reliable, specific, localized country of origin information. The tool itself is a Microsoft Word plug-in that integrates the Syria event database into the interviewing officer's assessment.

Use of the COI Tool allows officers to access information regarding locations and events in Syria relevant to the applicant's refugee claim, places of residence, and travel patterns. This applicant-specific COI Tool enhances the officer's ability to develop tailored lines of questioning, assess applicant credibility, and identify potential national security concerns and TRIG.

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PRACTICAL EXERCISES

(b)(7)(E)

Practical Exercise # 1

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Practical Exercise # 2 (b)(7)(E)

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SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

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

REQUIRED READING

1.

ADDITIONAL RESOURCES

2.

SUPPLEMENTS

International and Refugee Adjudications Supplement

Burden and Standard of Proof for TRIG Inadmissibility Grounds

If the evidence indicates that the refugee applicant may be inadmissible to the United States pursuant to INA § 212(a)(3)(B), then the refugee applicant must establish clearly and beyond doubt that the inadmissibility ground does not apply in order to be eligible for refugee[122] status.[123]

(b)(7)(E)

[122] Refugee cases include both Form I-590 and Form I-730 follow-to-join refugee (FTJ-R) adjudications.

[123] INA § 235(b)(2)(A).

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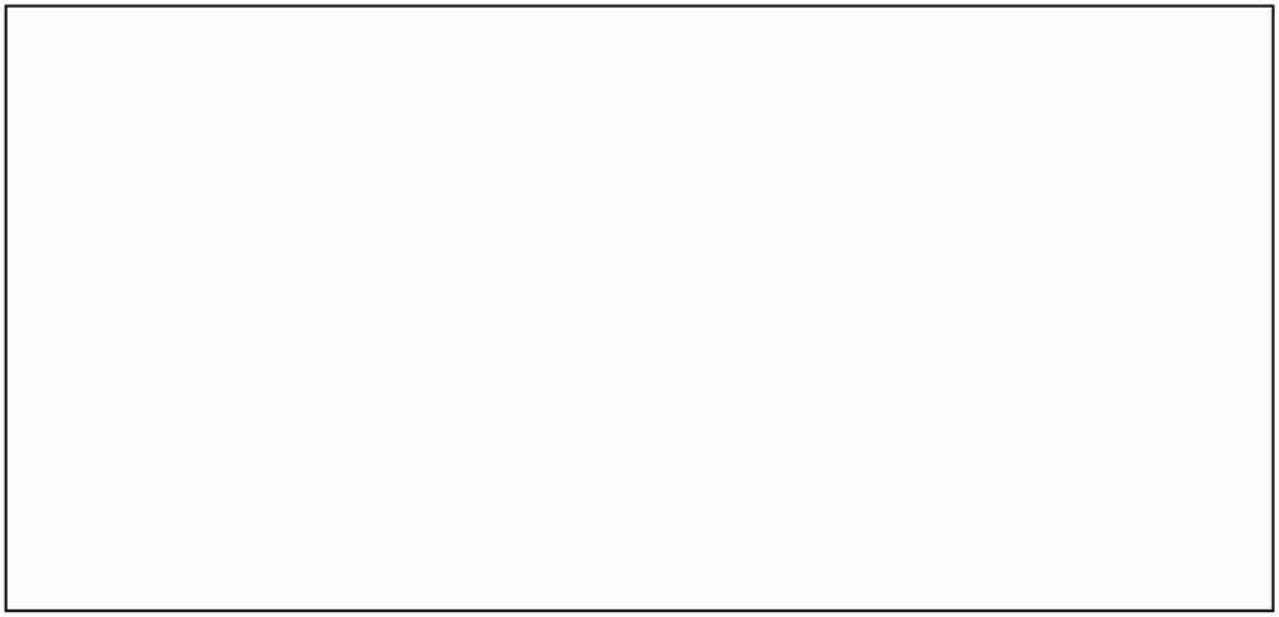
(b)(7)(E)



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SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

REQUIRED READING

1. Asylum Division Identity and Security Checks Procedures Manual (ISCPM), especially Section VIII of the ISCPM regarding Cases Involving Terrorism or Threats to National Security.
2. Asylum Division Affirmative Asylum Procedures Manual (AAPM).
3. ABC/NACARA Procedures Manual.

ADDITIONAL RESOURCES

1. Matter of A-H-, 23 I&N Dec. 774 (AG 2005).
2. Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Cir. 2004).
3. Matter of R-S-H-, 23 I&N Dec. 629 (BIA 2003).
4. Barahona v. Holder, 691 F. 3d (4th Cir. 2012).

SUPPLEMENTS

(b)(7)(E)

Asylum Adjudications Supplement

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Asylum Adjudications Supplement

Note Taking – National Security

For further explanation and requirements, see RAIO Training module, Interviewing - Note-Taking, including the Asylum Adjudications Supplement. See also the Affirmative Asylum Procedures Manual (AAPM), the ABC/NACARA Procedures Manual and the Suspension of Deportation and Special Rule Cancellation of Removal under NACARA Lesson Plan.

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U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

ANALYZING THE PERSECUTOR BAR

TRAINING MODULE

DATE (see schedule of revisions): 12/20/2019

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RAIO Directorate – Officer Training / RAIO Combined Training Program

ANALYZING THE PERSECUTOR BAR

Training Module

MODULE DESCRIPTION

This module addresses the legal analysis of claims where a refugee or asylum applicant may have been involved in the persecution of others as well as related interviewing considerations.

TERMINAL PERFORMANCE OBJECTIVE(S)

During an interview, you (the officer) will be able to elicit all relevant information to correctly determine when an applicant, who is otherwise a refugee, is ineligible for a grant of asylum or refugee status because he or she was involved in the persecution of others on account of a protected ground.

ENABLING PERFORMANCE OBJECTIVES

1. Summarize recent developments in U.S. law regarding the persecutor bar.
2. Explain the standard of proof applicable in the persecutor bar analysis.
3. Explain the factors to consider when determining whether or not an applicant may have ordered or incited an identifiable persecutory act on account of a protected ground.
4. Explain the factors to consider when determining whether or not an applicant may have assisted or otherwise participated in the persecution of another on account of a protected ground.
5. Describe indicators ("red flags") that an individual may have been involved in the persecution of others.

INSTRUCTIONAL METHODS

- Interactive presentation

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- Practical exercise
- Demonstration

METHOD(S) OF EVALUATION

Observed Practical Exercise and Written test

REQUIRED READING

1. Negusie v. Holder, 555 U.S. 511 (2009);
2. Matter of A-H-, 23 I&N Dec. 774 (AG 2005);
3. Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988);

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

4. Matter of D-R-, 25 I&N Dec. 445 (BIA 2011);
5. Matter of Vides Casanova, 26 I&N Dec. 494 (BIA 2015).

Additional Resources – International and Refugee Adjudications

Additional Resources – Asylum Adjudications

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR23	Knowledge of bars to immigration benefits (4)
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR4	Knowledge of the relevant sections of 8 Code of Federal Regulations (CFR) (4)
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
RI1	Skill and identifying issues of a claim (4)
RI2	Skill in identifying the information required to establish eligibility (4)
RI3	Skill and conducting research (e.g., legal, background, country conditions) (4)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
4/14/2015	Throughout document	Minor formatting edits; fixed broken links; a few recent cases added	RAIO Training
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training

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

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

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

1 INTRODUCTION

The term "refugee" in the Immigration and Nationality Act (INA) "does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[1] The INA also specifically bars the Attorney General from granting asylum to such a person.[2] The persecutor bar may apply to government actors as well as private individuals.[3]

There are a number of human rights-related inadmissibility grounds that may arise for Nazi persecutors, genocidaires, torturers, and foreign government officials who have committed particularly severe violations of religious freedom and seek refugee status through overseas processing. [International and Refugee Adjudications Supplement – Grounds of Inadmissibility.] While there may be instances when acts which implicate the persecutor bar also trigger a human rights-related inadmissibility ground, this module is

[1] INA § 101(a)(42).

[2] INA § 208(b)(2)(A)(i). This bar also applies to: cancellation of removal, INA § 240A(e)(5); withholding of removal, INA § 241(b)(3)(B)(i); temporary protected status (TPS), INA § 244(c)(2)(B)(ii); adjustment of status of certain entrants before January 1, 1982 (legalization) (applicant must establish that he or she has "not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion), INA § 245A(a)(4)(C); naturalization of persons who have made extraordinary contributions to national security, INA § 316(f)(1); special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105-100, § 203, 111 Stat. 2160 (1997), 8 C.F.R. § 240.66(a); and withholding of removal under the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT), 8 C.F.R. § 208.16(d)(2).

[3] Matter of McMullen, 19 I&N Dec. 90, 96 (BIA 1984).

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focused exclusively on the persecutor bar. The human rights-related grounds of inadmissibility are discussed in the RAIO Training module, Overview of Inadmissibility Grounds, Mandatory Bars, and Waivers.

The statutory exclusion of persecutors from the refugee definition means that even if an applicant has been persecuted in the past, or has a well-founded fear of future persecution on account of one of the protected grounds, he or she does not meet the definition of a refugee under the INA if the persecutor bar applies.

Other statutes and provisions in the INA contain or have contained language relating to persecutors (e.g., the Displaced Persons Act [DPA][4] and the Holtzman amendment[5]). In this module, unless otherwise specified, reference to the "persecutor bar" refers exclusively to the language in the refugee definition in INA § 101(a)(42).

This module addresses individuals who may be barred from refugee or asylum status as "persecutors." This term is used to describe those individuals who have ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five protected grounds. In other settings, references may be made to the broader category of "human rights abusers" or "human rights violators." While persecutors may be included in that group, it is important to keep in mind that the term "persecutor" is a specific term of art in refugee and asylum adjudications, unlike general terms such as "human rights abuser" and "human rights violator."

This module:

- Lays out the elements of the law about which you must elicit testimony during the course of your interview
- Provides an analytical framework to help you analyze the persecutor bar issue
- Provides a list of possible indicators ("red flags") to help alert you when you must explore the persecutor bar issue
- Explains how credibility may play a part in your determinations

1.1 Burden of Proof and Duty to Elicit

[4] The Displaced Persons Act of 1948, Pub.L. No. 80-774, 62 Stat. 1009 (1948), as amended by Pub.L. No. 81-555, 64 Stat. 219 (1950).

[5] INA § 212(a)(3)(E); see also INA § 237(a)(4)(D).

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The burden is on the applicant to establish eligibility.[6] Asylum and refugee applicants are not expected to understand the complexities of U.S. asylum law and may not realize that they are subject to the persecutor bar, especially if they did not directly commit the act(s) of persecution.[7] Accordingly, although the applicant has the burden of proving eligibility, you have an equal duty in a non-adversarial interview to elicit detailed testimony from the applicant.[8] If you believe that the persecutor bar may apply, you must question the applicant about his or her possible involvement in persecutory acts. If the applicant denies involvement, you must then determine the credibility of that denial.

For additional information regarding credibility determinations, see section below, Credibility and the Persecutor Bar and RAIO Training modules, Evidence and Credibility, and Asylum Adjudications Supplement – Burden Shifting.

1.2 Standard of Proof

An applicant must establish that he or she is not subject to the persecutor bar by a preponderance of the evidence. When using the preponderance of the evidence standard, it is important to focus on the quality of the evidence, not the quantity.[9] Remember that assessing the quality of testimonial evidence means determining whether or not it is credible. See section below, Credibility and the Persecutor Bar.

1.3 The Rationale behind the Bar

The rationale for the persecutor bar is derived from the general principle in the 1951 Convention relating to the Status of Refugees that even if someone meets the definition of a refugee, i.e., has a well-founded fear of persecution on account of a protected ground, he or she may nonetheless be considered to be undeserving or unworthy of refugee status.[10]

The BIA has recognized that the exclusion from the refugee definition in INA § 101(a)(42) of those who were involved in the persecution of others is consistent with the principles of the 1951 Convention.

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[6] 8 C.F.R. § 208.13(a); Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1992) (*"UNHCR Handbook"*), ¶ 196.

[7] See Jacinto v. INS, 208 F.3d 725, 733-734 (9th Cir. 2000) ("Applicants for asylum often appear without counsel and may not possess the legal knowledge to fully appreciate which facts are relevant…[adjudicators] are obligated to fully develop the record in [such] circumstances…").

[8] 8 C.F.R. § 208.9(b); UNHCR Handbook, ¶¶ 196, 205(b)(i).

[9] For further information on the preponderance of the evidence standard, see RAIO Training Module Evidence Assessment.

[10] United Nations Convention Relating to the Status of Refugees, art. 9F, July 28, 1951, 189 U.N.T.S. 150.

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> This exclusion from refugee status under the Act represents the view that those who have participated in the persecution of others may be unworthy or undeserving of international protection. The prohibited conduct is deemed so repugnant to civilized society and the community of nations that its justification will not be heard.[11]

2 ANALYTICAL FRAMEWORK

If at any time during your adjudication the persecutor bar issue arises, you will need to develop additional lines of questioning and ask follow-up questions until the record reflects that the applicant is either subject to or not subject to the bar. Often this will involve a credibility determination. You must conduct a particularized evaluation and examine all relevant facts in determining whether the persecutor bar applies.[12]

The INA does not define the terms listed in the persecutor bar: "order," "incite," "assist," or "otherwise participate in." Nor have the courts developed a uniform, bright-line test to apply when the persecutor bar is an issue. However, the following analytical framework, derived from existing case law, can assist you in analyzing whether the persecutor bar applies. This analytical framework is explored in greater detail below.

Step One: Determine if there is Evidence of the **Applicant's** Involvement in an Act that May Rise to the Level of Persecution

- Look for red flags in the evidence to alert you that the persecutor bar may be at issue.
- Evidence may include:
  - the applicant's testimony during the interview;
  - information in the applicant's file indicating his or her involvement with an entity known for committing human rights abuses; and
  - country of origin information (COI)
- If a red flag is present, examine whether there is further evidence of a specific act or acts that may rise to the level of persecution.

[11] McMullen, 19 I&N Dec. at 97.

[12] Vukmirovic v. Ashcroft, 362 F. 3d 1247, 1252 (9th Cir. 2004); Miranda Alvarado v. Gonzales, 449 F.3d 915, 926-27 (9th Cir. 2006); Hernandez v. Reno, 258 F.3d 806, 814 (8th Cir. 2001); see Matter of A-H-, 23 I&N Dec. 774, 784 (AG 2005), overruled on other grounds by Haddam v. Holder, 547 F. App'x 306 (4th Cir. Dec. 4, 2013) ("It is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies.").

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- Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.

Step Two: Analyze the Harm Inflicted on Others

- Did the harm rise to the level of persecution?
- Was there a nexus to a protected ground?
- Was the act a legitimate act of war or law enforcement?

Step Three: Analyze the Applicant's Level of Involvement

- Did the applicant order, incite, assist, or otherwise participate in the persecutory act(s)?
- Did the applicant know that the persecution was occurring?
- Did the applicant act under duress?

Fully explore this issue for the record and follow adjudication-specific guidance. Following the analytical framework above will help you avoid using faulty logic that is demonstrated in the following statements:

- "Bad Place + Bad Time = Bad Person"
- "I Know It When I See It"

These statements are not legal standards and should not be the basis of analysis in any decisions relating to the persecutor bar.

2.1 Step One: Determine if there is Evidence of the Applicant's Involvement in an Act that May Rise to the Level of Persecution

When there is an indication that the persecutor bar may be applicable, you must explore the issue thoroughly. Whether it emerges through the applicant's testimony, evidence in the file, or country of origin information (COI), a "red flag" will indicate that you must ask follow-up questions to determine if there is evidence of an act that may rise to the level of persecution. A red flag does not mean that the applicant will be automatically barred from asylum or refugee status. Once you have identified a red flag, you must ask follow-up questions to determine if there is evidence of an act that may rise to the level of persecution.

As noted, evidence may include:

- the applicant's testimony during the interview;

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- information in the applicant's file indicating that the applicant may have been involved with an entity known for committing human rights abuses;

- country of origin information

Potential Red Flags

Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.[13] However, belonging to an organization that engaged in the persecution of others is a "red flag," and you must carefully question the applicant regarding his or her duties or activities within the organization to ascertain whether the applicant was involved in any specific acts that may rise to the level of persecution. The following is a non-exhaustive list of possible red flags or indicators that will alert you to explore the applicant's actions further during your interview.

- Involvement with Agents of Persecution and Positions of Leadership in an Organization or Entity Known for Persecuting Others

Both testimony of the applicants and country of origin research may alert you to acts of persecution committed by organizations or entities known for persecuting others. When an applicant indicates that he or she worked for a government known to have committed human rights abuses, elicit details from the applicant about his position and activities within the government. Furthermore, holding a leadership position in an organization or entity known to have persecuted others during a time when such abuses have been documented is a significant red flag. Elicit testimony regarding the applicant's role(s) and responsibilities, and explore through questioning whether the applicant had any connections with acts that may rise to the level of persecution.

Relevant Questions

- What was the applicant's role(s) and position(s)?
- Did the applicant supervise anyone?
- To whom did the applicant report?
- What functions did the applicant's unit(s) or division(s) perform within the organization?

[13] See Matter of Rodriguez-Majano, 19 I&N Dec. 811, 814-15 (BIA 1988); Vukmirovic v. Ashcroft, 362 F.3d at 1252; Hernandez v. Reno, 258 F.3d at 814 (8th Cir. 2001); Xu Sheng Gao v. U.S. Att'y Gen., 500 F.3d 93, 99 (2d Cir. 2007) (mere association "with an enterprise that engages in persecution is insufficient" on its own to trigger the persecutor bar).

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- What was that unit or division's relationship with other units or divisions who may have been involved in persecutory acts?

See also suggested questions below regarding rank, duties, and structure of government or armed forces.

- Holding an Official Position within a Government or Other Similar Entity

You may be aware of country of origin information about branches of government at the national or local level that have been responsible for human rights abuses, e.g., the Ministry of Information in Iraq under Saddam Hussein, the civil patrol in Guatemala during the civil war, or the head of a neighborhood committee in China during the Cultural Revolution. Closely examine the activities of an applicant who is associated with a government or branch of government that is known to have committed human rights abuses.

Relevant Questions

- When did the applicant work for that branch of government?
- Why did the applicant work for the government?
- What were the applicant's duties and responsibilities?
- What rank, if any, did the applicant hold? If so, when?

- Membership in an Ethnic or Religious Group Involved in Ethnic Fighting

Where ethnic or religious violence has erupted, in some situations both sides in a conflict may have committed abuses. When interviewing an individual who claims to be a victim of ethnic violence during a civil war, elicit information regarding the applicant's activities during that time period, especially during times when human rights abuses committed by the applicant's group have been documented. Examples: the Bosnian war, the Rwandan genocide, and the Syrian civil war.

- The Military, Police, and Other Security Forces

Where country conditions indicate that the military, paramilitary, police, or other security forces have committed human rights violations against civilians, or members of their own organization (e.g., a whistleblower), elicit detailed testimony about the applicant's duties if he or she was a member of the military, police, or other security forces. Additionally, researching the structure of the military, paramilitary, policy or security forces in the applicant's country of nationality and eliciting background information from the applicant will be helpful in examining whether the persecutor bar may be at issue. Understanding the nature of the applicant's rank and position in the armed forces will help you to develop further lines of questioning into the applicant's activities.

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Relevant Questions

- In what branch of the police, military, or security forces did the applicant serve?
- How were the branches organized?
- Were the security forces divided into military and police forces? If, so, what kinds of functions did each perform?
- Were there paramilitary units?
- Within the branch in which the applicant served, in what specific unit or company did the applicant serve?
- Where did the applicant serve and when?
- Did the applicant serve in the field or at a desk job?
- If it was the military branch, did the applicant serve during a time of war? If so, was the applicant in a combat unit or a support unit?
- What was the applicant's position?
- How long did the applicant serve in the security forces?
- What specifically were his or her duties?
- What types of orders were carried out by the individual/unit/entity and who issued the orders?
- Were there ever any orders that the individual/unit/entity refused to carry out? If so, what were those orders and why were they not carried out?

- Military Service Requirement

Some countries require that all individuals or all males over a certain age serve in the armed forces for a set period of time. Research the service requirement of the applicant's country of nationality to alert you to the fact that the applicant may have served in the military. Explore the applicant's service or non-performance of service during the interview.

Relevant Questions

When an applicant has not listed military experience on his application, determine whether the country of the applicant's nationality had a mandatory service requirement at the time that the applicant was of service age. If there was such a requirement, ask why did the applicant not serve? Did he get an exemption? How? Did anyone assist him? How

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was he assisted? What kind of an exemption did he get, medical, educational, or otherwise? Did he pay a bribe? Did he have documentation that he needed to present to show an exemption? What kind of documentation? Where is that documentation?

2.2 Step Two: Analyze the Harm Inflicted on Others

2.2.1 Did the Harm Rise to the Level of Persecution?

In order to be subject to the persecutor bar, an applicant must have ordered, incited, assisted, or otherwise participated in conduct that rises to the level of persecution. Once you have identified an act, you must then determine whether the harm inflicted rises to the level of persecution.

Persecution has been defined as a threat to the life or freedom of another or the infliction of suffering or harm upon another.[14] Harm can be psychological as well as physical, and can include threats and serious economic harm.[15] If there is evidence of an act, but the harm did not rise to the level of persecution, the applicant is not subject to the bar. For additional guidance on what constitutes persecution, see RAIO Training module, Definition of Persecution and Eligibility Based on Past Persecution.

In the majority of cases where the persecutor bar arises, the evidence will implicate an act or acts that constituted harm that the victim(s) experienced as persecution, such as killing; torture or other cruel, inhumane, or degrading treatment; slavery; and rape or other severe forms of sexual violence. However, in certain instances, you may need to independently assess whether the victim would experience the act or acts in question as serious harm.

Relevant Questions

Elicit detailed testimony about:

- the type of harm that was inflicted
- the severity of the harm
- the effect the act(s) had on the victim(s) or others
- the reason or motivation behind why individual(s) were harmed

2.2.2 Was There a Nexus to a Protected Ground?

To find that the persecutor bar may apply, the persecutory act in question must be "on account of" at least one of the five protected grounds: race, religion, nationality,

[14] Matter of Acosta, 19 I&N Dec. 211, 221-23 (BIA 1987).

[15] Matter of T-Z-, 24 I&N Dec. 163 (BIA 2007).

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membership in a particular social group, or political opinion.[16] However, it is not necessary that the applicant had a punitive or malignant intent, nor that the applicant shared the same persecutory motive as the person or entity that committed or orchestrated the persecution.[17]

Examples

> An individual, who was forcibly recruited into the Revolutionary United Front (RUF) of Sierra Leone and who had murdered a female villager and chopped off the limbs and heads of non-combatants, argued that because he did not share the RUF's intent to target political opponents, he did not engage in persecution on account of political opinion. The court found that the applicant's personal motivation was not relevant, and that the persecutor bar applied because the applicant "participated in persecution, and the persecution occurred because of an individual's political opinion."[18]
>
> The head constable of a local police department participated in raids of homes of innocent Sikh families, helped arrest innocent Sikhs without cause, and transport Sikhs to the police station on orders from the police chief, where they were subsequently beaten. He testified that he was personally opposed to the persecution of innocent Sikhs, and only stayed with the police force due to his need for a steady income. The court found that even though the constable stated that he did not share the persecutory motive, he still assisted in or participated in persecution of others on account of a protected ground.[19]

Relevant Questions

Because the persecutor bar requires that the persecutory act or acts were committed on account of one of the five protected grounds, elicit detailed testimony to ascertain who the victims of the persecutory acts were. Why were they targeted? How were the victims identified? By whom?

For additional guidance on the requirement that there be a connection between the persecution and one of the five protected grounds, see the RAIO Training Module, Nexus and the Five Protected Grounds.

2.2.3 Was the Act a Legitimate Act of War or Law Enforcement?

[16] INA § 101(a)(42); Elias-Zacarias v. INS, 502 U.S. 478 (1992).

[17] Matter of Fedorenko, 19 I&N Dec. at 69 (concentration camp guard assisted persecution even if not motivated by racial or religious prejudice); Singh v. Gonzales, 417 F. 3d 736, 740 (7th Cir. 2005); Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003); RAIO Training module, Nexus and the Protected Grounds.

[18] Bah, 341 F.3d at 351.

[19] Singh, 417 F.3d at 740.

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Legitimate Acts of War

The fear of general civil strife or war, and incidental harm resulting from such violence, may not, by itself, establish eligibility for asylum or refugee status. Likewise, involvement in a civil war may not, by itself, trigger the persecutor bar. Such harm may not constitute persecution if it is not directed at the victim(s) on account of a protected ground.

For example, in open combat, acts of warfare taken in furtherance of political goals are not necessarily acts committed on account of a protected ground. The BIA has stated:

> As the concept of what constitutes persecution expands, the group which is barred from seeking haven in this country also expands, so that eventually all resistance fighters would be excluded from relief. We do not believe Congress intended to restrict asylum and withholding only to those who had taken no part in armed conflict.[20]

Reference to international laws governing warfare may be useful in determining whether actions taken in the context of warfare constitute persecution or are "legitimate" acts of war.[21]

Examples

> An individual forced to assist guerrillas fighting in El Salvador did not participate in persecution on account of a protected ground when he covered guerrillas with weapons while they burned cars and drove supplies for battles, because this was considered a legitimate act of war.[22]
>
> The rape of Bosnian Muslim women by an ethnic Serb soldier in order to bring shame to the Bosnian Muslim community during the Bosnian War is not a legitimate act of war, and is in fact a crime of war, and would have the requisite nexus to a protected characteristic to subject an applicant to the persecutor bar.[23]

Likewise, true acts of self-defense do not have a nexus to a protected ground and would not subject an applicant to the persecutor bar.[24]

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[20] Rodriguez-Majano, 19 I&N Dec. at 816.

[21] Rodriguez-Majano, 19 I&N Dec. at 816; see RAIO Training Module International Human Rights Law for examples of international instruments relevant to determining what would be considered a "legitimate" act of war.

[22] Rodríguez-Majano, 19 I&N Dec. at 815-16.

[23] See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.N.T.S. 135 (entered into force Oct. 21, 1950) (Geneva Convention III); RAIO Training Module, Nexus and the Five Protected Grounds.

[24] Vukmirovic, 362 F. 3d at 1252-53 ("[h]olding that acts of true self-defense qualify as persecution would run afoul of the 'on account of' requirement in the provision.").

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Example

> A Bosnian Serb fended off attacks of Croats who attacked his village. He did not participate in physical attacks against Croats other than in self-defense. The Ninth Circuit held that, given these facts, there was insufficient evidence to find that the applicant was motivated by the Croats' ethnicity or religion and remanded the case to the Immigration Judge for further evaluation.[25]

If you identify an act that rises to the level of persecution but there is no connection to one of the five protected grounds, the applicant is not subject to the bar.

Legitimate Acts of Law Enforcement

Likewise, legitimate acts of law enforcement have no nexus to a protected ground and would not subject the applicant to the persecutor bar. [26]All countries have the right to investigate, prosecute, and punish individuals for violations of legitimate laws.[27] Government actors may seek to legitimately penalize individuals for violations of criminal laws of general applicability. Conversely, government actors may use the guise of prosecutions to harm applicants on account of a protected ground.[28] Consider all the facts in the case, along with relevant country of origin information, in determining whether the applicant was involved in a legitimate act of law enforcement. For additional guidance on the difference between prosecution and persecution, see RAIO Training module, Nexus and the Protected Grounds.

2.3 Step Three: Analyze the Applicant's Level of Involvement

You must evaluate all of the facts in order to determine whether the applicant is subject to the persecutor bar.[29] It is appropriate to look at the totality of the relevant conduct to determine whether the bar applies.[30] The persecutor bar applies even if the individual did not personally commit the persecutory act(s), so long as he or she "ordered, incited, assisted, or otherwise participated in the persecution."[31] It is not necessary for the

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[25] Id. at 1253.

[26] See Cruz-Samayoa v. Holder, 607 F.3d 1145, 1151-1154 (6th Cir. 2010).

[27] Matter of A-G-, 19 I&N Dec. 502, 506 (BIA 1987); UNHCR Handbook, para. 56; Dinu v. Ashcroft, 372 F.3d 1041 (9th Cir. 2004) (harassment resulting from an investigation does not give rise to an inference of political persecution where police are trying to find evidence of criminal activity and there is a logical reason for pursuit of the individual).

[28] Matter of A-G-, 19 I&N Dec. at 506; Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996); UNHCR Handbook, para. 57-59.

[29] Vukmirovic, 362 F. 3d at 1252; Miranda Alvarado, 449 F.3d at 926-27; Hernandez, 258 F.3d at 814.

[30] Matter of A-H-, 23 I&N Dec. at 784.

[31] INA § 101(a)(42)(B).

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applicant to have specific knowledge of particular acts of persecution for the bar to apply so long as the applicant is aware that his or her actions resulted in persecution.[32] But while application of the persecutor bar does not require direct personal involvement in the acts of persecution,[33] mere membership in an entity or organization that commits acts of persecution is not enough to apply the bar.[34]

2.3.1 Did the Applicant **Order** Others to Commit a Persecutory Act?

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

[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.

[35] Maikovskis v. INS, 773 F.2d 435, 446 (2d. Cir. 1985).

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DPA. At least two courts found that involvement in the publication of anti-Semitic propaganda during the Holocaust constituted assistance in the persecution of others.[36]

The Attorney General has noted in discussion that "[t]o 'incite' means 'to move to a course of action: stir up: spur on: urge on' or 'to bring into being: induce to exist or occur.'"[37] The term "incite," along with the terms "assist" and "participate," "is broad enough to encompass aid and support provided by a political leader to those who carry out the goals of his group, including statements of incitement or encouragement and actions resulting in advancing the violent activities of the group."[38] Moreover, the terms "are to be given broad application" and "do not require direct personal involvement in the acts of persecution."[39] Finally, whether the alien served in a leadership role may be "highly relevant," and "in certain circumstances statements of encouragement alone can suffice" for a finding that an applicant incited or otherwise participated in the persecution of others.[40]

Example

Statements made by an Algerian opposition political leader in various newspapers could fit within the plain meaning of the word incite when those statements resulted in the violent activities of the armed faction of his political party.[41]

During the 1994 genocide in Rwanda, the radio station Radio Mille Collines played a role in organizing militias, transmitted lists of people to be killed, and urged ethnic Hutus to kill ethnic Tutsis. These acts, if examined under the persecutor bar analysis, would likely be considered evidence of inciting persecution.

2.3.3 Did the Applicant Assist or Otherwise Participate in, or Actively Carry Out or Commit Persecution of Others?

[36] U.S. v. Koreh, 59 F.3d 431, 440 (3d. Cir. 1995) (editor of an anti-Semitic publication in Hungary was found to have assisted in the persecution of Hungarian Jews under the DPA by fostering a climate of anti-Semitism); U.S. v. Sokolov, 814 F. 2d 864, 874 (2d Cir. 1987) (German army propagandist assisted in persecution "by creating a climate of opinion where persecution is acceptable").

[37] Matter of A-H-, 23 I&N Dec. at 784, citing Webster's Third New International Dictionary of the English Language Unabridged 1142 (2002). Matter of A-H- remains good law for the general propositions as to the meaning of the words "incite," "assist," and "participate."

[38] Matter of A-H-, 23 I&N Dec. at 784.

[39] Id.

[40] Id.

[41] Id. at 785.

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Where an applicant did not order or incite the persecution of others, he or she may still be subject to the persecutor bar if he or she "assisted," or "otherwise participated" in, or actively carried out or committed persecution of others.

Commit or Actively Carry Out

Although the persecutor bar does not expressly include the terms "commit" or "actively carry out," if an applicant admits to you that he or she directly committed or carried out persecutory acts, that applicant has "otherwise participat[ed]" in persecution, and the persecutor bar applies.

Example

> A former Iraqi intelligence officer admits to you that he used "creative" techniques when questioning individuals in his custody. When you ask what he means by "creative," he tells you that he sometimes beat these individuals to the point of unconsciousness and used electric shock against them. While this harm seems like enough to subject him to the bar if the detainees were targeted on account of a protected ground, you must develop the record with follow-up questions, not only about what he did, but also about the severity of the harm he caused and the characteristics of the targeted individuals.

Relevant Questions

In the example above, you should elicit testimony that includes:

- what the applicant means by "beating" and using "electric shock" against detainees;
- how many times he beat the detainees;
- how often he beat them;
- how he shocked them
- what he shocked them with;
- how often he shocked them;
- who the detainees were;
- why they were detained;
- whether any particular group of detainees were treated differently from others;

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- whether either the detention or any act of mistreatment was on account of the detainees' race, religion, nationality, membership in a particular social group, or political opinion.

Assist or Otherwise Participate

The Attorney General has explained that "[t]o 'assist' means 'to give support or aid: help,' And to 'participate' means 'to take part in something (as an enterprise or activity) usually in common with others.'"[42] To date, neither the BIA nor federal circuit courts have analyzed the meaning of the term "otherwise participate" independently from the term "assist." Accordingly, guidance from case law focuses on the term "assist."

When you analyze the facts of the case before you, focus on whether the applicant's particular conduct can be considered assistance in the persecution of others in the way the Supreme Court did in Fedorenko. The Supreme Court explained that:

> [A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.[43]

Accordingly, it is appropriate to think of acts that might subject an individual to the persecutor bar along a continuum of conduct.[44] The role the individual played in the commission of the persecutory act will determine whether he or she assisted or otherwise participated in persecution.

Courts have interpreted Fedorenko line-drawing as assigning accountability and personal culpability. According to the Ninth Circuit, to properly analyze what it means to assist or otherwise participate in persecution, you must identify the kinds of acts the applicant engaged in.[45] You must evaluate those acts along a continuum between the two examples listed in Fedorenko to determine the applicant's culpability. Also evaluate the surrounding circumstances, including whether the applicant acted in self-defense.[46]

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[42] Matter of A-H-, 23 I&N Dec. at 784, citing Webster's Third New International Dictionary of English Language Unabridged, at 132 ("assist") and 1646 ("participate").

[43] Fedorenko, 449 U.S. at 513 n.34 (1981).

[44] See id.; Miranda-Alvarado, 449 F.3d at 925-927.

[45] Miranda-Alvarado, 449 F.3d at 926.

[46] Id.

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Finally, ask yourself, did the applicant's acts further the persecution, or were they tangential to it?

To aid in this analysis, courts have suggested questions which help to place the applicant's activities along a continuum of conduct. For example, the Second Circuit asks: was the conduct active and did it have direct consequences for the victims or was the conduct tangential to the acts of oppression and passive in nature?[47] The Seventh Circuit draws a distinction between genuine assistance and inconsequential association. This court asks whether the applicant was simply a member of an organization during a pertinent persecutory period or whether the applicant actually assisted or participated in persecution.[48] Similarly, the Ninth Circuit asks whether the acts were instrumental to the persecutory end. Did the acts further persecution or were they tangential to it?[49] These questions are organized in the following chart:

Did the Applicant Assist in the Persecution of Others?		
Subject to the Bar	OR	Not Subject to the Bar
Did the applicant assist in the persecution of others?		Did the applicant merely assist in the operation of a location where persecution took place, where his or her duties were not related to the persecution?
Did the applicant's acts further the persecution?		Were the applicant's acts tangential to the persecution?
Was the conduct active and did it have direct consequences for the victims?		Was the conduct tangential to the acts of persecution and passive in nature?
Did the applicant actually assist or otherwise participate in persecution?		Was the applicant simply a member of an entity during a pertinent period of

[47] Suzhen Meng, 770 F.3d at 1075; Weng, 562 F.3d at 514; Lin, 584 F.3d at 80; Balachova, 547 F.3d at 385; Gao v. U.S. Atty. Gen., 500 F.3d at 99; Xie v INS, 434 F.3d 136, 143 (2d Cir. 2006).

[48] Singh, 417 F.3d at 739.

[49] Miranda-Alvarado, 449 F.3d at 928.

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		persecution?

Relevant Questions

Elicit detailed testimony about:

- what the applicant did;
- what actions the applicant took, committed, or performed;
- what his or her position was;
- what his or her duties were;
- the dates and locations the applicant performed these actions;
- who, if anyone, the applicant worked for or took orders from;

Case Law Examples

Most case law on the persecutor bar explores the question of whether or not the applicant "assisted" in persecution. Not coincidentally, the majority of the cases you will encounter will involve applicants who did not order or incite persecution but may have assisted or otherwise participated in it. The following case summaries are divided into fact specific categories that may help you in your analysis. These categories include intelligence gathering, coercive population control, military or security forces, rebel or opposition forces, and government officials. In each category, the courts have examined the applicant's specific actions to determine whether or not the applicant assisted or otherwise participated in persecution.

- Intelligence Gathering

Examples

Did Not Assist in Persecution

Diaz-Zanatta v. Holder, 558 F.3d 450 (6th Cir. 2009) Peru (military intelligence analyst)

The applicant gathered information and passed it up the chain of command. For example, she gathered information on whether a particular professor at a university had communist tendencies. She also listened to and transcribed telephone conversations of designated individuals. When she heard that other factions of the Peruvian military were engaged in human rights violations, she reported her concerns to superiors and requested an immediate transfer. There was no evidence that information the applicant supplied actually assisted in

persecution of any individuals, or that the applicant had prior or contemporaneous knowledge of the persecution.[50]

Did Assist in Persecution

Higuit v. Gonzales, 433 F.3d 417 (4th Cir. 2006) Philippines (intelligence operative)

For 10 years, the applicant provided the Marcos regime with intelligence about the leftist New People's Army and other anti-Marcos communist groups. The applicant testified that the information he gathered on these individuals led to their torture, imprisonment, and death. He argued that he never physically tortured or harmed any person. The Fourth Circuit concluded that while "a distinction can be made between genuine assistance in persecution and inconsequential association with persecutors," in this case there was "no dispute over [the applicant's] personal culpability."

- Coercive Population Control

Examples

Did Not Assist in Persecution

Weng v. Holder, 562 F.3d 510 (2d Cir. 2009) China (nurse's assistant)

The applicant provided post-surgical care to women who had undergone forced abortions, registered patients, assisted nurses in caring for patients, recorded vital signs, and maintained patient files. On one occasion she helped guard (unarmed) several women awaiting forced abortions for 10 minutes before helping one woman escape. The Second Circuit found that her conduct, considered in its entirety, was not sufficiently "direct, active, or integral" to the performance of forced abortions. It looked at the 10-minute unarmed guarding incident and her behavior as a whole and found that the post-surgical care she provided did not contribute to or facilitate the victims' forced abortions.

Lin v. Holder, 584 F.3d 75 (2d Cir. 2009) China (nurse)

The applicant was a maternity nurse at a state general hospital from 2003 to 2005, where she assisted with ultrasounds and other prenatal examinations, participated in live-birth deliveries, cared for newborns, and provided recovery care to women who had undergone forced abortions. She "did not participate in the abortion procedure itself," but the examinations she performed "were sometimes used to determine the position of the fetus so that a forced abortion could be performed

[50] See section below, Did the Applicant Know that Persecution was Occurring?

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without threatening the life of the mother." The Second Circuit looked to the applicant's behavior as a whole and found that her examinations did not contribute to or facilitate forced abortions in any direct or active way because they did not cause the abortions nor did they make it more likely they would occur. According to the Second Circuit, her actions were "tangential and not sufficiently direct, active or integral to amount to assistance in persecution."

Did Assist in Persecution

Chen v. U.S. Att'y Gen., 513 F.3d 1255 (11th Cir. 2008) China (employee at a family planning office)

The applicant voluntarily accepted employment at a family planning office and fully understood the forced abortion policy. She was responsible for watching over detained, pregnant women locked in rooms before their scheduled forced abortions. She monitored confined women to ensure they did not escape. She was provided with a rod or baton that she never actually used. She thought that forced abortions were limited to women who were one or two months pregnant and released a woman who was eight months pregnant with her second child. The Eleventh Circuit found while she did not perform the abortions herself or use force against the women, her conduct ensuring the woman did not escape was "essential to the ultimate persecutory goal." Her single redemptive act in releasing one woman, "while laudatory," did "not absolve her of the consequences of her personal culpability of her previous assistance."

Xie v. INS, 434 F.3d 136 (2d Cir. 2006) China (van driver)

The applicant occasionally transported pregnant women against their will to hospitals for forced abortions in a locked van. On each occasion the women physically resisted and wept. The court noted that the applicant's actions contributed directly to the persecution. By driving the van, the applicant ensured the women were brought to the place of their persecution: the hospitals where their forced abortions took place. The applicant claimed that his actions were not voluntary. The Second Circuit considered not just the voluntariness of the applicant's actions, but his behavior as a whole and whether his conduct was active and had direct consequences for the victims or was tangential to the acts of oppression and passive in nature. It concluded that the applicant played "an active and direct, if arguably minor, role" in the persecution. Further, the Second Circuit noted that even if voluntariness were an issue, nothing in the record indicated that the applicant did not have the ability to quit his job.

- Military or Security Forces

Examples

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Did Not Assist in Persecution

Kumar v. Holder, 728 F.3d 993 (9th Cir. 2013) India (constable who guarded Sikh prisoners and witnessed their mistreatment)

The applicant worked as a constable in the local police department in Punjab. He served as a guard at an intelligence facility where Sikhs suspected of being part of the militant separatist movement were detained and interrogated. The applicant did not arrest, transport, or interrogate the prisoners, but he witnessed prisoners being beaten. He spoke to his superiors about the mistreatment, but nothing was done. After he was promoted to head constable, he spoke to several superior officers about mistreatment he had witnessed but was transferred after only a few weeks in the position. The Ninth Circuit held that the BIA erred in finding that the applicant was subject to the persecutor bar because his position was integral to the functioning of a facility where persecution took place; rather, it should have analyzed whether his conduct was integral to the persecution itself.

Balachova v. Mukasey, 547 F.3d 374 (2d Cir. 2008) Russia (soldier during arrest and rape of two Armenian girls)

The applicant, under orders from his captain, broke down the door of a house to search for arms. The captain ordered the applicant to take two girls found inside the house to the car. The applicant told the two girls that they had to go with him. As he reached for one of the girls, she pulled away. The captain then commanded the applicant to hit the girl. The applicant refused, and was forced to relinquish his weapon. He remained handcuffed in the car while refusing to participate in a gang rape of both girls by fellow soldiers. The Second Circuit concluded that the applicant's actions were "tangential to the oppression and had no direct consequences for the victims."

Doe v. Gonzales, 484 F.3d 445 (7th Cir. 2007) El Salvador (Former lieutenant present during execution of Jesuits)

The applicant was a lieutenant in the Atlacatl Battalion who was present during the execution of priests at a Catholic university. He was ordered to accompany troops to kill a Jesuit priest, despite voicing his misgivings. He did not give orders, fire his gun, seize anyone, or block anyone's attempted escape. Troops killed six Jesuits, a cook, and her daughter on that mission. After the attack, the applicant assisted in destroying log books identifying soldiers who had participated. The Seventh Circuit noted that under different facts, personal presence by a military or police officer could maintain order over prisoners and discourage victims from attempting to escape, and as a result, could constitute assistance or participation in persecution. However, under the facts of this case, the applicant's mere presence did not "discourage attempts at escape, help to maintain order, or otherwise contribute to persecution." The Seventh Circuit also

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examined the applicant's assistance in destroying log books after the attack, and concluded that destruction of the log books did not constitute "assistance" in persecution. It reasoned that helping a murderer cover his tracks would make an individual an accessory after the fact to murder, but not a murderer. The Seventh Circuit remanded to the BIA to consider the applicant's asylum claim on other grounds.

Did Assist in Persecution

Quitanilla v. Holder, 758 F.3d 570 (4th Cir. 2014) El Salvador (Sergeant who oversaw investigation, capture, and transfer of anti-government guerrillas)

The applicant was a sergeant in the Salvadoran military for about five years, three of which he spent in the "Patrulla de Reconocimiento de Alcance Largo" (PRAL). He testified that, during his military service, he investigated and arrested about fifty guerrillas and civilians he believed to be "terrorists" aligned with anti-government guerrillas. He indicated that he never interrogated or mistreated anyone; he simply transferred the prisoners to his superiors. He denied that he was aware of human rights abuses in the Salvadoran military, but the IJ found him not credible on this point, pointing to extensive country conditions evidence detailing severe human rights abuses by the PRAL in particular. The Fourth Circuit found that the applicant's leadership role and oversight over the arrest and investigation actively "facilitated" the persecution of guerrillas and civilians and upheld the IJ's adverse credibility finding with respect to the applicant's knowledge. Thus, the applicant "assisted in the persecution of individuals because of their political views."

Miranda Alvarado v. Gonzales, 441 F.3d 750, opinion amended and superseded on denial of reh'g, 449 F.3d 915 (9th Cir. 2006) Peru (Interpreter during torture sessions)

The applicant was a member of the Civil Guard. His duties included protecting government officials and banks from guerrilla attacks. He was also a Quechua interpreter at interrogations during which suspects were subjected to electric shock torture and beatings. He quit after performing his duties for six years and had been present in such interrogations approximately 200 times. The Ninth Circuit explained that determining whether the applicant "assisted in persecution" requires a "particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability." It found that because the applicant translated questions and answers interspersed with electric shock treatment, he played an integral role in facilitating persecution. As a result, he was undisputedly a regular and necessary part of the interrogation. He was not a bystander, but was present and active during the alleged persecution.

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Singh v. Gonzales, 417 F.3d 736 (7th Cir. 2005) India (Supervisory constable who helped arrest fellow Sikhs)

The applicant was head constable in the local police department in Punjab during a period of considerable violence between Sikh separatist militants and the authorities. The department engaged in legitimate police activities but also systematically arrested without cause Sikhs accused of being militants. The applicant admitted that he brought suspects into the police station where they were wrongfully beaten by others, but claimed he did not share a persecutory motive. He also admitted that he went on nighttime raids that led to false charges and beatings of innocent Sikhs. The Seventh Circuit found that the applicant's acts constituted assistance or participation in persecution.

- Rebel or Opposition Forces

Examples

Did Not Assist in Persecution

Hernandez v. Reno, 258 F.3d 806 (8th Cir. 2001) Guatemala (Forcibly recruited by guerrillas)

The applicant was forcibly recruited by guerrillas and given weapons training, to which he objected. He was forced to join the organization after his life was threatened; he did not know that he would be asked to participate in violent activities. On one occasion, he was forced to fire his rifle at villagers but testified that while he fired, he purposefully shot away from the civilians. He escaped from the guerillas after 20 days. The Eighth Circuit stated that the BIA erred in only considering certain facts, and that if properly analyzed under the Fedorenko standard, the applicant "may be seen to have met his burden of proving that he did not assist or participate in the persecution of others." It remanded the case to the BIA to conduct a full analysis of the record.

Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988) El Salvador (Forcibly recruited by guerrillas)

The applicant was taken from his home by guerrillas and given military training. He accompanied the guerillas on propaganda trips, and once covered them with his weapon while they burned cars. After two months, he deserted. He was subsequently imprisoned and tortured with electric shock for having worked with guerrillas. The BIA explained that membership alone in an organization that engages in persecution is not enough to bar one from relief. The BIA also noted that a finding of persecution "requires some degree of intent on the part of the persecutor to produce the harm the applicant fears." The BIA determined that persecution does not include harm resulting from, or directly related to, military

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objectives of an armed conflict, including drafting of youths as soldiers, unofficial recruiting of soldiers by force, disciplining rebel group members, prosecution of draft dodgers, attacking of garrisons, burning of cars, and destruction of other property.

Did Assist in Persecution

Parlak v. Holder, 578 F.3d 457 (6th Cir. 2009) Turkey (Kurdish PKK supporter)

The applicant smuggled weapons into Turkey and buried them. He then led Turkish authorities to the location of the hidden weapons, even though he claimed they were for his own personal use. The Sixth Circuit found that "smuggling weapons across an international border to aid the Kurdistan Workers Party (PKK) in committing violent acts against Turks and Turkish-aligned Kurds constitutes assistance in persecution."

Matter of A-H-, 23 I&N Dec. 774 (AG 2005) Algeria (Leader of opposition political party), overruled in part by Haddam v. Holder, 547 F. App'x 306 (4th Cir. December 4, 2013)

The applicant, a self-proclaimed leader-in-exile of the Islamic Salvation Front of Algeria (FIS), supported and took credit for the unification of the armed factions of his party and other armed groups, which formed the Armed Islamic Group (GIA); made public statements that encouraged atrocities committed by armed groups in Algeria, and made no attempt to publicly disassociate himself from the armed faction of the party until the assassination of 2 FIS leaders. The Attorney General found that the BIA had not applied the correct legal standard when it found that the applicant was not subject to the persecutor bar. The Attorney General explained that "incite" means to move to a course of action, stir up, spur on; "assist" means to give support or aid, or help; and "participate" means to take part in something, usually in common with others. The Attorney General explained that under the correct legal standard, someone who had created and sustained ties between the political movement and the armed group, while aware of the atrocities committed by the armed group, who used his profile and position of influence to make public statements that encouraged those atrocities, and who made statements that appeared to condone the persecution without publicly and specifically disassociating himself or the movement from the acts of persecution, could be barred as a persecutor. The Attorney General remanded to the BIA to apply the correct analysis. (On a separate ground, the Attorney General also determined that there may be reasonable grounds for regarding the applicant as a danger to national security and remanded to the BIA to make factual findings).

On petition for review from the BIA's ultimate decision denying relief to the applicant in A-H-, the Fourth Circuit held, in an unpublished decision, that the Attorney General's construction of the persecutor bar was impermissible to the

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extent that it could be applied to an applicant whose actions had no causal relationship to an actual instance of persecution. The Fourth Circuit explained that under the Attorney General's test, an applicant who had created and sustained ties with a group that had previously engaged in persecution could be barred even if he did so long after the persecution took place; in such a case, no causal nexus would exist. Although it rejected the A-H- decision in this narrow respect, the Fourth Circuit's logic is consistent with USCIS guidance and did not disturb other aspects of the Attorney General's decision, which remains binding on all RAIO officers.

Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003) Sierra Leone (Forcibly recruited by RUF)

The applicant and his family were captured by the rebel group RUF. The RUF incinerated his father and raped and killed his sister. The applicant was kidnapped and forced to join the RUF. He tried to escape twice. He was ordered to murder a female prisoner and to chop off the limbs and heads of non-combatants. He stated that the RUF engaged in these practices in order to scare civilians so that they would not support the government. He argued that he did not engage in political persecution because he did not share the persecutory intent. The Fifth Circuit found that personal motivation is not relevant, that the applicant had participated in persecution, and the persecution occurred because of the victims' political opinions.

Matter of McMullen, 19 I&N Dec. 90 (BIA 1984) Ireland (Active Provisional Irish Republican Army (PIRA) member)

The applicant was a member of the Provisional Irish Republican Army (PIRA), a clandestine, terrorist organization. When the applicant joined the PIRA, its use of violence was escalating. The applicant was respected as an effective member of the PIRA and his duties included training other PIRA members and conducting special operations. He was also personally responsible for coordinating many illegal arms shipments from the United States to Northern Ireland, which the PIRA used to perpetrate acts of persecution and violence. The BIA found that the applicant "assisted" and "otherwise participated" in the persecution of others through his "active and effective" membership in the PIRA and through his coordination of arm shipments.

- Government Officials

Example

Did Not Assist in Persecution

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Gao v. U.S. Att'y Gen., 500 F.3d 93 (2d Cir. 2007) China (Supervisory bookstore inspector)

The applicant was the chief officer for the Culture Management Bureau in Qingdao City. His bureau was responsible for inspecting bookstores to determine if they were selling books prohibited under the Chinese government's cultural laws. He and his inspectors issued reports about prohibited books being sold. He confiscated prohibited books and issued citations. He reported these violations up to his superiors, who would then determine whether fines should be imposed or business licenses suspended. He was aware that a violator could receive 10 years in jail but never knew of anyone who was arrested or jailed. The mere fact that the applicant may have been associated with an "enterprise that engages in persecution" is insufficient to apply the bar. The bureau where the applicant worked did not exist solely to persecute those who illegally distributed banned materials, but also performed legitimate tasks such as enforcing copyright and pornography laws. The Second Circuit found that there was no identifiable act of persecution in which applicant assisted.

Did Assist in Persecution

Suzhen Meng v. Holder, 770 F.3d 1071 (2d Cir. 2014) China (public security official)

The applicant worked as a public security officer in China for 22 years. In this role, she reported pregnant women to China's family planning authorities, including those in violation of the state's coercive population control policies. She knew that women who violated the family planning policies would be punished, including by being forced to undergo sterilization or abortion. The Second Circuit upheld the BIA's conclusion that the applicant had assisted in persecution and rejected the applicant's argument that evidence linking her to a specific act of persecution was required in order for the bar to apply. It concluded that when "the occurrence of persecution is undisputed, and there is such evidence of culpable knowledge that the consequences of one's actions would assist in acts of persecution," evidence of an applicant's assistance or participation in a particular act of persecution is not necessary.

2.3.4 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

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others.[51] Several courts have provided guidance on the knowledge requirement for the persecutor bar.

Example

> (Castañeda-Castillo) Castañeda was a lieutenant in the antiterrorist unit of the Peruvian military and worked in areas where the Shining Path was active. During an operation to search for Shining Path members, Castañeda led a patrol that was assigned to block escape routes from the village while two other patrols entered and conducted a search in the village. The two search patrols committed a brutal massacre of innocent villagers. Castañeda was in radio contact with his base commander, but not with the two search patrols who had entered the village. Therefore, he was unaware that the attack occurred and became a massacre. He stated he did not learn of the atrocities until three weeks after the operation. Because Castañeda did not have prior or contemporaneous knowledge, the First Circuit found that the persecutor bar did not apply.[52] The First Circuit used a hypothetical example of a bus driver who unknowingly and unwittingly drove a killer to the site of a massacre. It said the driver should not be labeled a persecutor even if the objective effect of his actions furthered the killer's secret plan.[53]

Whether knowledge is an issue in a case will depend on the specific facts of the case and the credibility of the applicant's claim.

Examples

> (Diaz-Zanatta) On the one hand, a Peruvian intelligence officer was found not to have assisted in the persecution of others because she testified credibly that she did not know how the information she gathered was used and was not aware that any person about whom she had gathered information was persecuted as a result of her actions.[54]
>
> (Higuit) On the other hand, the persecutor bar applied to a Filipino intelligence officer who admitted that he was aware that the information he gathered was used to torture, imprison, and kill political opponents.[55]

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[51] Diaz-Zanatta, 558 F.3d 450; Lin, 584 F.3d 75; Weng, 562 F.3d 510; Balachova, 547 F.3d 374; Gao, 500 F.3d 93; Castañeda-Castillo, 488 F.3d 17; Quitanilla, 758 F.3d 570; Suzhen Meng, 770 F.3d 1071.

[52] Castañeda-Castillo, 488 F.3d at 21-22; Castañeda-Castillo v. Holder, 638 F.3d 354, 359 (1st Cir. 2011) (appeal after remand).

[53] Castañeda-Castillo, 488 F.3d at 20.

[54] Diaz-Zanatta, 558 F.3d 450.

[55] Higuit, 433 F.3d 417.

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If the applicant you are interviewing denies knowledge, the focus of your analysis will be whether the applicant's denial is credible. If you have a concern about the applicant's credibility, you must confront the applicant, informing him or her of your concern, and give him or her an opportunity to explain or elaborate. See section below, Credibility and the Persecutor Bar.

Relevant Questions

- Does the applicant know if what he or she did resulted in harm to others?
- Did he or she know of instances where others were persecuted as a result of the actions of individuals in similar positions?

2.3.5 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 the guidance for handling such cases pursuant to the type of adjudication you are performing. See International and Refugee Adjudications Supplement – Duress; Asylum Adjudications Supplement – Headquarters Review.

The duress issue was litigated before the U.S. Supreme Court in Negusie v. Holder in 2009.[56] Negusie was a dual national of Ethiopia and Eritrea who was forced to join the Eritrean army. When he refused to fight against Ethiopia, he was imprisoned, beaten with sticks and placed in the hot sun. After two years he was released and forced to work as a prison guard. He carried a gun, guarded the gate to prevent escape, kept prisoners from taking showers and obtaining fresh air, and forced prisoners to stay out in the hot sun.[57] He claimed that he committed these acts involuntarily. In the lower court decisions, the BIA and the Fifth Circuit held that the persecutor bar contains no exception for coerced acts.

The Supreme Court found that the Fifth Circuit erred by applying the holding of Fedorenko v. United States[58] to the applicant. In Fedorenko, an individual who served as

[56] Negusie, 555 U.S. 511 (2009).

[57] Id. at 514-515 (2009).

[58] Fedorenko, 449 U.S. 490 (1981).

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a guard at a concentration camp while held as a German prisoner of war was found to have assisted in the persecution of others without consideration of whether such participation was against his will.[59] While the Fedorenko Court found that voluntariness was not required to apply the persecutor bar, the Negusie Court explained that the Fedorenko decision interpreted the terms of the Displaced Person Act of 1948 and not the Refugee Act of 1980. Accordingly, the Court concluded that the Fedorenko holding does not control the BIA's interpretation of the persecutor bar under the INA. Because the BIA had not exercised its interpretive authority with regard to the INA, the Court remanded the case back to the BIA for the agency to determine, in the first instance, whether the persecutor bar in the refugee definition applies to involuntary actions or whether a duress exception may be read into the refugee definition. The BIA's review of this case is stayed while DHS and DOJ develop regulations.

Despite the holding in Negusie, court decisions prior to Negusie contain relevant guidance on lines of inquiry in assessing a voluntariness element in the context of culpability, and will assist you in fully exploring on the record whether an applicant may have a plausible claim for duress. A particularized evaluation is required to determine whether the applicant's behavior was culpable "to such a degree that he or she could be deemed to have assisted or participated in the persecution of others."[60]

For example, in Hernandez v. Reno, a case pre-dating Negusie, the Eighth Circuit criticized the BIA for solely evaluating the applicant's participation in shooting civilians in reaching its determination that the applicant was a persecutor.[61] The Eighth Circuit explained that the BIA should have also considered the fact that the applicant had been forcibly recruited into the guerrilla organization, that he shared no persecutory motives with the guerrillas, and that he participated in the shooting only while the commander stood behind him during the shooting and checked the magazine of his rifle afterwards. Furthermore, the BIA should have also taken into account the applicant's disagreement with his commander about the shootings immediately following the incident, and that at the first available opportunity, the applicant risked his life to escape the guerrillas.[62]

As discussed above, in all cases involving the persecution of others, even those where the applicant alleges that his or her acts were committed under duress, you must carefully weigh all relevant facts to determine whether the applicant's actions furthered the persecution of others on account of a protected ground. Consider these facts even in cases where the acts were committed involuntarily.[63]

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[59] Id. at 512 (interpreting the "voluntariness" aspect of the persecutor bar under the Displaced Persons Act).

[60] Vukmirovic, 362 F.3d at 1252.

[61] Hernandez, 258 F.3d at 814.

[62] Id.

[63] See, e.g., Miranda Alvarado, 449 F.3d at 927.

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Example

(Miranda-Alvarado v. Gonzales) Upon considering the applicant's interpretation of interrogation questions during torture, his involvement in interrogations for six or seven years two to three times per month, his continued interpretation despite that he would not have suffered dire consequences if he stopped interpreting, and that he made little effort to avoid being involved in the interrogations, other than to ask for the torture to be lessened when it was so extreme that that the victim had difficulty speaking, the Ninth Circuit found that the applicant assisted in the persecution of others.[64]

Relevant Questions

- What led the applicant to commit, assist/participate in the act?
- Did the applicant believe that he or she had a choice?
- Could the applicant have reasonably avoided committing, assisting/participating in the act?
- Did the applicant take steps to avoid committing the act?
- What was the severity and type of harm inflicted and/or threatened by those coercing the applicant to engage in the act?
- To whom was/were those threats and/or harm directed? (e.g., the applicant, his or her family)?
- Was the person threatening the applicant with immediate harm or future harm?
- What was the perceived likelihood that the threatened harm would actually be inflicted? (e.g., past harm to the applicant, his or her family)?
- Any other relevant factors?

3 CREDIBILITY AND THE PERSECUTOR BAR

As explained in greater detail in the RAIO Training modules Interviewing - Eliciting Testimony and Evidence, while the burden of proof is on the applicant to establish eligibility, your duty to elicit all relevant testimony is equally important. As discussed above, if a "red flag" emerges, because of the non-adversarial nature of the interview, you must utilize interviewing techniques that best allow you to elicit detailed testimony from an applicant, and diligently conduct relevant country of origin (COI) research.

[64] Id.

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In addition to the applicant's testimony, general country of origin information may be the only other type of evidence available to you when you make your decision in a case involving the persecutor bar.[65] It is important to remember that reliable information may sometimes be difficult to obtain. The absence of such information should not lead you to presume that an applicant assisted or participated in persecutory acts by being a member of or associated with a group that committed persecutory acts.

If an applicant was in a particular place at a time when you know from COI that human rights abuses were being committed but denies any involvement or knowledge, the applicant should be questioned about his or her activities and awareness that abuses were taking place. The credibility of the applicant's responses should be examined in the same way that you would examine any statements that are material or relevant to the claim: the statements are credible if they are detailed, consistent and plausible. If the applicant testifies credibly that he or she did not order, incite, assist, or otherwise participate in the persecution of others on account of a protected ground then he or she is not subject to the persecutor bar. A negative credibility determination must contain well-articulated examples of flaws in the applicant's testimony.[66] Your notes must reflect that you explained your credibility concerns to the applicant, and in turn, gave the applicant an opportunity to address your concerns.

It is important to remember that the evidence refugee applicants can reasonably obtain varies greatly compared with the corroborating evidence some asylum seekers can reasonably obtain.

Relevant Questions

- Is the applicant aware that his or her unit committed human rights abuses ?
- Did the applicant hear or see other members of his or her unit commit human rights abuses?
- How was the applicant able to remain in a unit that committed human rights abuses without learning about them or being involved?

4 DECISION-MAKING AND WRITING

4.1 Mandatory Nature of the Persecutor Bar

[65] It is well-established that a fact-finder consider both direct and circumstantial evidence in the persecutor bar context. Matter of D-R-, 25 I&N Dec. 445 (BIA 2011).

[66] See RAIO Training Module, Credibility.

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If you determine that the applicant is subject to the persecutor bar, you cannot approve the case.

In asylum cases, you have no discretion to approve the case, even though the applicant may otherwise qualify for asylum or derivative status. If the asylum applicant is subject to the persecutor bar, you do not weigh that adverse factor against the risk of future persecution in an exercise of discretion. You will either deny the applicant, or if the person is not in status, refer the applicant for an immigration court hearing. See Asylum Adjudications Supplement – Discretion.

In the refugee context, there is no waiver available to an applicant who has been denied based on the persecutor bar. Denial in such cases is mandatory in the overseas context.

4.2 Applicability to Dependents

When a principal applicant is granted asylum or refugee status, his or her spouse and/or children, as defined in the Act, may also be granted status if accompanying or following to join. If the principal applicant is subject to the persecutor bar, neither the spouse nor the child is eligible for asylum or refugee status as a dependent. Conversely, if the principal applicant is not subject to the persecutor bar, but his spouse or his child is subject to the persecutor bar, the principal may be approved and the dependent will be denied or referred.[67]

4.3 Relationship to Terrorism-Related Inadmissibility Grounds (TRIG)

When analyzing the facts before you, it is also important to keep the persecutor bar distinct from the terrorist-related inadmissibility grounds, particularly the bar against material support. Some cases that you review will implicate the applicability of both bars. Under the TRIG analysis, the amount of support need not be large or significant, whereas in the persecutor bar analysis, an applicant must be found to have "ordered, incited, assisted, or otherwise participated" in the persecution.

Another distinction between these grounds arises regarding application of a duress exception. While the Executive Branch may provide exemptions by policy for applicants who provided material support under duress to designated or undesignated terrorist organizations, as noted above, the Executive Branch is still considering whether a duress exception should be read into the persecutor bar analysis, and what the limits of that exception would be. Although the relevant facts may occasionally overlap, it is important to keep TRIG and persecutor bar concepts distinct when analyzing the facts of the case before you.

Example

[67] INA § 101(a)(42)(B); INA § 207(c)(2); 8 C.F.R. § 208.21(a).

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On a few occasions, when the applicant was a medical doctor in Syria, he provided medical care to patients whom he knew were members of several armed groups opposed to the Syrian Government. On one occasion, after a violent protest, the applicant was taken by the police and government agents to a locked area and told to revive a man who had fainted. The applicant provided medical care to the patient until he regained consciousness and was able to faintly speak. The police then made the applicant leave. The applicant saw signs of beating on the patient and feared the patient was beaten again after he left.

In such a situation, depending on the facts, testimony and any other relevant evidence, the applicant's treatment of members of armed groups opposing the Syrian regime could render him inadmissible for engaging in terrorist activity by providing material support to a terrorist organization, although he could be eligible for a TRIG exemption for the voluntary medical care. However, depending on the facts, testimony and other evidence, the applicant might also be subject to the persecutor bar for his medical care to the patient he feared was beaten by the police. The applicant would have to be questioned regarding, for example, his contemporaneous knowledge of the harm, why the patient was harmed, if he knew his medical care assisted in any later harm and if he acted under duress.

4.4 Addressing the Bar in your Decision

See Asylum Adjudications Supplement – Decision Writing.
See Asylum Adjudications Supplement – Note Taking.
See Asylum Adjudications Supplement – Identity Checks.
See Asylum Adjudications Supplement – One Year Filing Deadline.
See International and Refugee Adjudications Supplement – Decision Making and Recording.

5 CONCLUSION

Adjudicating claims that may involve the persecutor bar present certain challenges. You must carefully consider all relevant evidence in reaching your decision. As always, the law and the facts, rather than your emotions or intuition, must be your guide.

6 SUMMARY

The Rationale behind the Bar

The rationale for the persecutor bar is derived from the general principle in the 1951 Convention relating to the Status of Refugees that even if someone meets the definition of refugee, i.e., has a well-founded fear of persecution on account of a protected ground, he or she may nonetheless be considered undeserving or unworthy of refugee status.

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Analytical Framework

Step One: Determine if there is Evidence of the Applicant's Involvement in an Act that May Rise to the Level of Persecution

- Look for red flags in the evidence to alert you that the persecutor bar may be at issue.
- Evidence may include:
  - the applicant's testimony during the interview;
  - information in the applicant's file indicating his or her involvement in an entity known for committing human rights abuses; and
  - country of origin information (COI).
- If a red flag is present, examine whether there is further evidence of a specific act or acts that may rise to the level of persecution.
- Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.

Step Two: Analyze the Harm Inflicted on Others

- Does the harm inflicted rise to the level of persecution?
- Is there a nexus to a protected ground?
- Was the act a legitimate act of war or law enforcement?

Step Three: Analyze the Applicant's Level of Involvement

- Did the applicant order, incite, assist, or otherwise participate in the persecutory act(s)?
- Did the applicant know that the persecution was occurring?
  - Prior or contemporaneous knowledge is required.
- Did the applicant act under duress?
  - Fully explore this issue for the record and follow Division specific guidance.

Do Not Confuse Persecutor Bar with TRIG

It is important not to confuse the persecutor bar with terrorist-related inadmissibility grounds and the security-related mandatory bars to asylum. While some cases may implicate the applicability of both bars, each issue should be analyzed separately.

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PRACTICAL EXERCISES

Practical Exercise # 1

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

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OTHER MATERIALS

STEP-BY-STEP PERSECUTOR BAR CHECKLIST

1. **Is there evidence of the applicant's involvement in an act that may rise to the level of persecution?** Yes ☐ No ☐

   If no, STOP – applicant is not subject to the bar. If yes, proceed to next step.

2. **Analyze the harm inflicted on others.**

   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 adjudication-specific guidance.

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SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

International and Refugee Adjudications Supplement – Related Grounds of Inadmissibility

In addition to analyzing the possible applicability of the persecutor bar to refugee eligibility, when an applicant engages in activity that may have assisted in, or furthered, the harm or suffering of other individuals, the officer must also consider whether related grounds of inadmissibility may apply to the applicant. The related inadmissibility grounds are directed at preventing individuals from entering the United States if they have:

1. Ordered, incited, assisted or otherwise participated in Nazi Persecutions (INA Section 212(a)(3)(E)(i));

2. Ordered, incited, assisted or otherwise participated in genocide (INA Section 212(a)(3)(E)(ii));

3. Committed, ordered, incited, assisted or otherwise participated in torture or extrajudicial killing under the color of law (INA Section 212(a)(3)(E)(iii));

4. Recruited or used child soldiers in violation of section 2442 of title

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18, U.S. Code; or

5. As a foreign government official, committed particularly severe violations of religious freedom (INA Section 212(a)(2)(G)).

In the first three inadmissibility grounds, the same analysis of the persecutor bar to refugee status is applicable to the determination of whether an applicant ordered, incited, assisted, or otherwise participated in the relevant activity. Further discussion of these provisions can be found in the Inadmissibility module.

International and Refugee Adjudications Supplement – Decision Making and Recording

Please see Refugee Application Assessment Standard Operating Procedure (SOP): "D. Section IV – BARS AND INADMISSIBILITIES."

https://ecn.uscis.dhs.gov/team/raio/RAD/TrainingandQualityAssurance/Training%20Document%20Library/Assessment%20SOP.pdf

International and Refugee Adjudications Supplement – Duress

Pursuant to current guidance, all cases involving persecution committed under duress must be placed on hold for review at IRAD Headquarters to ensure the hold is appropriate. When a persecutor hold is appropriate, the applicant may be informed by the RSC regarding his or her options, which may include remaining on long-term hold with IRAD, requesting a denial or withdrawing from the USRAP in hope of resettlement in another country. Given the grave consequences for applicants, it is vital that officers elicit all relevant testimony to ensure that the persecutor bar does, in fact, apply. Testimony must be elicited regarding issues such as the applicant's level of involvement in persecution and his or her prior or contemporaneous knowledge of the persecution.

For additional information, see Refugee Affairs Division Memorandum, Updated Holds Policy – Persecution Under Duress (September 11, 2018).

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SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

Asylum Adjudications Supplement - Burden Shifting

The asylum regulations regarding the "mandatory bars" to asylum state that "if the evidence indicates that" an applicant ordered, incited, assisted, or otherwise participated in the persecution of any person on account of one of the five protected grounds, "he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act."[68]

As discussed earlier in this module, the burden is on the applicant to establish eligibility.[69] Credible testimony alone may be enough to meet the applicant's burden. While the applicant has the burden of proving eligibility, you have an equal duty in a non-adversarial interview to elicit detailed testimony from the applicant.[70] If the applicant's testimony, documents in the record, country of origin information, or other evidence indicates that the persecutor bar may apply, you must question the applicant about his or her possible involvement in persecutory

[68] 8 C.F.R. § 208.13(c).

[69] 8 C.F.R. § 208.13(a); UNHCR Handbook, para 196.

[70] 8 C.F.R. § 208.9(b); UNHCR Handbook, para 196, and 205(b)(i).

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acts. If the applicant denies involvement, you must then determine the credibility of that denial. For additional information regarding credibility determinations and evaluation of evidence, see RAIO Training modules, Credibility and Evidence. Just as you must identify inconsistencies and offer the applicant an opportunity to explain, in the instance where it appears the persecutor bar might apply, you must identify the issues of concern and elicit detailed information on which to base the determination. The applicant must establish that he or she is not subject to the persecutor bar by a preponderance of the evidence.

Asylum Adjudications Supplement - Note-Taking

Asylum adjudication procedures require that officers take notes in a sworn statement format when the applicant admits, or there are serious reasons to believe, he or she ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five enumerated grounds.

This is crucial because an applicant's admission may be used as a basis to institute deportation or removal proceedings against him or her, or as a basis for DHS to detain the applicant.

For further explanation and requirements, see RAIO Module, Interviewing - Note-Taking, including the Asylum Adjudications Supplement, and see the Affirmative Asylum Procedures Manual (AAPM).

Asylum Adjudications Supplement - Discretion

There may be some cases in which facts fall short of a mandatory bar to asylum but nonetheless warrant the denial or referral of the asylum application as a matter of discretion, even if the applicant has established refugee status.

Examples:

Although mere membership in an organization that is or has been involved in the persecution of others is insufficient to statutorily bar an applicant from a grant of asylum, it may be considered as an adverse factor when weighing the totality of the circumstances to exercise discretion to grant asylum.

An applicant testifies to serving in his country's police force for several years. Country conditions information reports that many individuals held in police custody are abused by police officers. The applicant admits that he had used

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extreme force in a number of situations in dealing with prisoners. There is insufficient evidence to support a finding that the applicant's actions amounted to persecution on account of one of the five grounds. In such a situation, the officer may be able to support a determination that asylum should not be granted as a matter of discretion.

Officers must bear in mind that the sound exercise of discretion requires a balancing of the fact that the applicant qualifies as a refugee, along with any other positive factors, against any negative factors presented in the case. This should be reflected in the assessment.

The likelihood of future persecution is an important factor in the exercise of discretion. A reasonable possibility of future persecution weighs heavily in favor of exercising discretion to grant asylum. The BIA has held that "the danger of persecution should generally outweigh all but the most egregious of adverse factors."[71]

NOTE: Denials and referrals of applicants who meet the definition of a refugee and are otherwise eligible for asylum, but are denied or referred because of acts that are not a bar to asylum must be reviewed by Headquarters Quality Assurance.

Asylum Adjudications Supplement – Decision Writing

If the evidence indicates that the persecutor bar may apply, the assessment must contain an analysis of that evidence. The analysis must include a summary of the material facts, an explanation of how those facts and other evidence support a finding that the bar may apply, and a conclusion as to whether or not the applicant is subject to the bar.

Where it appears that the persecutor bar may apply to the applicant, your analysis must give a detailed explanation as to whether the applicant ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five protected grounds. The analytical framework described in this module must be followed in order to accurately describe the relevant issues. Because it is an open area of law, the analysis must also address the issues of duress and intent, including the age and/or mental capacity of the applicant at the time he or she may have engaged in the acts of persecution.

Unlike applicants barred from receiving asylum or refugee status on other grounds, an applicant found to be a persecutor CANNOT also be said to be a refugee

[71] Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987); Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996).

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