

**Shirk, Georgette L**

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**From:** Nunes, Gorette C  
**Sent:** Thursday, October 03, 2019 9:14 AM  
**To:** #ZBO Everyone  
**Subject:** [redacted] Fraudulent Passports  
**Attachments:** [redacted]

(b)(7)(c)

Hello everyone.

(b)(7)(c) (b)(7)(e)

[redacted]

If you have any questions, please let me know.

Regards,

[redacted] (b)(7)(c)

Immigration Officer | Fraud Detection & National Security (FDNS)  
Boston Asylum Sub-Office | RAIO | USCIS  
15 New Sudbury Street | Room 600 | Boston, MA 02203

Tel: [redacted] (b)(7)(c)

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## II.N. AO Prepares a Decision

(last updated 9/1/2017)

### II.N. AO PREPARES A DECISION

Once the AO completes the interview, he or she prepares the decision. The AO writes an Assessment or NOID in every interviewed case adjudicated by the Asylum Office. Local office policy dictates whether an individual other than an AO prepares a decision letter, NTA, I-94 card, etc.

This section lists the possible decisions that an AO may reach, and the documents that must be prepared to support that decision. The instructions on which documents to prepare presume that the immigration status of the principal applicant and all dependents are the same.

If a dependent's immigration status is different from the principal applicant's status, the principal applicant may receive different documents than those listed in this section. These are referred to as "Split Decisions." An outline of how to process a split decision may be found in Section III.E.9.

#### 1. Applicant Appears Eligible for Asylum

The Asylum Office grants asylum in the exercise of discretion to an applicant who qualifies as a refugee under Section 101(a)(42) of the INA and is not barred from relief under Section 208(a)(2) or 208(b)(2) of the INA. The status of an applicant's identity and security check determines whether an applicant receives either a Recommended Approval letter or an Asylum Approval letter. 8 C.F.R. 208.14(b).

##### a. Recommended Approval

The Asylum Office issues a recommended approval when:

- All background security checks have been completed for the principal applicant and all dependent family members, except that an FBI name check response (primary, as well as any alias and alternate dates of birth) is IP (pending) for one or more of the family members. If an FBI name check response of PR (positive response) has been received, the basis for the response must be reviewed and considered before a recommended approval may be issued;
- All background security checks have been completed for the principal applicant and all dependent family members, but the Asylum Officer has only a W-file or T-file, procedures for issuing a final grant on the W-file or T-file have not been completed, and there are no reasonable grounds for believing information in the A-file would materially impact on the decision; and
- All background security checks have been completed for the principal applicant and all dependent family members, but a dependent appears to be subject to reinstatement of a final order and the Special Agent in Charge has not yet determined whether to reinstate the final order.

See Section III.J.4.b for more information on adjudicating an application on a T file.

See Section III.E.10 for more information on dependents subject to reinstatement.

A background security check is considered completed only after a response of negative (e.g., NONIDENT for a fingerprint check or "N" for IBIS checks) has been received or any positive response (e.g., IDENT or "Y" for IBIS checks) has been carefully reviewed and considered pursuant to existing procedures, including the receipt and review of court dispositions for all arrests listed on the Identity History Summary. If an applicant fails to provide any court dispositions requested by the Asylum Office within the required time period, the case may be referred or dismissed. See the Identity and Security Check Procedures Manual for more information on security checks.

A case in which the applicant appears eligible for an asylum grant but a final decision cannot be made because background security checks have not been completed, and a recommended approval is not permitted to be issued, will be put on hold using the "AD" code in RAPS. The AD code allows users to select whether the delay in the security check processing is due to the applicant, which stops the employment authorization "KLOK," or due to the government, which keeps the KLOK running.

All cases on AD hold can be tracked by Asylum Office management in the Officer Casebook. The Supervisory Asylum Officer is

### II.N. AO Prepares a Decision

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2. Applicant Appears Ineligible for Asylum

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responsible for receiving any court disposition records or other documentation related to an unresolved security check hit. As soon as the documentation is received by the Supervisory Asylum Officer, the Supervisory Asylum Officer is responsible for releasing the AD hold on the case.

Supervisory Asylum Officers retain discretion to cancel the decision pick-up appointment where Asylum Office personnel are still awaiting receipt and review of the FBI fingerprint check response and therefore cannot issue a recommended or final grant of asylum. For example, if the applicant's FBI fingerprint result is an "IDENT" response, and the Identity History Summary prompts the Asylum Officer to request court disposition documents from the applicant, the AD hold code would be placed at the fault of the applicant, thereby stopping the KLOK. If an IBIS hit instructs the Asylum Officer to call a certain law enforcement agency for follow-up information, and contact with the law enforcement agency is delayed, the AD hold code would be placed at the fault of USCIS, thereby continuing the KLOK.

The following is an outline of the documents and the Form I-589 and RAPS updates associated with a recommended approval. Detailed instructions on how to prepare the documents can be found in Section IV, "How To ..." of this manual.

- Assessment to Grant
- Recommended Approval letter (Appendix 47 or 48)
- RAPS – PDEC of GR. When updating "basis of the claim" section, enter the basis upon which the case is decided, rather than basis claimed by the applicant (if there is a difference).
- I-589 – "FOR BCIS USE ONLY" section. If the form does not contain a space for a recommended approval, Asylum Office personnel write "recommended approval," the Asylum Officer ID number (e.g., ZCH041), and the date of the decision.
- RAPS – DINT for service of decision letter

#### b. Asylum Approval

The Asylum Office issues an asylum approval when results of all required identity and security checks for the principal applicant and all dependent family members are current and complete and allow for an approval.

The following is an outline of the documents and the Form I-589 and RAPS updates associated with an asylum approval. Detailed instructions on how to prepare the documents can be found in Section IV, "How To..." of this manual.

- Assessment to Grant
- Asylum Approval letter (Appendix 17, 49, or 50)
- I-94 card, endorsed with asylum approval stamp (see Section IV.E below) that bears the date of asylum approval, signature, Asylum Office code, and office ID number of the adjudicating officer.
- Asylum and NACARA § 203 Background Identity and Security Checklist (Appendix 1 of the Identity and Security Checks Procedures Manual)
- RAPS – FDEC of G1
- When updating "basis of the claim" section, enter the basis upon which the case is decided, rather than basis claimed by the applicant (if there is a difference).
- If the claim is being granted based solely on coercive family planning (CFP) policies, place an "X" next to the CFP ground only. For more information on CFP cases, see Section III.B.2.
- I-589 – "FOR BCIS USE ONLY" section. Asylum Office personnel complete the appropriate area(s) of this section, indicating a final approval, date, and Asylum Officer ID number.
- RAPS – GLET for service of decision letter

## 2. Applicant Appears Ineligible for Asylum

### a. Asylum Office Authority to Issue Decisions to Applicants who Appear Ineligible for Asylum

The Asylum Office's authority to issue decisions to individuals who are found ineligible for asylum is defined by regulation. 8 C.F.R. 208.14(c). Because the authority of the Asylum Office varies depending on the individual's status, the type of decision prepared depends on the status of the individual at the time the decision is issued (mailed or personally served), not at the time of decision preparation or interview, if there is a difference.

Asylum Office Directors maintain the discretion to establish the most efficient workflow for the processing of decisions for individuals who appear ineligible for asylum provided that:

- The type of decision is appropriate under the regulations at the time it is issued; and
- In the absence of exceptional circumstances, asylum applications are processed in a manner consistent with established timeliness requirements and without unreasonable delay.

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See Section III.N for special procedures governing parolees.

### b. Referral

The Asylum Office must refer to the Immigration Court for adjudication in removal proceedings an applicant who is ineligible to apply for or be granted asylum and appears inadmissible or deportable at the time the decision is issued. 8 C.F.R. 208.14(c)(1). *See also Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens*, USCIS Policy Memorandum 602-0050.1, 28 June 2018, 11 p.

The following is an outline of the documents associated with a referral. Detailed instructions on how to prepare the documents can be found in Section IV, "How To..." of this manual.

- Assessment to Refer (Appendix 46)
- Form I-213, Record of Deportable/Inadmissible Alien, if required. *Check with local Asylum Office management about requirements for preparing Form I-213.*
- Form I-862, Notice to Appear (NTA), or Form I-863, Notice of Referral to Immigration Judge
- Referral Notice (Appendices 51, 52, 53, 54 and 55)
- Asylum and NACARA § 203 Background Identity and Security Checklist (Appendix 1 of the Identity and Security Checks Procedures Manual)
- Global decision card, with a deportation code of A1 if an NTA is to be issued, A5 if an I-863 is to be issued.
- When updating "basis of the claim" section, enter the basis upon which the case is decided, rather than basis claimed by the applicant (if there is a difference). Global allows entry of no nexus if the applicant failed to establish nexus to one of the five protected grounds.
- Global and ECHO to generate an NTA and Form I-213, if required.
- I-589 - "FOR BCIS USE ONLY" section. If the form does not contain a space for a referral, Asylum Office personnel write "referral," the Asylum Officer ID number, and the date of the decision. Update the Global Service card for service of decision letter.

### c. Notice of Intent to Deny (NOID)

The Asylum Office issues a denial of asylum to an applicant who is ineligible to apply for or be granted asylum and is maintaining valid immigrant, nonimmigrant, or Temporary Protected Status ("in-status") at the time the decision on the application is issued. Prior to denial, the Asylum Office issues an in-status applicant a NOID (Appendix 45), providing him or her 10 days, plus 6 days for mailing (a total of 16 days), to rebut the reasons for the denial. Any rebuttal is considered prior to making a final decision in the case. An applicant found eligible for asylum after the rebuttal period is processed for approval as indicated above in this section. An applicant found ineligible for asylum is processed as a denial or referral, as described in this section.

Under 8 CFR § 208.11(c), an applicant must be provided the opportunity to review and respond to any Department of State (DOS), Bureau of Democracy, Human Rights and Labor (DRL) comments prior to the issuance of any final decision to deny the application. In accordance with this regulation, if the basis for issuing the NOID is, in part, based on DOS DRL comments, the NOID must cite to the use of the DOS DRL comment letter and note the specific information applied in reaching the adverse determination. A copy of the DOS DRL comment letter should be attached to the NOID for the applicant's reference.

From time to time, Asylum Office personnel will encounter an applicant who nears and reaches the end of his or her period of authorized stay during the processing of the asylum application. As indicated in Section II.N.2, an Asylum Office Director maintains the discretion to establish procedures to ensure that the appropriate decision is prepared based on the applicant's status at the time the decision is issued, without undue delay.

*For discussion of extensions of periods of nonimmigrant status, see Section III.G.*

The following is an outline of the documents and RAPS updates associated with a NOID. Detailed instructions on how to prepare the documents can be found in Section IV, "How To..." of this manual.

- Notice of Intent to Deny (NOID) (Appendix 45)
- RAPS – "Y" and expiration date entered in VIST
- RAPS – PDEC of D1-D7, deportation code A6.
- When updating the "basis of the claim" section, enter the basis upon which the case is decided, rather than basis claimed by the applicant (if there is a difference). The RAPS screen allows entry of "NO," for no nexus if applicant failed to establish nexus to one of the five protected grounds.
- I-589 – "FOR BCIS USE ONLY" section. Asylum Office personnel write "NOID," the Asylum Officer ID number, and the date of the

decision.

- RAPS – DINT for service of the NOID, RBUT for receipt of any rebuttal.

#### d. Denial

After a NOID and rebuttal period, the Asylum Office denies asylum to an applicant who is ineligible to apply for or be granted asylum and is maintaining valid immigrant, nonimmigrant, or Temporary Protected Status or has valid parole at the time the decision on the application is issued. If the applicant lost valid status between the issuance of the NOID and the date of issuance of the final decision, a referral is issued. 8 C.F.R. 208.14(c).

The following is an outline of the documents and the Form I-589 and RAPS updates associated with a denial. Detailed instructions on how to prepare the documents can be found in Section IV, "How To..." of this manual.

- Final Denial (Appendices 56, 57, and 58)
- Asylum and NACARA § 203 Background Identity and Security Checklist(Appendix 1 of the Identity and Security Checks Procedures Manual)
- RAPS – "Y" entered in VIST
- RAPS – FDEC of D1-D7, deportation code A6.
- When updating "basis of the claim" section, enter the basis upon which the case is decided, rather than basis claimed by the applicant (if there is a difference). The RAPS screen allows entry of "NO," for no nexus if applicant failed to establish nexus to one of the five protected grounds.
- I-589 – "FOR BCIS USE ONLY" section. If required by local Asylum Office policy, the AO completes the appropriate area(s) of this section, indicating a denial.
- RAPS –DENY for service of decision letter.

 Print Version

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## 54. REFERRAL NOTICE – 1-YEAR DEADLINE

### Referral Notice

This letter refers to your Form I-589, Application for Asylum and for Withholding of Removal, filed with U.S. Citizenship and Immigration Services (USCIS).

An applicant for asylum who files his or her application after April 1, 1998, must file within one year of the date of last arrival, unless there are changed circumstances that materially affect the applicant's eligibility for asylum or extraordinary circumstances directly related to the delay in filing. You filed your application for asylum on «FileDate», but you have not demonstrated with clear and convincing evidence that your application was filed within one year of your last arrival.

1.  You have not demonstrated that an exception to the 1-year filing requirement applies in your case. In the period of time since April 1, 1997, no changes were found in applicable United States law, country conditions, or your circumstances that would materially affect your asylum eligibility. You also have not shown extraordinary circumstances directly related to your failure to file your asylum application within one year of your last arrival.
  
2.  Although you have established changed circumstances materially affecting your eligibility for asylum, or extraordinary circumstances directly related to your delay in filing, you failed to file your application within a reasonable period of time given those circumstances.

Based on the above determination(s) made following your asylum interview, your application for asylum has been referred to an immigration judge for adjudication in removal proceedings before the U.S. Department of Justice, Executive Office for Immigration Review. This is not a denial of your asylum application. You may request that the immigration judge consider your asylum application, and you may amend your application when you appear before the immigration judge at the date and time listed on the attached charging document (Form I-862, Notice to Appear). Once you appear before the immigration judge, the judge will consider whether your application was timely filed or whether an exception to the filing deadline applies in your case. The Immigration Judge will evaluate your asylum claim independently and is not required to rely on or follow the decision made by USCIS. This referral includes the derivative family member(s) included in your asylum application, who are listed above.

**WARNING:** Currently jurisdiction over your asylum application is with the Immigration Court. You must attend all scheduled hearings with the Immigration Court or you may be ordered removed from the United States.

#### Change of Address:

Because you have been placed in removal proceedings, you must notify the Immigration Court within five days of any change of address by completing Form EOIR-33, *Alien's Change of Address Form/Immigration Court*, and submitting the Form EOIR-33 to the immigration court where your proceedings have been referred, in accordance with instructions to the Form. Form EOIR-33 is available on the Department of Justice website at [www.justice.gov/eoir/eoirforms/eoir33/ICadr33.htm](http://www.justice.gov/eoir/eoirforms/eoir33/ICadr33.htm).

#### Employment Authorization:

If you applied for asylum on or after January 4, 1995, you are subject to a 150-day waiting period before you can apply for employment authorization, and an additional 30 days before employment authorization

can be approved, for a total of 180 days. The number of days a completed asylum application is considered pending does not include any delays requested or caused by you while your application is pending with the Asylum Office or with an immigration judge. See Title 8, Code of Federal Regulations section 208.7. This time period during which your asylum application must be pending with USCIS and/or the Executive Office for Immigration Review before you may be granted an employment authorization document (EAD) is called the “180-day asylum EAD clock.”

Delays requested or caused by you while your application was pending with the Asylum Office may include:

- a request to transfer your case to a new Asylum Office or interview location, including when the transfer is based on a new address;
- a request to reschedule your interview for a later date;
- failure to appear at your interview or fingerprint appointment;
- failure to provide a competent interpreter at your interview;
- a request to provide additional evidence after your interview; and
- failure to receive and acknowledge your asylum decision in person (if required).

Less than 150 days have elapsed since your asylum application was first filed in accordance with 8 C.F.R. §§ 208.3 and 208.4. Therefore, you are currently not eligible to apply for employment authorization pursuant to 8 C.F.R. § 274.a12(c)(8) and provided in 8 C.F.R. § 208.7. The earliest possible date you are eligible to apply for employment authorization is «Projected Date». If an immigration judge does not deny your asylum application within the 150-day waiting period, then you will be eligible to apply for employment authorization. If you fail to appear for the scheduled hearing before the immigration judge and this failure is not excused, employment authorization will not be granted. As of the date of this notice, your asylum application was pending «CLK DAYS ELAPSED» days.



49. STANDARD ASYLUM APPROVAL  
(RFGM NOV. 2015)

Asylum Approval

As of «FDECDate», you have been granted asylum in the United States pursuant to section 208 of the Immigration and Nationality Act (INA). Your derivative family member(s) listed above – who are present in the United States, who were included in your asylum application, and for whom you have established a qualifying relationship – are granted derivative asylum. Enclosed with this letter you will find a completed Form I-94, Arrival-Departure Record, for you and each of your derivative family members listed above. Please retain this document.

Asylum is authorized for an indefinite period, but asylum status does not give you the right to remain permanently in the United States. Asylum status may be terminated pursuant to section 208(c)(2) of the INA if you no longer have a well-founded fear of persecution because of a fundamental change in circumstances, you have obtained protection from another country, or you have committed certain crimes or engaged in other activity that makes you ineligible to retain asylum status in the United States.

Now that you are an asylee, you may apply for certain benefits listed below. You are responsible for complying with applicable laws and regulations explained in this letter. In addition to your Form I-94, Arrival-Departure Record, we recommend that you retain the original of this letter as proof of your status and that you submit copies of this letter when applying for any of the benefits or services listed below.

You may obtain any of the U.S. Citizenship and Immigration Services (USCIS) forms mentioned in this letter on the USCIS website at [www.uscis.gov](http://www.uscis.gov), through the National Customer Service Center at 1-800-375-5283, or at a local USCIS office.

Benefits

1. Employment Authorization

You are authorized to work in the United States for as long as you remain in asylum status. Your derivative family member(s) listed above are also authorized to work in the United States, so long as they retain derivative asylum status. You are authorized to work in the United States whether or not you have an Employment Authorization Document (EAD). To demonstrate employment authorization to employers, you must show certain documentation such as an unrestricted Social Security card, a state-issued driver's license, or an unexpired EAD issued by USCIS. For a list of all documents that employers may accept as proof of employment authorization, consult the USCIS Form I-9, Employment Eligibility Verification, on the USCIS website at <http://www.uscis.gov/i-9-central>. Many employers also use E-Verify to electronically check your employment eligibility. You can learn your E-Verify rights and responsibilities by visiting <http://www.uscis.gov/e-verify>.

USCIS will mail to the last address you provided to USCIS a secure Form I-766, Employment Authorization Document (EAD), which will be valid for two years. USCIS will also mail EADs for each of your derivative family members listed above who previously submitted their biometrics (e.g., fingerprints, photo and signature) at a USCIS Application Support Center (ASC). If you or your derivative family member(s) do not receive the EAD(s) in the mail within 14 business days of the issuance of your asylum approval letter, please contact the Asylum Office listed above that issued your grant of asylum.

Contact information for asylum-based EAD questions is available on [www.uscis.gov/asylum](http://www.uscis.gov/asylum) (see “Asylum

Employment Authorization and Clock Contacts”). If your initial EAD is lost or stolen, you may apply for a replacement card by submitting Form I-765, Application for Employment Authorization, to the address listed on the online “FORMS” page on the USCIS website at [www.uscis.gov](http://www.uscis.gov).

## 2. Derivative Asylum Status

You may request derivative asylum status for your spouse and/or any unmarried child(ren) under 21 years of age who are not included in this decision and with whom you have a qualifying relationship, whether or not that spouse or child is in the United States. To request derivative asylum status, you must submit Form I-730, Refugee/Asylee Relative Petition, to the address listed on the online “FORMS” page on the USCIS website at [www.uscis.gov](http://www.uscis.gov) within two years of the date you were granted asylum status. USCIS may extend the two-year filing period in certain cases for humanitarian reasons.

## 3. Social Security Cards

You and any of your derivative family members listed above may apply immediately for an unrestricted Social Security card at any Social Security office. For more information or to obtain a Form SS-5, Application for a Social Security Card, visit the Social Security Administration’s website at [www.ssa.gov](http://www.ssa.gov), call their toll-free number 1-800-772-1213, or visit a local Social Security office. When you go to a Social Security office to apply for a Social Security card, you must take your Form I-94, Arrival-Departure Record, to demonstrate that you have been granted asylum. If available, you should also take photo-identity documentation, such as an EAD or passport. For directions to the Social Security office nearest to you, call the Social Security Administration toll-free number or visit the website listed above.

## 4. Assistance and Services through the Office of Refugee Resettlement

You and any of your derivative family members listed above may be eligible to receive assistance and services through the Office of Refugee Resettlement (ORR). ORR funds and administers various programs run by state and private, non-profit agencies throughout the United States. These programs include cash and medical assistance, employment preparation and job placement, and English language training. Many of these programs have time-limited eligibility periods that begin from the date you were granted asylum. Therefore, to take advantage of these programs, you must contact ORR as soon as possible after receipt of this letter. For more information about these programs and where to go for assistance and services in your state, visit the ORR website at [www.acf.hhs.gov/programs/orr](http://www.acf.hhs.gov/programs/orr).

## 5. Employment Assistance

You and any of your derivative family members listed above are eligible to receive certain employment services – including job search assistance, career counseling, and occupational skills training – through One-Stop Career Centers. To find the center nearest you, call 1-877-US2-JOBS or visit America’s Service Locator at [www.servicelocator.org](http://www.servicelocator.org).

## 6. Adjustment of Status to Lawful Permanent Resident Status

After you and any of your derivative family members listed above have been physically present in the United States for one year from the date you were granted asylum, you may apply for lawful permanent resident status by submitting a separate Form I-485, Application to Register Permanent Residence or Adjust Status, for yourself and each qualifying family member to the address listed on the online “FORMS” page on the USCIS website at [www.uscis.gov](http://www.uscis.gov).

## Responsibilities

### 1. Travel Outside of the United States

If you, or your family member(s) with derivative asylum status, plan to travel outside of the United States, you must each request permission to return to the United States before you leave this country by obtaining a refugee travel document. A refugee travel document is valid for one year and is issued to an asylee to allow his or her return to the United States after temporary travel abroad. If you, or your family member(s) with derivative asylum status, do not request a refugee travel document in advance of your departure from the United States, you may be unable to re-enter the United States or you may be placed in removal proceedings before an immigration judge. A refugee travel document does not guarantee that you will be admitted into the United States. Rather, you must still undergo inspection by an immigration inspector from United States Customs and Border Protection (CBP). You and your derivative family member(s) listed above may apply for a refugee travel document by submitting Form I-131, Application for Travel Document, for each individual to the address listed on the online "FORMS" page on the USCIS website at [www.uscis.gov](http://www.uscis.gov).

**WARNING:** If you return to the country of claimed persecution, you may be questioned as to why you were able to return to the country of claimed persecution, and your asylum status may be terminated pursuant to section 208(c)(2) of the INA. Returning to one's country of claimed persecution may demonstrate a change of circumstances in the country of claimed persecution, show fraud in the initial asylum application, or demonstrate you have voluntarily availed yourself of the protection of the country of claimed persecution.

### 2. Changes of Address

You must notify the Department of Homeland Security (DHS) of any change of address within ten days of such change by submitting Form AR-11, *Alien's Change of Address Card*, to the address listed on the online "FORMS" page on the USCIS website at [www.uscis.gov](http://www.uscis.gov). You may obtain Form AR-11 at a U.S. Post Office, a USCIS office, or online at [www.uscis.gov](http://www.uscis.gov). You may also submit a change of address electronically at [www.uscis.gov](http://www.uscis.gov).

### 3. Selective Service Registration

All male asylees between the ages of 18 and 26 must register for the Selective Service. Failure to do so may affect your ability to obtain certain benefits in the United States or obtain U.S. citizenship in the future. For more information about the Selective Service and how to register, visit the Selective Service website at [www.sss.gov](http://www.sss.gov) or obtain a Selective Service "mail-back" registration form at the a U.S. Post Office.

Note: Please write your full name, date of birth, and A-number on any correspondence you have with DHS.

Enclosures:     \_\_\_ Form I-94, Arrival-Departure Record(s)  
                  \_\_\_ Translated Summary of This Approval Letter

## 57. STANDARD FINAL DENIAL – REBUTTAL

### Final Denial

This letter refers to your Form I-589, Application for Asylum and for Withholding of Removal, filed with U.S. Citizenship and Immigration Services (USCIS).

You were previously issued a Notice of Intent to Deny (NOID) your asylum claim. You were afforded sixteen (16) days in which to offer evidence or argument in rebuttal to the discussion in the NOID. The information you submitted, however, failed to overcome the grounds for denial as stated in the NOID for the following reasons:

Your asylum application is therefore denied as of «FinalDecisionDate» for these reason listed above and the reasons contained in the NOID. There is no appeal from this decision. This denial includes the derivative family member(s) included in your asylum application, who are listed above. Because you are maintaining valid immigrant, nonimmigrant, parole or temporary protected (TPS) status, your asylum application will not be referred to an immigration judge for adjudication in removal proceedings before the U.S. Department of Justice, Executive Office of Immigration review.

You must notify the Department of Homeland Security (DHS) through USCIS of any change of address within ten days of such change by submitting Form AR-11, *Alien's Change of Address Card*, to the address listed on that form. You may obtain Form AR-11 at a U.S. Post Office, a USCIS office, or online at [www.uscis.gov](http://www.uscis.gov). You may also submit a change of address electronically at [www.uscis.gov](http://www.uscis.gov).

#### Employment Authorization:

Because your asylum application has been denied, you are not eligible to apply for or renew employment authorization based on a pending asylum application. See Title 8, Code of Federal Regulations section 208.7(a). If you have already applied for and received an Employment Authorization Document (EAD), your EAD will indicate that you were granted or renewed employment authorization based on a pending asylum application by listing "C08" in the "CATEGORY" field. Please be advised that any employment authorization issued to you by USCIS as a result of having a pending asylum application will terminate at the expiration of the EAD listed on the card or 60 days from the date of this notice, whichever date is later. You may be otherwise eligible for employment authorization based on your valid immigrant, nonimmigrant, parole, or temporary protected (TPS) status.

## 56. STANDARD FINAL DENIAL – NO REBUTTAL

### Final Denial

This letter refers to your Form I-589, Application for Asylum and for Withholding of Removal, filed with U.S. Citizenship and Immigration Services (USCIS).

You were previously issued a Notice of Intent to Deny (NOID) your asylum claim. You were afforded sixteen (16) days in which to offer evidence or argument in rebuttal to the discussion in the NOID. You failed to submit information to rebut the proposed grounds for denial.

Your asylum application is therefore denied as of «FinalDecisionDate» for the reasons contained in the NOID. There is no appeal from this decision. This denial includes the derivative family member(s) included in your asylum application, who are listed above. Because you are maintaining valid immigrant, nonimmigrant, parole or temporary protected (TPS) status, your asylum application will not be referred to an immigration judge for adjudication in removal proceedings before the U.S. Department of Justice, Executive Office for Immigration Review.

You must notify the Department of Homeland Security (DHS) through USCIS of any change of address within ten days of such change by submitting Form AR-11, *Alien's Change of Address Card*, to the address listed on that form. You may obtain Form AR-11 at a U.S. Post Office, a USCIS office, or online at [www.uscis.gov](http://www.uscis.gov). You may also submit a change of address electronically at [www.uscis.gov](http://www.uscis.gov).

#### Employment Authorization:

Because your asylum application has been denied, you are not eligible to apply for or renew employment authorization based on a pending asylum application. See Title 8, Code of Federal Regulations section 208.7(a). If you have already applied for and received an Employment Authorization Document (EAD), your EAD will indicate that you were granted or renewed employment authorization based on a pending asylum application by listing "C08" in the "CATEGORY" field. Please be advised that any EAD issued to you by USCIS based on a pending asylum application will terminate at the expiration of the EAD listed on the card or 60 days from the date of this notice, whichever date is later. You may be otherwise eligible for employment authorization based on your valid immigrant, nonimmigrant, parole or temporary protected (TPS) status.

## 47. STANDARD RECOMMENDED APPROVAL LETTER

### Recommended Approval

This letter refers to your Form I-589, Application for Asylum and for Withholding of Removal, filed with U.S. Citizenship and Immigration Services (USCIS). Your application has been recommended for approval.

However, final approval of your asylum application cannot be given until USCIS receives the results from the mandatory, confidential investigation of your identity and background. If the results of these required security checks reveal derogatory information that affects your eligibility for asylum, USCIS may deny your application for asylum or refer it to an immigration judge for further consideration. If the results of these required security checks do not reveal derogatory information that affects your eligibility for asylum, the recommended approval of your application for asylum will be changed to a grant of asylum.

The recommended approval of your asylum application is valid for the period of time necessary to obtain the results of the required security checks. This recommended approval includes your derivative family member(s) listed above who are present in the United States, were included in your asylum application, and for whom you have established a qualifying relationship by a preponderance of evidence.

This recommended approval does not entitle your spouse or children living outside the United States, if any, to receive derivative asylum status or to be admitted to the United States. If your recommended approval of asylum is changed to a grant of asylum following receipt of the results of the required security checks, you may then apply for derivative asylum for your spouse or unmarried child(ren) under 21 years of age by filing a Form I-730, Refugee/Asylee Relative Petition.

### Travel Outside of the United States:

If you and/or your derivative family member(s) listed above plan to travel outside of the United States and intend to return, before you leave the United States, you must each obtain advanced parole for permission to return to this country. If you leave the United States without first obtaining advanced parole, it may be presumed that you abandoned your application for asylum. Advance parole does not guarantee that you will be paroled into the United States. Rather, you must still undergo inspection by an immigration inspector from United States Customs and Border Protection (CBP).

You and/or each of your derivative family members listed above may apply for advance parole by submitting a Form I-131, Application for Travel Document, to the address listed on the online "FORMS" page on the USCIS website at [www.uscis.gov](http://www.uscis.gov).

**WARNING:** If you return to the country of claimed persecution, your eligibility for asylum may be affected and you may be required to explain the reasons for your return. If you fail to show compelling reasons for your return, your recommended approval of asylum may be revoked.

### Change of Address:

You must notify the Department of Homeland Security (DHS) of any change of address within ten days of any such change, by submitting Form AR-11, *Alien's Change of Address Card*, to the address indicated on that form. You may obtain Form AR-11 at the post office, a USCIS office, or online at [www.uscis.gov](http://www.uscis.gov). You may also submit a change of address electronically at [www.uscis.gov](http://www.uscis.gov). Please also submit a copy of Form AR-11 or other written notification of any change of address to the Asylum Office having jurisdiction over your pending application for asylum.

Employment Authorization:

Because your asylum application has been recommended for approval, you are eligible to apply for and receive employment authorization immediately, without the passage of the required 180-day waiting period for asylum applicants. See Title 8, Code of Federal Regulations section 208.7(a) and section 274a.12(c)(8)(ii). You and each of your derivative family members listed above must apply for and obtain an employment authorization document (EAD) in order to work in the United States. If authorized, you may accept employment subject to any restrictions in the regulations or on the card. To obtain an EAD, you must each submit a Form I-765, Application for Employment Authorization, to the address listed on the online "FORMS" page on the USCIS website at [www.uscis.gov](http://www.uscis.gov). Your initial EAD will be valid for a one year period. You and your derivative family member(s) listed above are not required to pay a fee with your initial application(s) for employment authorization. However, when you submit an application to renew your employment authorization, you must each pay a fee or request a fee waiver under 8 C.F.R. § 103.7(c).

You may obtain any of the USCIS forms mentioned in this letter on the USCIS website at [www.uscis.gov](http://www.uscis.gov), through the National Customer Service Center at 1-800-375-5283, or at a local USCIS office.

Note: Please write your full name, date of birth, and A-number on any correspondence you have with the DHS.

## 51. STANDARD REFERRAL NOTICE

### Referral Notice

This letter refers to your Form I-589, Application for Asylum and for Withholding of Removal, filed with U.S. Citizenship and Immigration Services (USCIS).

Applicants for asylum must credibly establish that they have suffered past persecution or have a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, and that they merit a grant of asylum in the exercise of discretion.

For the reason(s) indicated below, USCIS has not granted your application for asylum:

1.  You have not established that you are a refugee because:

A. Past Persecution

- You did not describe any instances of suffering harm in the past.
- You have not established that any harm you experienced in the past, considering incidents both individually and cumulatively, amounts to persecution.
- The person or persons who harmed you were not government agents and you failed to establish that the government was unable or unwilling to protect you.
- You have not established that any harm you experienced in the past is on account of one of the protected characteristics in the refugee definition (race, religion, nationality, membership in a particular social group, or political opinion).

AND

B. Future Persecution

- You have not expressed a fear of future persecution.
  - You have not established that there is a reasonable possibility you would suffer persecution in the future.
  - You have not established that any future harm you fear is on account of one of the protected characteristics in the refugee definition (race, religion, nationality, membership in a particular social group, or political opinion).
  - You have not established that the threat of persecution you fear exists throughout your country (or, if stateless, country of last habitual residence) or that it would be unreasonable for you to relocate within that country to avoid future persecution.
  - You have not established that your fear of future persecution is well-founded, because you have not shown that your government is unable or unwilling to protect you from the harm you fear.
2.  Although the evidence indicates that you are a refugee because you were persecuted in the past on account of a protected characteristic in the refugee definition, USCIS has referred your request as a matter of discretion because:
- A preponderance of the evidence establishes that country conditions have changed to such an extent that there is not a reasonable possibility you would suffer persecution if



- you were to return to your country (or, if stateless, country of last habitual residence),
- A preponderance of the evidence establishes that there has been a fundamental change in circumstances such that there is not a reasonable possibility you would suffer persecution if you were to return to your country (or, if stateless, country of last habitual residence),
  - A preponderance of the evidence establishes that the threat of persecution you fear does not exist throughout your country and it would be reasonable for you to relocate within your country (or, if stateless, country of last habitual residence) to avoid future persecution,

AND

you have not shown compelling reasons for being unwilling or unable to return to your country (or, if stateless, country of last habitual residence) arising from the severity of the past persecution you experienced, nor have you established that there is a reasonable possibility you would suffer other serious harm in your country (or, if stateless, country of last habitual residence).

3. (FOR APPLICATIONS FILED PRIOR TO APRIL 1, 1997)

- Evidence indicates that you are barred by statute from a grant of asylum for the following reason(s), and you failed to establish by a preponderance of the evidence that such reason(s) does not apply to you:
  - You were convicted of a particularly serious crime, which occurred in the U.S.
  - You were convicted of an aggravated felony.
  - There are reasonable grounds for regarding you as a danger to the security of the United States.
  - You are described within section 212(a)(3)(B)(i)(I),(II), and (III) of the Act as it existed prior to April 1, 1997 and as amended by the Anti-terrorist and Effective Death Penalty Act of 1996 (AEDPA), unless it is determined that there are not reasonable grounds to believe that you are a danger to the security of the United States.
  - You were firmly resettled in a third country.
  - Evidence indicates that you ordered, incited, assisted, or otherwise participated in the persecution of others on account of race, religion, nationality, membership in a particular social group, or political opinion.

4. (FOR APPLICATIONS FILED ON OR AFTER APRIL 1, 1997.)

- Evidence indicates that you are barred by statute from a grant of asylum for the following reason(s) and you failed to establish by a preponderance of the evidence that such reason(s) does not apply to you:
  - Evidence indicates that you ordered, incited, assisted, or otherwise participated in the persecution of others on account of race, religion, nationality, membership in a particular social group, or political opinion.
  - You were convicted of a particularly serious crime or aggravated felony, which occurred inside or outside the U.S.

- There are serious reasons for believing that you committed a serious nonpolitical crime outside the United States before you came to the United States.
  - There are reasonable grounds for regarding you as a danger to the security of the United States.
  - You have engaged in terrorist activity.
  - You are engaged in or are likely to engage in terrorist activity.
  - You are a representative of an organization that has been designated by the Secretary of State as a foreign terrorist organization.
  - You have incited terrorist activity.
  - You were firmly resettled in a third country.
5.  You are a citizen or national of another country in addition to the country of persecution, and you have not established that you were persecuted or have a well-founded fear of persecution on account of a protected ground in that other country.
6.  After careful consideration of all available information and explanations at your asylum interview, your claim was deemed not credible on the basis of:
- Material inconsistency(ies) between your testimony and application and/or other evidence.
  - Material inconsistency(ies) within your testimony.
  - Material inconsistency(ies) with country conditions information.
  - Lack of detail(s) on material points.

Brief Explanation: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

7.  You failed to follow requirements for fingerprint processing.
8.  Other Reason for Referral: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Based on the above reason(s), your asylum application has been referred to an immigration judge for adjudication in removal proceedings before the U.S. Department of Justice, Executive Office for Immigration Review. This is not a denial of your asylum application. You may request that the immigration judge consider your asylum application, and you may amend your application when you appear before the immigration judge at the date and time listed on the attached charging document (Form I-862, Notice to Appear). The immigration judge will evaluate your asylum claim independently and is not required to rely on or follow the decision made by USCIS. This referral includes the derivative family member(s) included in your asylum application, who are listed above.

**WARNING:** Currently jurisdiction over your asylum application is with the Immigration Court. You must attend all scheduled hearings with the Immigration Court or you may be ordered removed from the United States.

Change of Address:

Because you have been placed in removal proceedings, you must notify the Immigration Court within five days of any change of address by completing Form EOIR-33, *Alien's Change of Address Form/Immigration Court*, and submitting the Form EOIR-33 to the immigration court where your proceedings have been referred. Form EOIR 33 is available on the Department of Justice website at [www.justice.gov/eoir/eoirforms/eoir33/ICadr33.htm](http://www.justice.gov/eoir/eoirforms/eoir33/ICadr33.htm).

Employment Authorization:

If you applied for asylum on or after January 4, 1995, you are subject to a 150-day waiting period before you can apply for employment authorization, and an additional 30 days before employment authorization can be approved, for a total of 180 days. The number of days a completed asylum application is considered pending does not include any delays requested or caused by you while your application is pending with the Asylum Office or with an immigration judge. See Title 8, Code of Federal Regulations section 208.7. This time period during which your asylum application must be pending with USCIS and/or the Executive Office for Immigration Review before you may be granted an employment authorization document (EAD) is called the "180-day asylum EAD clock."

Delays requested or caused by you while your application was pending with the Asylum Office may include:

- a request to transfer your case to a new Asylum Office or interview location, including when the transfer is based on a new address;
- a request to reschedule your interview for a later date;
- failure to appear at your interview or fingerprint appointment;
- failure to provide a competent interpreter at your interview;
- a request to provide additional evidence after your interview; and
- failure to receive and acknowledge your asylum decision in person (if required).

Less than 150 days have elapsed since your asylum application was first filed in accordance with 8 C.F.R. §§ 208.3 and 208.4. Therefore, you are currently not eligible to apply for employment authorization pursuant to 8 C.F.R. § 274.a12(c)(8) and provided in 8 C.F.R. § 208.7. The earliest possible date you are eligible to apply for employment authorization is «Projected Date». If an immigration judge does not deny your asylum application within the 150-day waiting period, then you will be eligible to apply for employment authorization. If you fail to appear for the scheduled hearing before the immigration judge and this failure is not excused, employment authorization will not be granted. As of the date of this notice, your asylum application was pending «CLK DAYS ELAPSED» days.



U.S. Citizenship  
and Immigration  
Services

**RAIO DIRECTORATE – OFFICER TRAINING**

RAIO Combined Training Program

**CHILDREN’S CLAIMS**

TRAINING MODULE

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**RAIO Directorate – Officer Training / RAIO Combined Training Program****CHILDREN'S CLAIMS****Training Module****MODULE DESCRIPTION:**

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

**TERMINAL PERFORMANCE OBJECTIVE(S)**

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

**ENABLING PERFORMANCE OBJECTIVES**

1. Examine the development of international law that protects the rights of children and children seeking refugee or asylum status.
2. Describe procedural considerations when working with child applicants.
3. Apply child-sensitive questioning and listening techniques that facilitate eliciting information from children.
4. Describe how persecution must be analyzed when looking at a claim of a child refugee or asylum-seeker.
5. Describe how nexus must be analyzed when looking at a claim of a child refugee or asylum-seeker.

**INSTRUCTIONAL METHODS**

Interactive presentation

Discussion  
Practical exercises

## METHOD(S) OF EVALUATION

Written exam

## REQUIRED READING

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

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

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

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

### **Required Reading – International and Refugee Adjudications**

### **Required Reading – Asylum Adjudications**

## ADDITIONAL RESOURCES

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

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

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

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

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

- Geidd, Jay, "Inside the Teenage Brain," Frontline, PBS, January 2002.
- Memorandum from Joseph E. Langlois, INS Asylum Division, to Asylum Office Directors, et al., H.R. 1209 – Child Status Protection Act, (HQIAO 120/12.9) (7 August 2002).
- Lustig, Stuart L., MD, MPH, et al., Review of Child and Adolescent Refugee Mental Health: White Paper from the National Child Traumatic Stress Network Refugee Trauma Task Force, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (HHS), Boston, MA, 2003.
- Lutheran Immigration and Refugee Service (LIRS), Working with Refugee and Immigrant Children: Issues of Culture, Law & Development, June 1998.
- National Organization for Victim Assistance, "Children's Reaction to Trauma and Some Coping Strategies for Children," Issues of War Trauma and Working with Refugees: A Compilation of Resources, edited by Susan D. Somach, 56–62, Washington, DC: Center for Applied Linguistics Refugee Service Center, 1995.
- Office of Refugee Resettlement, Office of Health and Human Services, Unaccompanied Minors Program.
- Perry, Nancy W. and Larry L. Teply, "Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys," Creighton Law Review, 18, 1985, pp. 1369–1426.
- UN General Assembly, Convention on the Rights of the Child, G.A. Resolution 44/25, UN GAOR 20 Nov.1989.
- UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997).
- UNHCR, Refugee Children: Guidelines on Protection and Care (Geneva: 1994).
- UNHCR, Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries 2001-2003 (Geneva: July 2004).
- Walker, Anne Graffam, "Suggestions for Questioning Children," Working with Refugee and Immigrant Children: Issues of Culture, Law & Development, Lutheran Immigration and Refugee Service, 63–64. Baltimore, MD: LIRS, 1998.
- Memorandum from William R. Yates, Associate Director for Operations, USCIS, to Regional Directors, et al., The Child Status Protection Act – Children of Asylees and Refugees, (HQOPRD 70/6.1) (17 August 2004).





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**SCHEDULE OF REVISIONS**

<b>Date</b>	<b>Section (Number and Name)</b>	<b>Brief Description of Changes</b>	<b>Made By</b>
8/21/2014	Entire Lesson Plan	Lesson Plan published	RAIO Training
11/30/2015	Section 8.4, Nexus to a Protected Ground	Modified recommended PSG formulations for FGM and forced marriage	RAIO Training
5/11/2017	Division Supplements	Minor updates to division supplements	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 purpose of this module is to familiarize the student with guidelines for adjudicating children's refugee and asylum claims. The module will cover U.S. law and international guidance that bears on this issue, the procedural adjustments you must make when interviewing children, and the legal issues that must be considered when analyzing cases and making determinations.

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

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

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

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

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

## 2 INTERNATIONAL GUIDANCE

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

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

### 2.1 The Universal Declaration of Human Rights

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

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

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

<sup>3</sup> See RAIO modules on International Human Rights Law and Overview of UNHCR and Concepts of International Protection.

<sup>4</sup> Universal Declaration of Human Rights. G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

## 2.2 Convention on the Rights of the Child

Many of the components of international policy regarding children derive from the U.N. Convention on the Rights of the Child (CRC).<sup>5</sup> Adopted by the United Nations in November 1989, the CRC codifies standards for the rights of all children.

Article 3(1) of the CRC provides that “the ‘best interests of the child’ should be the primary consideration” in all actions involving children.<sup>6</sup> The “best interests of the child” principle holds that the state is ultimately responsible for ensuring that the basic needs of children are met and that the fundamental rights of children are protected. The internationally recognized “best interests of the child” principle is a useful measure for determining appropriate interview procedures for children, but it does not play a role in determining substantive eligibility for immigration benefits under the U.S. law. Additionally, under Article 12(1), children’s viewpoints should be considered in an age and maturity-appropriate manner.<sup>7</sup>

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

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

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

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

<sup>6</sup> CRC, Article 3.

<sup>7</sup> CRC, Article 12.

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

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

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



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

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

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

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

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

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

#### **2.4.1 ExCom Conclusions**

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

#### **UNHCR ExCom Conclusion No. 47**

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

<sup>11</sup> Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). See Asylum Adjudications Supplement, Bars to Applying for Asylum, below, for more detail on the CSAA.

<sup>12</sup> For additional information on the Executive Committee, see RAIO module, UNHCR Overview.

<sup>13</sup> UN High Commissioner for Refugees, Conclusion on Refugee Children, 12 Oct. 1987. No. 47 (XXXVIII) - 1987.

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

Conclusion No. 47 also emphasized that all action taken on behalf of refugee children must be guided by the principle of the “best interests of the child.”<sup>14</sup>

#### **UNHCR ExCom Conclusion No. 59**

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

#### **UNHCR ExCom Conclusion No. 107**

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

### **2.4.2 UNHCR Policies and Guidelines**

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

#### **Policy on Refugee Children**

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

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

<sup>14</sup> See section on Convention on the Rights of the Child, above.

<sup>15</sup> UNHCR, Conclusion on Refugee Children, 13 Oct. 1989. No. 59 (XL), 1989.

<sup>16</sup> UNHCR, Conclusion on Children at Risk, 5 Oct. 2007. No. 107 (LVIII), 2007.

<sup>17</sup> UNHCR. Policy on Refugee Children, EC/SCP/82 (August 6, 1993).

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

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

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

- to increase awareness of the special needs of unaccompanied children and the rights reflected in the CRC;
- to highlight the importance of a comprehensive approach to child refugee issues; and
- to stimulate internal discussion in each country on how to develop principles and practices that will ensure that the needs of unaccompanied children are met.

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

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

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

<sup>18</sup> UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva: 1994).

<sup>19</sup> UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997).

<sup>20</sup> UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008.

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

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

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

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

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

## **3 U.S. LAW**

### **3.1 Definition of "Child"**

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

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

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

<sup>22</sup> UNHCR, [A Framework for the Protection of Children](#), 26 June 2012.

<sup>23</sup> CRC, Article 1.

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

out specific definitions and categories of children.

Following are some of the different contexts and definitions:

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

<sup>25</sup> INA § 101(b)(1); INA § 101(c)(1).

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

<sup>27</sup> Id.

<sup>28</sup> INA § 212(a)(2)(A)(ii).

<sup>29</sup> See 8 C.F.R. § 236.3.

<sup>30</sup> Homeland Security Act of 2002, Section 462, 6 U.S.C. § 279(g)(2).

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

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

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

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

### 3.2 Derivative versus Independent Status

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

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

You should follow the guidance covered in this Training Module when interviewing child beneficiaries. While the guidance covered in this Training Module is particularly

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

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

<sup>33</sup> 8 C.F.R. § 103.2

<sup>34</sup> 8 C.F.R. §§ 207.7 and 208.21(a).

<sup>35</sup> For additional information, see RAIO Training modules, Persecutor Bar, Grounds of Inadmissibility, and National Security.

relevant for children who raise independent claims, the procedural sections of this Training Module are useful for all cases involving children and young adults.

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

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

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

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

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

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

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

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

<sup>36</sup> Matter of A-K-, 24 I&N Dec. 275 (BIA 2007).

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

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

continue to be classified as children for adjustment purposes (which avoids the need to file an independent petition).<sup>39</sup>

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

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

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

## **4 CHILD DEVELOPMENT**

### **4.1 General Considerations**

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

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

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

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

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



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

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

#### 4.2 Developmental Stages

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

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

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

At about age twelve, children begin to develop increasing ability to navigate on their own emotionally, physically, and mentally.<sup>43</sup>

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

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

<sup>42</sup> LIRS, *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development* (June 1998) hereinafter LIRS.

<sup>43</sup> Child Development Institute, "Stages of Social-Emotional Development In Children and Teenagers."

<sup>44</sup> Id.

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

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

### 4.3 Factors that Influence Development

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

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

### 4.4 Factors that Accelerate or Stunt Development

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

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

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<sup>46</sup> LIRS, pp. 6-7.

<sup>47</sup> LIRS, p. 7.

#### 4.5 Effects of Stress and Violence

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

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

#### 4.6 Culture and Development

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

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

##### *Example*

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

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

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

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

*Example*

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

#### 4.7 Preconceptions

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

- **All governments are corrupt**

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

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

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

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

It is not uncommon for any refugee or asylum applicant to experience “survivor’s guilt” for having fled to a country of asylum, especially when family members were left behind.<sup>52</sup>

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

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<sup>50</sup> LIRS, p. 35.

<sup>51</sup> LIRS, p. 36.

<sup>52</sup> LIRS, p. 36.

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

You must earn the trust of the child applicant in order to dispel these preconceptions and put the applicant at ease.<sup>53</sup>

## **5 PROCEDURAL CONSIDERATIONS**

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

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

### **5.1 Officers in the RAIO Directorate**

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

### **5.2 Interview Scheduling**

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

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

For asylum procedural considerations, see [Asylum Adjudications Supplement](#).

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<sup>53</sup> See section 6, Interview Considerations.

## 6 INTERVIEW CONSIDERATIONS

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

### 6.1 Presence of a Trusted Adult at the Interview

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

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

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

As appropriate and with the consent of the child, you are encouraged to interview the trusted adult, if any, in order to confirm his or her relationship to the child, any guardianship arrangement, and the adult's legal authority to speak on behalf of the

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

child.<sup>55</sup> The adult may also have information about parental knowledge of and consent to the application. The trusted adult may also be able to provide information on the child's claim where the child's age at the time of harm or interview prevents him or her from fully detailing events. Where inconsistencies arise between the applicant's and the adult's testimony, an opportunity must be given to the child to reconcile inconsistencies apparent at the interview. Note that it is not a requirement that a witness or trusted adult be present at the interview.

## 6.2 Guardianship, Parental Knowledge, and Consent

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

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

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

- With whom is the child living?
- Did anyone accompany the child to the interview?

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

<sup>56</sup> Id.



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

### 6.3 Conducting a Non-Adversarial Interview

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

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

### 6.4 Working with an Interpreter

Interpreters play a critical role in ensuring clear communication between you and the child, and the actions of an interpreter can affect the interview as much as those of an officer.<sup>60</sup> As in all interviews, you should confirm that the child and the interpreter fully understand each other. You should also confirm that the child understands the role of the interpreter. This is particularly important in cases where the interpreter does not have the child's best interests at heart, such as when there is a possibility that the private interpreter is part of a trafficking ring. In cases where the child appears to be uncomfortable with the interpreter, or where the interpreter does not appear to be

<sup>57</sup> 8 C.F.R. § 208.9(b).

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

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

<sup>60</sup> For additional information, see RAIO module, Interviewing - Working with an Interpreter.



interpreting correctly, you should stop the interview and reschedule with a different interpreter.

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

## 6.5 Building Rapport

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

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

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

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

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<sup>61</sup> See Gender Guidelines, p. 5; and RAIO Training module, Interviewing - Working with an Interpreter.

<sup>62</sup> LIRS, p. 45.

<sup>63</sup> UNHCR Handbook, para. 198.

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

<sup>65</sup> For an example of an opening statement to be used in interviews of children, see Asylum Adjudications Supplement – Sample Opening Statement for Children.

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

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

## 6.6 “Reading” the Applicant

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

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

## 6.7 Explaining How to Respond to Questions

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

If necessary, you may explain to the child how to use the “I don’t know” response.<sup>70</sup>

### *Example*

<sup>66</sup> LIRS, pp. 45-46.

<sup>67</sup> See 8 C.F.R. § 208.6 on disclosure to third parties.

<sup>68</sup> LIRS, pp. 46-47.

<sup>69</sup> Id. at 27; Perry and Teply, p. 1380.

<sup>70</sup> Id. at 50.

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

Child: I don't know.

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

## 6.8 Reassuring the Applicant

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

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

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

## 6.9 Taking Breaks

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

## 6.10 Concluding the Interview

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

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

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

### 6.11 Child-Sensitive Questioning and Listening Techniques

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

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

#### *Example*

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

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

#### *Example*

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

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<sup>73</sup> UNHCR, Interviewing Applicants for Refugee Status (1995), p. 48.

<sup>74</sup> UNHCR Handbook, para. 214.

<sup>75</sup> Perry and Teply, p. 1383.

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

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

<b>GENERAL INTERVIEWING AND LISTENING RULES</b>	
You should endeavor to:	
1	<ul style="list-style-type: none"> <li>• Use short, clear, age-appropriate questions.<sup>77</sup></li> <li>• <b>Example:</b> “What happened?” as opposed to “What event followed the arrest?”</li> </ul>
2	<ul style="list-style-type: none"> <li>• Avoid using long or compound questions.<sup>78</sup></li> <li>• <b>Example:</b> “What time of year did it happen?” and “What time of day did it happen?” as opposed to “What time of year and what time of day did it happen?”</li> </ul>
3	<ul style="list-style-type: none"> <li>• Use one- or two-syllable words in questions; avoid using three- or four-syllable words.<sup>79</sup></li> <li>• <b>Example:</b> “Who was the person?” as opposed to “Identify the individual.”</li> </ul>
4	<ul style="list-style-type: none"> <li>• Avoid complex verb constructions.<sup>80</sup></li> <li>• <b>Example:</b> “Might it have been the case....?”</li> </ul>

<sup>77</sup> Symposium, p. 40.

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

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

<sup>80</sup> Symposium, p. 40.

5	<ul style="list-style-type: none"> <li>Ask the child to define or explain a term or phrase in the question posed <b>in order to check the child's understanding.</b><sup>81</sup></li> </ul>
6	<ul style="list-style-type: none"> <li>Ask the child to define or explain the terms or phrases that he or she uses in answers, and then use those terms.</li> <li><b>Example:</b> If a child says that his father "disappeared," ask him what he means by "disappeared," and then use that term in questions involving that event.</li> </ul>
7	<ul style="list-style-type: none"> <li>Use easy words, not complex ones.<sup>82</sup></li> <li><b>Example:</b> "Show," "tell me about...," or "said" instead of "depict," "describe," or "indicate."</li> </ul>
8	<ul style="list-style-type: none"> <li>Tolerate pauses, even if long.<sup>83</sup></li> </ul>
9	<ul style="list-style-type: none"> <li>Ask the child to describe the concrete and observable, not the hypothetical or abstract.<sup>84</sup></li> </ul>
10	<ul style="list-style-type: none"> <li>Use visualizable, instead of categorical, terms.<sup>85</sup></li> <li><b>Example:</b> Use "gun," not "weapons."</li> </ul>
11	<ul style="list-style-type: none"> <li><b>Avoid using legal terms, such as "persecution."</b><sup>86</sup></li> <li><b>Example:</b> Ask, "Were you hurt?" instead of "Were you persecuted?"</li> <li><b>Example:</b> Explain, "Asylum is a way to stay in the United States if</li> </ul>

<sup>81</sup> Walker, reprinted in LIRS, p. 63; Symposium, p. 40.

<sup>82</sup> Walker, reprinted in LIRS, p. 63.

<sup>83</sup> Perry and Teply, p. 1380.

<sup>84</sup> Symposium, p. 40.

<sup>85</sup> Id.

<sup>86</sup> Id.

	there are people who hurt or want to hurt [you] back home and [you are] afraid of returning.” <sup>87</sup>
12	<ul style="list-style-type: none"> <li>• Avoid using idioms.</li> <li>• Idioms are phrases that mean something other than what the words actually say. Such phrases could be difficult for both the interpreter and the child applicant.</li> <li>• <b>Example:</b> Ask, “Do you understand?” not, “Is this over your head?”</li> </ul>
13	<ul style="list-style-type: none"> <li>• Use the active voice instead of the passive when asking a question.<sup>88</sup></li> <li>• <b>Example:</b> Ask, “Did the man hit your father?” instead of “Was your father hit by the man?”</li> </ul>
14	<ul style="list-style-type: none"> <li>• Avoid front-loading questions.<sup>89</sup></li> <li>• Front-loading a question places a number of qualifying phrases before asking the crucial part of the question.</li> <li>• Example: “When you were in the house, on Sunday the third, and the man with the gun entered, did the man say...?”</li> </ul>
15	<ul style="list-style-type: none"> <li>• Keep each question simple and separate.<sup>90</sup></li> <li>• <b>Example:</b> The question, “Was your mother killed when you were 12?” should be avoided. The question asks the child to confirm that the mother was killed and to confirm his or her age at the time of the event.</li> </ul>

<sup>87</sup> Christopher Nugent and Steven Schulman, “Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children,” 78 No. 39 INTERPRETER RELEASES 1569, 1575 (2001).

<sup>88</sup> Symposium, p. 40.

<sup>89</sup> Id.

<sup>90</sup> LIRS, p. 47.

16	<ul style="list-style-type: none"> <li>• Avoid leading questions.</li> <li>• Research reveals that children may be more highly suggestible than adults and are more likely to answer according to what they think the interviewer wants to hear.<sup>91</sup> Leading questions may influence them to respond inaccurately.</li> </ul>
17	<ul style="list-style-type: none"> <li>• Use open-ended questions to encourage narrative responses.</li> <li>• Children's spontaneous answers, although typically less detailed than those elicited by specific questioning, can be helpful in understanding the child's background.<sup>92</sup> Try not to interrupt the child in the middle of a narrative response.</li> </ul>
18	<ul style="list-style-type: none"> <li>• Explain any repetition of questions.</li> <li>• Make clear to the child that he or she should not change or embellish earlier answers.<sup>93</sup> Explain that you repeat some questions to make sure you understand the story correctly. "Repeated questions are often interpreted (by adults as well as children) to mean that the first answer was regarded as a lie or wasn't the answer that was desired."<sup>94</sup></li> </ul>
19	<ul style="list-style-type: none"> <li>• Never coerce a child into answering a question during the interview.<sup>95</sup></li> <li>• Coercion has no place in any USCIS interview. For example, you may never tell children that they cannot leave the interview until they answer your questions.</li> </ul>
20	<ul style="list-style-type: none"> <li>• Accept that many children will not be immediately forthcoming about events that have caused great pain.</li> </ul>

<sup>91</sup> Id. at 26; Perry and Teply, pp. 1393-1396.

<sup>92</sup> LIRS, p. 47.

<sup>93</sup> Walker, reprinted in LIRS, p. 64; Symposium, p. 23.

<sup>94</sup> Walker, reprinted in LIRS, p. 64.

<sup>95</sup> Symposium, p. 41.



## 7 CREDIBILITY CONSIDERATIONS

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

### 7.1 Detail

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

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

#### *Example*

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

#### **Measurements of Time and Distance**

Children may try to answer questions regarding measurements of distance or time without the experience to do so with any degree of accuracy.

You must make an effort to ascertain the child's quantitative reasoning ability.

#### *Example*

You should determine the child's ability to count before asking how many times something happened.<sup>98</sup>

<sup>96</sup> For additional information, see RAIO modules, Cross-Cultural Communication and Credibility.

<sup>97</sup> *Canadian Guidelines*, p. 8.

<sup>98</sup> *Symposium*, p. 41.

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

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

*Example*

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

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

*Examples*

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

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

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

**“I don’t know” Responses**

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

*Example*

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<sup>99</sup> For additional information, see RAIO module, Cross-Cultural Communication.

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

## 7.2 Demeanor

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

### *Example*

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

### **Trauma**

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

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

<sup>100</sup> For additional information, see RAIO module, Interviewing Survivors of Torture.

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

### **Age and Developmental Considerations**

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

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

### **Other Considerations**

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

You should keep the following in mind:

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

### ***Example***

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

- the role of others in preparing children for interview

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

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<sup>101</sup> For additional information, see RAO module, Credibility; see also [Bhabha and Young](#).

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

### 7.3 Evidence

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

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

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

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

<sup>102</sup> LIRS, p. 51.

<sup>103</sup> UNHCR Handbook, para. 219.

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

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

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

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

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

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

### *Example*

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

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

## **8 LEGAL ANALYSIS**

### **8.1 Introduction**

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

<sup>106</sup> For additional information, see RAO module, Country Conditions Research; Matter of S-M-J-, 21 I&N Dec. at 726.

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

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

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

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

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

## 8.2 Persecution

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

### Harm that Rises to the Level of Persecution

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

<sup>108</sup> INA §§ 101(a)(42)(A); 208(a)(2); UNHCR Handbook, para. 213.

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

<sup>110</sup> For additional information, see RAIO modules, Refugee Definition and Past Persecution.

<sup>111</sup> UNHCR Handbook, para. 52; see also Bhabha and Young, pp. 761-62.



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

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

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

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

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

<sup>113</sup> *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1315 (9th Cir. 2012).

<sup>114</sup> *Benjamin v. Holder*, 579 F.3d 970, 972 (9th Cir. 2009).

<sup>115</sup> *Mendoza-Pablo*, 667 F.3d at 1310.



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

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

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

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

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

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

<sup>116</sup> *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006).

<sup>117</sup> *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008).

<sup>118</sup> *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007).

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

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

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

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

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

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

<sup>120</sup> *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (Reinhardt, J., concurring opinion).

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

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

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

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

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

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

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<sup>122</sup> Bhabha and Young, pp. 760-61.

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

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

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

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

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

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

<sup>123</sup> Convention on the Rights of the Child.

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

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

seeking protection.

### 8.3 Well-founded Fear of Future Persecution

#### General Considerations<sup>126</sup>

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

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

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

#### Personal Circumstances

You should examine the circumstances of the parents and other family members, including their situation in the child's country of origin.<sup>132</sup>

<sup>126</sup> For additional information, see RAIO module, Well-Founded Fear.

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

<sup>128</sup> UNHCR Handbook, para. 215.

<sup>129</sup> UNHCR Handbook, para. 216.

<sup>130</sup> *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004).

<sup>131</sup> *Cruz-Diaz v. INS*, 86 F.3d 330, 331 (4th Cir. 1996) (per curiam).

<sup>132</sup> UNHCR Handbook, para. 218.

*Family as similarly situated*

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

*Family's intentions*

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

*Child's arrival*

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

**Internal Relocation**

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

<sup>134</sup> *Bhabha and Young*, 764.

<sup>135</sup> *UNHCR Handbook*, para. 219.

<sup>136</sup> *UNHCR Handbook*, para. 218.

<sup>137</sup> See 8 C.F.R. § 208.13(b)(2); *UNHCR Handbook*, para. 217.

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

#### 8.4 Nexus to a Protected Ground

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

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

##### Burden of Proof

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

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

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

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

<sup>139</sup> See RAIO Training Modules, Nexus and the Protected Grounds and Nexus – Particular Social Group.

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

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

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

### **No requirement for Punitive Intent**

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

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

<sup>141</sup> Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988).

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

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



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

### **Inability to Articulate a Political Opinion**

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

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

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

### **Membership in a Particular Social Group**

<sup>144</sup> *Civil v. INS*, 140 F.3d 52 (1st Cir. 1998).

<sup>145</sup> *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (per curiam).

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

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

[A]n applicant . . . seeking relief based on “membership in a particular social group” must establish that the group is

- (1) composed of members who share a common immutable characteristic,
- (2) defined with particularity, and
- (3) socially distinct within the society in question.<sup>148</sup>

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

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

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

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

- Common bases for children's particular social group claims include family membership, gang violence, female genital mutilation, forced marriage, and abuse within the family.
- Other harms faced by children may include trafficking, gender-based violence, rape, forced prostitution, forced recruitment by rebels or para-military, and child exploitation. The appropriate particular social group depends on the facts of the case and may involve the trait of socially recognized lack of effective protection.

*Example*

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

*Example*

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

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

- Family alone can constitute a particular social group. If a person is targeted because of the family connection, then the particular social group of family is appropriate. This is true even if the original family member on whom the connection is based is not targeted due to a protected ground.<sup>149</sup> The shared familial relationship is the common trait that defines the group. In most societies, the nuclear or immediate family is socially distinct, while in some societies, more extended relationships may also be socially distinct. Possible formulations are “Immediate [or nuclear] family” or “Immediate [or nuclear] family of [X individual].”
- A particular social group for gang recruitment may not succeed where recruitment is conducted in order to fill the ranks of the gang and not on account of a protected ground; youths who resist gang recruitment generally do not constitute a particular social group.<sup>150</sup> Former gang membership also generally does not form the basis of a particular social group,<sup>151</sup> as it is generally agreed that the shared characteristic of terrorist, criminal or persecutory activity or association, past or present, cannot form

<sup>149</sup> See, e.g., Aldana-Ramos v. Holder, --- F.3d ----, No. 13-2022, 2014 WL 2915920 (1st Cir. June 27, 2014).

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

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

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

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

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

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

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

<sup>155</sup> In Abay v. Ashcroft, 368 F.3d 634, 640 (6th Cir. 2004), the Sixth Circuit overturned an Immigration Judge’s finding that the 9-year-old applicant expressed only a “general ambiguous fear,” noting that young children may be incapable of experiencing fear to the same degree as adults.

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

whether an applicant fears FGM to another family member due to the applicant's political opinion.<sup>157</sup>

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

## 8.5 Child-Specific Considerations Concerning Bars and Grounds of Inadmissibility

### Firm Resettlement

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

### Serious Nonpolitical Crime

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

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

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

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

<sup>160</sup> *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011).

<sup>161</sup> *A-G-G-*, 25 I&N Dec. at 501.

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

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

## **9 OTHER IMMIGRATION STATUSES AVAILABLE TO CHILDREN**

For additional information, see [Asylum Adjudications Supplement – Other Immigration Statutes Available to Children](#).

## **10 SUMMARY**

### **10.1 International Guidance**

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

### **10.2 Child Development**

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

### **10.3 Procedural Considerations**

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



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

#### **10.4 Interviewing Considerations**

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

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

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

#### **10.5 Legal Analysis**

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



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

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

**PRACTICAL EXERCISES**

There are no practical exercises for this module.

**OTHER MATERIALS****Sample Opening Statement for Children**

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

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

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

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

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

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

## **SUPPLEMENT A – 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. USCIS Refugee Affairs Division, *Standard Operating Procedure: Children's Cases* (4 January 2011).
2. Memorandum from John W. Cummings, Deputy Director, INS Office of International Affairs, to Overseas District Directors, *Guidelines for Children's Refugee Claims*, (120/6.4) (30 Jan. 1999).

### **ADDITIONAL RESOURCES**

1. UNHCR, *Field Handbook for the Implementation of UNHCR BID Guidelines* (2011).
2. UNHCR, *Guidelines on Determining the Best Interests of the Child* (2008).
3. Policy Memorandum from the Office of the Director, Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes; Updates to Adjudicator's Field Manual (AFM) Chapters 21.4, 21.5, 21.6, 21.10 and 71.1; AFM Update AD12-10 (PM-602-0070) (9 July 2012).
4. Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, concluded at the Hague 29 May 1993, entered into force for the United States April 1, 2008.
5. USCIS' adoption website: [www.uscis.gov/adoption](http://www.uscis.gov/adoption).
6. U.S. Department of State's adoption website: [www.adoption.state.gov](http://www.adoption.state.gov).

### **SUPPLEMENTS**

#### **International and Refugee Adjudications – Married Minors**

The International and Refugee Affairs Division and Department of State have independently issued guidance on how to adjudicate refugee cases involving

married children.<sup>162</sup> If UNHCR refers a case involving married minor, you may find a BID in the file under certain circumstances. If no BID is in the case file and you have concerns about the well-being of the married child, you must consult the team leader and request that a BID be done.

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

The following principles apply when processing married minors<sup>163</sup> for the U.S. Refugee Admissions Program (USRAP):

1. In general, a marriage must be legally valid in the place of celebration. Camp marriages may be accepted in certain circumstances.<sup>164</sup>
2. Married minors who are both under age 18 and are traveling without their parents. United Nations High Commissioner for Refugees (UNHCR) Best Interest Determinations (BIDs)<sup>165</sup> are required for both children. The children are considered unaccompanied minors and may be placed in foster care.
3. Married minors who are both under age 18 and at least one set of parents is traveling with the couple. BIDs are not required. The married couple must have their own case, which should be cross-referenced with the parents' case so that they may be interviewed altogether.
4. Married couple where one spouse is under age 18 and the other spouse is over age 18. A BID is generally not needed for the minor, even if he/she is not traveling with the parents. A minor questionnaire should be completed by the RSC for the minor spouse.

An officer may request a BID (for UNHCR P1 or P2 referrals) if there are cases

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

<sup>163</sup> Minors are under the age of 18.

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

<sup>165</sup> BIDs are required for unaccompanied or separated children referred by UNHCR under Priority 1 or Priority 2.

which fall outside the norm and the officer would like a closer examination of what is in the best interests of the child. Ex: a BID could be requested for a 16-year-old married to a 50-year-old or where there is some suspicion of abuse.

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

**International and Refugee Adjudications – Standard Operating Procedures  
for Children's Cases**

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

**Key Elements of a Valid BID**

Was the BID prepared by a qualified child welfare professional?

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

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

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

<sup>166</sup> Memorandum from Terry Rusch, Director, Office of Admissions, Bureau of Population, Refugees and Migration, Department of State, to U.S. Refugee Program Processing Entities, Program Announcement 2001-01 USRP Policy on Resettling Unaccompanied Refugee Minors (URM's), (20 November 2002). See also Bureau of Population, Refugees and Migration, Department of State, Guidance for UNHCR and NGOs Referring Minor Cases (16 May 2013).

<sup>167</sup> USCIS Refugee Affairs Division, Standard Operating Procedure: Children's Cases, (4 January 2011).

caregiver?

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

Was a diligent search for family carried out (consistent with child and family safety and country conditions)?

**Information To Be Elicited and Recorded in an Interview with Unaccompanied and Separated Children (UASC)**

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

Verify information in BID with child

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

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

When interviewing a separated child:

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

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

After the USCIS interview:

Document clearly in the Assessment whether the Officer concurs with the

recommendations in the BID. This concurrence should be noted after "Justification" at the end of Section VI of the Refugee Application Assessment.

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

- Example 1: If a separated child is found to be a refugee, but the officer has concerns about the current guardian, the officer may conclude that "Child is found to be a refugee; however, case should be returned to UNHCR or the referring entity for resolution of the caregiving arrangement prior to final USCIS approval."
- Example 2: Unresolved custody issues may be addressed by noting, for example: "Child's mother is in refugee camp. BID does not address her whereabouts or why child is not with her. Return case to UNHCR for further inquiry."

### **Officer Responsibility for Child Safety**

The officer must note any of the following:

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

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

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

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

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



custody arrangement.

### **BID Process for Unaccompanied and Separated Refugee Children**

In 2003 the U.S. Department of State announced that the United States abides by the “best interest” rule as stated in the Convention on the Rights of the Child. Furthermore, the United States relies on the formal Best Interest Determination process of UNHCR to determine a course of action for an unaccompanied refugee child being referred to the USRAP for resettlement.<sup>168</sup>

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

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

### **International and Refugee Adjudications – Adoptions**

Most RAIO adjudications involving adoptions are reviewed by RAIO HQ Adjudications Officers. Additionally, officers sometimes have to determine the

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

<sup>169</sup> USCIS Refugee Affairs Division, Standard Operating Procedures: Children's Cases (4 January 2011).

validity of a claimed adoption during their adjudications.

### **Intercountry Adoptions**

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

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

The USCIS National Benefits Center in Lee's Summit, Missouri processes: 1) all Hague-related applications and petitions, and 2) domestically filed Orphan-related applications and petitions. In both processes, the USCIS officer will determine the prospective adoptive parents' suitability and eligibility to adopt a child and the child's eligibility to immigrate to the United States.

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

Currently, RAIO officers do not adjudicate applications and petitions related to the Orphan or Hague process or adoption-related immediate relative petitions.

## **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. Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997).
2. Matter of A-K-, 24 I&N Dec. 275 (BIA 2007); Hernandez-Ortiz v. Gonzales, 496 F.3d 1042 (9th Cir. 2007); Jorge-Tzoc v. Gonzales, 435 F.3d 146 (2d Cir. 2006); Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004); Liu v. Ashcroft, 380 F.3d 307 (7th Cir. 2004); Salaam v. INS, 229 F.3d 1234 (9th Cir. 2000); Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000); Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985).
3. Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Staff, Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (HQRAIO 120/12a) (25 March 2009).
4. Memorandum from Ted Kim, Acting Chief, USCIS Asylum Division, to Asylum Office Staff, Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (HQRAIO 120/12a) (28 May 2013).
5. Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Directors, et al., Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS (HQRAIO 120/9.7) (14 August 2007).
6. Memorandum from Jeff Weiss, Acting Director, INS Office of International Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees), Guidelines for Children's Asylum Claims, (120/11.6) (10 Dec.1998).

### **ADDITIONAL RESOURCES**

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

2. Bhabha, Jacqueline and Susan Schmidt, Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S., Harvard University, Cambridge, MA, 2006, pp. 18–23, 108–137, 143–145, 188–191.
3. Bhabha, Jacqueline and Wendy A. Young. “Through a Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers,” Interpreter Releases, Vol. 75, No. 21, 1 June 1998, pp. 757–773.
4. Neal, David L. Chief Immigration Judge, Executive Office for Immigration Review. Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, Memorandum for All Immigration Judges. (Washington, DC, 22 May 2007), 11 pages.
5. Nugent, Christopher and Steven Schulman. “Giving Voice To The Vulnerable: On Representing Detained Immigrant and Refugee Children,” Interpreter Releases, Vol. 78, No. 39, 8 October 2001, pp.1569–1591.
6. UNHCR, Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries, 2001–2003 (Geneva, July 2004), 14 pages.
7. Peters, Jean Koh, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions (2nd ed. 2001).
8. Symposium: Child Abuse, Psychological Research on Children as Witnesses: Practical Implications Forensic Interviews and Courtroom Testimony, 28 PAC. L.J. 3 (1996), 92 pages. (NOTE: Myers, J., Saywitz, K., & Goodman, G., [1996] Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony. Pacific Law Journal, 28, 3–90.)

## SUPPLEMENTS

### Asylum Adjudications – Procedural Considerations

With the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Congress gave USCIS initial jurisdiction over any asylum application filed by an unaccompanied alien child (UAC), including those in removal proceedings.<sup>170</sup> This law took effect on March 23, 2009. As a result, UACs

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

filing for asylum who previously would have had their case heard by an immigration judge in the first instance now receive an affirmative interview with you. In conducting the interview of a possible UAC in removal proceedings, you should verify that the applicant was a UAC at the time of filing such that USCIS has jurisdiction over the claim.

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

### **Minor Principal and Unaccompanied Minor Fields in Global**

In August 2007, the Asylum Division began capturing data on minor principal applicants, both accompanied and unaccompanied.<sup>171</sup> This data allows the Asylum Division to track applicants who are unaccompanied minors and reminds you that modified procedures are in order when handling a minor principal applicant's claim. The ability to gather information on the adjudication of unaccompanied minors' applications assists the Asylum Division in developing or refining policy with regard to these cases.

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

- **Minor Principal**

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

- **Unaccompanied Minor**

<sup>171</sup> Joseph E. Langlois, USCIS Asylum Division, Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS, Memorandum (Aug. 14, 2007).

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

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

- **Unaccompanied Alien Child (UAC)**

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

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

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

Statutorily, subject to the filing bars, “[a]ny alien who is physically present in the United States or who arrives in the United States,” without regard to immigration status, has the right to apply for asylum.<sup>174</sup> Under certain circumstances, however, children may lack the capacity to assert this right to apply for asylum. In the case of young children who lack the capacity to make immigration decisions, you will

<sup>172</sup> See Section 462 of the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (defining the term “unaccompanied alien child”).

<sup>173</sup> Section 462 of the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2).

<sup>174</sup> INA § 208(a)(1); 8 C.F.R. § 103.2(a)(2).

need to determine who has the legal authority to speak for the child. Generally, the parent will have the authority to speak for the child, unless (as discussed below) there are conflicts between the parent's and child's interests that prevent this.

There is no age-based restriction to applying for asylum. Where an asylum application is submitted on behalf of a child by someone other than the child's parent or legal guardian, however, USCIS need not "process...applications if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for ignoring the parents' wishes."<sup>175</sup> In the case involving Elian Gonzalez, an application for asylum was filed on behalf of a six-year-old Cuban boy against the wishes of his father in Cuba. INS determined that the child did not have the capacity to seek asylum on his own behalf, and that it was his father who had authority to speak for him in immigration matters.<sup>176</sup> Important to INS's decision was the finding that Elian was not at risk of persecution or torture, that Elian's father had Elian's best interests in mind, and that the father did not have conflicts of interest that would prevent him from representing the child's best interests in immigration matters. The Eleventh Circuit upheld the INS policy, noting that line-drawing on the basis of age is an adequate approach to determining who may individually file for asylum.

In contrast, older children may have the capacity to assert a claim. In *Polovchak v. Meese*, a Seventh Circuit case involving a twelve-year-old boy's grant of asylum counter to his parents' wishes to return to Russia, the court evaluated the applicant's capacity to assert his individual rights as part of the court's procedural due process balancing test: "At the age of twelve, Walter was presumably near the lower end of an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents; at age seventeen (indeed, on the eve of his eighteenth birthday), Walter is certainly at the high end of such a scale, and the question whether he should have to subordinate his own political commitments to his parents' wishes looks very different. The minor's rights grow more compelling with age, particularly in the factual context of this case."<sup>177</sup> While the court was not evaluating capacity to apply for asylum, its findings on age and capacity to assert individual rights are nonetheless instructive in the asylum context. Although the court acknowledged that a child may have the

<sup>175</sup> Bo Cooper, INS General Counsel, *Elian Gonzalez*, Memorandum (Jan. 3, 2000).

<sup>176</sup> *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

<sup>177</sup> *Polovchak v. Meese*, 774 F.2d 731, 736-37 (7th Cir. 1985); see also 8 C.F.R. § 103.2(a)(2) (providing that a parent or legal guardian may sign an application or petition of a person under the age of fourteen); 8 C.F.R. § 236.3(f) (providing for notice to parent of juvenile's application for relief).

capacity to assert a claim, it found that the parents had a significant liberty interest in being notified of the claim and given an opportunity to participate

### Confidentiality and Notification of Parents

Federal regulations governing asylum adjudications generally do not permit the disclosure to third parties of information contained in or pertaining to an asylum application without the written consent of the applicant.<sup>178</sup> As a general matter, however, we would notify the parent of a claim by a child when the parent does not seem to be the one submitting the claim. Where a child lacks capacity and a parent or legal guardian has the authority to speak for the child, that parent or legal guardian may not in fact be a third party as a legal matter, so that notification of the parent or legal guardian will not implicate the asylum confidentiality provisions in 8 CFR § 208.6.<sup>179</sup> Further, even in cases where a child has capacity to assert a claim, the parent's liberty interest in directing the interests of their child generally requires notification of and an opportunity to participate in the proceedings, unless such notification would pose a serious risk to the child (such as in cases involving abuse or where the parent is involved in the persecution). Where a child applies for asylum without the parents' knowledge and/or consent, many complex issues are raised, and the Asylum Office should contact HQASM to coordinate in addressing any issues relating to the child's capacity to apply for asylum, potential conflicts between a child's and the parents' interests concerning the asylum application, or notification of the parent.

### **Affirmative Asylum Process for Unaccompanied Alien Children**

In 2008 the TVPRA made USCIS responsible for adjudicating all asylum claims of unaccompanied alien children (UACs). It was recognized that unaccompanied children would benefit from a non-adversarial interview in lieu of the adversarial process of the immigration courts.<sup>180</sup> Responsibility for adjudicating their protection claims has moved from the immigration courts to the affirmative asylum system of USCIS.

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

<sup>178</sup> 8 C.F.R. § 208.6.

<sup>179</sup> See Polovchak, 774 F.2d at 735 (noting “the fundamental importance of the parents’ interest in the residence, nurture and education of a minor child, then twelve or thirteen”).

<sup>180</sup> Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Staff, Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children, Memorandum (HQRAIO 120/12a) (Mar. 25, 2009).



## Asylum Adjudications – Bars to Applying for Asylum

### **One-Year Filing Deadline**

The TVPRA amended the INA to state that the one-year filing deadline does not apply to unaccompanied alien children.<sup>181</sup> As of the TVPRA's effective date of March 23, 2009, when you determine that a minor principal applicant is unaccompanied, you should forego the one-year filing deadline analysis and conclude that the one-year filing deadline does not apply. The one-year filing deadline continues to be applicable for accompanied minor principal applicants (those with a parent or legal guardian) and for adult principal applicants. Additionally, as the unaccompanied alien child definition includes the element that the child may not have lawful immigration status, the one-year filing deadline must still be analyzed for in-status unaccompanied minors.

Accompanied minors and in-status unaccompanied minors may qualify for the extraordinary circumstances exception to the one-year filing deadline based on legal disability.<sup>182</sup> While unaccompanied minors are specifically listed in the regulations as an example of a category of asylum applicants that is viewed as having a legal disability that constitutes an extraordinary circumstance for the purposes of the one-year filing deadline, the circumstances that may constitute an extraordinary circumstance are not limited to the examples listed in the regulations. The same logic underlying the legal disability ground listed in the regulations is relevant also to accompanied minors: minors, whether accompanied or not, are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.

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

In *Matter of Y-C-*, petitioner, an unaccompanied fifteen-year-old, attempted to file an asylum application with an Immigration Judge five months after being released from over a year in immigration custody.<sup>183</sup> The Immigration Judge refused to accept the application, but the petitioner successfully filed a second application

<sup>181</sup> See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A). For additional information, see Asylum lesson plan, One-Year Filing Deadline.

<sup>182</sup> 8 C.F.R. § 208.4(a)(5).

<sup>183</sup> *Matter of Y-C-*, 23 I&N Dec. 286, 288 (BIA 2002).

within one year of being released from custody. The BIA found that the petitioner had established extraordinary circumstances because “he did not, through his own action or inaction, intentionally create these circumstances, which were directly related to his failure to meet the filing deadline.” Note that this case was decided before the TVPRA’s amendment to the INA to exclude unaccompanied minors from the one-year filing deadline took effect.

### **Safe Third Country**

As of March 23, 2009, the provision in the INA that allows an individual to be barred from applying for asylum based on a safe third country agreement cannot be applied to an unaccompanied alien child.<sup>184</sup> The Safe Third Country Agreement between the United States and Canada, currently the only safe third country agreement between the United States and another country, already has an exception for unaccompanied minors. Even if future safe third country agreements are created, INA § 208(a)(2)(E), as created by the TVPRA, does not permit a safe third country agreement to apply to unaccompanied alien children.

### **Serious Nonpolitical Crime**

The Child Soldiers Accountability Act of 2008 (CSAA), which was signed into law and became effective on October 3, 2008, creates both criminal and immigration prohibitions on the recruitment or use of child soldiers.<sup>185</sup> Specifically, the CSAA establishes a ground of inadmissibility at section 212(a)(3)(G) of the INA and a ground of removability at section 237(a)(4)(F) of the INA. These parallel grounds set forth that “[a]ny alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code” is inadmissible and is removable.

The statute also requires that DHS and DOJ promulgate regulations establishing that an alien who is subject to these grounds of inadmissibility or removability “shall be considered an alien with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime,” and is therefore ineligible for asylum pursuant to INA section 208(b)(2)(A)(iii).<sup>186</sup> The regulations are pending publication. In the interim, the Congressional intent in enacting the

<sup>184</sup> See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A). See also INA § 208(a)(2)(A) ; Asylum lesson plan, Safe Third Country Threshold Screening.

<sup>185</sup> Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008); see also Lori Scialabba and Donald Neufeld, USCIS, Initial Information Concerning the Child Soldiers Accountability Act, Public Law No. 110-340, Memorandum to Field Leadership (Dec. 31, 2008); CSAA, sec. 2(b)-(c).

<sup>186</sup> CSAA, sec. 2(d)(1). See also Asylum lesson plan, Mandatory Bars to Asylum and RAO Training Module, Discretion.

CSAA, as well as the nature of the serious crime of the use of child soldiers, should be considered in determining whether an applicant is subject to the serious nonpolitical crime bar. It is still an open question whether the statute permits an exemption for children under the age of 15.

### **Asylum Adjudications – Other Immigration Statuses Available to Children**

#### **Special Immigrant Juvenile Status**

Special Immigrant Juvenile Status (SIJS) provides legal permanent residency under certain conditions to unmarried children present in the United States who are under twenty-one years of age.<sup>187</sup> First, a juvenile must be declared dependent on a state juvenile court or legally committed to, or placed under the custody of, an agency or department of a state, or an individual or entity appointed by a State or juvenile court, and the juvenile court must find the child's reunification with one or both of his or her parents not viable "due to abuse, neglect, or abandonment, or a similar basis found under State law" and must determine that "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence." Second, the Department of Homeland Security must consent to the grant of SIJ status. In cases where the child is in the custody of the Department of Health and Human Services (HHS), the Secretary of HHS must specifically consent to juvenile court jurisdiction to determine the custody status or placement of an alien.

#### **Victims of Trafficking or Criminal Activity**

The T visa is available to aliens present in the United States who have been the victims of a severe form of trafficking in persons, who are physically present in the United States on account of such trafficking, and who "would suffer extreme hardship involving unusual and severe harm upon removal."<sup>188</sup> Aliens must comply with governmental requests for assistance in investigation or prosecution of the acts of trafficking, though persons unable to cooperate due to physical or psychological trauma or those under the age of eighteen are exempt from this obligation. After three years of continuous presence from the date of admission as a nonimmigrant,

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<sup>187</sup> INA § 101(a)(27)(J).

<sup>188</sup> INA § 101(a)(15)(T)(i).

the T visa holder may adjust status.

The U visa is available to aliens who have “suffered substantial physical or mental abuse as a result of having been a victim” of qualifying criminal activity, which violated U.S. law or occurred in the United States.<sup>189</sup> The person must possess information related to the criminal activity and have been helpful or be likely to be helpful in the investigation or prosecution of the criminal activity. Where the person is under sixteen years of age, a parent, guardian, or next friend may possess information and assist in the investigation or prosecution, in the place of the child under sixteen. A U visa holder may adjust status after three years of continuous presence from the date of admission as a nonimmigrant.

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<sup>189</sup> INA § 101(a)(15)(U)(i). See USCIS Adjudicator’s Field Manual, chapter 39, for further details.

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## Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	Corps Values and Goals
Rev. Date	May 9, 2013
Lesson Description	This lesson describes the values that guide the USCIS Asylum Program as it works to fulfill its mission and explains how those values are embodied in the concrete goals set as a measurement of the program's success. This lesson is taught through a discussion usually led by the Chief of the Asylum Division.
Terminal Performance Objective	In working to fulfill the mission of the U.S. Asylum Program, the Asylum Officer <b>will</b> be able to identify the guiding values of the Asylum Corps, identify the goals set by management, and describe how the achievement of those milestones is measured and reflects the Officer's success in fulfilling the mission.
Enabling Performance Objectives	<ol style="list-style-type: none"><li>1. Identify the values that guide the mission of the Asylum Program. (OK2) (OK3)</li><li>2. Identify the goals that the Asylum Program must achieve in order to honor its values. (OK2) (OK3)</li><li>3. Describe the measurable targets that the Asylum Program has set to achieve its goals. (OK3)</li></ol>
Instructional Methods	Lecture, class discussion, visual aids
Student Materials / References	Lesson plan
Method of Evaluation	This lesson's material is important to understanding how the Asylum Program operates; however, it is not appropriate material for testing.
Background Reading	<ol style="list-style-type: none"><li>1. Ted Kim, Acting Chief, Asylum Division, Refugee, Asylum and International Operations Directorate, US Citizenship and Immigration Services, <i>Fiscal Year 2012 4<sup>th</sup> Quarter (Year End) Annual Performance Report</i>, Memorandum for Joseph Langlois, Acting Associate Director, Office of Refugee, Asylum, and International Operations (Washington, DC: 1 February 2012), 6 pp.</li><li>2. Ted Kim, Acting Chief, Asylum Division, Refugee, Asylum and</li></ol>

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International Operations, US Citizenship and Immigration Services.  
*Fiscal Year 2013 Productivity Planning*, Memorandum to Asylum  
Officer Directors and Deputy Directors (Washington, DC: 21  
January 2013), 6 pp.

## CRITICAL TASKS

1. Knowledge of the Asylum Division's mission, values, and goals.
2. Knowledge of how the Asylum Division contributes to the mission and goals of RAIO, USCIS, and DHS.

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## Corps Values and Goals

### I. INTRODUCTION

The objective of this lesson is to explain the mission, values, and goals of the Asylum Corps. By reviewing these important concepts, this lesson also seeks to explain the meaning behind the demands placed on each Asylum Officer and the Asylum Corps. Understanding the conceptual framework within which the Asylum Program operates will enable Asylum Officers to better accomplish our mission.

### II. MISSION

The mission of an organization justifies the organization's existence; if there is no mission, there is no need for the organization. The mission of the Asylum Program is to offer protection to refugees in accordance with the laws of the United States and international obligations, while upholding the integrity of the program and national security of the United States.

### III. VALUES

Organizational values represent what is fundamentally important to the organization and guide the organization in its pursuit of the mission. The mission can only be accomplished through strict adherence to these values.

In the context of the Asylum Program, fairness is the overarching value. As public servants, we have an obligation to the public to manage our resources effectively and efficiently in pursuit of our mission to offer protection to qualified refugees. In order for the Asylum Program to succeed in offering this protection, its policies, processes and procedures must be fair to the asylum applicant. The Asylum Program's definition of fairness contains two inseparable components: quality and timeliness. Both components must be present for a process to be considered fair. A correct but belated decision and a timely but inaccurate decision are both unfair results.

#### A. Quality

The Asylum Program demands a particularly high level of quality in our work because of the serious consequences of error in our profession. Indeed, the Asylum Corps was founded on the principle that no applicant should be deprived of a legally sufficient, thorough, and unbiased determination. Thus, each asylum claim must be fully and accurately heard, researched, and adjudicated.

#### B. Timeliness

The Asylum Program values timely completion of cases from each Asylum Officer. A delay in processing is distressing and unfair to the applicant ("justice delayed is justice denied"), impedes timely family reunification, risks violating statutory timeframes, and makes the Asylum Program vulnerable to fraud and abuse.



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## IV. GOALS

Goals embody organizational values in concrete and measurable ways. Setting tangible goals helps an organization adhere to those values. Conversely, if an organization does not set goals, its values will not be reflected in its actions and will ring hollow. To adhere to our twin values of quality and timeliness, the Asylum Program has set twin goals, quality and timeliness.

### A. The Goal of Quality

One of the twin goals of the Asylum Program is to produce high-quality adjudications. Adjudications are high quality if they meet the standards set by the Asylum Program in the qualitative areas of the adjudication process, such as interviewing and decision writing.

### B. Achieving Quality

The Asylum Program has made substantial investments into the development of training and information resources and has implemented a number of policies to ensure that high-quality adjudications can be produced on a consistent basis.

#### 1. Investments

##### a. Specialized Training

##### (i) Refugee, Asylum, and International Operations (RAIO) Directorate Officer Training

In Fiscal Year 2013, RAIO standardized and integrated basic officer training across its three divisions: Asylum, Refugee Affairs, and International Operations. The RAIO Directorate Officer Training program seeks to establish consistent policy and legal guidance and promote training efficiencies.

The RAIO Directorate Officer Training is comprised of two courses: RAIO Combined Training (RAIO CT), which covers topics pertinent to all RAIO officers; and the Asylum Division Officer Training Course (ADOTC) which augments RAIO Combined Training with division-specific training. These two training courses replace what was formerly called the Asylum Officer Basic Training Course (AOBTC).

The consecutively presented training courses are:

##### RAIO CT:

- Distance training component that Participants attend from their home offices for approximately 2 weeks, and
- Combined, residential, face to face component lasting approximately 3 weeks, followed by the

##### ADOTC:

- 
- A residential, face to face division-specific component lasting approximately 3 weeks

The RAIO Directorate Officer Training course has been piloted and tested. As with the predecessor AOBTC course, this training course provides specialized instruction from subject matter experts and luminaries in the field of refugee and asylum protection and law.

Instructors teach and test trainees using a comprehensive, carefully designed curriculum with a focus on asylum and refugee law, interviewing techniques, analytical writing, and procedures.

Specialized training for Asylum Officers is vital to our efforts to achieve quality. The importance of training to the Asylum Program is reflected in its unique administration of RAIO Directorate Officer Training. Unlike other USCIS programs, the RAIO Directorate Training unit and the Asylum Division directly oversee and administer all aspects of RAIO Directorate Officer Training, including ADOTC, and devote a number of headquarters staff full-time to training matters.

(ii) BASIC

The Asylum Division requires all new Asylum Officers to attend BASIC, a residential course provided by the USCIS Academy for both Immigration Service Officers and Asylum Officers. During this course, trainees are instructed in various sections of immigration law, including those pertaining to nationality, immigrants, non-immigrants, inadmissibility, and deportation.

(iii) Supervisory Asylum Officer Training

The Asylum Division has developed a specialized training course for all Supervisory Asylum Officers (SAOs). The primary focus of this course is an in-depth study of asylum law, coupled with an examination into the ways that SAOs can improve the interviewing and writing techniques of the officers they supervise. Presentations by experienced practitioners of asylum law, representatives of the Office of Chief Counsel, and other subject-matter experts complement those by the staff of the Headquarters Asylum Division and field office personnel.

(iv) Instructor Training

All Quality Assurance/Training Officers (QA/Ts), some SAOs, headquarters officers, and others, attend formal instructor training, the objective of which is to provide those officers who will be conducting training for the Asylum Division with a basic understanding of adult education and instructional technology theories, principles, and practices. Satisfactory completion of the course enables officers to design, deliver, and evaluate instructional activities supporting the Asylum Program.

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b. Local Training

Recognizing the need to keep abreast of country conditions and changes in asylum law and procedure, the Asylum Division requires each Asylum Office to set aside 10 percent of the workweek (4 hours per week) for training purposes. The substantial amount of time allocated by the Asylum Program to training is unique within USCIS and reflects the Asylum Division's commitment to achieving quality. Asylum Offices have discretion to utilize this time to address any training needs they might have, including instruction on issues of national interest, novel areas of law, country conditions, interviewing techniques, and procedures.

c. Quality Assurance of Decisions

(i) Supervisory Review

Current policy requires 100% supervisory review of Asylum Officer casework. Supervisors sign off on every decision to ensure that each decision is supported by the law and that proper procedures have been followed.

(ii) RAIO Quality Assurance Review

RAIO Quality Assurance review was developed to look at measurable standards of quality both across the divisions within the RAIO Directorate and quality of adjudications within each of the divisions. For the Asylum Program, these statistically relevant random reviews are conducted periodically by teams comprised of Headquarters Asylum Officers, Supervisory Asylum Officers, and Quality Assurance Trainers. An important goal of RAIO Quality Assurance is identification of trends and training needs that will enhance the effectiveness of future training. As opposed to the Headquarters and Local Quality Assurance mentioned above, the RAIO QA review is conducted after the service of the decision.

(iii) Local Quality Assurance

Each Asylum Office employs at least one Quality Assurance /Training Officer who reviews individual cases, identifies local training needs, organizes weekly training sessions on selected topics, reviews difficult cases in conjunction with the Headquarters Quality Assurance Referral process, and is part of the process of reviewing cases and trends in support of RAIO Quality Assurance reviews. The QA/T also serves as an intermediary between HQ and the field by instructing officers on new lessons, provided by HQ and by disseminating and training on new guidance and memos issues by HQ.

(iv) Headquarters Quality Assurance

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Local Asylum Offices must submit to Headquarters, before serving the decision, certain categories of sensitive cases, such as likely to be publicized cases, cases involving national security risks, negative credible fear decisions, and certain cases involving gender as part of a particular social group. This level of quality assurance is aimed at ensuring consistency in novel and/or complex areas of the law. Asylum Offices may also request review of cases that do not fall into a mandatory review category but present a novel or complex issue, which the office believes would benefit from Headquarters review and input.

d. Information Technology Resources and Libraries

The Asylum Program's commitment to quality adjudications is reflected in its investment in information technology resources and Asylum Office libraries and other resources aimed at facilitating access to relevant materials. All Asylum Officers have individual access to the Internet and Westlaw on their desktop computers, which allows Officers to effectively and efficiently research country conditions and various court decisions. Moreover, each Asylum Office maintains resources with relevant and updated reference materials. The RAIO Research Unit also provides research, news summaries, training and other forms of support to the Asylum Program related to Country of Origin Information.

2. Policies

a. Hiring Practices

The Asylum Program is committed to hiring individuals from diverse backgrounds and perspectives who are capable of performing at a very high level of competence and who are proficient in interpersonal, analytical, research, and writing skills. To maximize the chances of attracting such individuals, the Asylum Program issues a public job announcement in addition to an internal announcement (within the government) for every Asylum Officer opening. In addition, the Asylum Program offers the opportunity for Asylum Officers to begin at the General Schedule 12 grade, which is a relatively high level at which to enter the government. One indicator that the Asylum Program has been successful in recruiting individuals of such caliber is that a significant percent of the Asylum Corps has a graduate degree or has completed some level of graduate coursework.

b. Performance Plan & Appraisal (PPA)

The Asylum Program has integrated our quality goal into the PPA, which is the primary tool used by supervisors to assess an Asylum Officer's individual performance. Under the PPA, supervisors rate Asylum Officers on critical qualitative elements of the job, including interviewing skills and decision writing.

c. Limiting the Number of Assigned Cases Per Pay Period

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As a policy, the Asylum Program limits the number of interviews that it assigns to Asylum Officers during a two-week pay period to 18 cases. This rate allows Asylum Officers to focus properly on the quality of their work at the level of sophistication expected, while completing interviews at a timely rate. To preserve this balance of quality and timeliness, this rate of production is fixed despite an increase in new application receipts and other external pressures.

### C. The Goal of Timeliness<sup>1</sup>

The other twin goal of the Asylum Program is to complete adjudications in a timely manner. A timely adjudication is one that is completed within a timeframe that is considered fair. The Asylum Program establishes its timeliness goals within the statutory and procedural frameworks of the asylum process. Because of the significant substantive differences among the protection programs administered by the Asylum Program, timeliness goals differ according to the protection sought and may be adjusted to accommodate changes in case receipts. The goals listed below were current as of September 2012. In FY 2013, the Asylum Program experienced an increase in credible fear receipts, along with a significant increase in other case loads and as a result the targets below were increased.

#### 1. Timeliness Goal for Affirmative Asylum

The Asylum Program aims to complete within 60 days of receipt at least 85% of the affirmative asylum cases it refers to Immigration Court.

The statute holds the Department of Homeland Security and the Department of Justice accountable to specific deadlines in asylum application processing. The 60-day target reflects these deadlines.

##### a. 180-Day Adjudication Deadline

The statute requires the final administrative adjudication of the application (not including appeal) to be completed within 180 days after the date the application was filed.

Cases before an Immigration Judge frequently take several months to process because the Court must schedule multiple hearings, and each hearing may last a number of days. As the initial adjudicator in the process, the Asylum Program must take into account the fact that the Immigration Court will likely need up to 120 days to adjudicate applications that are ultimately referred. Therefore, the Asylum Division has established a goal to adjudicate 85% of all referrals adjudicated at local Asylum Offices within 60 days.

For cases that are not referred, the Asylum Program is allowed an additional 120 days to complete adjudication. However, these applications are generally

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<sup>1</sup> The targets described here include the fundamental matrices used to track the priorities of the Asylum Division. In addition to these goals, there are a variety of other targets designed to measure programmatic success relating to many agency priorities.

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adjudicated promptly because they are processed entirely by the Asylum Program. Nearly all of these applications are adjudicated well before the 180-day statutory deadline.

b. 45-Day Interview Deadline

The statute also requires that the applicant be interviewed within 45 days after the date the application was filed. The Asylum Program's 60-day completion target allows the Asylum Office at least 15 days after the interview to complete the case. This 15-day period includes the time necessary for the Asylum Officer to conduct research, compose the assessment, and do the necessary paperwork, as well as for supervisory review and clerical processing.

2. Timeliness Goal for Credible Fear Screening

The Asylum Program aims to complete 85% of all credible fear cases within 14 days of receipt.

The 14-day target was established in view of the following:

a. Detention and Parole

The statute requires that certain individuals who express a fear at ports-of-entry must be detained until the credible fear determination, at which point they may be paroled by the U.S. Immigration and Customs Enforcement (ICE) Special Agent in Charge (SAC) if a credible fear is found.

The statute allows ICE SACs to make their parole decisions for expedited removal cases only after receiving the credible fear determination from the Asylum Office. The sooner the Asylum Officer makes a determination, the sooner the ICE SAC can make a parole determination for those who are found to have a credible fear. The 14-day target provides sufficient time for the Asylum Program to complete its determinations, while giving ICE SACs a chance to make their parole decisions in a timely manner.

b. Credible Fear Determination

The Asylum Program is responsible for making credible fear determinations. The 14-day completion target begins after the Asylum Program receives notification that the individual is subject to expedited removal processing, which usually coincides with the individual's date of arrival. The Asylum Program provides all individuals in the expedited removal process a respite of 48 hours after the date of detention to recover from long flights, contact family members, friends, or any consultants, and to prepare for the credible fear interview. Within the 14-day completion target, Asylum Officers must provide the 48-hour respite, travel to the detention facility, conduct the interview, make the determination, complete paperwork, and update relevant databases.

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### 3. Timeliness Goal for Reasonable Fear Screening

The Asylum Program aims to complete 85% of all reasonable fear cases within 90 days of receipt.

The 90-day target was established in view of the following:

#### a. Detention and Parole

The statute requires that certain individuals, subject to administrative removal, who express a fear must be detained until the reasonable fear determination is made. If such a fear is found, a U.S. Immigration and Customs Enforcement (ICE) Special Agent in Charge (SAC) may parole the applicant.

The statute allows ICE SACs to make their parole decisions only after receiving the reasonable fear determination from the Asylum Office. The sooner the Asylum Office makes a determination, the sooner the ICE SAC can make a parole determination for those who are found to have a reasonable fear, limiting detention time and associated costs. The 90-day target provides sufficient time for the Asylum Program to complete its determinations, while giving ICE SACs a chance to make their parole decisions in a timely manner.

#### b. Reasonable Fear Determination

The Asylum Program is responsible for making reasonable fear determinations. The 90-day completion target begins after a case has been referred to the Asylum Program. A case is considered referred when the Asylum Program has received (1) notice that a person requires a reasonable fear screening, (2) the completed decision to reinstate the prior removal order (Form I-871) or the completed Final Administrative Removal Order (Form I-851A), and (3) the A-file, including any associated T-files.

#### c. Evolving Challenges

Regulations require Asylum Pre-Screening Officers (APSOs) to conduct the reasonable fear interview and make the determination within 10 days after the case has been referred to the Asylum Office absent exceptional circumstances. 8 CFR 208.31(b). Many changes in administrative removal have taken place since the regulations were promulgated, and it is likely that the current volume of cases was never foreseen. HQASM has determined that an Asylum Office should err on the side of ensuring that the individual is able to present his or her full claim, so long as there is no evidence of intentional delay tactics or abuse of process. In this regard, HQASM has established two performance goals for the processing of reasonable fear cases accordingly (85% within 90 days of referral and 95% within 150 days or less of referral), as explained in the Update to Reasonable Fear Procedures Manual: Section III.B.1 (April 2012).

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## D. Achieving Timeliness

The Asylum Program has implemented a number of policies to ensure that adjudications can be completed in a timely manner. These policies may be adjusted to accommodate changes in case receipts. The policies listed below were current as of September 2012.

### 1. Timeliness Targets

The Asylum Program has integrated our timeliness goals into the PPA. Under the PPA, supervisors rate Asylum Officers on their ability to complete cases in a timely manner. For affirmative asylum cases, completed cases must be submitted to the supervisor within 4 days after the interview for decisions that are picked up at the Asylum Office by the applicants, and within 10 days after the interview for decisions that are mailed to in-status applicants. These targets conform to the 15-day timeframe allotted to the Asylum Program to complete interviewed cases that are ultimately referred. For credible fear cases, completed cases must be submitted to the supervisor within 2 days after the interview. This target conforms to the 14-day timeframe allotted to the Asylum Program to complete its portion of expedited removal processing. For both affirmative asylum and credible fear screening, Asylum Officers must complete cases in advance of the target completion date in order to allot time for supervisory review and subsequent clerical processing.

### 2. Reasonable Allowances

It is the policy of the Asylum Program to make reasonable allowances for its timeliness goals so that our quality goal is not sacrificed when additional time is required to make a sound determination. To strike this balance, the Asylum Program allows for a certain percentage of cases to be completed outside the target timeline. The allowance for affirmative asylum is up to 15% of cases referred to Immigration Court, and the allowance for credible fear screenings is up to 20% of all cases. In each of these programs, the Asylum Program recognizes that a certain percentage of cases should be exempt from timeliness goals due to the complexity of particular cases and the unavailability of staff at certain times.

These reasonable allowances manifest themselves in the PPA. Timeliness performance standards do not apply to those cases placed on hold by the supervisor, or where the supervisor finds that excused leave or other duties interfere with timely case completion.

### 3. Productivity Target

The Asylum Program aims to achieve timeliness by setting a productivity target for Asylum Officers. The productivity target for affirmative asylum is 18 interviews per pay period per Asylum Officer. Under the PPA, Asylum Officers are rated on their ability to interview 18 affirmative asylum cases in a two-week pay period, taking into account and adjusting for approved leave and other duties assigned.

#### a. Balance



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In order to achieve our goal of timely case completions, the Asylum Program has established a productivity target that gives the Asylum Corps a reasonable ability to keep pace with the overall rate at which it receives new asylum applications. If the Asylum Corps fails to keep pace with the overall rate of new application receipts, some incoming applications will not be adjudicated, and they will begin to form a backlog. As a consequence, the applications in this backlog will not be processed in a timely manner. Moreover, a mounting backlog could make the asylum system vulnerable to fraud and abuse, a notion that is more fully examined in the lesson, History of the Affirmative Asylum Program.

If the productivity rate is set too low, the Asylum Corps would not have a reasonable ability to keep pace with new receipts given the staff available. Reducing the productivity rate would require reallocating staff from other programs (such as credible fear screening and overseas refugee processing) to the affirmative asylum program to keep up with receipts given the reduced productivity of each officer. This reallocation would divert human resources away from these other critical protection programs and may hinder our ability to achieve our goals in those programs.

Conversely, if the productivity rate for affirmative asylum applications is set too high, the quality of adjudications would likely suffer.

b. Other Considerations

The Asylum Program's level of productivity comes under the scrutiny of governmental authorities inside and outside of USCIS, the watchful eye of non-governmental organizations, and public view. While it is more often the accuracy of our decisions that are reported in the press and by non-governmental organizations, our effectiveness, efficiency, and overall productivity as USCIS officers are judged under equal scrutiny. Our productivity is often judged in light of our role as USCIS officers who hear claims during the first stage of a larger administrative and legal process. Our productivity is also judged in comparison to the productivity of other USCIS programs -- the fees of which help fund the Asylum Program.

## V. PRIORITIES

### A. Asylum Program Priorities

The Asylum Program aligns its organizational priorities squarely with its mission -- to protect refugees according to the laws of the United States and international obligations, while upholding the integrity of the program and national security of the United States. With these priorities in mind, the Asylum Program adjusts its quantitative goals in relation to available resources, increasing caseload, and other key variables. These priorities may be adjusted to accommodate changes in case receipts. The policies listed below were current as of September 2012.

#### 1. First Priority

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a. Affirmative Asylum Applications

One of our prime responsibilities in our endeavor to protect refugees is to adjudicate applications filed affirmatively with USCIS. The lessons of the pre-reform period teach us that certain levels of backlog in pending applications invite fraud and abuse of the system. The ultimate consequence of this failure is that genuine refugees do not receive timely protection and therefore cannot be promptly reunified with their immediate family members who may still be in danger.

b. Credible Fear Screening

Congress has charged the Asylum Corps to screen individuals in the expedited removal process for a credible fear of persecution or torture. A determination of credible fear gives individuals a full opportunity to apply for asylum and/or protection under the Convention against Torture before an Immigration Judge, and a negative credible fear determination may mean the immediate removal of the individual. Until the credible fear interview takes place, the statute requires the Department of Homeland Security to detain the individual. Failure to promptly interview these individuals may unnecessarily increase the amount of time these individuals -- many of whom may be genuine refugees -- spend in detention.

c. Reasonable Fear

Congress has charged the Asylum Corps to screen individuals in the administrative removal process for a reasonable fear of persecution or torture. A determination of reasonable fear gives individuals an opportunity to apply for withholding of removal and/or protection under the Convention against Torture before an Immigration Judge, and a negative reasonable fear determination may mean the immediate removal of the individual. Until the reasonable fear interview takes place, the statute requires the Department of Homeland Security to detain the individual. Failure to promptly interview these individuals could easily increase the amount of time these individuals spend in detention.

d. Overseas Refugee Processing

Each year the President consults with Congress to determine the level of refugee admissions for that year. Failure to meet these admission levels is tantamount to squandering a critical opportunity to protect genuine refugees who have just fled immediate danger and are in urgent need of safe haven. The Asylum Program assists the refugee program in processing a number of refugees close to the annual ceiling by making Asylum Officers available to interview refugees overseas.

2. Second Priority – Nicaraguan Adjustment and Central American Relief Act (NACARA)

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In an interim rule published on May 21, 1999, the Attorney General delegated to the Asylum Program authority to grant or refer to the Immigration Court certain applications for suspension of deportation or special rule cancellation of removal filed under NACARA. Because eligibility rules require most NACARA applicants to have first entered the United States by 1990, most applicants have resided in the United States for many years and already have employment authorization. While the Asylum Program's failure to promptly adjudicate NACARA applications would certainly result in hardship for some applicants, the consequences of such failure do not compare with the grave consequences of failure to promptly process first priority cases.

Needless to say, the NACARA program is an integral part of our work and prioritizing in this manner occurs only when overall workload exceeds our overall work capacity.

## B. Department of Homeland Security Performance Plan

The Department of Homeland Security (DHS) sets annual goals to measure how effectively its programs utilize their resources to accomplish their missions. DHS and USCIS review and assess the performance of USCIS programs based on these targets. These targets are products of negotiation between the program, USCIS management, and DHS.

For the Asylum Division, the DHS performance goals reflect several of the Asylum Program's goals listed above. These goals may be adjusted to accommodate changes in case receipts. The goals listed below were current as of September 2012.

1. Percentage of Asylum Cases Completed in 60 Days
2. Total Number of Asylum Cases Completed
3. Percentage of Credible Fear Screenings Completed in 14 Days
4. Total Number of NACARA Cases Completed

## VI. CONCLUSION

The day-to-day work of each Asylum Officer is critical to our mission to offer protection to refugees. An Asylum Officer's decision can significantly alter the course of an asylum seeker's life and must therefore be both accurate and timely. Making decisions such as these every day is not an easy task. However, given our past success, our high-caliber workforce, and our extensive training, we believe that it is a reasonable task. Completion targets, productivity targets, investments in training, and other policies are in place to enable Asylum Officers to adhere to our values, achieve our goals, and carry out the overall mission of the Asylum Program successfully.



# U.S. Citizenship and Immigration Services

## RAIO DIRECTORATE – OFFICER TRAINING

**RAIO Combined Training Program**

### DECISION MAKING

#### TRAINING MODULE

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

## **DECISION MAKING**

### **Training Module**

#### **MODULE DESCRIPTION**

This module describes the general factual, legal and analytical considerations involved in constructing legally sufficient decisions.

#### **TERMINAL PERFORMANCE OBJECTIVE(S)**

Given the field situation in which you have a request to adjudicate, you will be able to identify the relevant legal elements and apply them to relevant evidence to construct legally sufficient determinations and decisions.

#### **ENABLING PERFORMANCE OBJECTIVES**

1. Identify general writing and style techniques, including USCIS Plain Language principles that improve comprehensibility.
2. Explain the purposes of legal analysis.
3. Distinguish proper from improper factors in legal decision making.
4. Distinguish relevant from irrelevant facts and issues in decision making. Explain the different components of legal decision making.
5. Construct a legally sufficient argument to support a determination or conclusion.

#### **INSTRUCTIONAL METHODS**

- Interactive presentation
- Practical exercises

#### **METHOD(S) OF EVALUATION**

- Written Examination
- Practical Exercise Exam

### **REQUIRED READING**

- 1.
- 2.

#### **Required Reading – International and Refugee Adjudications**

#### **Required Reading - Asylum Adjudications**

### **ADDITIONAL RESOURCES**

1. Divine, Robert C., Acting Deputy Director, U.S. Citizenship and Immigration Services, Memorandum to Office of Domestic Operations; Office of Refugee, Asylum, and International Operations; and Office of National Security and Records Verification, *Legal and Discretionary Analysis for Adjudication* (May 3, 2006)
2. Administrative Procedure Act, 5 U.S.C. § 557(c)
3. 8 C.F.R. §§ 208.9, 208.19
4. 8 C.F.R. § 207.7(g)
5. Yule Kim, Legislative Attorney, American Law Division, Statutory Interpretation: General Principles and Recent Trends, CRS Report for Congress, (August 31, 2008) *available at* <http://www.fas.org/sgp/crs/misc/97-589.pdf>.
6. M.H. Sam Jacobson, *Legal Analysis and Communication* (2009).
7. Templin, Benjamin A., LawNerds.com, *Part 2: Learn the Secret to Legal Reasoning* (2003), <http://www.lawnerds.com/guide/irac.html>.

#### **Additional Resources – International and Refugee Adjudications**

#### **Additional Resources – Asylum Adjudications**

**CRITICAL TASKS**

SOURCE:

<b>Task/ Skill #</b>	<b>Task Description</b>



### SCHEDULE OF REVISIONS

<b>Date</b>	<b>Section (Number and Name)</b>	<b>Brief Description of Changes</b>	<b>Made By</b>
02/06/2013	Entire Lesson Plan	Lesson Plan published	RAIO Training
05/10/2013	Throughout document	Corrected minor typos, formatting, cites identified by OCC-TKMD.	L. Gollub, RAIO Training
11/23/2015	Throughout document	Corrected links and minor typos	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

As an officer in the RAIO Directorate, you will make different types of eligibility decisions. Your decisions must be made and communicated in a legally sound, professional, and comprehensible manner. For this reason, you should become familiar with the processes used in legal decision making. Even where your decisions will not result in a written explanation of eligibility, following these processes will assist you in preserving clarity and quality in the adjudication process.

This module provides an overview of the analytical processes for making eligibility determinations. The module does not provide the legal criteria for making such determinations. Instead, the RAIO Training Modules and the division-specific training materials constitute primary field guidance for all officers who make legal eligibility decisions for the RAIO Directorate.

## 2 GENERAL CONSIDERATIONS

Each decision you will make involves the life of an individual. Although you may be under time constraints to complete a decision, each decision you make is an important one and cannot be made lightly. You have a duty to be a neutral, unbiased adjudicator and to give adequate and appropriate consideration to every decision you make.

### 2.1 Definition of Analysis and Legal Analysis

Dictionaries have several definitions of “analysis,” all of which involve the breaking down of a complex whole into separate parts for study.

Legal analysis breaks down a determination that an applicant does or does not qualify for a benefit requested into short explanations and conclusions that reveal how you reached this determination. Legal analysis makes clear to others the rationale behind your determination.

## 2.2 Every Adjudication Involves Legal Analysis

Legal analysis confirms what facts a petitioner or applicant (USCIS “customers”) must establish in order to prove eligibility under the law, and then assesses whether those facts have been established. Sometimes you will adjudicate benefits that do not call for a written explanation of your analysis; however, you should still engage in a careful legal analysis in every case in order to accurately determine each customer’s eligibility for the benefit requested.

You have a duty to follow the law as it is set forth by statute, regulation, policy guidance, precedent decisions, and the USCIS Office of Chief Counsel. You cannot develop your own standards on the basis of what you think the law should be.

## 2.3 Case-by-Case Basis

There are no “magic formulas” to determine whether or not an applicant is eligible for an immigration benefit. Although many claims are similar, they are never identical, and each applicant is unique. Therefore, each request must be evaluated on its own merits.

You should be mindful of the facts of each particular case without allowing previous cases to unduly influence your decision-making. For example, when adjudicating asylum or refugee claims, the fact that one applicant has suffered severe persecution should not prevent you from finding that another applicant, who suffered less severe harm, also suffered persecution. Likewise, a parole applicant who demonstrates a particularly compelling urgent humanitarian need for parole should not prevent you from finding urgent humanitarian need in less compelling cases. Each case must be analyzed on its own facts.

Although each of your decisions must be made on a case-by-case basis, you should strive for consistency in applying the law from one case to another.

## 2.4 Appropriate Considerations

When making a decision, you must consider all relevant evidence and give that evidence the appropriate weight due to it.<sup>1</sup> What is relevant, however, will depend on what benefit the applicant is requesting and what the applicable law indicates he or she must establish in order to prove eligibility for that benefit. [[Asylum Adjudications Supplement](#)]

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<sup>1</sup> See RAIO Training Module, *Evidence*.

## 2.5 Inappropriate Considerations

- Similarities or differences with other cases
- Foreign policy considerations:
  - That the applicant is from a country whose government the United States supports or with which it has favorable relations
  - That the United States government agrees or disagrees with the political or ideological beliefs of the individual
- Your personal opinions and beliefs
  - That you may disagree with the applicant’s political ideology
  - That you may not have the same religious beliefs, sexual orientation, or cultural norms
  - Preconceived notions that applicants from a particular country are or are not truthful
  - Personal experience from living or traveling in an applicant’s country  
  
(This can help you form lines of questioning, but does not substitute for objective country of origin information)
- Reports on the incidence of fraud by applicants of the same nationality

You will receive information and briefings on fraud and the use of fraudulent documents. This can provide very useful information you can use when interviewing an applicant and reviewing evidence. You should be careful, however, not to raise the standard of proof for an applicant based on incidences of reported fraud for that nationality.

## 2.6 Quality and Quantity

Both quality and quantity are priorities in decision making for the RAIO Directorate. You may sometimes find it difficult to balance these priorities when under time constraints. For example, when doing protection work, you may be unable to research every unfamiliar detail of an applicant’s claim, ask every question you might like to ask during an interview, or read all available country of origin reports. You will be required to work within designated timeframes, however, as delays can have negative repercussions for the immigration process, as well as for applicants and their families. It is therefore imperative that you train yourself to identify and focus on the critical legal and factual issues. Doing so will enable you to know when to stop—that is, to

know when you have gathered enough evidence to render a decision. This is only part of the picture, however. You must also become skilled at making well-reasoned, legally sufficient decisions supported by the evidence you have gathered.

## 2.7 The Purpose of Legal Analysis

Legal analysis promotes and ensures timeliness and quality in the decision making process in the following ways:

### *Ensures that Decisions Are Based on Appropriate Factors and the Correct Application of the Law*

The process of explaining a decision encourages you to examine the facts and applicable legal standards and discourages you from jumping to conclusions or relying on “gut feelings.” This process safeguards applicants with genuine claims while prevents others from erroneously being granted relief.

### *Allows for Review that Enhances Quality*

Written legal analysis conveys to the reviewer -- most often your supervisor or someone from quality assurance locally or at headquarters -- the reasons behind your decision. This allows the reviewer to determine if you properly applied the law in your decision and ensures you make consistent and quality decisions.

### *Adds Transparency to the Decision-Making Process*

Written decisions serve to inform USCIS “customers” about the adjudication of their case. Whether part of a written decision or encompassed in a properly completed adjudication form, the rationale for your decision should be set forth so that the customer and any reviewer (such as your supervisor, headquarters, the Administrative Appeals Office (AAO), the Board of Immigration Appeals (BIA), Immigration Judges (IJs), and the federal courts) can understand the rationale for the decision.<sup>2</sup>

### *Provides a Meaningful Opportunity to Respond*

Clear legal analysis can also explain to the applicant why you intend to deny or have denied the applicant’s request for relief. The applicant is then in a much better position to formulate a relevant response or rebuttal that specifically addresses the shortcomings or concerns you have identified. If the applicant understands the reason(s) behind your decision, the applicant can address your specific concerns, rather than merely reiterating the facts already presented, hoping to cover all bases.

## 3 THE LEGAL DECISION MAKING PROCESS

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<sup>2</sup> See RAIO Training Module, *Evidence*.

When determining eligibility for a benefit:

- Know the law to be applied
- Break the law into its elements
- Identify the evidence in the claim
- Evaluate the evidence to determine the facts
- Apply (the elements of) the law to the facts to explain your decision

### 3.1 Begin by Knowing the Law to Be Applied

Before adjudicating, you must understand the law involved. Start by reviewing the relevant statute, regulation, policy guidance, and/or precedent decisions to identify the law that you will be applying. If you are using a template or shell, be sure that it is current.

#### Mandatory vs. Permissive Language

- Mandatory Language: Shall, Must, Required, And
- Permissive Language: May, Either, Or

Seemingly little words can mean a lot, such as those shown above. Their presence can affect how and when the law is to be applied. As in everyday English, the use of the conjunctive “and” in a list ordinarily means that all of the requirements listed must be satisfied, while use of the disjunctive “or” means that only one of the requirements listed need be satisfied. The use of “shall” and “may” also mirrors common usage; ordinarily “shall” is construed as mandatory, and “may” as permissive. These words should also be read in their broader statutory context, in order to determine whether the overall legal directive itself is mandatory or permissive.

The example below illustrates the use of mandatory and permissive terms in the definition of the “disappearance of both parents” under 8 C.F.R. 204.3(b) for orphan cases:

1. both parents have unaccountably or inexplicably passed out of the child's life;
2. [both parents’] whereabouts are unknown;
3. there is no reasonable hope of [both parents’] reappearance; and
4. there has been a reasonable effort to locate [both parents] as determined by a competent authority in accordance with the laws of the foreign-sending country.



The placement of “*or*” in element 1 indicates that either basis for the parents’ passing from the child’s life will satisfy this particular element (i.e., the parents’ passing can be unaccounted for *or* inexplicable). The placement of “*and*” after element 4 makes it clear that all four of the elements must be present in order to satisfy the legal requirements and establish the “*disappearance of both parents.*”

### 3.2 Break the Law into its Elements

Next, break up the law into its individual elements. The law you apply may follow one of three basic formulas:

1. a legal “test” to be met
2. a set of “factors” to be considered
3. an analytical “framework” to be followed

Keep in mind that these formulas are not mutually exclusive. In fact, it is not uncommon for a particular law to consist of several elements (and even sub-elements), each containing one or more of these formulas. That is, a law may be made up of several elements, and each element could contain a test, a set of factors, or an analytical framework.

#### 3.2.1 A Legal “Test” to Be Met

The law you apply may indicate that all of the enumerated elements must be satisfied, or it may indicate that the existence of one, or some, of them will suffice.

##### *Example*

The Immigration and Nationality Act (INA) defines “stepchild” as an unmarried person under 21 years of age, whether or not born out of wedlock, provided the child had not reached the age of 18 years at the time the marriage creating the status of stepchild occurred.<sup>3</sup>

Required elements of the test to be met:

- unmarried person
- under 21 years of age
- a marriage creating the status of stepchild for this person has occurred
- person had not reached the age of 18 years at the time of such marriage

##### *Example*

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<sup>3</sup> INA §§ 101(b); 101(b)(1)(B).

You are adjudicating a Form I-600 Petition to Classify Orphan as an Immediate Relative (“orphan petition”) pursuant to INA § 101(b)(1)(F). An issue in the case before you is whether the child beneficiary is an orphan due to the disappearance of his parents.

The Code of Federal Regulations at 8 C.F.R. § 204.3(b) defines “disappearance of both parents” as follows:

Disappearance of both parents means that both parents have unaccountably or inexplicably passed out of the child's life, their whereabouts are unknown, there is no reasonable hope of their reappearance, and there has been a reasonable effort to locate them as determined by a competent authority in accordance with the laws of the foreign-sending country.

8 C.F.R. § 204.3(b) Broken into its Essential Elements:

- Both parents have unaccountably or inexplicably passed out of the child's life;
- [both parents’] Whereabouts are unknown;
- There is no reasonable hope of [both parents’] reappearance; and
- There has been a reasonable effort to locate [both parents] as determined by a competent authority in accordance with the laws of the foreign-sending country.

### 3.2.2 A Set of “Factors” for Consideration

Alternatively, the law may identify a number of factors to weigh or consider when making a particular legal determination. The law may specify that some factors should be given more weight than others, or that each factor is to be evaluated equally. Either way, you must indicate which (if any) factors exist in the case. Often, the law requires you to engage in a “balancing test” or to consider the “totality of the circumstances.”

#### *Example*

Courts have identified various factors for consideration when evaluating whether past threats made against an asylum or refugee applicant constitute persecution. These factors include:

- Does the persecutor have the means to harm?
- Has the persecutor attempted to act on the threat?

- Is the nature of the threat itself indicative of its seriousness?
- Has the persecutor harmed or attempted to harm the applicant in other ways?
- Has the persecutor attacked, harassed, or threatened the applicant’s family?
- Has the persecutor executed threats issued to others similarly situated to the applicant?
- Did the applicant suffer emotional or psychological harm as a result of the threat(s)?<sup>4</sup>

### 3.2.3 Following An Analytical “Framework”

The law may also provide a systematic, step-by-step approach that you must follow when analyzing a particular legal issue. To make a proper determination, your legal analysis should reflect that you engaged in each of the steps outlined and did so in the order indicated.

#### *Example*

*Matter of A-G-G*<sup>5</sup> provides a four-step framework that must be followed in order to properly determine whether an asylum applicant is firmly resettled.<sup>6</sup> This analytical framework consists of the following:

- **Step One:** Your burden to present *prima facie* evidence of an offer of permanent resettlement
- **Step Two:** If there is *prima facie* evidence, it is the applicant’s burden to rebut such evidence
- **Step Three:** You weigh the totality of the evidence and make a determination whether the evidence of an offer of firm resettlement has been rebutted
- **Step Four:** If you find the applicant was firmly resettled, the burden shifts to the applicant to show an exception applies.

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<sup>4</sup> See RAIO Training Module, *Definition of Persecution and Eligibility Based on Past Persecution*.

<sup>5</sup> *Matter of A-G-G*, 25 I&N Dec. 486 (BIA 2011).

<sup>6</sup> See RAIO Training Module, *Firm Resettlement*.

A law is typically comprised of several elements, with each element having one or more sub-elements. Each of these, in turn, may involve a test, a set of factors, or an analytical framework. This may sound complex, but your objective is a simple one. You need to understand the law you are dealing with, so you can effectively break it into elements and apply those elements to the facts of the case before you. The following example should help clarify this point.

*Example*

*Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), laid out a four-part test for determining well-founded fear in protection cases. To establish a well-founded fear of future persecution, an applicant must establish all of the following elements.<sup>7</sup>

- Possession (or imputed possession of a protected characteristic)
- Awareness (the persecutor is aware or could become aware the applicant possesses the characteristic)
- Capability (the persecutor has the capability of punishing the applicant)
- Inclination (the persecutor has the inclination to punish the applicant)

Here, we have an overall “test” to be met in order to establish the existence of a well-founded fear. This test involving Possession, Awareness, Capability, and Inclination is sometimes referred to as “PACI.”

The first element of the PACI test is possession. “Possession” consists of sub-elements that an applicant must establish. These include that:

- he or she possesses or is believed to possess a characteristic
- the persecutor seeks to overcome that characteristic, [and]
- the characteristic falls within one of the protected grounds listed in the refugee definition (i.e., race, religion, nationality, membership in a particular social group, or political opinion)

Thus, the element of “possession” involves an additional three-part “test” to be met. Notably, when analyzing the characteristic at issue, further elements comprising the characteristic will likely need to be analyzed (e.g., establishing the existence of a particular social group and the applicant’s membership therein may well involve a combination of test(s), factors and/or an analytical “framework.”)

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<sup>7</sup> See RAIO Training Module, *Well-Founded Fear*.

The third PACI element, “Capability” requires that an applicant establish that the persecutor has the capability to persecute him because he possesses (or is believed to possess) a protected characteristic. Some factors identified as appropriate for consideration in evaluating capability include:

- whether the persecutor is a governmental entity and, if so, the extent of the government’s power or authority;
- whether the persecutor is a non-governmental entity, and if so, the extent to which the government is able or willing to control it; and
- the extent to which the persecutor has the ability to enforce his or her will throughout the country

And while the four-part PACI test is not a strict “framework” in that the sequence of its steps are not rigidly defined, it is often used like one in practice because going through the elements in the order given is both logical and efficient.

### 3.3 Identify the Evidence in the Claim

When adjudicating an application, you may encounter different types of evidence including oral and written testimony and documents.<sup>8</sup> Before engaging in the analysis, review the evidence in the record and, if necessary, conduct country of origin information research or other research to identify the material facts of the case.

**Material facts** are those facts that directly relate to one or more of the required legal elements to be analyzed. They have a direct bearing on the outcome of the decision.<sup>9</sup>

**Relevant evidence** means evidence having a tendency to make the existence of a material fact more or less probable than it would be without the evidence.<sup>10</sup> If the presented evidence does not help to establish or refute a material fact, that evidence is irrelevant. You should not rely on irrelevant evidence in constructing your analysis.

*All* material facts must be considered in your analysis of whether the legal elements have been met. You may never ignore a material fact simply because it makes reaching a decision more difficult or fails to support your opinion about the applicant or his or her eligibility. Similarly, any factual conclusions you draw must be supported by the evidence (or the absence of evidence) in the record. Conclusions that rely on speculative, unsupported, equivocal, or irrelevant evidence should not be part of your analysis.

#### *Example*

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<sup>8</sup> See RAIO Training module, *Evidence*.

<sup>9</sup> See Federal Rules of Evidence, Rule 401; see also “Notes of Advisory Committee on Proposed Rules.”

<sup>10</sup> Federal Rules of Evidence, Rule 401; see also RAIO Training Module, *Evidence*, section on Types of Evidence.

Which of the following are *material facts* relating to the “disappearance of both parents,” as defined at 8 C.F.R. § 204.3(b)?

1. The child’s mother is in a refugee camp.
2. No one attempted to locate the child’s parents.
3. Records indicate that 18 months ago the child entered the United States without inspection and subsequently returned to the foreign-sending country.<sup>11</sup>

### **3.4 Evaluate the Evidence to Determine the Facts<sup>12</sup>**

After identifying the evidence, evaluate it to determine the facts of the claim. You must determine whether any testimony in support of the claim is credible and you must determine whether any documentary evidence is authentic or reliable.

### **3.5 Apply (the Elements of) the Law to the Facts to Explain your Decision**

After breaking down the law into specific elements and identifying the material facts to be considered, you are ready to apply the law to the facts and make a decision in the case.

Your analysis should not simply repeat the material facts. Rather, it should incorporate and connect them to the required legal elements.

Compare each individual piece of evidence that is linked to the same material fact. Weighing the different pieces of evidence against each other is a delicate task. You have to determine how pieces of evidence relate to each other. Do they support each other or are they contradictory? Then determine whether enough material facts are supported by evidence to meet the standard of proof for each element of eligibility.

#### **3.5.1 Include the Material Facts, an Explanation, and a Conclusion**

Your overall analysis will contain both explanatory statements and conclusions addressing each of the required legal elements. The explanatory statements will include the relevant facts and how the law applies to those facts. Taken together, these will lead to a final determination as to eligibility for the benefit sought.

#### ***Examples of complete legal analysis***

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<sup>11</sup>1-material—a parent’s whereabouts are not unknown; 2- material—no reasonable effort to locate parents has been made; 3-without more, this is not material – as it is not relevant to a legal element in 8 C.F.R. § 204.3(b) defining “disappearance of both parents.” However, testimony or other evidence might indicate that child was with a parent in the U.S.

<sup>12</sup> See RAIO Training modules: *Evidence; Credibility, Researching and Using Country of Origin Information in RAIO Adjudications; and Fraud.*

Because the applicant was able to live safely in his country for several years without further incident, he failed to establish that the authorities have the inclination to carry out their threats. Therefore, his fear of future persecution is not well-founded. (*material fact, analysis, and conclusion; may lead to final determination of ineligibility, if no past persecution*)

- The fact that the applicant safely relocated to another part of the country for nearly four years indicates that the guerrillas do not have the inclination or capability to carry out their will on a nation-wide basis. Because the applicant can avoid persecution through relocation and the evidence demonstrates that it is reasonable to expect her to do so, her fear of future persecution is not well-founded. (*material fact, analysis, and conclusion; may lead to final determination of ineligibility, if no past persecution*)

#### *Examples of incomplete legal analysis*

- The applicant was able to live safely in his country for several years after he was threatened. Therefore, the applicant is not eligible for asylum. (*statement of fact and final determination; no analysis*)
- The applicant failed to establish that his fear is well-founded. (*conclusion only*)
- The applicant can avoid persecution within her country. (*conclusion only*)
- The applicant safely relocated to another part of her country. Therefore, she is not eligible for asylum. (*statement of fact, final determination of eligibility; no analysis*)

Being able to determine what to include and what not to include in your decision is important. Include in your decision all of the material facts necessary to come to a conclusion. Do not include facts that are irrelevant to the claim. The reviewer should not be left wondering how you came to your conclusion, or wondering why you included unnecessary facts.

### **3.5.2 Not All Untrue Statements Lead to a Denial**

The fact that an applicant has made untrue statements during an interview raises questions about the veracity of the claim and should be considered. However, not all untrue statements lead to a denial or referral of the application. The untrue statements must be evaluated in light of the totality of the circumstances and all the relevant factors in the case.<sup>13</sup>

#### *Example*

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<sup>13</sup> See RAIO Training module, *Credibility*.

A Salvadoran citizen told an INS enforcement officer that he was Mexican. When the applicant applied for asylum, he asserted that he was Salvadoran. The Court of Appeals for the Ninth Circuit found that the immigration judge (IJ) erred in finding that the misrepresentation made the applicant ineligible for asylum. The misrepresentation supported the claim for asylum eligibility, because the applicant's misrepresentation to the enforcement officer whom he feared might deport him was consistent with the applicant's testimony that he feared deportation to El Salvador.<sup>14</sup>

Although you should not overly analyze inconsequential evidence that has been submitted, a brief reference to such evidence in your written decision may, in some cases, be useful. Including a brief explanation helps the applicant understand why his submitted evidence was insufficient.

### 3.5.3 IRAC – A Useful Tool to Organize your Analysis<sup>15</sup>

The “IRAC” method is a simple and objective means of organizing your legal analysis in a clear and logical way. In mathematical terms, it is similar to a formula. IRAC has four basic parts:

- Issue
- Rule
- Analysis
- Conclusion

It can be used to organize individual paragraphs or an entire decision. Many USCIS decision templates are based on IRAC.

#### *What is an ISSUE?*

An issue is the legal question presented by the case that must be resolved for a decision to be reached. For example, in a denial, it will be the legal reason that the case is being denied. The issue will arise from the material facts of the case. There can be more than one issue in a case. There will always be a rule to support each issue.

#### *Examples*

- CASE A: You are adjudicating a Form I-130 *Petition for Alien Relative*:

**ISSUE:** Can a Form I-130 *Petition for Alien Relative* filed by a lawful permanent resident (LPR) grandparent for a foreign-born granddaughter be approved?

<sup>14</sup> *Turcios v. INS*, 821 F.2d 1396, 1400-1401 (9th Cir. 1987).

<sup>15</sup> See RAIO Training module, *Reading and Using Case Law*



- **CASE B:** You are adjudicating an application for protection from persecution (i.e., an asylum application or application for refugee status):

**ISSUE:** Can past threats, without actual or attempted bodily harm, be sufficiently serious as to constitute past persecution?

### *What is a RULE?*

A rule is the applicable law. A rule can come from a statute, regulation, precedent decision, case law, policy memorandum, or other legal authority.

### *Examples*

- **CASE A - RULE:** A relative of U.S. citizen (USC) or Legal Permanent Resident (LPR)<sup>16</sup> may be the beneficiary of a Form I-130 Petition for Alien Relative provided she is among the classes of eligible alien relatives enumerated in INA §§ 201(b), 203(a). These provisions identify eligible alien relatives to include:
  - “*immediate family members*,” defined as:
    - the spouse, parent, or child (including adopted orphans) of a U.S. citizen
  - “*family-based preference petition - principal beneficiaries*,” defined as:
    - sons and daughters of USCs;
    - spouses, children, and unmarried sons and daughters of LPRs, and
    - brothers and sisters of USCs;

OR

  - “*family-based preference petition - derivative beneficiaries*,” defined as:
    - dependents (spouse and child(ren)) of principal beneficiaries.
- **CASE B - RULE:** You should evaluate the entire scope of harm experienced by the applicant to determine if he or she was persecuted. U.S. federal courts have identified the following factors for consideration in determining whether past threats are sufficient to constitute persecution:<sup>17</sup>
  - The nature and seriousness of the threat(s);

<sup>16</sup> The petitioner in this example was neither a refugee nor asylee, thus, INA §§ 207(c)(2), 208(b)(3) can not apply.

<sup>17</sup> See RAIO Training Module, *Definition of Persecution and Eligibility Based on Past Persecution*.

- whether the persecutor
  - attempted to act on the threat;
  - attempted to harm the applicant in other ways;
  - attacked, harassed or threatened the applicant’s family;
  - executed threats issued to others similarly situated to the applicant; and
- whether the applicant suffered emotional or psychological harm as a result of the threat(s)

### *What is ANALYSIS?*

Analysis is the application of the rules to the facts. The analysis should include a discussion of the material facts in the record of proceeding and explain how they demonstrate that the issue has been favorably or unfavorably resolved. Analysis is what explains “why,” and shows “how” you reached a given conclusion.

### *Examples*

- **CASE A - FACTS:** The petitioner is a lawful permanent resident (LPR) grandparent seeking to petition for her foreign-born granddaughter. The petitioner has presented documentation of the petitioner’s LPR status and the claimed relationship. The child has always resided with her married parents in the country of origin; there is no claim of adoption.

**ANALYSIS:** There is no provision under the INA providing for an LPR grandparent to petition for his/her foreign-born grandchild. See INA §§ 201(b), 203(a), 101. Grandchildren of LPRs are not among those listed as “immediate family members,” nor are they eligible to receive an immigrant visa as either a primary or derivative beneficiary. Furthermore, there is no indication that the grandparent here has adopted the child in question.

- **CASE B - FACTS:** The applicant has credibly testified that anti-government insurgents controlled much of the countryside near his home. For several years, he volunteered with the local community watch group. Some watch members, including the applicant, reported suspected insurgent activities to regional government officials. The applicant made three such reports, the last of which dealt with the location of an insurgent training camp. Weeks afterward, friends warned the applicant that known insurgents had been asking about him. A month later, insurgents left a letter outside the applicant’s home indicating that they knew he was a government supporter and advising him to shut his mouth. The letter also contained a picture of a skull, which the applicant understood to be a death threat. Applicant asserts that several people (one, a watch leader) who received similar letters were later killed. Applicant received two more letters over the next three months: one left on his doorstep,

and another tied to a rock thrown through the window of his workplace. The last letter (tied to the rock) warned that the applicant would “not live to report [them] again.” Upon receiving this letter, the applicant quit his job and went into hiding. He left for the United States two weeks later.

**ANALYSIS**: The applicant received increasingly serious death threats over a period of several months. The threats escalated both in their nature and in the seriousness of the threat made. For example, the initial letters advised applicant to be quiet and only implied physical harm (i.e., a skull image), while the last letter explicitly threatened applicant with assassination. Also, the initial threatening notes were left at the applicant’s home, while the last was delivered to applicant at his work place using violent means that damaged property associated with the applicant. In addition, the insurgents executed comparable threats made against others similarly situated to the applicant. This is evidenced by the fact that others -- including at least one person from applicant’s community watch group -- were killed after receiving similar threatening letters from the insurgents.

### *What is a CONCLUSION?*

A conclusion states the results from the application of the rule to the case facts. It should not introduce new ideas to the decision, but rather should briefly summarize the legal answer to the question posed by the issue in the case.

A conclusion will always elicit the question, “why?” And the “why” should always be explained in your analysis.

### *Examples*

- **CASE A – CONCLUSION**: The Form I-130 Petition for Alien Relative must be denied as a matter of law.
- **CASE B – CONCLUSION**: The threats that the applicant experienced are sufficiently serious as to constitute past persecution.

IRAC can be especially helpful in cases involving multiple issues. In such cases, you should “stack the issues,” dealing with each in turn, so that your analysis is clear and no issue is overlooked. Normally, you should begin with the strongest or most important issue, and conclude with the weakest. This is especially important in denials, where an applicant may seek further review or appeal.

In the absence of a template, a decision with multiple issues generally follows the following structure:

- Introduction and Procedural History
- Case Facts

- Law
- Issue #1 (presented in IRAC format)
- Issue #2 (presented in IRAC format)
- Burden of Proof
- Disposition / Conclusion

## 4 WRITING STYLE

### 4.1 Make Your Written Decision Readable

Individuals who read your decisions should be able to understand them the first time they read them. You have a duty to communicate clearly. Your decisions should be concise and logically organized. Whenever possible, you should use the active voice, short paragraphs and sentences, and simple words and pronouns. These are not only sound principles of writing, these principles are part of U.S. law through the Plain Writing Act of 2010.<sup>18</sup>

Some written decisions are intended for the applicant (e.g., asylum or orphan Notice of Intent to Deny), while others are intended for administrative reviewers who are familiar with the legal standards and terms you use as an officer. Applicants usually have little understanding of the complexities of the law. You must therefore take care when preparing decision documents that will be provided to the applicant. Be sure that the explanations within your legal analysis effectively communicate your ideas using words the applicant will understand.

#### *Example*

It may be sufficient to state in an asylum assessment, “the applicant failed to establish a nexus between the feared harm and a protected ground.” The reviewer of an assessment will know what you mean by “protected ground.” An asylum applicant may have quite a different notion of those two words (picture a piece of land with an armed guard).

In a Notice of Intent to Deny (NOID), it would be better to state, “you failed to make a connection between the harm you fear and a protected characteristic in the refugee definition (race, religion, nationality, membership in a particular social group, or political opinion).”

You should also avoid using certain legal terminology (“legalese”), such as Latin terms that would be difficult for a lay person to understand.

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<sup>18</sup> Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (Oct. 13, 2010). For further guidance on plain language principles, see USCIS’s Plain Language Guide (May 2011).

**Example**

“Because the applicant failed to establish a well-founded fear of future persecution, *a fortiori*, the applicant failed to establish eligibility for withholding of removal.”

This is better stated using plain language, such as: “Because the applicant failed to establish a well-founded fear of future persecution, he necessarily failed to meet the higher standard of proof required to establish eligibility for withholding of removal.”

**4.1.1 Be Focused**

Your explanation should not be long and detailed, but rather short and to the point. Avoid repetition. Discuss only facts that have a direct bearing on the case at hand.

**4.1.2 Include Objective Analysis, Not Personal Opinions, Assumptions, or Speculation**

Your analysis should contain only evidence presented by the applicant, including any relevant statements made by the applicant and other witnesses, and information from reliable sources. Your analysis should be free of your personal opinions, assumptions, or speculations about the applicant or his or her claim.

**4.1.3 Use an Explanatory Tone**

The purpose of the analysis is to inform, not to argue a point or persuade an adversary. Your analysis should be explanatory, not argumentative in tone.

**Examples**

- (*Argumentative*) The fact that the applicant safely relocated to another city in his country where he lived and worked for two years before coming to the United States clearly shows, without a doubt, that it is reasonable for him to relocate within his home country. Therefore, it is manifestly contrary to law to find that the applicant has a well-founded fear of future persecution.
- (*Explanatory*) Because the applicant was able to relocate safely within his country for two years prior to coming to the United States, he has not established a well-founded fear of persecution.

**4.2 Use Language that Reflects the Appropriate Legal Standard**

Take care to choose words that accurately reflect the law being applied; some words used in common dialogue may have specific legal connotations that may alter the legal meaning of the text.

*Examples*

- The word “would” reflects a particular standard of proof in a legal context. It implies a probability that an event will occur (which is the standard of proof for withholding of removal). Compare the following two statements:

“The applicant failed to establish that she would be persecuted if she returned to her country.”

“The applicant failed to establish that there is a reasonable possibility of persecution if she returned to her country.”

- The words “persecution” and “torture” are terms of art, in that they have specific legal meanings. You should not indicate that the harm an applicant suffered is persecution or torture, unless you have concluded that the harm actually meets the legal definition of those terms.

### **4.3 Use Citations Only Where the Source Was Relied Upon in Making a Decision**

#### **4.3.1 Citing Case Law**

Some RAIO Directorate determinations generally do not contain references to specific precedent decisions. A precedent decision should be cited only if you rely on that decision in formulating a legal conclusion within your decision.

#### **4.3.2 Citing Country of Origin Information<sup>19</sup>**

If you rely on a particular country of origin information report in reaching a conclusion in your legal analysis, then that information or report should be cited.

*Example*

The applicant claimed to have been threatened because he campaigned and voted for the Freedom Party candidate, Mr. Jones, for President in the 2008 elections. However, country conditions information reports establish that the candidate for the Freedom Party in the 2008 Presidential elections was Ms. Smith.

There should be a citation to the report noted in the above example. The best practice is that the citation should be complete, containing the name of the source, the author, the date and place of publication, the appropriate page numbers, and the URL, if accessed on the Internet. In overseas refugee processing, the citation is only necessary if the country of origin information is the sole basis for a denial and the citation form may be less formal, but should still be complete enough so that the source can easily be checked by a supervisor.

<sup>19</sup> See RAIO Training module, *Researching and Using Country of Origin Information in RAIO Adjudications*.

You should not rely on anecdotal or other unofficial country conditions information in your written decisions.

## **5 CONCLUSION**

Your adjudication decisions must be made, and where applicable communicated, in a legally sound, professional, and understandable way. Knowing and using proper legal analysis in your decision making will help ensure this goal. Even where a decision does not result in a written explanation of eligibility, adherence to the principles outlined in this module will help you to make quality adjudications that are legally sufficient and clearly communicated. Consistently well-reasoned decisions that rely on appropriate and permissible considerations bolster confidence in, and the integrity of, the RAIO Directorate and the U.S. immigration process.

## **6 SUMMARY**

### **6.1 General Considerations**

Each decision you make is important, as it involves someone's life. You should make decisions in a neutral, unbiased manner according to the law. Using legal analysis, the breaking down of a complex whole into separate parts for study, helps ensure that you give each decision due consideration.

Legal analysis breaks down an eligibility determination into short explanations and conclusions that make clear to others how you reached your final determination. Whether or not you write your decision, you must still engage in careful legal analysis in every case to determine accurately each applicant's eligibility for the benefit.

You must consider the particular facts of each case, and not be unduly influenced by your previous cases. Your duty as an officer is to be neutral and unbiased, and you should strive for consistency in your application of the law from one case to another.

You must apply the law as it is set forth by statute and interpreted by regulation, precedent decisions, and policy guidance. You should consider all relevant evidence and give that evidence the weight due to it. You cannot develop new standards based on what you think the law should be. Nor should your personal opinions and beliefs enter into your decision-making. Other inappropriate considerations include foreign policy concerns, the state of relations (favorable or unfavorable) between the U.S. Government and an applicant's home country, and generalized reports on fraud within the applicant's nationality (although such reports can assist in determining lines of questioning during the interview).

At times, you may find it difficult to balance quality with quantity while under time constraints to complete your cases. For this reason, it is particularly important that you



train yourself to focus on the critical legal and factual issues and to become skilled at making well-reasoned, supportable decisions.

Legal analysis promotes and ensures timeliness and quality by focusing on appropriate factors and the correct application of the law. It allows for review and transparency, and provides a meaningful opportunity, where applicable, for the applicant to respond.

## 6.2 The Legal Decision Making Process

When determining eligibility for a benefit: know the law you are applying, break the law into its elements, identify the evidence in the claim, evaluate the evidence to determine the facts, and apply the law to the facts to explain your decision.

Start your decision making by reviewing the relevant statute, regulation, case, or policy guidance. If you are using a template or shell, make sure that it is current. Determine whether the language in the law is mandatory or permissive and break the law into its elements. The law may follow one of three basic formulas: a legal “test,” a set of “factors” to consider, or an analytical framework to be followed. A law typically consists of several elements, with each element having one or more sub-elements. Each of these in turn may involve a test, set of factors, or an analytical framework. This may sound complex, but your objective is simple: to understand the law.

Next identify the evidence in the claim. In adjudicating an application for a benefit, you may encounter oral testimony, written testimony, and documentary evidence. Before engaging in legal analysis, review the evidence in the record and, if necessary, conduct country of origin research to identify and evaluate the relevant and material facts in the case. You must consider *all* material facts, *i.e.*, those related to the required legal elements, in your decision. You cannot ignore a material fact, nor may you rely on speculative, unsupported, equivocal, or irrelevant evidence in your legal analysis.

Lastly, apply the law to the facts to explain your decision. Compare each individual piece of evidence that is linked to the same material fact. Weighing the different pieces of evidence against each other is a delicate task. Determine if the pieces of evidence support each other or if they are contradictory. Then determine whether enough material facts are supported by evidence to meet the standard of proof. Your overall analysis will contain reference to material facts, explanatory statements, and conclusions. Taken together, these will lead to a final determination on the applicant’s eligibility for the benefit.

The IRAC method is a simple, objective means of organizing your legal analysis in a clear and logical way. It can be used to organize a paragraph or your entire decision.

IRAC has four basic parts:

- Issue – the legal question presented
- Rule – the applicable law
- Analysis – the application of law to facts
- Conclusion – the results of the application of law to facts



### 6.3 Writing Style

Your decisions should be understood the first time they are read. They should be concise and logically organized. Whenever possible, you should use the active voice, short paragraphs and sentences, and simple words and pronouns. These are sound writing principles which ensure compliance with the Plain Writing Act of 2010.

Your decision should be short and to the point. Your analysis should only contain references to the evidence of record and country information from reliable sources.

Use an explanatory tone. The purpose of your analysis and decision is to inform, not to argue a point or persuade an adversary. Choose words that accurately reflect the law and legal standard you are applying. Whenever possible, use plain language rather than legal jargon or “legalese.” Choose language the reader will understand.

RAIO Directorate decisions generally do not contain references to precedent case law; however, if you rely on a specific precedent case in formulating your decision, you should cite it. You should similarly cite country of origin information if it is from a reliable source and you rely on it to reach a conclusion within your legal analysis.

**PRACTICAL EXERCISES**

**OTHER MATERIALS****Other Materials - 1****Adjudicator's Field Manual****General Adjudication Procedures**

The following steps generally apply to all cases processed by the adjudications unit within a service center or local office (including all naturalization and nationality applications). Depending upon local procedures, these steps may be handled by a single adjudicator, or they may be broken down according to task with various tasks being handled by different employees.

...

(e) The Burden of Proof.

The burden of proof in establishing eligibility for an immigration benefit always falls solely on the petitioner or applicant. USCIS need not prove ineligibility.

...

(f) Inspection of Evidence.

The adjudicator can give a petitioner or applicant an opportunity to inspect and rebut adverse evidence used in making a decision. Prior to denying any application or petition based on such evidence, USCIS routinely issues a notice of intent to deny (NOID) letter, explaining the nature of the adverse information. The applicant or petitioner may choose to respond in writing or may ask to inspect the record of proceedings prior to submission of a rebuttal.

A NOID must specify the date by which a response must be received and instruct the applicant or petitioner that a failure to respond may result in a denial. The maximum time to submit a response to a NOID is 30 days. There are no extensions of time beyond the 30 day limit. 8 CFR 103.2(b)(8), (16).

...

(g) Decision: Approval.

If a case is ready for approval, the adjudicator must stamp the action block with his or her approval stamp and approved "security" ink. In some cases, the officer's signature is also required.

Depending upon local procedures, a work sheet for clerical action may be completed, or the adjudicator may update the CLAIMS system to initiate generation of an approval notice to the applicant or petitioner and the attorney of record, if any.

...

(h) Decision: Denial.

If a case is to be denied, the adjudicator must so note the action block and prepare the written denial notice. Denials may consist mainly of "boilerplate" paragraphs explaining the legal basis for the adverse decision or they may be entirely original. [I]n all cases, the specific facts of the individual case must be explained in the decision. If a denial is based on precedent decisions, those decisions should be properly cited in the body of the denial notice.

...

### 10.7 Preparing Denial Orders

(a) General. This paragraph provides basic guidelines to use when preparing a decision to deny an application or petition for a benefit under the Immigration and Nationality Act, or to certify a decision to either the AAO or the BIA.

For many applications and petitions, standardized forms exist, or "canned" paragraphs have been prepared, for assistance in preparing a formal decision. For many other applications and petitions, an individual formal order must be prepared. When using standard forms and "canned" paragraphs, make sure that the language of the form or paragraph is appropriate for the situation involved. It is all too easy to get into the habit of trying to make the situation fit the language of the canned decision. ...

... *[omitted: table of standard forms]*

Office letterhead may be used for denial notices for application types not specified above.

(b) Elements of a Formal Decision. Use simple language which can be understood by the applicant. Although immigration law can involve complicated legal principles, the decision should be written in clear, simple English so the applicant or petitioner can understand it. Avoid Latin terms and other "legalese" language.

A formal decision should contain five elements, each of which may be one or more paragraphs in length:

- (1) An introduction which describes the benefit being sought
- (2) A description of the criteria which the applicant or petitioner must meet in order to obtain the benefit being sought. This criteria should explain both the statutory requirements and (where appropriate) the discretionary standards and precedents.
- (3) A description of the evidence in the case in question. This includes both the documentation submitted by the applicant or petitioner, and the other evidence which is contained in the case file. If the applicant or petition cannot reasonably be presumed to be already aware of the evidence, he or she must be given an opportunity to rebut the evidence before a decision is made. [ 8 CFR103.2(b)(16)(i) ]
- (4) A discussion of how the evidence in the case fails to meet the criteria for obtaining the benefit. In many cases, there may be more than one reason for the denial, in which case normally all should be discussed. In some cases, however, when the statutory basis for the denial is clear and incontrovertible, a discussion of discretionary issues may be unnecessary.
- (5) A conclusion that informs the applicant or petitioner of the decision to deny and of the reason(s) for it...

...

*[omitted: Notes, appeals forms for inclusion, and Signatory Authority]*

**SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS**

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

**REQUIRED READING**

None

**ADDITIONAL RESOURCES**

1. USCIS Refugee Affairs Division, *Refugee Application Assessment Standard Operating Procedure (SOP)*, Pilot 11 January 2012
2. Decision Worksheets and decision notice templates are found in the Case and Activities Management for International Operations (CAMINO) and in the various RAIO form-specific Standard Operating Procedures.

**SUPPLEMENTS**

**International and Refugee Adjudications Supplement**

**Refugee Application Assessment  
Standard Operating Procedure (SOP)  
[Pilot 01-11-2012]**

**I. BACKGROUND**

The Refugee Application Assessment is a document used to record the refugee application (I-590) adjudication. This tool enables you to confirm the applicant's biographical information, relate the facts obtained during the interview, explain the case analysis, and record your decision. While it has evolved over the years, and different worksheets were developed in various locations, the Refugee Application Assessment becomes the record upon which you base your decisions. The document introduced in this SOP is the most recent version of the worksheet developed by the International and Refugee Affairs Division, and should be used throughout the world where the worldwide standard is used for refugee adjudications.

## II. PURPOSES

The Refugee Application Assessment has three main purposes:

**A. Working Aid.** The Refugee Application Assessment is a working aid. It is structured to assist you in conducting a complete and accurate adjudication, and has been organized in a manner that is logical to the interview process, both in the order of the questioning and the order of the analysis.

**B. Record.** The Refugee Application Assessment is an internal record of the interview and decision-making event. Usually, this document is the only record describing the refugee interview, and it must enable the reader to have a reasonable understanding of what transpired during the dialogue and of your analysis. This document is one of the most important items of record when adjudicating Requests for Review.

**C. Evaluation Tool.** The Refugee Application Assessment acts as a tool for evaluating your performance. This document provides the supervisor with a record of your performance, so that he or she is able to determine the quality of the adjudicator's work product and address any deficiencies that he or she may discover.

## III. GOVERNING PRINCIPLES

There are five important governing principles for the proper use of the Refugee Application Assessment:

**A. Completeness.** You must complete all applicable portions of the Assessment. There are important legal and policy reasons for each item on the Assessment, and although some items may seem unimportant in a particular field environment, they are necessary for the review of your work. Furthermore, an incomplete form could lead a reviewer to conclude that you failed to address the item or were equivocal on the issue. An incomplete Assessment indicates an incomplete adjudication.

**B. Legibility.** You must complete the Assessment in a legible manner. If the Assessment is not legible, it is of little or no value to the reviewing supervisor. An illegible Assessment results in an incomplete record of the adjudication, and if the decision is under challenge, the case could require a new interview.

It is understood that refugee cases must be processed within a short amount of time; however, they are some of the most expensive immigration benefits cases to process. If a decision is challenged and the Assessment is undecipherable or incomplete, the case may require a new interview resulting in a significant increase in the cost of the case.

**C. Professionalism.** You must report the case in a professional manner. The case record should not contain any personal opinions or matters that have no bearing on

the adjudication of the case. The Assessment should be prepared in a business-like tone. Inasmuch as this document could be open to examination by numerous persons both within and outside USCIS, particular care should be taken to ensure that your reporting reflects the highest standards of performance.

**D. Legal Sufficiency.** You are bound by your oath to uphold the laws of the United States. Consequently, you must apply the law as it is set forth by statute and interpreted by regulation and applicable case precedent. You have no authority to develop your own refugee standards or approve or deny an applicant for classification as a refugee other than as INA Section 207(c) dictates. To do so would violate the instructions and policies of the agency. The Assessment should document a sound legal decision.

**E. Consistency in decision-making.** There are no “magic formulas” to determine eligibility for refugee status. Although many claims are similar, they are never identical, and each refugee applicant is unique. Therefore, each request must be evaluated on its own merit. You should be mindful to focus on the facts of each particular case without allowing previous cases to unduly influence the decision-making. For example, the fact that one applicant has suffered severe persecution should not prevent a finding that another applicant, who suffered less severe harm, also suffered persecution. Although each decision must be made on a case-by-case basis, you should strive for consistency in application of the law from one case to another.

...

### C. Section III - APPLICANT’S CLAIM

The purpose of this section is to determine if the *applicant’s testimony*, if credible, would establish that he or she is a statutory refugee as defined in INA Section 101(a)(42).

*[omitted: excerpt of Form I-590 – III. INA §101(A)(42)—APPLICANT’S CLAIM]*

The adjudicator should pay particular attention to the instructions that correspond to each question. For example, section III.B.3 states, “If no, explain below.” If the answer to the question was “Yes,” you are not bound to offer any explanation to that question, but may if you believe it is necessary.

In order to establish that an applicant qualifies as a refugee pursuant to INA §101(a)(42), you must select all of the “Yes” options in either Part III-A/Past Persecution or Part III-B/Well Founded Fear of Future Persecution. If you select at least one “No” option in *both* of these sections, the applicant cannot be a refugee pursuant to INA §101(a)(42). Finally, even if you select all of the “Yes” options in Part III-A/Past Persecution, you must elicit applicant testimony regarding well-founded fear and complete Part III-B/Well Founded Fear of Future Persecution.



Note: It is possible to have all “Yes” answers checked and ultimately to decide that an applicant is not a refugee pursuant to INA §101(a)(42) because he or she was found not credible and/or barred as a persecutor.

...

**D. Section IV – BARS AND INADMISSIBILITIES**

The purpose of this section is to consider the various issues that would bar an applicant from being considered a refugee and/or render the applicant inadmissible to the United States. Bars and grounds of inadmissibility should be considered for every applicant on the case, not just the principal applicant. If the persecutor bar or a ground of inadmissibility applies to one of the applicants other than the principal, this should be noted in the explanation space provided.

**SUPPLEMENT B – ASYLUM ADJUDICATIONS**

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

**REQUIRED READING**

None

**ADDITIONAL RESOURCES**

1. United States Citizenship and Immigration Services, Asylum Officer Basic Training Course Lesson 22: *Decision Writing Part I: Overview & Components, Focusing on the 1st Three Components*, 21 June 2004, available at: [http://raiovl.uscis.dhs.gov/docushare/dsweb/Get/Document-57757/Decision\\_Writing\\_Part\\_1\\_Overview\\_and\\_Components\\_31aug10.doc](http://raiovl.uscis.dhs.gov/docushare/dsweb/Get/Document-57757/Decision_Writing_Part_1_Overview_and_Components_31aug10.doc)
2. United States Citizenship and Immigration Services, Asylum Officer Basic Training Course Lesson 23: *Decision Writing Part II: Legal Analysis*, 9 January 2006, available at: [http://raiovl.uscis.dhs.gov/docushare/dsweb/Get/Document-57758/Decision\\_Writing\\_Part\\_2\\_Legal\\_Analysis\\_31aug10.doc](http://raiovl.uscis.dhs.gov/docushare/dsweb/Get/Document-57758/Decision_Writing_Part_2_Legal_Analysis_31aug10.doc)

**SUPPLEMENTS**

**Asylum Adjudications Supplement**

**Factors that Asylum Officers May Consider**

The determination of whether an individual is eligible for asylum is usually a complex decision that involves consideration of a variety of factors. Factors that may be involved in making the decision are listed below.

Credibility - Evaluation of credibility may require:

- identification of inconsistencies and consideration of explanations for them
- awareness of trauma related symptoms and their potential effect on testimony
- assessment of the applicant's ability to communicate in a second-language

and of potential misunderstandings due to interpretation

- consideration of inter-cultural issues
- evaluation of testimony as it compares to known country conditions
- evaluation of the amount of detail an individual in the applicant's situation reasonably can be expected to provide

Country conditions - An understanding of country conditions may require an evaluation of several aspects of the situation in the country involved, especially when information is sparse or reports are conflicting. Some of the necessary information regarding the applicant's country includes:

- human rights abuses
- structure of the government and roles of the military and/or security forces
- identity of guerrilla forces, separatist groups, and terrorist organizations, and their activities and alliances
- structure and agendas of political organizations or parties
- laws and application of laws
- recent political events

U.S. asylum law - Application of asylum law requires knowledge and understanding of the following:

- statute and regulations
- precedent decisions and their interpretations
- general counsel opinions
- Asylum Division guidance

International human rights law - Application of international human rights law requires knowledge of the human rights protected by international treaties and customary international law, as well as an understanding of the relationship between international law and U.S. law.



# U.S. Citizenship and Immigration Services

## RAIO DIRECTORATE – OFFICER TRAINING

**RAIO Combined Training Program**

### DISCRETION

### TRAINING MODULE

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DATE (see schedule of revisions): 12/20/2019

USCIS00214

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RAIO Directorate – Officer Training / *RAIO Combined Training Program***DISCRETION**  
Training Module**MODULE DESCRIPTION**

This module provides guidelines for adjudicating immigration benefits or other immigration-related requests that are subject to the discretion of the Department of Homeland Security (DHS). The module addresses the basis for determining when discretion is warranted and for performing the legal analysis of claims that involve discretion.

**TERMINAL PERFORMANCE OBJECTIVE(S)**

Given a petition or application that requires a discretionary determination, you will be able to weigh discretionary factors properly and articulate your exercise of discretion in a written decision when appropriate.

**ENABLING PERFORMANCE OBJECTIVES**

1. Explain what adjudicative discretion is.
2. Identify the different circumstances that will require an officer to exercise discretion in an adjudication.
3. Apply the positive and negative factors properly in making a decision on a given case.
4. Explain the reasoning for an exercise of discretion.

**INSTRUCTIONAL METHODS**

- Interactive presentation
- Discussion
- Practical exercises

## **METHOD(S) OF EVALUATION**

Written exam

Practical exercise exam

## **REQUIRED READING**

1. Divine, Robert C., Acting Director, USCIS. Legal and Discretionary Analysis for Adjudication, Memorandum to Office of Domestic Operations, Office of Refugee, Asylum, and International Operations, and Office of National Security and Records Verification (Washington, DC: 03 May 2006)
2. Matter of Pula, 19 I&N Dec. 467 (BIA 1987)
3. Matter of Marin, 16 I&N Dec. 581 (BIA 1978)

## **ADDITIONAL RESOURCES**

Kanstroom, Daniel, Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law, *Tulane Law Review*, Volume 7, Number 3, p. 703 (February 1997).

### Critical Tasks

Task/ Skill #	Task Description
DM5	Skill in analyzing complex issues to identify appropriate responses or decisions (5)
DM7	Skill in making legally sufficient decisions (5)
DM10	Skill in developing a logical argument to support a determination or conclusion (5)

### SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
12/12/2012	Entire Lesson Plan	Lesson Plan published	RAIO Training
11/23/2015	Throughout document	Corrected links and minor typos	RAIO Training
3/2/2018	RAD Supplement	Expanded and updated RAD Supplement	RAD Policy
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training



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

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

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

## **1 INTRODUCTION**

Some decisions made by USCIS are mandatory once facts meeting the applicable standard have been established. Other decisions are made in the exercise of discretion after the officer finds facts that establish eligibility.

### **1.1 Decisions That Are Mandatory**

Mandatory decisions involve no discretion, only an inquiry into whether the facts of the case meet the relevant standard. The adjudicator is concerned only with the evidence that establishes eligibility; once the applicant has met his or her burden of proof, the analysis ends. An example of a benefit that is conferred once the applicant establishes eligibility is the approval of Form I-130, Petition for Alien Relative.<sup>1</sup>

### **1.2 Decisions that are made in the Exercise of Discretion**

Although the applicant may have met the burden of proof by showing that he or she is statutorily eligible, statutory eligibility depends on the exercise of discretion. Eligible applicants may be denied a benefit through an officer's exercise of discretion.

#### **1.2.1 Nonexclusive List of USCIS Case Types in which Discretion is Exercised**

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<sup>1</sup> USCIS officers must approve the I-130 Petition for Alien Relative when the qualifying relationship between the petitioner and the alien beneficiary and the individuals' identities have been established. The approved I-130 permits the beneficiary to apply for an immigrant visa from the Department of State. The consular officer then exercises discretion in determining whether to issue the visa. If the I-130 is being adjudicated under INA §245, in the U.S. concurrently with an I-485 application to adjust status, the grant of the I-485 by the USCIS officer would be discretionary.

- Adjustment of status under Immigration and Nationality Act (INA) §§ 245 and 209(b) (with limited exceptions such as NACARA § 202 and Haitian Refugee Immigration Fairness Act (HRIFA)) and creation of record under section 249 (registry)
- Employment authorization (with limited exceptions, such as for asylum applicants)
- Waivers of various inadmissibility grounds and advance permission to return to the U.S., INA §§ 211, 212 and 213
- Extension of nonimmigrant stay and change of nonimmigrant status, INA § 248
- Advance parole and reentry permits, INA §§ 212(d)(5)(A) and 223
- Waiver of labor certification requirement “in the national interest”, INA § 203(b)(2)(B)
- Revocation of visa petitions, INA § 205
- Waiver of joint filing requirement to remove conditions on permanent residence, INA § 216(b)(4)
- Fiancé(e) petitions, INA § 214(d)
- Special Rule Cancellation of Removal for Battered Spouses and Children, INA § 240A(b)(2)(D)
- Furnishing of information otherwise protected by the legalization confidentiality provisions, INA § 245A(c)(5)(C)<sup>2</sup>
- Refugee status, INA § 207
- Asylum, INA § 208

This lesson covers what discretion is, and how it is exercised. As an adjudicator, you may have the authority to deny a benefit in the exercise of discretion, but that is not license to deny a benefit for just any reason. As this lesson will explain, there are serious limits on exercising your discretion in making a decision on an application.

## 2 OVERVIEW OF DISCRETION

### 2.1 Definition

As a practical matter, in the immigration context, the Board of Immigration Appeals (BIA) has described discretion as a balancing of “the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations

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<sup>2</sup> See Devine, Robert C., Acting Director, USCIS. *Legal and Discretionary Analysis for Adjudication*, Memorandum to Office of Domestic Operations, Office of Refugee, Asylum, and International Operations, and Office of National Security and Records Verification (Washington, DC: 03 May 2006).

presented in his behalf to determine whether ... relief appears in the best interests of this country.”<sup>3</sup>

### *Discussion*

For our purposes, a simple definition of discretion is the “[a]bility or power to decide responsibly.”<sup>4</sup> Alternatively, discretion can be defined as, “freedom or authority to make judgments and to act as one sees fit.”<sup>5</sup> Of the two, the second definition is probably what “discretion” is more commonly understood to mean; however, the law imposes restrictions on the exercise of discretion by an adjudicator, which makes the first definition more accurate for our purposes. While discretion gives the adjudicator some freedom in the way in which he or she decides a particular case after eligibility has been established, that freedom is always constrained by legal restrictions. It is the restrictions that define scope of the adjudicator’s power of discretion.

The concept of discretion is not simple, as it implies certain limitations, without explaining just what those limitations are. One commentator has described discretion thus: “like the hole in a doughnut, [it] does not exist except as an area left open by a surrounding belt of restriction.”<sup>6</sup> The rules as to how to exercise discretion are scarce, but there are many restrictions that have been imposed by the courts in order to ensure that the official exercising discretion does not abuse that power. Discretion is defined in a negative manner, by what is impermissible rather than by what is permissible. In addition, in some instances, regulations or policy guidance may elucidate what factors should be considered in discretion.

## **2.2 Two Types of Discretion**

There are two broad types of discretion that may be exercised in the context of immigration law: prosecutorial (or enforcement) discretion and adjudicative discretion. The scope of discretion is defined by what type of discretionary decision is being made. For the purposes of your work with RAIO, you will be involved in exercising adjudicative discretion, but it is important to know about prosecutorial discretion to help you understand the limitations that are placed on you in your exercise of adjudicative discretion.

### **2.2.1 Adjudicative Discretion**

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<sup>3</sup> *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

<sup>4</sup> *The American Heritage Dictionary of the English Language*, Fourth Edition Houghton Mifflin Company (2000), available at: <http://www.thefreedictionary.com/discretion> (last visited November 23, 2015).

<sup>5</sup> *Collins English Dictionary – Complete and Unabridged*, HarperCollins Publishers 2003, available at <http://www.thefreedictionary.com/discretion> (last visited November 23, 2015).

<sup>6</sup> Ronald M. Dworkin, *Is Law a System of Rules?*, in *The Philosophy of Law* 52 (R.M. Dworkin ed., 1977).

Adjudicative discretion involves the affirmative decision of whether to exercise discretion favorably or not under the standards and procedures provided by statute, regulation, or policy that establish an applicant's eligibility for the benefit and guide the exercise of discretion. Adjudicative discretion has been referred to as "merit-deciding discretion."<sup>7</sup> The exercise of discretion is specifically provided in statute for certain benefits. Some mandatory benefits may have a discretionary component, while other types of adjudicative actions may have no discretionary component. In the case of a waiver-of-inadmissibility application, a favorable exercise of discretion on that application, absent any other negative factors, may lead to a mandatory positive decision on the underlying application.

### *Example*

The beneficiary of an I-730 Refugee/Asylee Relative Petition is seeking to join his spouse, who has been resettled in the United States as a refugee. He has an approved I-730, but you find that he had been living in the United States without documentation prior to their marriage and his wife's resettlement as a refugee and is therefore inadmissible and not eligible for derivative status. He may submit an I-602 Application by Refugee for Waiver of Grounds of Excludability in order to cure that defect in eligibility. Your decision to grant the waiver is discretionary, but once you grant the waiver, the I-730 benefit must be granted.

In general, absent any negative factors, discretionary decisions should be to grant once the applicant has met the requirements of the application or petition.<sup>8</sup> A formal exercise of discretion to deny, rather than to grant, may be appropriate when the applicant has met the requirements of the application or petition, but negative factors have been found in the course of the adjudication and outweigh the positive factors.

However, adjudicative discretion does not allow an adjudicator to grant an immigration benefit in cases where the individual is not otherwise eligible for that benefit.

### **2.2.2 Prosecutorial Discretion**

Prosecutorial discretion is a decision to enforce—or not enforce—the law against someone made by an agency charged with enforcing the law. The term "prosecutorial" can be deceptive, because the scope of decisions covered by this doctrine includes the decision of whether to arrest a suspected violator and the decision of whether to file a charging document against someone. Prosecutorial discretion is not an invitation to violate or ignore the law. Rather, it is a means to use the agency resources in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

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<sup>7</sup> *INS v. Doherty*, 502 U.S. 314 (1992).

<sup>8</sup> *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

Most prosecutorial discretion is exercised by enforcement agencies such as ICE and CBP in the context of their enforcement function (*i.e.*, removal proceedings). Prosecutorial discretion may be exercised at different points in the removal process, from the decision of who to detain or release on bond; to issue, or rescind a detainer, or a Notice to Appear (NTA); a decision to join in a motion for relief or benefit; or even to enforce an order of removal.<sup>9</sup>

One example of prosecutorial discretion exercised by some USCIS officers involves the issuance of an NTA, the document that puts an individual into removal proceedings after the denial of a petition or application. In certain situations, officers have the authority to exercise their discretion and not issue an NTA, despite the applicant's lack of immigration status. In RAIO, only Asylum Officers issue NTAs. This, however, is not a discretionary action by the Asylum Division. Under current regulations,<sup>10</sup> if an applicant is out of status and asylum is not granted, Asylum Officers do not issue denials, but must refer the case to the immigration court.

### 2.2.3 The Difference between Prosecutorial Discretion and Adjudicative Discretion

As noted earlier, officers have no adjudicative discretion to grant a claim that does not meet eligibility requirements. By contrast, prosecutorial discretion may be exercised before any legal finding and therefore may be exercised in cases of individuals who would be ineligible for any other form of relief.

### 2.3 Who Exercises Discretion?

Each time you render a decision on an application in a situation where the benefit is discretionary, you are doing so in the exercise of discretion. This is not an exercise of your own personal discretion; rather, you are exercising discretion as an official of the U.S. Government.

In the Immigration and Nationality Act (INA), Congress has expressly granted discretion to the Secretary of the Department of Homeland Security in deciding when to grant some benefits. For example, the INA contains provisions such as: "Subject to the numerical limitations established pursuant to subsections (a) and (b), the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee..."<sup>11</sup> Most of the time the grant of discretion

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<sup>9</sup> See, e.g., Jeh Johnson, Secretary of Homeland Security, Memo, "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants," (November 20, 2014).

<sup>10</sup> 8 C.F.R. § 208.14(c).

<sup>11</sup> INA § 207(c)(1).

is explicit in the statute;<sup>12</sup> in other instances it is implied, based on the language of the statute.

When Congress enacts a law and allows discretion in the enforcement of that law, it usually grants discretion to the head of the agency tasked with enforcing that law. When you exercise discretion in adjudicating an application for a benefit, you are exercising discretion on behalf of the Secretary of Homeland Security. The Secretary's discretionary power is delegated to you, the adjudicator, through DHS and USCIS.

In many cases, such as the waiver provisions in INA § 212, the statute still reads that is the Attorney General's discretion. In most instances, the statute has not been changed since the creation of the DHS and the transfer of many functions from the Department of Justice to DHS. If USCIS has adjudicative authority over the benefit, the statute should be read as conferring the power to exercise discretion on the Secretary of Homeland Security.<sup>13</sup>

The Secretary or the Director may, by regulation, or directive, set how you exercise your discretion in specific instances. For example, in the particular instance of asylum adjudications, regulations provide that when the applicant has met the refugee definition through a showing of past persecution, you must consider whether there is still a well-founded fear of persecution in the future. If you can show, by a preponderance of the evidence, that there is no well-founded fear, the regulations require you to exercise discretion to deny or refer the claim, unless the applicant shows compelling reasons arising from severe past persecution for being unwilling to return or shows that he or she would face other serious harm upon return.<sup>14</sup>

## 2.4 Limits on Discretion

Some clear limitations on the exercise of discretion must be kept in mind at all times, and are described in the following subsections.

### 2.4.1 Eligibility Threshold

There is never discretion to grant a benefit or relief in a case where the applicant has not met the eligibility requirements for the benefit or relief sought. As a legal matter, it is permissible to deny an application as a matter of discretion, without determining whether

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<sup>12</sup> See, e.g., INA § 209(b) (The Secretary of Homeland Security or the Attorney General, **in the Secretary's or the Attorney General's discretion** and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—...).

<sup>13</sup> 6 U.S.C. § 275.

<sup>14</sup> 8 C.F.R. § 208.13(b)(1)(i). NOTE: This is a different standard than th used in adjudicating refugee claims. For refugee claims an applicant need establish either past persecution or well-founded future fear. See INA 101(a)(42)(A) and (B).



the person is actually eligible for the benefit.<sup>15</sup> As a matter of policy, however, you should generally make a specific determination of statutory eligibility before addressing the exercise of discretion. If an application is denied as an exercise of discretion, and your decision is overturned, the record necessary for making a decision on eligibility for the benefit will be incomplete if the adjudicator did not establish eligibility prior to the discretionary analysis. Ideally, if you deny the petition or application, the denial notice will include a determination on both (1) statutory eligibility grounds and (2) discretionary grounds.

In the case of refugee admissions, to be eligible for refugee resettlement, the applicant must first establish that he or she has access to the U.S. Refugee Admissions Program (USRAP), meets the refugee definition, is not firmly resettled and is otherwise admissible to the United States. Most grounds of inadmissibility may be waived for refugee applicants—drug trafficking and certain security and related grounds are the only exceptions<sup>16</sup>—but you cannot consider the waiver request until the applicant has first established that he or she has access to the USRAP, is not firmly resettled and meets the definition of refugee. Your decision on the waiver application itself is an exercise of discretion.

#### **2.4.2 Lack of Negative Factors**

Absent any negative factors, you will always exercise discretion positively. The fact that an applicant is eligible for a particular benefit is, by itself, a strong positive factor in the weighing process. If there are no negative factors to weigh against that positive factor, denial of the benefit would be an abuse of discretion. This general rule does not apply to waiver adjudications, since the waiver process is predicated on the existence of at least one negative factor.<sup>17</sup>

Discretion gives the adjudicator authority to deny a benefit or a form of relief even when the applicant is eligible according to the law, but that power cannot be exercised arbitrarily or capriciously. When you use discretion to deny a claim, you must explain your reasons clearly and cogently.

### **3 APPLYING DISCRETION**

As an adjudicator, you have an obligation to evaluate any application that comes before you, but, in the course of your adjudication, you may become aware of negative factors. Discretion is the power that allows you to make a decision to deny the benefit when the applicant is eligible for the benefit, but for other reasons it would not be appropriate to

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<sup>15</sup> *INS v. Abudu*, 485 U.S. 94, 105 (1988); *INS v. Bagamasbad*, 429 U.S. 24, 26 (1976).

<sup>16</sup> See *INA* § 207(c)(3).

<sup>17</sup> *Matter of Marin*, 16 I&N Dec. 581, 586-87 (BIA 1978).

exercise discretion favorably. Discretion is the authority you exercise when weighing any negative factors against the positive factors before you make the final decision on the application.

### 3.1 Three-Step Process

Generally, the process you follow in rendering a decision on an application, when that application is discretionary, is:

- Find the facts
- Apply the law
- Balance any negative factors against positive factors before making a decision.

The third step is the exercise of discretion.<sup>18</sup> Each of the steps has a role in determining what constitutes a reasonable exercise of discretion.

#### 3.1.1 Finding the Facts

Finding the facts is a matter of gathering and assessing evidence. While the focus of fact-finding should be to obtain evidence that will help establish eligibility, you should also elicit information concerning the applicant's background such as family ties that they might have in the United States, any serious medical conditions, or other connections that they have in the community. Part of the reason for eliciting information on the applicant's background is to aid in the exercise of discretion, should it become necessary after eligibility is established. The fact that your discretion has become an issue will generally presuppose some negative factors have emerged in the course of processing the claim, you will need to have some idea of what equities the applicant has in order to properly weigh the factors.

In removal proceedings in immigration court the applicant has an affirmative duty to present evidence showing that a favorable exercise of discretion is warranted for any form of relief where discretion is a factor.<sup>19</sup> In adjudications outside the immigration court, however, there is no such requirement; therefore, it is important for you to explore this issue during the interview.

For example, in cases involving possible provision of material support to terrorist groups, where an exemption might be possible, your fact-finding during the interview will be crucial in determining whether an exemption is available and whether to grant the exemption in the exercise of discretion. The testimonial evidence that you elicit during an interview will often be the only evidence upon which to determine "whether the duress

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<sup>18</sup> Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press, 1969

<sup>19</sup> INA §240(c)(4)(A)(ii).

exemption is warranted under the totality of the circumstances.”<sup>20</sup> Your follow-up questions during the interview must focus on the nature and the circumstances of the applicant’s interactions with the suspected terrorist group.<sup>21</sup>

If there appear to be any negative factors present, you should always ask the applicant directly why he or she feels that he or she deserves to have discretion exercised favorably.

### 3.1.2 Applying the Law

The legal analysis of eligibility may also affect the discretionary determination in your adjudication. If, for example, an applicant for a benefit has been convicted of a crime, it may raise the possibility that the applicant may be inadmissible or, in the case of an asylum applicant, that the applicant is subject to a mandatory bar of asylum for having committed a particularly serious crime.<sup>22</sup> In adjudications where admissibility is an issue, the determination whether a particular crime is an aggravated felony will determine whether a waiver is available to the applicant. In some cases, the question of whether a particular crime is an aggravated felony will be easily decided; in others, it will require a close legal analysis.

### 3.1.3 Balancing any Negative Discretionary Factors against Positive Factors before Making a Decision

The act of exercising discretion involves balancing any negative factors against positive factors before making a decision. Discretion always consists of a weighing of positive and negative factors. In the immigration context, the goal is generally to “balance the adverse factors evidencing an alien’s undesirability as a resident of the United States with the social and humane considerations presented” in support of the alien’s residence in the United States<sup>23</sup>. Since most of the benefits conferred by RAIO are based on humanitarian concepts such as family unity and protection from harm, an interviewee’s eligibility for a benefit is always the main positive factor under consideration. The analysis of the negative factors should focus on what effect the alien’s presence in the United States will have on the general welfare of the community. [International and Refugee Adjudications Supplement – Balancing Positive and Negative Factors] [Asylum Adjudications Supplement – Balancing Positive and Negative Factors]

### 3.1.4 Totality of the Circumstances

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<sup>20</sup> Scharfen, Jonathan, Deputy Director, USCIS. *Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations*, Memorandum to Associate Directors; Chief, Office of Administrative Appeals Chief Counsel, (Washington, DC: 24 May 2007) at p. 7.

<sup>21</sup> *Id.*

<sup>22</sup> See INA § 208(b)(2)(A)(ii).

<sup>23</sup> *Matter of Marin*, 16 I&N Dec. 581, 586-87 (BIA 1978).

It is important, when weighing the positive and negative factors, that you do not consider the various factors individually, in isolation from one another.<sup>24</sup> When you consider each factor individually, without considering how all the factors relate to each other, it becomes difficult to weigh the positive and negative factors properly.

### *Example*

The BIA found that while the applicant's circumvention of orderly refugee procedures can be a serious adverse factor in considering an asylum application, "...it should not be considered in such a way that the practical effect is to deny relief in virtually all cases. This factor is only one of a number of factors which should be balanced in exercising discretion, and the weight accorded to this factor may vary depending on the facts of a particular case."<sup>25</sup> The BIA went on explain some of the factors that may influence how much weight should be given to the circumvention of orderly refugee procedures:

"Instead of focusing only on the circumvention of orderly refugee procedures, the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted.

Among those factors which should be considered are whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States.

In addition, the length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residency there are also relevant. For example, an alien who is forced to remain in hiding to elude persecutors, or who faces imminent deportation back to the country where he fears persecution, may not have found a safe haven even though he has escaped to another country.

Further, whether the alien has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere is another factor to consider. In this regard, the extent of the alien's ties to any other countries where he does not fear persecution

<sup>24</sup> *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

<sup>25</sup> *Id.*

should also be examined.

Moreover, if the alien engaged in fraud to circumvent orderly refugee procedures, the seriousness of the fraud should be considered. The use of fraudulent documents to escape the country of persecution itself is not a significant adverse factor while, at the other extreme, entry under the assumed identity of a United States citizen with a United States passport, which was fraudulently obtained by the alien from the United States Government, is very serious fraud.” - *Matter of Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987).

It is clear that all the factors listed by the BIA are interrelated, and it would be difficult to consider any of those factors in isolation from the others and then assign the proper weight to each factor. You must consider all factors together and determine not just whether a particular factor is positive or negative, but how it affects the other factors under consideration. In some cases, one factor will directly cancel out another. A finding that an applicant’s safety was in question may directly explain his/her circumvention of orderly refugee procedures. In other cases, a particular positive factor may just act to balance out a particular negative factor. An applicant’s having relatives in the U.S. may explain why he or she did not attempt to take advantage of orderly refugee procedures in a third country as he or she passed through on the way to the United States.

### **3.2 Identifying the Factors That May Be Considered in the Exercise of Discretion**

Anything about an applicant’s background is potentially a factor to be considered in exercising discretion. However, you must be able to articulate and explain how the factor should be weighed in a particular case. Any facts related to the applicant’s conduct, character, family relations in the United States, other ties to the United States, or any other humanitarian concerns are proper factors to consider in the exercise of discretion. Applicants’ conduct can include how they entered the United States and what they have done since their arrival—such as employment, schooling, or any evidence of criminal activity. Employment history, schooling, and criminal activity may also be relevant factors to consider. It is important to know what family members the applicant may have living in the United States and the immigration status of those family members. Other ties to the United States may include owning real estate or a business. Other humanitarian concerns may include health issues. For example, if an applicant or a family member has a serious illness, can that applicant or family member obtain adequate treatment if removed?

#### **3.2.1 Favorable Factors That May Be Considered**

Courts have listed a number of factors that may be considered as favorable or positive factors in the exercise of discretion. There can be no exhaustive list of factors, since

almost anything about a person's background can be considered. It is important to remember that the applicant's eligibility for the benefit being sought may be the first and strongest positive factor that you should consider. This is especially true in protection cases in which "discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors."<sup>26</sup> Other favorable factors that the BIA has identified include:

[S]uch factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).<sup>27</sup>

### 3.2.2 Negative Factors That May Be Considered

Like the positive factors, it is impossible to list all of the possible negative factors that you may consider in exercise of discretion. Court decisions have referred to a number of factors that they have considered as negative in the exercise of discretion. As a general rule, any information that raises the possibility that an inadmissibility applies, or, in the case of asylum applications, a bar to asylum might apply, might constitute a negative discretionary factor even if it is determined that the inadmissibility or bar does not apply. You should consider carefully any indication that the applicant might pose a threat to public safety or national security. Any criminal conviction is always a negative factor that will weigh heavily against an applicant. Other negative factors that the BIA has looked at in waiver cases include:

[T]he nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.<sup>28</sup>

### 3.3 Weighing Positive and Negative Factors

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<sup>26</sup> *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

<sup>27</sup> *Matter of Marin*, 16 I&N Dec. 581, 584-585 (BIA 1978).

<sup>28</sup> *Id.* at 585.



Having established which factors are relevant to your exercise of discretion, the next step is to determine how to weigh them. Some factors are always going to be more important than other factors.

### 3.3.1 Factors Material to Eligibility Are Given the Most Weight

Any factor that is material to the applicant's eligibility for the benefit being sought generally should be given the most weight. The applicant's eligibility for the benefit is, by itself, a factor arguing for the benefit to be granted in the exercise of discretion. If there are no negative factors present, then in most instances, eligibility is all that is needed to exercise your discretion to grant a benefit.

However, as an exception to the general rule in the case of asylum, there is regulation that restricts the factors you may look at in a specific circumstance, without regard to underlying eligibility. While an applicant may establish eligibility based on past persecution alone, if you find, by a preponderance of the evidence, that the applicant has no well-founded fear of persecution in the future, regulations instruct you to exercise your discretion negatively to refer the application even when there do not appear to be any negative factors.<sup>29</sup> This instruction arises from the fact that the underlying protection basis for the benefit no longer exists. The same regulation also lists two positive factors that may outweigh the lack of future risk to the applicant. Discretion may still be exercised to grant asylum in the absence of well-founded fear if the past persecution suffered by the applicant was so severe that it would not be humane to return the applicant to the country of persecution.<sup>30</sup> You may also grant in the absence of well-founded fear if you find that the applicant would suffer some other serious harm, not related to the past persecution.<sup>31</sup> Both of the factors that would outweigh the lack of well-founded fear are related to the humanitarian goals of the benefit being sought, but only a grant based on severity of past harm is directly related to the underlying eligibility.

Another exception to the general rule would be an I-601 waiver for the 3 and 10 year bars on re-entry for an alien who was unlawfully present and triggered the bars. For waiver of that ground of inadmissibility, the statute specifies that the only positive factor to be considered is extreme hardship to the qualifying relative even though that might not be directly relevant to the underlying benefit (issuance of an immigrant visa).<sup>32</sup>

## 4 DISCRETION IN DECISION WRITING

### 4.1 Positive Exercise of Discretion

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<sup>29</sup> 8 C.F.R. § 208.13(b)(1)(i) (Discretionary referral or denial).

<sup>30</sup> 8 C.F.R. § 208.13(b)(1)(iii)(A).

<sup>31</sup> 8 C.F.R. § 208.13(b)(1)(iii)(B); see *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012).

<sup>32</sup> INA §212(a)(9)(B)(v).

Generally, a positive exercise of discretion does not require a detailed analysis or explanation in the written decision. If no adverse factors at all are present, a simple statement is sufficient, saying that the applicant is eligible, that there are no adverse factors, and that therefore the applicant is granted the benefit in the exercise of discretion.

You should discuss cases that are less clear-cut, particularly those involving criminality or national security issues, with supervisors, who may raise the issue with USCIS counsel; if you do not address the issue in the decision, the file should contain some record of your deliberations. According to USCIS guidance on such cases, “[t]he adjudicator should annotate the file to clearly reflect the favorable factors and consultations that supported the approval in close or complex cases.”<sup>33</sup>

Whether addressing the discretionary issues in the written decision or by making an annotation in the file, you should state the rationale for your decision in a clear manner so that it is easily understandable to anyone reviewing the file.

#### **4.2 Negative Exercise of Discretion**

The written decision must contain a complete analysis of the factors considered in exercising discretion, with a specific and cogent explanation of why you exercised discretion negatively. Your decision will be reviewed, and it is imperative that those who review your decision are able to understand exactly how you reached it.

Negative factors must never be applied in a blanket fashion. Your decision must address negative factors on an individualized basis, applying the totality of the circumstances to the specific facts of the case. The decision should specify both the positive and negative factors that you identified and considered in coming to your decision and should explain how you weighed the different factors.

## **5 CONCLUSION**

Understanding when and how to exercise discretion in your adjudications is important for all officers within the RAIO Directorate. Not all of the adjudications that you make require an exercise of discretion, but when a decision is discretionary it is essential that you understand how to identify the positive and negative factors you must consider and how to weigh those factors. When discretion is called for in your decision making, a careful application of the principles underlying discretion will help ensure that your decision will be legally sufficient and appropriate.

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<sup>33</sup> Devine, Robert C., Acting Director, USCIS. *Legal and Discretionary Analysis for Adjudication*, Memorandum to Office of Domestic Operations, Office of Refugee, Asylum, and International Operations, and Office of National Security and Records Verification (Washington, DC: 03 May 2006).



## **6 SUMMARY**

### **6.1 Discretion Definition**

As a practical matter, in the immigration context, the BIA has described discretion as a balancing of “the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether ... relief appears in the best interests of this country.”<sup>34</sup> Congress has provided the Secretary of Homeland Security discretion in making many decisions; the Secretary’s authority to exercise discretion in many instances has been delegated to you, as an officer in USCIS.

### **6.2 Limitations on Discretion**

There is no discretion to grant a claim where eligibility has not been established. If the applicant is eligible, however, you may then consider discretionary factors. Absent any identifiable negative factors you will grant the benefit.

### **6.3 Applying Discretion**

- Find the facts
- Apply the law
- Balance any negative factors against positive factors before making a decision.

The third step is the exercise of discretion.

### **6.4 Totality of the Circumstances**

In considering what factors you may consider in exercising discretion, you must be able to articulate clearly a relationship between a factor and the desirability of having the applicant living in the United States. Remember that the humanitarian concerns present in a particular case should always be considered. If the applicant is eligible for the benefit it should be granted absent any negative factors. When weighing the positive and negative factors you must always consider the totality of the circumstances and not weigh factors in isolation.

### **6.5 Discretion in Decision Writing**

If you are exercising your discretion to grant a benefit, and there are no negative factors present, there is usually no need for further analysis. The fact that the applicant has established eligibility and there are no adverse factors is sufficient to justify the decision to grant a benefit. If you are exercising your discretion to deny a benefit, you must provide a complete analysis of your reasoning, specifying the positive and negative

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<sup>34</sup> *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978).

factors you considered, so that others reviewing your decision can clearly understand how you reached it. Negative factors should not be applied in a blanket fashion, but always individualized to particular circumstances of the applicant.

**PRACTICAL EXERCISES**

There are no student materials for practical exercises.

**OTHER MATERIALS**

There are no Other Materials for this module.

**SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS**

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

**REQUIRED READING**

None

**ADDITIONAL RESOURCES**

None

**SUPPLEMENTS**

[Supplement Redacted]

**SUPPLEMENT B – ASYLUM ADJUDICATIONS**

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

**REQUIRED READING**

None

**ADDITIONAL RESOURCES**

None

**SUPPLEMENTS**

**Asylum Adjudications Supplement – Balancing Positive and Negative Factors**

The most common situation in which you, as an Asylum Officer, will exercise discretion to deny an asylum claim, and a situation that does not require HQ review, involves those cases where eligibility is established by past persecution alone and it is determined that there is an absence of well-founded fear. The regulations provide clear guidance of how you should proceed.<sup>35</sup> This is an explanation of how you should apply that guidance:

1. The applicant has presented evidence that establishes that he meets the requirements of the refugee definition by virtue of having suffered past persecution. The applicant, having proven that he or she suffered persecution in the past has no further burden of proof in establishing eligibility and enjoys a presumption that their fear of persecution in the future is well-founded.
2. You must next consider whether there is evidence that rebuts the presumption of a well-founded fear of persecution in the future.<sup>36</sup>
3. First you consider any changed circumstances, having to do with the conditions in

<sup>35</sup> 8 C.F.R. § 208.13(b)(1).

<sup>36</sup> 8 C.F.R. § 208.13(b)(1)(i).

the country of persecution, or the applicant's personal situation, that would remove a reasonable possibility of future persecution.<sup>37</sup>

4. Next, you look to see if the applicant can reasonably relocate within his/her country of persecution and thereby avoid any future persecution.<sup>38</sup>
5. If you find that either of those conditions exists, the presumption that the applicant has a well-founded fear of persecution may be rebutted.
6. It is your burden of proof, in rebutting the presumption of well-founded fear that the applicant enjoys, to show by a preponderance of the evidence that the applicant would face no risk of persecution in the future.<sup>39</sup>
7. If you, the officer, are able to show, by a preponderance of the evidence, that the applicant no longer has a well-founded fear of persecution in the future, except in two very narrow circumstances detailed below, you are required to exercise your discretion to deny or refer the application. The basis of this regulation is the fact that the humanitarian concern that underlies the benefit no longer exists. The applicant is no longer in need of protection from persecution. In these cases the lack of risk of persecution is treated as a negative discretionary factor by the regulations.
8. The regulations also require that you consider two possible positive countervailing factors to the discretionary denial/referral of a claim based on past persecution with no well-founded fear. These two countervailing positive factors would allow for a grant of asylum in the absence of well-founded fear.
9. One countervailing factor is if the applicant presents evidence that indicates that there are compelling reasons for being unwilling or unable to return to the country of origin arising out of the severity of the past persecution, you may grant asylum.<sup>40</sup> While the humanitarian concerns that the benefit is meant to address no longer exist, there are other humanitarian concerns to consider as positive factors in weighing discretion.
10. Another countervailing factor is if the applicant presents evidence that he or she

<sup>37</sup> 8 C.F.R. § 208.13(b)(1)(i)(A).

<sup>38</sup> 8 C.F.R. § 208.13(b)(1)(i)(B).

<sup>39</sup> 8 C.F.R. § 208.13(b)(1)(ii).

<sup>40</sup> 8 C.F.R. § 208.13(b)(1)(iii)(A); *see also Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

would suffer some other serious harm if returned. While the other serious harm must rise to the level of persecution, no nexus to a protected ground is required.<sup>41</sup> If so, you may grant asylum in the absence of a well-founded fear of persecution.<sup>42</sup> Once again, risk to the applicant is the main positive factor to be considered in the exercise of discretion.

Officers should go through these steps in any case where the applicant is only able to establish eligibility through past persecution.

Remember, in order to rebut the presumption that the applicant has a well-founded fear of persecution after the applicant has established that he or she has suffered persecution in the past, the officer must be able to meet the preponderance of the evidence standard in showing that the applicant no longer has a well-founded fear of persecution. Before proceeding with a discretionary denial/referral based on a lack of well-founded fear in the future, the officer must also consider whether there are compelling reasons for the applicant being unwilling or unable to return to the country of origin arising out of the severity of the past persecution, or whether the applicant would suffer some other serious harm if returned.

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<sup>41</sup> *Matter of L-S-*, 25 I&N Dec. 704, 714 (BIA 2012).

<sup>42</sup> 8 C.F.R. § 208.13(b)(1)(iii)(B); *see also Matter of H-*, 21 I&N Dec. 337 (BIA 1996).





# U.S. Citizenship and Immigration Services

## RAIO DIRECTORATE – OFFICER TRAINING

**RAIO Combined Training Program**

### **GENDER-RELATED CLAIMS**

#### TRAINING MODULE

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## **GENDER-RELATED CLAIMS**

### **Training Module**

#### **MODULE DESCRIPTION:**

This module provides guidance on gender-related factors you must consider when interviewing and adjudicating claims related to gender, including claims based on violations of societal norms associated with gender.<sup>1</sup>

#### **TERMINAL PERFORMANCE OBJECTIVE(S)**

You, the Officer, will identify and assess gender-related factors when adjudicating claims involving gender or violations of societal norms associated with gender.

#### **ENABLING LEARNING OBJECTIVES**

1. Evaluate gender-related claims by applying appropriate legal, policy, procedural, and international guidance.
2. Evaluate factors related to gender that must be considered in determining eligibility for a gender-related claim.
3. Assess factors that may inhibit an applicant's ability to present fully a gender-related claim, including the use of an interpreter.
4. Apply effective interviewing techniques to fully elicit sensitive issues related to gender in a non-adversarial manner.
5. Evaluate factors related to gender that must be considered in evaluating credibility.
6. Evaluate factors related to gender that may affect an applicant's ability to relocate within his or her country.

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<sup>1</sup> Violations of social norms associated with gender are also addressed in RAIO Training Module, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims*.

## INSTRUCTIONAL METHODS

Classroom lecture, practical exercises

## METHOD(S) OF EVALUATION

Written Test

## REQUIRED READING

1. Coven, Phyllis. INS Office of International Affairs, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Asylum Gender Guidelines)*, Memorandum to INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995).

### **Required Reading – International and Refugee Adjudications**

### **Required Reading – Asylum Adjudications**

## ADDITIONAL RESOURCES

1. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva: January 1992), P 57 (including the 1951 Convention and the 1967 Protocol; other UNHCR-provided materials).
2. United Nations High Commissioner for Refugees (UNHCR). Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme (Geneva: 1993), p.173.
3. 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, 9pp.
4. United Nations High Commissioner for Refugees, Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses). HCR/GIP/03/03, 10 February 2003, 8 pp.
5. United Nations High commissioner for Refugees, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. HCR/GIP/02/01, 7 May 2002, 10 pp.

6. United Nations High Commissioner for Refugees, Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees. HCR/GIP/03/04, 23 July 2003, 8 pp.
7. United Nations High Commissioner for Refugees, Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. HCR/GIP/02/02, 7 May 2002, 5 pp.

**Additional Resources – International and Refugee Adjudications**

**Additional Resources – Asylum Adjudications**

**CRITICAL TASKS**

SOURCE: The Tasks listed below are from the Asylum Division’s 2001 Revalidation. These tasks will need to be modified to reflect the results of the RAIO Directorate – Officer Training Validation study.

<b>Task/ Skill #</b>	<b>Task Description</b>

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**SCHEDULE OF REVISIONS**

<b>Date</b>	<b>Section (Number and Name)</b>	<b>Brief Description of Changes</b>	<b>Made By</b>
5/16/2013	Throughout document	Corrected minor typos, formatting, cites identified by OCC-TKMD.	L. Gollub 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 provides guidance on special factors you must consider when interviewing applicants with gender-based claims. Gender-related claims most commonly arise in the context of female claimants seeking refugee protection. However, it is important to note that the forms of gender-based persecution described in this lesson can, and often are, inflicted on both females *and* males. Although the lesson often focuses on female applicants, you should keep in mind that the issues presented in this lesson may also impact male applicants, albeit less frequently. The discussion in this lesson will address the way gender-based claims may differ within the protection context.

## 2 GENDER-RELATED ISSUES

### 2.1 Overview of Gender-Related Persecution: Women's Human Rights

The Executive Office of the United Nations High Commissioner for Refugees (UNHCR) specifically addresses the need for special training on gender-related issues.<sup>2</sup> It calls upon States to adopt a gender-sensitive interpretation of the 1951 Convention and its 1967 Protocol.<sup>3</sup> UNHCR also provides guidelines for those adjudicating refugee protection claims in order to ensure that all gender-related claims are recognized as such and given the proper consideration.<sup>4</sup>

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<sup>2</sup> UNHCR Executive Committee Conclusion No. 98 (LIV) (2003).

<sup>3</sup> UNHCR Executive Committee Conclusion No. 85 (LIV) (2003).

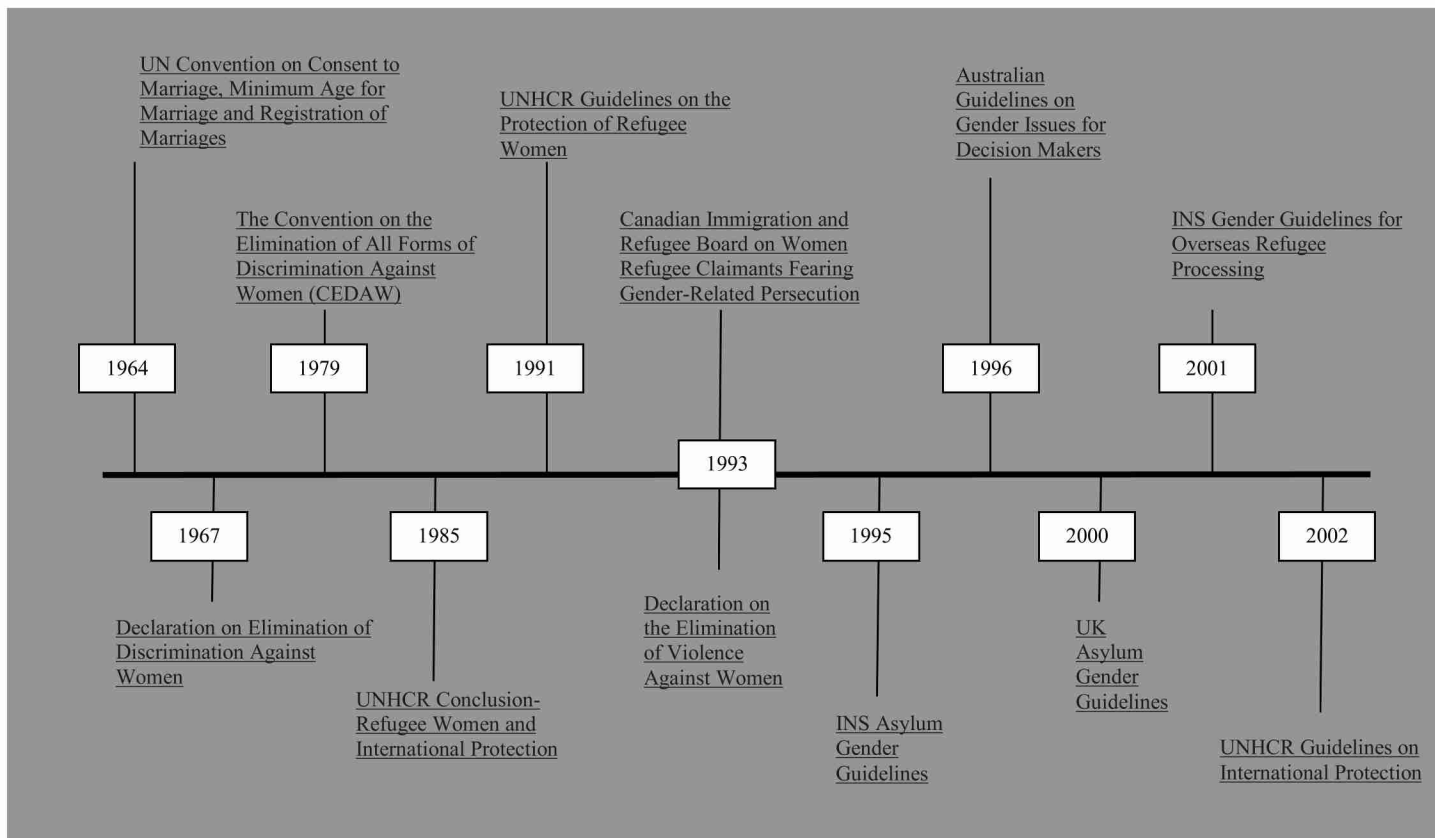
<sup>4</sup> UNHCR *Guidelines on International Protection No. 1, Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (May 2002).

## 2.2 International and National Guidelines Relating to Women and Children

In recognition of the particular vulnerability of women and children, international bodies and national governments have issued several documents in an effort to enhance their protection. UNHCR has provided guidance on gender-related persecution within the context of Article IA(2) of the 1951 Convention and its 1967 Protocol. Immigration authorities in Canada, the United States, and Australia have all issued guidelines for adjudicators in evaluating gender-based claims.

The chart below provides a timeline of the various guidelines enacted over the years to specifically protect vulnerable populations. (move the mouse over each document name for a brief overview of the document. Control + click for the entire document.)

**Table 1 - Evolution of Guidelines on Gender-Related Claims**



Of particular note, in 1995 the Immigration and Naturalization Service (INS), predecessor of the U.S. Citizenship and Immigration Services (USCIS), issued Asylum Gender Guidelines, instructing Asylum Officers on issues to consider when interviewing and evaluating gender-

related claims.<sup>5</sup> The guidelines are not binding on adjudicators outside of USCIS. However, they have been cited in asylum decisions by immigration judges, the Board of Immigration Appeals, and federal courts. In July 1995, INS issued a memorandum, *Follow Up on Gender Guidelines Training*, to further clarify guidance following a nation-wide training on this topic.<sup>6</sup> In February 2001, INS also issued *Gender Guidelines for Overseas Refugee Processing*, which provided additional guidance in the overseas context and techniques for interviewing gender-related cases.<sup>7</sup>

On May 7, 2002, the UNHCR issued *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*. The Guidelines recognize that while “gender-related persecution” has no legal meaning *per se*, gender can influence and dictate the type of persecution suffered and the reasons for the treatment. The Guidelines provide legal interpretative guidance for adjudicators in determining gender-related claims and offer recommendations for interviewing applicants with gender-based claims. The Guidelines are not binding on Officers adjudicating refugee or asylum claims, but, to the extent that they are consistent with U.S. law, are persuasive authority for the examination of gender-related claims.

The human rights of all individuals, regardless of gender, are guaranteed within international instruments such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, due to discriminatory interpretations and applications, these instruments have not always provided sufficient protection to women who may be viewed negatively or harmed for transgressing social norms and refusing to conform to ascribed gender roles. Accordingly, over time other international instruments have been created to outline rights and protections specifically for women.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>8</sup> defines discrimination as:

[a]ny distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human

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<sup>5</sup> Coven, Phyllis. INS Office of International Affairs, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Asylum Gender Guidelines)*, Memorandum to INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p. Note that this memo was addressed to Asylum Officers. Refugee Officers have specific guidelines, as well. See Weiss, Jeffrey L., Office of International Affairs, *Gender Guidelines for Overseas Refugee Processing*, Memorandum to all Overseas District Directors (Washington, DC: 23 February 2001), 2 pp. plus attachment.

<sup>6</sup> Melville, Rosemary, Asylum Division, Office of International Affairs, *Follow Up On Gender Guidelines Training*, Memorandum to Asylum Office Directors, SAOs, AOs, (Washington, DC: 7 July 1995), 2 pp. plus attachments.

<sup>7</sup> Weiss, Jeffrey L., Office of International Affairs, *Gender Guidelines for Overseas Refugee Processing*, Memorandum to all Overseas District Directors (Washington, DC: 23 February 2001), 2 pp. plus attachment.

<sup>8</sup> To date, the U.S. has not ratified CEDAW.

rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>9</sup>

The Declaration on the Elimination of Violence against Women (Declaration) defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>10</sup> Recognizing that violence against women occurs in both public and private settings, the Declaration states that violence against women includes any violence that occurs “in the family, within the general community or perpetrated or condoned by the State, wherever it occurs.”<sup>11</sup>

### 2.3 State and Non-State Agents of Persecution

Intimidation and harassment of individuals as a strategy of gaining power and control over vulnerable populations occurs both within the public context of community and society, as well as within the private sphere of home and family life. However, States are generally obliged to protect their citizens from persecution. Specifically, under international law, States parties to specific human rights covenants may be responsible “for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.”<sup>12</sup> “Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”<sup>13</sup>

### 2.4 Torture and Psychological Trauma

Both men and women who are persecuted throughout the world often suffer torture and psychological trauma for a variety of reasons. “The severity of the harm inflicted upon women by private individuals can be as damaging as that inflicted on women who are tortured by agents of the state.”<sup>14</sup> Many of the practices described in the sections below induce acute psychological trauma, in which women live in constant fear of harm amongst multiple possible and actual abusers, including close relatives and primary care givers.

Many abuses in the family or community are intentionally inflicted. In addition, such abuses are often inflicted for similar reasons to torture in custody. Torture in custody is often used not only to extract confessions but also to instill profound dread into victims, to break their will, to

<sup>9</sup> Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the UN General Assembly in 1979.

<sup>10</sup> Declaration on the Elimination of Violence against Women, Article 1.

<sup>11</sup> Declaration on the Elimination of Violence against Women, Article 2.

<sup>12</sup> General Recommendations made by the Committee on the Elimination of Discrimination against Women, General Recommendation 19, point 9.

<sup>13</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Dec. 2011, HCR/IP/4/Eng/REV.3.

<sup>14</sup> Amnesty International, *Broken Bodies, shattered minds: torture and ill-treatment of women*, London, 2001 p. 5

punish them and to demonstrate the power of the perpetrators. Similar purposes characterize acts of torture in the family or the community. The perpetrators may seek to intimidate women into obedience or to punish women for allegedly bringing shame on relatives by their disobedience.<sup>15</sup>

You should keep in mind that perpetrators of violence against women may be other women. For example, many girls experience pressure from female relatives to submit to female genital mutilation (FGM) or forced marriage. Concepts of gender inequality are often internalized and perpetuated by older women against younger generations.

### **3 GENDER-BASED PERSECUTION EXPERIENCES**

In many societies, women hold significantly different positions than men. Experiences that give rise to women leaving their homelands are often different than the experiences of men. To properly evaluate the claims of women, you must be sensitive to certain unique aspects of their experiences and circumstances. You must also understand how to consider the experiences and circumstances in the context of refugee, asylum and immigration law.

#### **3.1 Restrictive Social Norms**

Social norms refer to the customary rules that govern behavior in groups and societies.<sup>16</sup> In many countries around the world, women and girls face particularly restrictive social norms within their society and culture. For many women and girls, violence and discrimination at the hands of family members and the larger society is a reality.

Though some are subject to the brutality of individual family members, others suffer violence because cultural practices sanction the violence and make it legitimate and acceptable within the greater society. These structural forms of abuse are not always seen to constitute violence and are often embedded in the economic and social life of the community. Because of the link to notions of culture, these forms of violence are tenacious and extremely difficult to eradicate.

The type of violence and discrimination that women suffer under the guise of cultural practice are diverse and varied. Some cultural practices result in murder or severe pain and suffering, irretrievably transforming women's lives. Honor killings, female genital mutilation, bride burning, the pledging of young children to be concubines or sex slaves, are just a few examples of the types of practices that shock the conscience because they involve physical violence and brutality.<sup>17</sup>

Discrimination against women may be entrenched in a country or society, leading to unequal status within constitutions, legislation, cultural ideology, institutions, the workplace, schools, community and the home.

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<sup>15</sup> Amnesty International, *Broken bodies, shattered minds; Torture and ill-treatment of women*, London 2001 p. 6.

<sup>16</sup> Social Norms, *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/social-norms/> (March 1, 2011).

<sup>17</sup> Special Rapporteur on Violence Against Women,

<http://www.unhcr.ch/hurricane/hurricane/nsf/view01/666287371B645B1C1256BA0004AADF5?opendocument>

### 3.2 Economic and Social Rights

In some countries women do not have access to the same social and economic rights as men. They may have limited access to formal education and healthcare; they are not able to own land or property, inherit, work outside the home, travel freely, hold a bank account in their own name or obtain credit, among other things. As a result, women are often wholly or partially dependent on their male relatives, physically and psychologically, making it difficult for them to escape violence within the home and community, and seek protection and redress. Their position, status and treatment in society often make it difficult for them to relocate to another area without the support of male relatives or a family network. In addition, it may not be economically feasible for a woman to relocate if she has been deprived of the opportunity to pursue an education or if her ability to work outside the home has been severely restricted.

Poverty and unemployment may force women and girls into trafficking and/or smuggling situations, at times leading to prostitution for survival; “prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them.”<sup>18</sup>

### 3.3 Reporting, Law Enforcement, and Access to State Protection

Historically, countries where women are socially and economically dependent on male relatives underreport abuses against women, particularly because most women are dependent on their abusers for subsistence. A woman who has made a complaint may be identified as a “trouble maker” and become vulnerable to further harassment.<sup>19</sup> Women may be ostracized, face extreme stigma or reprisals for reporting practices which are considered culturally acceptable and for bringing dishonor to the family by making “private” matters public.

There may also be practical difficulties in reporting abuses, such as the attitudes of law enforcement officials or a lack of legislation supporting women’s rights. Cultures of gender inequality are often internalized to the point where women are not aware of their rights. Further, law enforcement officials and government entities often lack the sensitivity, professionalism and training to handle complaints of violence against women, and may use informal justice systems or cultural pressure to encourage women to return to an abusive situation rather than undertake serious investigations. In some countries women may be arrested and imprisoned “for their own protection.”<sup>20</sup> Attitudes amongst some law enforcement officials show that they down-play the significance of violence against women, perceiving acts of sexual violence within the family to be largely consensual and viewing domestic violence as a private, family matter rather than a criminal offense.<sup>21</sup>

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<sup>18</sup> General Recommendations made by the Committee on the Elimination of all Forms of Discrimination against Women, General Recommendation No. 19.

<sup>19</sup> Daily Dawn, Woman accuses police of harassment, 10 October 2007, available from <http://archives.dawn.com/2007/10/10/nat44.htm>

<sup>20</sup> Amnesty International, *Afghanistan: Women still under attack – a systematic failure to protect* (May 2005).

<sup>21</sup> Human Rights Watch, *A Question of Security: Violence against Palestinian Women and Girls* (November 2006) at p. 61.

In some countries gender discrimination is prevalent within legislation and the formal court system. Women may not have access to the same types of social or legal protections available to men. For example, requests for protection from abuse may be ignored if the abuser is a woman's husband or father. In many countries, a woman's testimony in court is not accorded the same legal weight as a man's testimony.<sup>22</sup>

Where legislation prohibiting violence against women does exist, women are often unable to access its protection and there is a failure by the State to prosecute the perpetrators. Women's access to financial resources to pursue legal protection may be limited. The law may also criminalize female victims of violence, e.g., rape victims may be detained and prosecuted as adulterers and victims of trafficking may be prosecuted as prostitutes.<sup>23</sup>

## 4 TYPES OF GENDER-BASED HARM

The types of harm that women suffer vary across a broad range of countries, cultures and classes. Forms of harm that are unique to, or more common to, women, include, but are not limited to:

- Sexual Violence
- Female Genital Mutilation (FGM)
- Forced and Early Marriage
- Domestic Violence
- Human Trafficking
- Slavery
- Honor Crimes
- Infanticide
- Forced Abortion
- Bride Burning

The sections below address certain types of harm most often directed at women, though the list is not exhaustive. You should keep in mind that though these types of harm are most often directed at women, sexual violence can be, and often is, perpetrated against men as well.

### 4.1 Sexual Violence

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<sup>22</sup> See, e.g., U.S. Department of State Human Rights Report: Saudi Arabia (2010) at p. 35.

<sup>23</sup> Pearson, E., Human Traffic Human Rights: Redefining Victim Protection, Anti-Slavery International, London, 2002.



Sexual violence is defined as “any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”<sup>24</sup> Much like beatings, torture or other forms of physical violence, sexual violence is a serious form of harm and may rise to the level of persecution, such as in the case of rape. For asylum and refugee status, sexual violence must be perpetrated on account of a protected characteristic. It is important for you to remember that the appearance of sexual violence in a claim does not mean that the claim is an instance of purely "personal harm."

Rape is an act of violence serving non-sexual needs or aims. Rape is not based on a need for a sexual relationship; it is based on a desire to degrade, control or terrorize the victim or the victim’s community and is perpetrated against both males and females. Rape has long been an integral part of conflict, used as a tactical weapon to terrorize civilian communities, to achieve ethnic cleansing, to seek revenge against an enemy, and to suppress political opposition.<sup>25</sup>

The rape of one woman is translated into an assault upon the community through the emphasis placed in every culture on a woman’s virtue: the shame of the rape humiliates...all those associated with the survivor.<sup>26</sup>

In an extensive investigation of rape in a wide range of countries, including former Yugoslavia, India (Kashmir), Haiti, Somalia, and Peru, Human Rights Watch found that:

Of all the abuses committed in war or by repressive regimes, rape in particular is inflicted predominantly against women. Although men also are raped, efforts to document human rights abuse reveal that women are overwhelmingly the targets. Despite how pervasive it is, rape has often been a hidden element of strife, whether political or military, a fact that is inextricably linked to its largely gender-specific character. That this abuse is committed by men against women has contributed to its being narrowly portrayed as sexual or personal in nature, a characterization that depoliticizes sexual abuse in conflict and results in its being ignored as a crime.

Yet rape in conflict or under repressive regimes is neither incidental nor private. It routinely serves a strategic function and acts as a tool for achieving specific military or political objectives. Like other human rights abuses, rape serves as a means of harming, intimidating and punishing individual women. Further, rape almost always occurs in connection with other forms of violence or abuse against women or their families.

<sup>24</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, September 2, 1998, at ¶ 688.

<sup>25</sup> See Human Rights Watch Women’s Rights Project, *The Human Rights Watch Global Report on Women’s Human Rights* (1995); Giller, Joan E. MA, MB, MRCOG; Swiss, Shana MD, *Rape as a Crime of War – A Medical Perspective*, JAMA (Vol. 270, No.5, 4 August 1993), pp 612-615. Human Rights Watch/Africa Human Rights Watch Women’s Rights Project, *Shattered Lives - Sexual Violence During the Rwandan Genocide and its Aftermath* (September 1996).

<sup>26</sup> Pearson, E., *Human Traffic Human Rights: Redefining Victim Protection*, Anti-Slavery International, London, 2002.

Far from being an isolated sexual or private act, rape often occurs alongside other politically motivated acts of violence.<sup>27</sup>

Note that the historic portrayal of rape as "sexually" or "personally" motivated influences the way that many women articulate the assailant's motives for attacking her. An applicant may initially characterize the attack as motivated by sexual desire, but you should make efforts to elicit any evidence that the assault occurred on account of a protected ground. The following exchange, quoted in *Shoafera v. INS*<sup>28</sup>, recognizes that rape is not primarily motivated by sexual desire, and is instructive on how to elicit relevant information about a sensitive incident:

[Q.] Now, with regard to the rape, do you have any idea—and I know this is a difficult question, but do you have any idea why Hagos Belay did this to you?

[A.] I just--He probably was attracted to me. I don't know.

Q. Aside from the fact that he may have been attracted to you, can you think of any other circumstances or factors that might have made you an easier target for him, or someone who he felt he could do this to?

A. 'Cause I'm an Amhara. If I was a Tigrean he wouldn't do it.

## 4.2 Female Genital Mutilation (FGM)

Female genital mutilation (FGM) is a custom involving the cutting or removal of all or part of the female genitalia. The origins of FGM are unknown. It predates Christianity and Islam and is not required by the Bible or the Koran. FGM crosses religious, ethnic and cultural boundaries.

FGM can expose women to serious and potentially life threatening physical complications. Factors that allow for the continued practice of FGM include traditional beliefs, superstition, the role of women in the society and the belief that FGM will suppress and control sexual behavior. It may be performed on infants, children, adolescents, single, married, pregnant, or post-partum women, and corpses.<sup>29</sup>

FGM is most prevalent in Africa. It is practiced in at least twenty-eight African countries as well as in several Middle East countries, including Egypt, Oman, Saudi Arabia, Yemen and the United Arab Emirates. It is found in India, Pakistan, Indonesia and Malaysia, as well as within small indigenous groups in Peru, Mexico and Brazil.

### 4.2.1 Types of FGM

<sup>27</sup> Human Rights Watch Women's Rights Project, *The Human Rights Watch Global Report on Women's Human Rights* (1995).

<sup>28</sup> *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000) (reversing the immigration judge who held that the applicant's comment that the rape was on account of her ethnicity was "speculative," despite supporting testimony by her sister and country conditions information).

<sup>29</sup> United States Department of State, Office of the Under Secretary for Global Affairs, Office of the Senior Coordinator for International Women's Issues, *Female Genital Mutilation (FGM)* (Washington, DC: Feb. 1, 2000, updated June 27, 2001).

Some people refer to the practice of FGM as “circumcision.” Circumcision is only one type of FGM, and it is the least physically traumatic and dangerous. Only a small percentage of women subjected to FGM are circumcised. The vast majority of women suffer more drastic and dangerous forms of FGM.

#### 1. Circumcision

The clitoral prepuce or tip of the clitoris is cut away. About five percent of the women who undergo FGM undergo circumcision.

#### 2. Excision

The clitoris and/or prepuce are partially or totally cut away. In addition, all, or part of, the labia minora are cut away. This is the most commonly practiced type of FGM.

#### 3. Infibulation

The clitoris, the prepuce, the labia minora and a part of the labia majora are cut away. The edges of the labia majora are then sewn, pinned, or brought together with an adhesive in order for scar tissue to form.

### 4.2.2 Short and Long Term Consequences of FGM

FGM can have devastating and harmful consequences for a woman throughout her life.

Those performing FGM have varying degrees of expertise. FGM is often performed without anesthesia, under unsanitary conditions, by non-medical personnel. The type of procedure, the degree of sterility and the expertise of the individual performing the procedure affect the degree of harm experienced. However, long-term serious harm may result even when the least damaging procedure (circumcision) is performed by qualified surgeons in sterile operating rooms.<sup>30</sup>

Short-term consequences include: bleeding, post-operative shock, infection, tetanus, damage to other organs and death.

Long-term consequences include retention of blood in the abdomen and swelling of the stomach, chronic infections of the bladder and vagina, extremely painful menstruation, child-birth obstruction, risk of HIV infection, psychological problems and sexual dysfunction.

### 4.3 Forced and Early Marriage

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<sup>30</sup> United States Department of State, Office of the Under Secretary for Global Affairs, Office of the Senior Coordinator for International Women’s Issues, Female Genital Mutilation (FGM) (Washington, DC: Feb. 1, 2000, updated June 27, 2001)

Forced marriage is arranged and enforced against the victim's wishes. International human rights documents recognize that the right to marry is a fundamental human right, and they also mandate that "no marriage shall be legally entered into without the full and free consent of both parties." However, some women and girls are married against their will in forced marriages.<sup>31</sup>

In some circumstances, a forced marriage may be determined to be persecution,<sup>32</sup> although you will still need to establish a nexus to a protected characteristic. It is important to distinguish between forced marriages and arranged marriages. Arranged marriages are an important tradition in many cultures and are often entered into willingly, even in situations where the girl might not have reached 18 years of age. Factors to consider in determining whether a marriage was or would be forced include the type and level of coercion to which an applicant was or would be subjected, the applicant's ability to avoid the marriage at all, and the nature of the consequences for the applicant if she were to refuse to submit to the marriage.

Forced marriage takes place throughout the world and occurs for a variety of reasons stemming from issues such as poverty, gender discrimination, and lack of security.<sup>33</sup> A family may sell or offer a daughter in marriage to alleviate the financial burden on the family, to settle a debt, to provide the daughter with a "better life," or to afford additional wives for the male family members. In some contexts, forced marriage may provide a method to atone for criminal conduct or as punishment to the perpetrator of a gender-based crime such as rape. Forced marriage may serve the purpose of uniting two families or adhering to religious and cultural traditions. Families may wish to force their daughters to marry to protect them from rape or to keep their virginity intact.<sup>34</sup>

Forced marriage violates numerous human rights. It provides an arena in which sexual abuse, sexual exploitation, domestic violence, forced labor, and slavery often go unnoticed. Women in forced marriages may have fewer educational and work opportunities and their freedom of movement may be restricted. In some cultures, women and girls may be subjected to FGM prior to the forced marriage. A woman's attempt to refuse the forced marriage may result in abusive or harmful treatment.<sup>35</sup>

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<sup>31</sup> United Nations, Covenant on Consent to Marriage, Minimum Age for Marriage and Registration at Marriage, G.A. Res. 1763(A)(XVII), U.N. GAOR, Nov. 7, 1962 (Note the United States has not ratified this treaty); United Nations, Universal Declaration of Human Rights, G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

<sup>32</sup> See, e.g., *Bi Xia Ou v. Holder*, 618 F.3d 602, 607-09 (6th Cir. 2010)(finding women in China who have been subjected to forced marriage and involuntary servitude constitute a particular social group and that the applicant suffered past persecution).

<sup>33</sup> See, e.g., *For Somali Women, Pain of Being a Spoil of War*, New York Times, December 27, 2011, describing how militants are forcing families to hand over girls for short-term forced marriages which "are essentially sexual slavery."

<sup>34</sup> UNHCR, *Sexual and Gender-based Violence Refugees, Returnees and Internally Displaced Persons* (May 2003) at 24; Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 Am. U.J. Gender Soc. Pol'y & L. 233 (2004)

<sup>35</sup> *Id.*; *The Forum on Marriage and the Rights of Women and Girls, Early Marriage: Sexual Exploitation & the Human Rights of Girls* (Nov. 2001); *Sexual and Gender-based Violence Refugees, Returnees and Internally Displaced Persons* at 18.

Forced marriage poses particular human rights concerns for girls, who are subject to early marriage. Early marriage is one which takes place before a child reaches the age of majority. According to the Convention on the Rights of the Child, a girl under the age of 18 is a minor and cannot give informed consent.<sup>36</sup> Thus, under this standard, it might be possible to consider any underage marriage as forced. It would not constitute persecution, however, unless the applicant experienced it, or her treatment within it, as serious harm.

Although most countries have minimum age requirements for marriage, the age for girls is often two or three years lower than the age for boys and national age requirements may be ignored at the local level. For example, in most of Africa, Asia, Latin America, and the Middle East, girls are often married before the age of 18.

#### 4.4 Domestic Violence

Violence against mothers, sisters and daughters, like other forms of violence against women, is often related to the historically more powerful position of men in the family and in society, the perceived inferiority of women, and unequal status granted by laws and societal norms. In many societies, the police, the court system, and even the laws may condone the practice, allow for it, and at best may simply do nothing to prevent it or to punish the perpetrator. For example, in some countries, there is no legal recognition that sexual assault is a crime, if committed by a husband against his wife.<sup>37</sup>

Speaking to the extent and scope of domestic violence in certain societies, a Special Rapporteur on violence against women reported to the UN Commission on Human Rights:

There are many different types of domestic violence. Young girls are often the victims of sexual assault within the family. Elderly family members and the infirm may also be subject to ill treatment. In extended families, mothers-in-law are often violent towards their daughters-in-law. Though there are many incidents of assault directed against the husband, studies show that they are not so frequent and rarely result in serious injury.<sup>38</sup>

Although most battered women engage in various forms of resistance to abuse, there are many factors that may make it difficult for a battered woman to leave her abuser. Fear of losing her children is one such factor as socio-economic factors may make it impossible for a woman to support herself and her children without assistance from her husband. Other factors include fear of arrest themselves and the stigma of leaving their husbands caused by cultural, religious and social norms. Leaving the batterer also could pose an even greater threat to a woman's safety than staying, unless she can escape to a place where the batterer has no access to her.

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<sup>36</sup> Early Marriage: Sexual Exploitation & the Human Rights of Girls; Convention on the Rights of the Child, G.A.Res 44/25, U.N.GAOR, Nov. 20, 1989.

<sup>37</sup> United Nations Commission on Human Rights, *Violence Against Women, its Causes and Consequences*, Preliminary Report by the Special Rapporteur Ms Radhika Coomaraswamy, 22 November 1994; United Nations Commission on Human Rights, *Violence Against Women*, Report by the Special Rapporteur, 24 February 2000.

<sup>38</sup> *Id.* p. 22.

At the point that separation (or the decision to separate) occurs, the risk of violence to the battered woman increases, a phenomenon referred to as "separation abuse." When battered women are killed, they are more likely to be killed after having left the relationship.<sup>39</sup>

Therefore, for some women, staying with the batterer may actually be a strategy to protect herself or her children.

#### 4.5 Human Trafficking

“Trafficking in persons” is defined as the recruitment, harboring, transportation, provision, or obtaining of persons by means of the threat or use of force or other forms of coercion, or fraud for the purpose of exploitation.<sup>40</sup> Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or removal of organs.<sup>41</sup>

Trafficked women are bought and sold as commodities; they are held against their will and subjected to sexual slavery, forced labor or forced marriage, for the profit of their trafficker. Traffickers use various control mechanisms including repeated rape by the agent and his associates to erode a girl’s sense of “self” and to break her will. Agents will use physical and psychological abuse against the victim and make threats towards her family. Agents create debt bondage by imposing debts for the journey, accommodation, clothes and make-up. Women can be imprisoned and isolated by their traffickers. Agents withhold passports and identity papers. Because a woman’s immigration status is often as an illegal entrant, she may fear law enforcement officials. Women may believe that the law enforcement agencies are complicit in the trafficking of women. Traffickers also instill this fear to deter escape.<sup>42</sup>

Women are lured into trafficking in different ways, often by deception or force. Women may be made false promises of jobs as nannies, waitresses, etc., through bogus recruitment agencies, only to discover en route or upon arrival that they have been deceived. The trafficker may pretend to be romantically interested in a woman, developing a coercive relationship in which the woman finds that her “boyfriend” forces her to have sex with his “friends.” Women may be drugged and abducted. Some girls are trafficked with family involvement. While some parents may innocently believe they are sending their child to receive an education, other parents are aware that they are selling their child into slavery.<sup>43</sup>

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<sup>39</sup> Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 Fla.B.J. 24, Oct 1994.

<sup>40</sup> See RAIO Training Module, *Detecting Possible Victims of Trafficking*. See also Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

<sup>41</sup> *Id.*

<sup>42</sup> See Department of State, Trafficking in Persons Report (2010).

<sup>43</sup> The International Association of Chiefs of Police (IACP), The Crime of Human Trafficking: A Law Enforcement Guide to Identification and Investigation, p. 7.

A more detailed discussion of trafficking and smuggling is available in the RAIO Training Module, *Detecting Possible Victims of Trafficking*.

#### 4.6 Honor Crimes

In some cultures women are perceived to be the keepers of a family's honor, conditioning women and girls to be self-controlled, show deference to men throughout their lives, and present subservient behavior. A woman is considered to bring shame on her family and community if she does not adhere to strict social norms of behavior and conduct. Honor crimes are acts carried out to "restore" a family's honor. Perpetrators may be members of a woman's family or community. Abuses involving the concept of honor are prevalent throughout the world and are factors in other types of persecution listed in this section, including, but not limited to, FGM and domestic violence.

Examples of honor crimes include, but are not limited to, stoning, abduction, imprisonment, rape, poisoning, acid attacks, disfigurement, forced marriage, murder, or attempts to coerce the victim to commit suicide. Women also may suffer reprisal attacks as a result of another relative's perceived behavior.<sup>44</sup>

The family may go to great lengths to pursue women (and men) accused of violating a family's honor. Families employ bounty hunters, private detectives and social networks to pursue victims and searches may persist over years. In cultures with extended family networks over a large geographical area, relocation may offer no real protection. In patriarchal societies, women without family or male relatives may create suspicion in a new community, attracting further stigmatization and persecution. It may be difficult for a woman to integrate and support herself economically. In many countries there are few shelters or other resources available to women who seek to escape harm and access to those resources may be impeded by cultural factors or considered taboo. Women may be at risk of being arrested "for their own protection"<sup>45</sup> or prosecuted for adultery.

Acts deemed to transgress a family's honor may include, but are not limited to, having sex before or outside marriage, losing virginity, even as a result of rape. Some societies do not make a clear distinction between rape and consensual sexual relations and will hold a woman who has been raped fully responsible for losing her virginity or committing "adultery."<sup>46</sup> Other acts of transgression include refusing to accept a forced marriage, being suspected of having an affair,<sup>47</sup> attracting gossip within the community, seeking an education, being assertive and outgoing in behavior or inappropriate dress.<sup>48</sup>

<sup>44</sup> BBC, [Acquittals in Pakistan gang rape](#), April 21, 2011.

<sup>45</sup> UNICEF, *Innocenti Digest*, [Early Marriage: Child Spouse](#), No. 7 March 2001.

<sup>46</sup> See, e.g., [Afghanistan: Woman Jailed on Charges of 'Forced Adultery' Is Released](#), NY Times, Dec. 14, 2011.

<sup>47</sup> *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011).

<sup>48</sup> See, e.g., [Afghanistan: Woman Jailed on Charges of 'Forced Adultery' Is Released](#), NY Times, Dec. 14, 2011; [Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission](#), Vol. II, Chapter III, ¶. 336-7 at 171 (2004)(describing how under Sierra Leonean customary law, "[f]amilies usually settle crimes of rape and sexual violence by



Victims of rape may be murdered for bringing shame upon their family, or victims may be forced to marry their rapists to appease family honor.<sup>49</sup> Controlling women through the concept of honor is permitted in many countries. Even in countries where honor crimes are illegal, lesser sentences may be given if the crime was committed in the name of honor.<sup>50</sup>

## **5 INTERVIEWING CONSIDERATIONS**

The purpose of this section is to emphasize the importance of creating an interview environment that allows applicants to discuss freely the elements and detail of their claims and to identify issues that may be related to a female applicant's gender. This section should be considered in conjunction with the RAIO Modules on Interviewing.

### **5.1 Pre-Interview File Review**

Prior to the interview, you may have the opportunity to review the information in the case file. You should take this time to identify any gender-related issues involved in the claim. You are expected to conduct interviews involving gender-related claims in a non-adversarial manner and with sensitivity. Due to the very delicate and personal issues arising from sexual abuse, some applicants may have inhibitions about disclosing past experiences to an interviewer of the opposite sex.

To the extent that personnel resources permit, you should honor an applicant's request for an interviewer of a particular sex. If a pre-interview review of the case file indicates that the case may involve sensitive gender-related issues, you should consult with your supervisor prior to the interview to evaluate whether it would be more appropriate for an Officer of the opposite sex to conduct the interview.

### **5.2 Considerations Related to Gender and Culture**

Cultural factors, such as the expected role of a woman in her society, may significantly affect an applicant's testimony. In order to properly elicit and evaluate testimony, you must be aware of such factors when eliciting testimony at the interview.

1. Cultural norms may exacerbate reluctance to relate sensitive information.

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accepting monetary compensation or by the offender being compelled to enter into marriage with the minor victim. The Commission recommends...end[ing] the practice under customary law of compelling women and girls who have been raped to enter into marriage with the offender.”

<sup>49</sup> *Id.*

<sup>50</sup> Human Rights Watch, Jordan: Victims Jailed in Honor Crime Cases, April 2004.



Due to strict cultural norms in many countries, applicants may be reluctant to disclose experiences of sexual violence. This may be especially true for women from societies that place extreme importance on preserving a woman's virginity. With regard to sexual assault, this type of harm perpetrated on men, as well as women is seen as a violation of community or family morality. The combination of shame, feelings of responsibility and blame for having been victimized in this way can seriously limit a man's or a woman's ability to discuss or even to mention such experiences.

## 2. Cultural norms may limit an applicant's knowledge of other family members' activities

In some cultures, men normally do not share the details of their political, military or even social activities with spouses, sisters, daughters or mothers. Women from such cultures may be able to present only vague testimony about experiences of male relatives, even husbands. Some women may not be able to explain which male relatives were politically active or, if they are aware of the relative's political activity, may be unable to provide any details about it.

## 3. Presence of relatives may inhibit testimony

For a variety of reasons, the presence of relatives, particularly a husband, father, or child, may impede an applicant's willingness to discuss gender-related persecutory acts or fears. For example:

- The applicant's relatives may not be aware of the harm experienced by the applicant. She may wish that the relative remain unaware of her experiences, or she may be ashamed to say what she has experienced or fears in front of a relative.
- The applicant's claim may be based, in part, on fear of the relative who is present.
- In some cases, a woman may be accustomed to having a male relative speak for her and may try to defer to that male relative in the interview, or the male relative may insist on speaking for the applicant, in which case you should remind the relative that the applicant must answer the question herself.

While the presence of a relative may inhibit testimony, as described above, in other cases a woman may be more comfortable testifying with the presence of a relative, male or female. Therefore, to the extent possible, the choice of whether to be interviewed alone or with a relative present should be left to the applicant. She should be asked her preference directly, and in the absence of any relatives, when possible, prior to the interview.

If the applicant elects for the relative to be present at the interview, you should exercise sound judgment during the interview; determining whether the presence of the relative is impeding communication. If it appears that the relative's presence is interfering with open communication, the relative should be asked to wait in the waiting room.

#### 4. Interpreters may inhibit testimony

Testimony on sensitive issues such as sexual abuse may be diluted when received through the filter of an interpreter. The applicant may not feel comfortable discussing gender-related issues with an interpreter, especially one of the opposite sex. The same holds true for the interpreter; even if the applicant feels comfortable using a particular interpreter, the interpreter may be inhibited about discussing gender-related issues or using certain terms. For example, the interpreter may substitute the word “harm” for “rape,” because the interpreter is not comfortable discussing rape or because of cultural taboos. *See also* RAIIO Training Module, *Interviewing – Working with an Interpreter*.

### 5.3 Suggested Interview Techniques

In all cases, you must use your utmost care to assure that all interviews are conducted in a non-adversarial and open atmosphere that allows for the discussion of various issues, including past experiences and fears of future harm and its ramifications.

Some techniques that may be employed (discussed in greater detail in the lessons on interviewing) include the following:

- Begin with easy topics to establish rapport and give the applicant time to become accustomed to the interview.
- If the applicant becomes upset, pause to allow the applicant to regain composure.
- Acknowledge how difficult it may be for the applicant to answer certain questions by assuring the applicant that it is all right to let you know when something is difficult to discuss in detail.

Note: In the protection context, it is necessary for you to elicit a certain level of detail in order to establish credibility. The applicant may be able to provide sufficient detail about certain parts of the claim to establish credibility, without providing minute detail on particularly sensitive topics. Example: The applicant provides detail about circumstances of arrest and conditions of detention, but finds it extremely painful to provide detailed description of certain torture she endured during detention. You do not need to press for detail about the torture if the applicant’s testimony about the arrest and the general conditions of detention is credible.

- Temporarily switch from the sensitive topic to something less sensitive, remembering to return to the sensitive topic later if more information is required.
- Approach the issue from a different angle. For example, ask about events that led up to the traumatic experience and how the applicant felt after the experience, instead of asking about the specifics of the traumatic incident.
- Switch the focus to another victim the applicant has testified about and then return to the applicant’s experience.

- Ask open-ended questions to explore the applicant’s claim, then ask specific follow-up questions, as needed, to establish the credibility of the claim. Be mindful that your tone of voice and questions don’t come across as judgmental, as that may place the applicant on the defensive and possibly impede the flow of communication.
- Emphasize the confidential nature of the interview.
- Remind the applicant that in order to evaluate eligibility for the benefit, you need to understand the applicant’s history, including the harm she may have experienced.

#### 5.4 Examples of Questions to Elicit Sensitive Information

If you suspect the applicant may have been sexually abused but is not forthcoming, you may try to help the applicant relax by reassuring her of the confidentiality of the process and by acknowledging that the interview process may be difficult for her.

- “I understand that it is difficult to talk about such things. I know that women in your country often have bad experiences. Everything we talk about here is completely confidential. No one in your country (family) will know what you tell me today, unless you tell them yourself. Is there anything else you want to tell me?”

In some instances country conditions reports may reflect that individuals in the applicant’s country may be ostracized for being raped. However, where no such country conditions information exists, you should still attempt to elicit testimony about any potential harm by asking questions like:

- “Would anything happen to you if your family and community found out what happened to you while you were detained?”

In cases where sexual assault is alleged and the applicant has difficulty providing details, you may focus on the circumstances surrounding the incident.

- “You said you were assaulted. I understand that this is difficult to talk about, but it would be helpful for me to understand more about what happened.
  - Where were you at the time?
  - Were you alone?
  - What happened to your sister who was with you?
  - Did that also happen to you?
  - Did you tell anyone about the incident?
  - What did the attacker say to you?

- Do you remember what you did immediately after the assault?”

You should always ask questions one at a time and give the applicant sufficient time to fully answer.

In cases where applicants fear the stigma or other social consequences of being seen as a rape victim, it may help to remind the applicant that everything she or he says in the interview is kept confidential.

## 6 LEGAL ANALYSIS – ASYLUM AND REFUGEE CASES

### 6.1 Persecution and Agent of Persecution

Neither this lesson, nor the component-specific lessons on this subject provide guidance that expands the statutory definition of a refugee. The legal criteria used to evaluate a female asylum or refugee applicant’s eligibility for immigration benefits, whether the claim is gender-based or not, is the same criteria used in all other asylum and refugee adjudications. However, because female applicant’s experiences are often different than those of men, it is useful to discuss how those experiences fit into the legal framework of established asylum and refugee law.

#### 6.1.1 Persecution

As explained in greater detail in RAIO Training Modules, *Refugee Definition* and *Definition of Persecution and Eligibility Based on Past Persecution*, the term “persecution” is not defined by treaty, statute, or regulation, and you must rely on guidance from various sources, including international human rights norms, to evaluate whether harm constitutes persecution. To be eligible for asylum or refugee status, the applicant must also establish that the persecution is “on account of” a protected characteristic in the refugee definition. This section focuses on the type of harm that may constitute persecution. The requirement that the persecution be on account of a protected characteristic (“Nexus”) will be discussed in the next section.

##### 1. General Considerations

In evaluating whether harm constitutes persecution in a gender-related case, you should consider the same factors as in an asylum or refugee case that is not related to gender. The relevant considerations are:

- Whether the harm the applicant experienced and/or fears is serious enough to constitute persecution by objective standards,
- Whether the applicant would experience the harm in question as serious harm, and
- Whether the persecutor is the government (or agent of the government) or an entity that the government is unable or unwilling to control.

The fact that a practice is widespread, (e.g., domestic violence, FGM, rape as part of an occupation during war) is not relevant to determining whether the alleged acts constitute persecution.<sup>51</sup>

### 1. Rape and Other Sexual Violence

Rape constitutes harm serious enough to amount to persecution. Other sexual violence may constitute persecution, depending on the degree of harm experienced by the applicant. In some countries a woman may experience severe discrimination and social ostracism because she was raped. The ostracism is further harm after the rape, and may itself be sufficiently serious to constitute persecution.<sup>52</sup> In other words, even if the harm of the original rape was not “on account of” a protected ground, societal perception of a rape victim and the social consequences arising from that perception may give rise to a well-founded fear of persecution on a protected ground, most likely membership in a particular social group. *See* RAIO Training Module, *Nexus – Particular Social Group*.

### 2. Torture, Beatings, and Inhuman Treatment

Female asylum and refugee applicants may have experienced or fear the same types of “traditional” persecution experienced by male applicants, such as torture, beatings, and other inhuman treatment. Note that rape in detention is a form of torture that occurs to both men and women.

### 3. Female Genital Mutilation (FGM)

Harm resulting from FGM is sufficiently serious to constitute persecution. FGM has been internationally recognized as a violation of women's and female children's rights and is criminalized under federal law. The U.S Court of Appeals, Second Circuit stated that FGM involves the infliction of “grave harm constituting persecution.”<sup>53</sup> Thus it is clearly serious harm by objective standards. The applicant’s testimony that she experienced or would experience FGM as serious harm is best and sufficient evidence on this point.

Note that even if a woman has been subjected to FGM in the past, it is a form of harm that is capable of repetition.<sup>54</sup> Moreover, a woman is not required to show that she would undergo the

<sup>51</sup> *See Mohammed v. Gonzales*, 400 F.3d 785, 796, n.15 (9th Cir. 2005) (rejecting the government’s argument that the widespread practice and acceptance of FGM in Somalia meant that FGM could not form a basis for a past persecution claim. The court stated that the approach to analyzing refugee claims does not change because a type of harm is commonly accepted and practiced.)

<sup>52</sup> *See Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000) (rape by gov’t official constitutes persecution).

<sup>53</sup> *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007) (vacated in part, *Matter of A-T-*, 24 I&N Dec. 617 (A.G.2008)); *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) *citing to Report of the Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 14*, U.N. GAOR, 45th Sess., Supp. No. 38, at 80, ¶ 438, U.N. Doc. A/45/38; and *The Beijing Declaration and The Platform for Action*, Fourth World Conference on Women, Beijing, China, 4-15 September 1995, U.N. Doc. DPI/1776/Wom (1996) ¶¶ 112-113.

<sup>54</sup> *Matter of A-T-*, 24 I&N Dec. 617, 621 (AG 2008)(vacating BIA’s determining that FGM was a one-time act incapable of repetition and that future harm need not be in the identical form as the original harm).

identical form of past harm to establish well-founded fear in cases in which the past harm (*e.g.*, FGM) is unlikely to be repeated.<sup>55</sup> Consideration of the enduring harm, in such circumstances, is also appropriate to the analysis of whether there are compelling reasons arising from the severity of the past persecution to grant asylum status in the absence of a well-founded fear.<sup>56</sup>

In *Matter of A-K-*, the BIA clarified that an applicant cannot establish eligibility for asylum based **solely** on a fear that his or her child would be subject to FGM. The rationale is that an applicant must establish persecution that is targeted at him or herself. An applicant may certainly be affected by his or her child undergoing FGM. But, in most cases, the persecutor is directing the FGM at the child, not the parent. However, a parent who actively opposes FGM and takes affirmative steps to keep a child from undergoing the procedure could conceivably suffer *other* harm on account of this political or religious opinion.

Also, the harm must be on account of a protected characteristic. When a child is being subjected to FGM, it is generally not because of a parent's protected characteristic. Rather, the FGM is imposed on the child because of the child's characteristic of being a female who has not yet undergone FGM as practiced by his or her culture.<sup>57</sup> If, however, there were evidence that the child would be targeted for FGM *in order* to punish the parent for the parent's opposition to FGM (or for some other protected reason), this might be distinguishable from the scenario discussed in *Matter of A-K-*.

#### 4. Forced Marriage

In some circumstances, forced marriage may constitute persecution. However, it is important to note the distinction between forced marriage and arranged marriage. Arranged marriage is not considered persecution as both parties willingly enter into the arrangement, even if reluctantly. Forced marriage, on the other hand, may constitute persecution as one or both parties do not consent to the arrangement. You should also consider whether the consequences for refusal would constitute persecution.<sup>58</sup>

NOTE: You should keep in mind that in addition to asylum and refugee cases, you may encounter victims of forced marriage in the family petition context (*e.g.*, I-130 and I-730).

Asylum and refugee claims involving forced marriage often include allegations that the applicant was subjected to FGM or fears being subjected to FGM. You must analyze whether

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<sup>55</sup> *Id.* at 622.

<sup>56</sup> See *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008). See also *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005). This consideration exists primarily within the asylum context since a refugee applicant need not establish a well founded fear of return if she or he has established past persecution.

<sup>57</sup> *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007).

<sup>58</sup> See United Nations, Covention on Consent to Marriage, Minimum Age for Marriage and Registration at Marriages, G.A. Res. 1763(A)(XVII), U.N. GAOR, Nov. 7, 1962 (Note the United States has not ratified this treaty); United Nations, Universal Declaration of Human Rights, G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

the FGM or forced marriage, or both, were inflicted (or would be inflicted) on account of a protected characteristic. See RAI0 Training Module, *Nexus – Particular Social Group*.

#### 5. Forced Abortion and Forced Sterilization

The INA provides that forced abortion and forced sterilization, or persecution for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, constitute harm amounting to persecution that is on account of political opinion.<sup>59</sup>

#### 6. Discrimination and Harassment

Discrimination and harassment may amount to persecution if the adverse practices or treatment accumulates to the level of persecution, or is so serious that that it leads to consequences of a substantially prejudicial nature. An applicant's deprivation of educational opportunities, the right to work, the right not to be forced into marriage, and other deprivations of internationally recognized rights may constitute persecution, depending on how such deprivations affect the applicant's well-being.

#### 7. Violation of Fundamental Beliefs

The U.S. Court of Appeals, Third Circuit indicated that “the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs.”<sup>60</sup>

In *Fatin v. INS*, the court considered whether the asylum applicant's opposition to strict Iranian dress codes would constitute persecution. In that case, the court found that the record before it failed to establish that obeying the strict dress codes would be “so profoundly abhorrent” as to amount to persecution, but left open the possibility that other applicants could make such a case.<sup>61</sup>

### 6.1.2 Agent of Persecution

As in any other asylum or refugee claim, in order to establish persecution, the applicant must demonstrate that the persecutor is the government (including agents of the government) or an entity that the government is unable or unwilling to control. The persecutor may be a rebel group, a clan, a tribe, or a family member, such as a brother, father, or husband.<sup>62</sup>

In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, you should consider whether the government protection that is available is reasonably effective. Factors to consider include whether the government takes reasonable steps to control

<sup>59</sup> INA § 101(a)(42)(B); *Matter of X-P-T-*, 21 I&N Dec. 634 (BIA 1996).

<sup>60</sup> *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993).

<sup>61</sup> *Id.* See also *Sharif v INS*, 87 F.3d 932 (7<sup>th</sup> Cir. 1996) (finding that applicant failed to meet this standard because she did not offer evidence that conforming to Iranian law caused her serious harm).

<sup>62</sup> *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)

the infliction of harm or suffering and whether the applicant has reasonable access to the existing state protection. Evidence that the government does not respond to requests for protection is a strong indication that state protection is unavailable.<sup>63</sup>

In some cases, an applicant may establish that state protection is unavailable even when she did not actually seek protection. For example, the evidence may indicate that the applicant would not have received assistance if she had sought it. Country conditions information may reveal that government officials in the applicant's country view violence perpetrated by a family member, clan member, or tribal member as a "private" dispute for which governmental intervention is inappropriate.

Or, evidence may establish that seeking protection would have placed an applicant at even greater risk of persecution. For example, country conditions information shows that women from Pakistan who report rape to the authorities are often themselves arrested and jailed under laws prohibiting sexual relations outside of marriage, and may be subject to verbal and physical abuse. Therefore, a woman from Pakistan may reasonably fear reporting a rape and seeking state protection from the person who raped her.<sup>64</sup>

You often must consult country conditions information to evaluate whether state protection is available to an applicant who suffered or fears persecution from a non-governmental entity.

## 6.2 Nexus

The "nexus" requirement, discussed in the RAIIO Training Modules, *Nexus and the Protected Grounds\**, and *Nexus – Particular Social Group*, applies equally to female and male applicants and to all claims, including those related to gender. Because "nexus" is discussed in detail in other modules, this section focuses on common nexus issues raised in gender-related claims, explaining how the analysis may be formulated, taking into account the social circumstances of female applicants.

### 6.2.1 Overview

To be eligible for asylum or refugee status, the applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the applicant because the persecutor perceives the applicant to possess a protected characteristic. The persecutor's perception can be either because the applicant actually has such a characteristic, or because the persecutor incorrectly imputes it to the applicant.<sup>65</sup>

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<sup>63</sup> See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (finding applicant had established a state action where country conditions evidence showed that applying to the police would have been futile and dangerous and that legal remedies were generally unavailable to women).

<sup>64</sup> See U.S. Department of State, "Pakistan," Country Reports on Human Rights Practices for 2005 (Washington, DC: U.S. Government Printing Office, Mar. 8, 2006); *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000)

<sup>65</sup> *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); RAIIO Training Module, *Nexus – Particular Social Group*.



Evidence about patterns of violence in the society against individuals similarly situated to the applicant may be relevant to the "nexus to a protected ground" determination. For example, in a domestic violence claim, an adjudicator would consider evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that a woman may acquire when she is in a domestic relationship. This would include any direct evidence about the abuser's own actions; as well as any circumstantial evidence that such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society.<sup>66</sup>

Such circumstantial evidence (in addition to the direct evidence regarding the abuser's statements or actions) would be relevant to determining whether the abuser believes he has the authority to abuse and control the victim "on account of" her status in the relationship. Further, in domestic violence cases, there is often no evidence that the abuser would seek to harm other women who share the same social status in a domestic relationship. Rather, it often appears that the abuser is motivated only to harm his own spouse or partner. While evidence of motivation to harm others who share the applicant's protected trait may help to establish nexus, it is not required. Where other evidence shows that the persecutor harms the victim because of her status within the relationship, the absence of a motivation to harm others with that trait does not undermine a finding of nexus.

There are two factors to consider when evaluating "nexus." The first is whether the harm is "on account of" a protected characteristic. The second is whether the applicant possesses or is believed to possess a protected characteristic.

#### 1. "On account of"

The "on account of" requirement focuses on the motivation of the persecutor. The persecutor must be motivated to harm the applicant on account of a protected characteristic. However, the persecutor may have mixed motivations in harming the applicant. In refugee processing cases, the persecutor must be motivated, at least in part, by a protected characteristic.<sup>67</sup> For more on these standards, see RAIIO Training Module, *Nexus and the Protected Grounds\**. In asylum adjudications, as long as 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. This "one central reason" standard was added to the statute by the REAL ID Act, and applies only to asylum adjudications. The Board has explained, however, that the "one central reason" language should be interpreted consistent with prior Board precedent that allows nexus to be established where the persecutor has mixed motivations.<sup>68</sup>

#### 2. Protected Characteristics ("Five Grounds")

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<sup>66</sup> See *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (noting that in Morocco, a father's power over his daughter is unfettered).

<sup>67</sup> *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996)

<sup>68</sup> *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)

As the Court of Appeals for the Ninth Circuit has noted, “gender” is not specifically listed as one of the five enumerated characteristics in the refugee definition. However, an asylum or refugee applicant may present a claim that is based on one of the five protected characteristics and that is at the same time related to the woman’s gender. Additionally, gender may be one of the characteristics included in the formulation of a particular social group.<sup>69</sup>

## 6.2.2 Political Opinion

### 1. Actual Political Opinion

There are a few important points you should bear in mind when evaluating women asylum or refugee applicants’ claims. First, women often express political opinions in the traditional sense of actively participating in political institutions within a country, such as political parties, and organizing or participating in political demonstrations. Even in countries with extremely restrictive norms and laws governing women’s behavior, some women may risk severe harm by taking such actions.

Second, women may also engage in more non-traditional political expression than men, because of their situation in society. For example, a woman may cook and provide food for an opposition group or rebel forces, rather than campaign for the group or fight with the rebel forces. Or women may organize to try to obtain release of male relatives detained for political reasons.

Third, opposition to institutionalized discrimination of women, expressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior associated with gender (such as dress codes and the role of women in the family and society) may all be expressions of political opinion. Feminism is a political opinion and may be expressed by refusing to comply with societal norms that subject women to severely restrictive conditions.<sup>70</sup>

### 2. Imputed Political Opinion

- Activities of Family Members

In evaluating why a persecutor may have harmed or seek to harm an applicant, it may be important to inquire into any political activities of the applicant’s family members and whether the government has attributed a family member’s political views to the applicant. For example, if the applicant’s husband is involved in opposition political activities, the authorities might assume that the applicant has assisted her husband and shares his political views.

- Violation of Social Norms

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<sup>69</sup> *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); Asylum Gender Guidelines.

<sup>70</sup> *Fatin*, 12 F.3d at 1242.

In some cases, a political opinion may be attributed to a woman who refuses to comply with social norms or laws governing behavior based on gender. For example, authorities might attribute a feminist political opinion to a woman who refuses to participate in an arranged marriage or who otherwise attempts to live outside the constraints governing the role of women in her society. It is important for you to elicit information regarding how the feared persecutor views the woman for such behavior.

Violation of social norms may also indicate persecution on account of religion. The Board of Immigration Appeals considered the case of a young Moroccan woman whose father repeatedly abused her. He burned her thighs to discourage her from wearing short skirts, brutally beat her for giving directions to a man on the street, and forbade her from leaving the house, all because of his religious viewpoint about the proper role of women in society. The Board found that the applicant, in wearing western-style clothing and interacting with men, was demonstrating that her religious beliefs were different than those of her father. Although both were Islamic, the Board determined that the father persecuted the daughter on account of her religion.<sup>71</sup>

- Applicants Living in Theocracies

In some cases, a political opinion may be imputed to an asylum or refugee applicant who resides in a theocracy, if she displays behavior that is considered contrary to societal norms. Where tenets of the governing religion in such a country require certain kinds of behavior, contrary behavior may be perceived by the government as evidence of an unacceptable political opinion, because it is perceived as being in opposition to the national law.<sup>72</sup>

Cases involving female applicants who flee theocracies may be complex. You must determine whether the applicant is subject to legitimate prosecution for violating the laws of the country (including an assessment of whether the law itself is persecutory), or whether there is evidence that the applicant is perceived as holding an adverse political (or religious) opinion and punished as a result.<sup>73</sup>

- Imputing a Political Opinion as a Means of Control

In one case, the court found an applicant eligible for asylum based on persecution on account of imputed political opinion because an army sergeant who had in effect enslaved the applicant threatened to tell the authorities that she supported the guerrillas. Although the sergeant knew that the applicant did not support the guerrillas, he used the threat to terrorize the applicant into submission and keep control over her. Because of his position in society, it was found that the

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<sup>71</sup> *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000).

<sup>72</sup> Punishment for refusal to comply with laws established in a theocracy may also constitute persecution on account of religion. See section on religion. See also RAIO Training Module, *Nexus and the Protected Grounds\**, section on prosecution vs. persecution.

<sup>73</sup> See, e.g., *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (finding that evidence in the record failed to establish applicant would be subject to persecution as opposed to prosecution for violating Iranian laws governing conduct and dress of women.); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

sergeant would be believed by the authorities and therefore the applicant's fear of future persecution on account of imputed political opinion was reasonable.<sup>74</sup>

### 6.2.3 Religion

The notion of freedom of religion encompasses the freedom to hold and express a belief system of one's choice and the right not to be subjected to coercion that impairs the freedom to have or adopt a religion or belief of one's choice.<sup>75</sup>

Just as in claims involving political opinion or imputed political opinion, the relevant inquiry in evaluating whether an applicant has established a connection between the harm she suffered and/or fears and religion, is how the persecutor views the woman. The fact that the persecutor may target a woman because of the persecutor's religious beliefs about how a woman should behave does not, in itself, establish that the persecutor is targeting the woman because of the woman's religious beliefs or religious beliefs imputed to her. However, a woman may, through her behavior, demonstrate that her beliefs are at odds with those of the persecutor.<sup>76</sup>

Certain religions assign particular roles to women; if a woman does not fulfill her assigned role she may be viewed as having "incorrect" religious views and punished. Such punishment would be considered to be "on account of" religion.

As explained in the section above on persecution, the U.S. Court of Appeals for the Third Circuit has indicated that forced compliance with laws that fundamentally are abhorrent to a person's deeply-held religious convictions may constitute persecution.<sup>77</sup>

### 6.2.4 Particular Social Group

The factors to consider in evaluating whether an applicant is a member of a particular social group and whether harm is on account of that group membership are discussed in detail in another module.<sup>78</sup> The purpose of this section is to focus on gender-specific issues related to particular social group.

The BIA has held that members of a particular social group must share a "common, immutable characteristic" that the members "cannot change, or should not be required to change because such characteristic is fundamental to their individual identities or conscience."<sup>79</sup> The group must also reflect social distinctions, such that the persecutor is not motivated by purely personal reasons, but rather is influenced by broader social mores or factors ("social visibility" or "social

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<sup>74</sup> *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

<sup>75</sup> Universal Declaration of Human Rights (Art. 18); The International Covenant on Civil and Political Rights (Art. 18).

<sup>76</sup> See *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000).

<sup>77</sup> *Fatin v. INS*, 12 F. 3d 1233 (3d Cir. 1993).

<sup>78</sup> See RAIO Training Module, *Nexus – Particular Social Group*.

<sup>79</sup> *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).

distinction” element). This element can be satisfied by evidence that the society in question meaningfully distinguishes individuals who have the shared characteristic from individuals who do not have it.

Gender is an immutable trait and has been recognized as such by the BIA and some federal courts. Further, there may be circumstances in which an applicant's marital status or status within a family could be considered immutable. A father-daughter relationship, or a marriage in which a woman could not reasonably be expected to divorce because of religious, cultural or legal constraints, are examples of such immutable traits. Any intimate relationship could also be immutable if the evidence indicates that the relationship is one that the victim could not reasonably be expected to leave. Note that the particular social groups identified by the courts prior to the BIA’s 2006 decision in *Matter of C-A-* emphasized a “social distinction” consideration in the analysis of “particular social group.” However, an examination of the facts reveals that the society’s perception of the group members was a factor in deciding these cases.<sup>80</sup>

Though some circuits have discussed gender as a basis of a particular social group, few have found an individual to be eligible for asylum on the basis of a particular social group defined solely by the applicant’s gender. Generally, this is because the persecutor was not motivated to harm the applicant solely because of her gender, but because of her gender and some other characteristic she possessed.

### 6.2.5 Race and Nationality

A female applicant’s claim may be based on persecution or feared persecution on account of her race or nationality, or a combination of race or nationality and other characteristics in the refugee definition.

The U.S. Court of Appeals for the Ninth Circuit, found an applicant who was raped by a policeman to be eligible for asylum because she had been persecuted on account of her ethnicity. The applicant testified that the Tigrean policeman had raped her because she was Amharic, her sister’s testimony supported her claim, and documents submitted on her behalf also supported that conclusion.”<sup>81</sup>

### 6.3 Internal Relocation

An applicant does not have a well-founded fear of persecution if he or she could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.<sup>82</sup> You should remember that in some circumstances it is unreasonable to expect that applicants could relocate within their own

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<sup>80</sup> See, e.g., *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005). See also *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

<sup>81</sup> *Shoafra v. INS*, 228 F.3d 1070 (9th Cir. 2000)

<sup>82</sup> 8 C.F.R. 208.13(b)(2)(ii)

country. For example, if the government is the feared persecutor, then the threat is presumed to be countrywide and it would be unreasonable to assume the applicant has the ability to relocate. The same reasoning would apply in situations where the feared persecutor is a group operating countrywide that the government is unable or unwilling to control. In assessing reasonableness, you may also consider other serious harm the applicant may face in the place of suggested relocation; any ongoing civil strife within the applicant's home country; the administrative, economic, or judicial infrastructure of that country; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.<sup>83</sup> For a more detailed discussion, see RAI0 Training Module, *Well-Founded Fear*.

The crucial aspect of analyzing the internal flight alternative is an inquiry as to whether relocation would be reasonable under all the circumstances. Reasonable relocation possibilities for a woman may vary substantially from the relocation possibilities for a man from the same country.

Legal restrictions and cultural or social norms governing women's behavior must be considered in evaluating whether it would be reasonable for a female applicant to relocate within her country. Keep in mind also that women may have other vulnerabilities even in the absence of specific laws or norms restricting their movement; for example, in a very corrupt country, where a man might have to give a bribe in order to secure a residence permit, a woman may be more likely to be coerced or forced into giving sexual "favors". Likewise, in countries with high rates of trafficking, women who do not have the protection of their families or communities may be particularly vulnerable.

### 6.3.1 Ability to Travel

In evaluating whether it would be reasonable for a woman to relocate within her country, you must consider whether there are significant restraints on a woman's right to travel. For example:

- Saudi women may not undertake domestic travel alone, may not legally drive, and risk arrest for riding in a vehicle driven by a male who is not a close relative.<sup>84</sup>
- If there is civil strife or war ongoing in the woman's country, she may be particularly vulnerable if she travels outside the area in which she is protected by family or clan.

You should inquire into whether there are any legal or social constraints on the applicant's ability to travel. This information should be elicited during the interview and also may be found in country conditions information.

### 6.3.2 Economic Circumstances

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<sup>83</sup> *Id.*

<sup>84</sup> U.S. Department of State. "Saudi Arabia," Country Reports on Human Rights Practices for 2006 (Washington, DC: U.S. Government Printing Office, Mar. 6, 2007)

You should consider whether it would be reasonable to expect a woman to survive economically, if she were to relocate within her country to avoid future persecution. In many parts of the world, women are still economically dependent on men and availability of employment opportunities is quite restricted for women.

### 6.3.3 Social Circumstances

In some countries, a woman living outside the protection of her father, spouse, or clan may be vulnerable to attack and/or damaging social stigma. For example, in some countries it is assumed that a woman living on her own or with other unrelated women is a prostitute. In other countries, women are not allowed to rent an apartment, open a bank account or own property. Therefore, you must be aware of conditions for women living on their own in the applicant's country to evaluate whether internal relocation to avoid future persecution is reasonable.

## 7 CREDIBILITY

Cultural differences and norms governing women's behavior, as well as the effects of trauma, may present special difficulties in evaluating credibility of female asylum and refugee applicants.<sup>85</sup>

### 7.1 Detail

An applicant's gender may affect her ability to provide detailed testimony in a number of ways. In evaluating the amount of detail an applicant should be expected to provide regarding any element of a claim, you should take into account the applicant's social background and role in society. When an applicant is not able to provide detail about certain aspects of her claim, you should inquire into the reason why she is unable to do so.

Some factors that may limit a female applicant's ability to provide detail include the following.

#### 1. Social Constraints May Limit Access to Information

Social constraints governing gender roles may restrict a woman's role in an opposition organization and she therefore may be unable to provide many details about the organization, even if she is a member of the organization. Although a woman may take great risks to further the goals of the organization, male members of the organization may limit the female members' knowledge of the detailed workings and structure of the organization.

A woman who may be at risk of persecution because of her relationship to a male family member may be unable to provide detail about the activities of the male family member that placed the family at risk. In many societies it is normal for a male family member not to discuss

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<sup>85</sup> As explained in the RAIO Training Module, *Credibility*, when evaluating credibility, you must consider "the totality of the circumstances" including all relevant factors, such as detail, consistency and plausibility. All of these factors may be affected by circumstances related to an applicant's gender.



his “public” activities (such as political activities, or activities in a union or religious organization) with female members of the family, even with his wife.

## 2. Effects of Trauma

As discussed in other modules and earlier in this module, effects of trauma may have a significant impact on an applicant’s ability to present details about her claim. The effect of trauma on an applicant’s ability to present a credible claim is not unique to gender. However, because persecution directed against women may involve sexual harm, you need to be sensitive to the possibility that a woman is reluctant to provide detail about certain experiences because those experiences may be difficult to discuss, particularly with a male officer or through a male interpreter.

## 3. Gender Roles

A woman’s cultural and social background may also affect her ability or the ease with which she discusses her history with a stranger. In some cultures, women live secluded lives and may only rarely have contact with strangers, particularly strangers of the opposite sex. When women in such societies do encounter strangers, they may be accustomed to having male relatives speak for them. This may result in an applicant providing only short, limited answers to questions you pose.

## 4. Education Level

In some countries or cultures, women are denied the opportunity to obtain an education, or for a variety of reasons, may only be able to obtain a very limited education. In many refugee-producing countries, the literacy rate for women is quite low. A lack of education can affect a woman’s ability to express herself or her understanding of the context of the social situation. A woman with little or no education may be unable to clearly express her claim, or may express it in a confused or halting manner creating the false impression that she is being evasive.

## 7.2 Consistency

Given some women’s limited literacy skills, coupled with the fact that women in some societies may be accustomed to having male relatives conduct all “public” activities for them, female asylum or refugee applicants may sign or mark applications that have been completed by a male relative who did not allow them to review it for accuracy. As in any asylum or refugee case, you should always inquire into who prepared the application for the applicant and whether the applicant had an opportunity to review it for accuracy before signing.

## 7.3 Plausibility

You should exercise care in evaluating the plausibility of the claims by someone from a different culture when behavior or life choices are being evaluated. What may seem implausible behavior to you could be plausible in the applicant’s culture, or given conditions in the applicant’s country.



## 7.4 Demeanor

As explained in the RAIO Training Module, *Credibility*, demeanor is often an unreliable and misleading indicator of credibility. This may be particularly true in cases involving torture or sexual violence. While some individuals who have been tortured become emotionally overcome when recalling their ordeals, others may exhibit no emotion at all. Because there are such a wide variety of emotional reactions to recounting experiences of torture, you should not expect the asylum or refugee applicant to manifest any particular emotion when recounting traumatic experiences.

In some cultures, keeping the head down and avoiding eye contact are signs of respect. For many women, making eye contact and speaking clearly and directly are considered highly inappropriate conduct and should not be viewed as indicators of lack of credibility.

## 8 EVIDENTIARY CONSIDERATIONS

The same evidentiary rules apply to female applicants, whether or not the claim is gender-related, as apply to male applicants. Testimony alone may be sufficient to establish eligibility if it is credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. However in some cases, additional corroboration of material facts may be required. “[W]here it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant’s claim, such evidence should be provided or an explanation should be given as to why such information was not presented or as to why such corroboration cannot be provided.”<sup>86</sup>

In evaluating whether an applicant should be expected to provide documentation, you must take into account the applicant’s situation in the country she fled and the circumstances under which she fled. For a number of reasons, a female asylum or refugee applicant might not have access to identity documents or other documentary proof of her claim. For example, women in the applicant’s country may not be afforded full rights of citizenship, or an applicant’s means of support may have been dependent upon a male relative who had control over any documents pertaining to the female applicant.

It may be unreasonable to expect a woman from a refugee-producing country to have documentation of sexual violence she suffered. Because of strong cultural stigma attached to rape, “women survivors of sexual violence often are reluctant to seek medical assistance or to file police reports, because they do not want it known that they were raped.”<sup>87</sup>

## 9 CONCLUSION

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<sup>86</sup> INA § 208(b)(1)(B)(ii); 8 CFR § 208.13(a); *Diallo v. INS*, 232 F.3d 279 (2d. Cir. 2000); *Matter of S-M-J-*, 21 I&N Dec 722 (BIA 1997).

<sup>87</sup> Human Rights Watch Women’s Rights Project, *The Human Rights Watch Global Report on Women’s Human Rights* (August 1995) <http://www.hrw.org/sites/default/files/reports/general958.pdf>

Understanding the role of gender and how to evaluate gender-based claims is important for all Officers within the RAIO Directorate. Although not all of the divisions will encounter gender-based issues on a routine basis, you should familiarize yourself with the types of potential gender-based issues that could arise in the course of adjudicating cases. Being familiar with the terminology and applicable laws and regulations relevant to the adjudications will help you recognize and adjudicate gender-based claims and make legally sufficient decisions.

## **10 SUMMARY**

### **10.1 Gender-Related Issues**

Women often suffer types of harm unique to women or much more commonly experienced by women than men, and at times women may suffer harm solely because of their gender. In many societies, women are subject to much greater social restrictions and harsher penalties for social violations than are men.

Furthermore, social constraints placed on women in many countries pose great obstacles to accessing the protection of the state or fleeing harm.

### **10.2 International and National Guidelines Relating to Women Refugees**

Recognizing the particular vulnerability of women, international bodies and national governments have issued several documents in an effort to enhance their protection. These documents may be helpful reference tools for you in evaluating gender-based claims, including determining whether a type of harm experienced or feared by a woman seeking protection has been condemned by the international community as contrary to international human rights norms.

Some of those instruments and documents are:

- Declaration on Elimination of Discrimination Against Women (1967)
- Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- UNHCR Guidelines on the Protection of Refugee Women (1991)
- Declaration on the Elimination of Violence Against Women (1993)
- INS Asylum Gender Guidelines (1995)
- UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002)

### **10.3 Types of Gender-Based Harm**

The types of harm that women suffer vary across a broad range of countries, cultures, and social classes. You will confront particular types of harm in the claims of women interviewed.

### **10.3.1 Rape and Other Sexual Violence**

Rape and other forms of sexual assault are acts of violence serving non-sexual needs or aims. Rape is based on a desire to degrade, control, and/or terrorize a victim or her community. Rape of women civilians has long been an integral part of conflict, used as a tactical weapon to terrorize civilian communities.

### **10.3.2 Female Genital Mutilation (FGM)**

Female genital mutilation (FGM) is a custom of unknown origins involving the cutting or removal of all or part of the female genitalia. This practice can have devastating and harmful consequences for a woman throughout her life.

### **10.3.3 Forced Marriage**

Forced marriage takes place against the victim's wishes and without the informed consent of both parties. The practice occurs throughout the world and may arise out of gender discrimination. Forced marriage constitutes a human rights violation and may constitute persecution where the applicant experiences it as serious harm.

### **10.3.4 Domestic Violence**

Violence against women by relatives is related to the historically more powerful position of men in the family and society. In many societies, the police, the court system, and laws may condone the practice, allow for it, or may simply do nothing to prevent it or punish perpetrators. Although most battered women make efforts to avoid or resist abuse, there are many factors that make it difficult for a battered woman to leave her abuser.

### **10.3.5 Human Trafficking**

Women and men are sometimes victims of human trafficking, a circumstance that involves their exploitation as forced laborers or prostitutes, among other types of harm. They are held against their will, either physically or psychologically. A victim of human trafficking is sometimes lured into her position by deception such as false promises of employment or under false pretenses that the trafficker is romantically interested in the victim. Traffickers often withhold their victims' passports and identity documents. More information is available in the RAIO Training Module, *Detecting Possible Victims of Trafficking*.

### **10.3.6 Honor Crimes**

In some cultures, women are perceived to be the keepers of their families' honor. The family and society consider that a woman has brought shame on her family if she does not adhere to strict social norms of behavior and conduct. Families carry out honor crimes to restore honor to their families. Perpetrators may be members of the woman's family or her community.

Honor crimes include: stoning, abduction, imprisonment, rape, poisoning, acid attacks, disfigurement, forced marriage, murder, and attempts to coerce the victim to commit suicide. A woman may be subjected to these honor crimes for engaging in, or for being accused of engaging in, sex before or outside of marriage, even as a result of rape; refusing to agree to a forced marriage; assertiveness; or wearing inappropriate clothing. Even in countries where honor crimes are illegal, lax enforcement or lesser sentences may be given to perpetrators of these crimes.

#### **10.4 Interviewing Considerations**

Cultural factors, such as the expected role of a woman in her society, may significantly affect an applicant's testimony. Cultural norms may exacerbate a reluctance to discuss an issue or limit an applicant's knowledge on a particular subject. The presence of certain people, such as family members or interpreters, may inhibit an applicant's testimony.

You must use your utmost care to assure that the interview is conducted in a non-adversarial manner and to employ questioning techniques that both encourage testimony and put the applicant at ease.

#### **10.5 Legal Analysis – Persecution and Agent of Persecution**

The Asylum Gender Guidelines do not expand the statutory definition of a refugee. The legal criteria used to evaluate a female asylum or refugee applicant's eligibility for asylum or refugee status is the same criteria used in all other protection adjudications.

##### **10.5.1 Persecution**

When considering whether the harm that an applicant has suffered or fears rises to the level of persecution, keep in mind that rape and FGM are serious enough forms of harm to amount to persecution. According to statute, forced abortion and forced sterilization and other serious harm imposed for resistance to a coercive population control program constitute harm amounting to persecution.

Discrimination and harassment may amount to persecution if the adverse practices or treatment accumulate to the level of persecution, or is so serious that it leads to consequences of a substantially prejudicial nature. Some case law has also indicated that being compelled to engage in conduct that is abhorrent to an individual's deeply-held beliefs may constitute persecution.

##### **10.5.2 Agent of persecution**

As in any other asylum or refugee claim, in order to establish persecution, the applicant must demonstrate that the persecutor is the government (including agents of the government) or an

entity that the government is unable or unwilling to control. The persecutor may be a rebel group, a clan, a tribe, or a family member, such as a brother, father, or husband.

In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, you should consider whether the government provides reasonably effective protection. Factors to consider include whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to existing state protection.

Evidence that the government does not respond to requests for protection is a strong indication that state protection is unavailable. In some cases, an applicant may establish that state protection is unavailable even when she did not actually seek protection.

Keep in mind also that, while the existence of laws on the books criminalizing domestic abuse and government agencies or initiatives devoted to addressing the problem are factors which may serve to indicate a willingness and ability to protect victims of domestic violence, they are not in and of themselves proof that such protection exists and is effective.

## **10.6 Legal Analysis – Nexus**

The “nexus” requirement applies equally to female and male applicants and to all claims, including those in which gender is an element.

When examining claims based on female applicants’ political opinion, you must remember that in addition to expressing political opinions in the traditional sense of actively participating in political institutions within a country, women also express their political opinion in more non-traditional ways, such as cooking or providing food to rebel forces. Women also express political opinions when they oppose or challenge institutionalized discrimination or restrictive social norms.

The BIA has recognized gender as an immutable trait that could form the basis of a particular social group, as have a few federal courts. However, most courts analyzing gender-related social groups consider gender along with other characteristics.

## **10.7 Legal Analysis – Internal Relocation**

Determinations regarding whether a female applicant could avoid future harm through internal relocation must take into consideration the legal restrictions and cultural or social norms governing women’s behavior. This includes a woman’s ability to travel, her economic circumstances, and her social circumstances.

## **10.8 Credibility**

Cultural differences and norms governing women’s behavior, as well as the effects of trauma, may present special difficulties in evaluating credibility of female asylum and refugee applicants. For example, social constraints controlling access to information, the effects of

trauma, or customs of social interaction may limit a woman's ability to provide detailed testimony about certain aspects of her claim. Also, as women from certain countries are less likely to be literate than their male compatriots, they may not have the ability to review the asylum or refugee application for accuracy.

PRACTICAL EXERCISESPractical Exercise # 1

- **Title: Analysis of Harm in a Gender-Related Claim**
- **Student Materials: Gender Fact Pattern**

Applicant is a 22-year old woman from country X, which is engaged in a civil war between the government and rebel forces. When she was about 9 years old in 1993, rebel forces began going to Applicant's village and demanding that men join them. They often would kidnap men to join their forces, and men who resisted were killed. The rebel forces took about 20 men from the village, which was about 1 per family.

A few years later, the military began coming to the village. They would beat men, women and children. They also would rape women. Over the next several years, soldiers raped someone in village every 8 – 15 days. Applicant claimed that the military targeted the village and retaliated against residents based on the mistaken belief that the villagers had voluntarily joined the rebels and therefore the village supported the rebels.

When Applicant was 19, soldiers came to her home at night. They beat her father and mother. The soldiers told her father that they wanted to "eat and to be with a woman." They tied Applicant's father behind the house and forced her mother into the kitchen to cook. Applicant was then left alone with three soldiers who beat and raped her. After the soldiers left, the Applicant's parents sent her to stay with an aunt in a nearby village. Fearing further harm, Applicant fled her country.

When asked why she thought she and her family were assaulted, Applicant testified, "I think they were attacking us because the guerrillas had taken my brother away, so they thought we were in favor of the guerillas." When asked why she believed there was a connection between her brother's kidnapping and her rape so many years later, she responded, "Because the guerillas continued to kidnap people from the town. So for the same reason, the military soldiers thought that all the persons they took away, that they were in agreement with the guerillas."

**Analyze whether the harm Applicant experienced was persecution on account of a protected characteristic. What additional information would be helpful in making this determination?**

**Practical Exercise # 2**

- **Title: Interviewing a Gender-Related Case**
- **Student Materials: Excerpt of Interview Notes; Country Conditions Information**

Q. Why are you afraid to return to Pakistan?

A. I would be killed absolutely.

Q. Who would kill you and why?

A. My brothers. They would kill me. I have shamed them.

Q. Why would they kill you?

A. I have dishonored them. Brought shame on my family.

Q. What do you mean? How have you dishonored them?

A. They will say that I had intimate relations and I am not married.

Q. Why will they think that?

A. My neighbor violated me. He made me submit. I didn't want to and now I am pregnant and no one will believe me.

Q. What do you mean when you say no one will believe you?

A. My neighbor, he will deny it. He will say he didn't touch me – or he will say I asked for it.

Q. I know this is difficult to talk about, but I must ask you, did he rape you?

A. Yes. (Applicant begins to cry).

Q. Describe to me what happened.

A. They will say I have dishonored the family.

Q. When did your neighbor harm you?

A. It was in October – last October.

Q. Why do you think your brothers would harm you because of this?

A. I am not married. It is illegal. They won't believe me that I was forced.

Q. Have you told anyone in your family what happened?

A. No.

Q. Why not?

A. It is too shameful.

Q. Did you tell the police?

A. No. They would arrest me. No one will believe me.

Q. Do you know any other women who have been raped?

A. No. But my cousin got pregnant when she was not married and she died.

Q. How did she die?

A. They said it was an accident, that she fell down the stairs. But I know that she was killed by my uncle and his sons.

Q. How do you know this?

A. After she died, my oldest brother said that her family did the right thing, that they saved the family honor.



Q. Why does this mean she was killed?

A. What else could it mean? My brothers had been very upset when they learned she was pregnant. They said terrible things about her. Called her terrible names. They talked to my cousins who were also very upset. They said she brought shame upon the entire family and that something had to be done. Then she suddenly had an accident. I don't believe it was an accident.

Q. Was there an investigation?

A. There never is.

**After reviewing the excerpt from the notes above, answer the following questions:**

- 1. What other questions should be asked?**
- 2. Are there better ways to have asked any of the above questions?**
- 3. On these facts and, in light of country conditions, can the applicant establish eligibility for asylum?**

**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**

1. Weiss, Jeffrey L., Office of International Affairs, Gender *Guidelines for Overseas Refugee Processing*, Memorandum to all Overseas District Directors (Washington, DC: 23 February 2001), 2 pp. plus attachment.

**ADDITIONAL RESOURCES**

- 1.
- 2.

**SUPPLEMENTS**

**International and Refugee Adjudications Supplement**

**There are no 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.

**REQUIRED READING**

- 1.
- 2.

**ADDITIONAL RESOURCES**

1. Melville, Rosemary, Asylum Division, Office of International Affairs, *Follow Up On Gender Guidelines Training*, Memorandum to Asylum Office Directors, SAOs, AOs, (Washington, DC: 7 July 1995), 2 p. plus attachments.
2. Weiss, Jeffrey L., Office of International Affairs, *Gender Guidelines for Overseas Refugee Processing*, Memorandum to all Overseas District Directors (Washington, DC: 23 February 2001), 2 pp. plus attachment.

**SUPPLEMENTS**

**Asylum Adjudications Supplement**

**There are no supplements.**



U.S. Citizenship  
and Immigration  
Services

**RAIO DIRECTORATE – OFFICER TRAINING**

**RAIO Combined Training Program**

**GUIDANCE FOR ADJUDICATING  
LESBIAN, GAY, BISEXUAL,  
TRANSGENDER, AND INTERSEX  
(LGBTI) REFUGEE AND ASYLUM  
CLAIMS**

TRAINING MODULE

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

**GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL,  
TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND  
ASYLUM CLAIMS**

**Training Module**

**MODULE DESCRIPTION:**

This module provides guidelines for adjudicating and considering immigration benefits, petitions, protections, or other immigration-related requests by lesbian, gay, bisexual, transgender, and intersex, (LGBTI) individuals. The module addresses the legal analysis of claims that involve LGBTI applicants as well as related interviewing considerations.

**FIELD PERFORMANCE OBJECTIVE(S)**

When interviewing in the field, you (the Officer) will elicit all relevant information from an LGBTI applicant to properly adjudicate and consider the immigration benefit, petition, protection, or other immigration-related request before you.

**INTERIM PERFORMANCE OBJECTIVES**

1. Summarize the developments in U.S. law that focus on LGBTI applicants.
2. Describe the types of harm that may be present in refugee and asylum claims involving LGBTI issues.
3. Describe how membership in a particular social group is analyzed when looking at the refugee or asylum claims involving LGBTI issues.

Identify factors to consider when evaluating evidence presented by LGBTI applicants.

5. Identify factors that may hinder an interview of an LGBTI applicant.
6. Identify methods and techniques to put an LGBTI applicant at ease during an interview.

Use sensitive questioning and listening techniques that aid in eliciting information from LGBTI applicants.

## INSTRUCTIONAL METHODS

- Interactive presentation
- Discussion
- Practical exercises

## METHOD(S) OF EVALUATION

- Multiple-choice exam
- Observed practical exercises

## REQUIRED READING

1. *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990).
2. UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, available at: <http://www.refworld.org/docid/50348afc2.html> Legal Memorandum, Stephen H. Legomsky, USCIS Chief Counsel, *General Guidance to the Field in Same-Sex Marriage Cases*, (July 26, 2013).
3. USCIS Policy Memorandum on Adjudication of Immigration Benefits for Transgender Individuals, August 10, 2012, available at <http://connect.uscis.dhs.gov/workingresources/immigrationpolicy/Documents/PM-602-0061.1.pdf>.

Memorandum from William R. Yates, Associate Director for Operations, USCIS, *Adjudication of Petitions and Applications Filed by or On Behalf Of, or Document Requests by, Transsexual Individuals* (April 16, 2004).

### **Required Reading – International and Refugee Adjudications**

### **Required Reading – Asylum Adjudications**

## ADDITIONAL RESOURCES

1. LGBTI-related Case Law  
  
Immigration Equality, *Immigration Equality Asylum Manual*, available at <http://immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/>.



3. Immigration Equality, *Immigration Equality Draft Model LGBT Asylum Guidance*, (2010), available at <http://www.immigrationequality.org/wp-content/uploads/2011/07/ImEq-Draft-Model-LGBT-Asylum-Guidance-2004.pdf>.
4. International Lesbian, Gay, Bisexual, Trans and Intersex Association-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2015*, May 2015, available at: [http://www.ilga-europe.org/sites/default/files/Attachments/01\\_full\\_annual\\_review\\_updated.pdf](http://www.ilga-europe.org/sites/default/files/Attachments/01_full_annual_review_updated.pdf).
5. Amnesty International, *Making Love a Crime: Criminalization of Same-Sex Conduct in Sub-Saharan Africa*, June 24, 2013, available at: <http://www.amnestyusa.org/research/reports/making-love-a-crime-criminalization-of-same-sex-conduct-in-sub-saharan-africa?page=show>.
6. International Gay and Lesbian Human Rights Commission, *When Coming Out is a Death Sentence: Exposing Persecution of LGBT Individuals in Iraq*, November 19, 2014, available at: <http://iglhrc.org/content/exposing-persecution-lgbt-individuals-iraq>.
7. *Statement by the President on the UN Human Rights Council Resolution on Human Rights, Sexual Orientation, and Gender Identity*. The White House, Office of the Press Secretary, June 17, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/06/17/statement-president-un-human-rights-council-resolution-human-rights-sexu>.
8. Memorandum from David A. Martin, INS General Counsel, *Seropositivity for HIV and Relief From Deportation*, (Feb. 16, 1996).
9. International Gay and Lesbian Human Rights Commission (IGLHRC), *Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa* (2011), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/484-1.pdf>.
10. Aengus Carroll and Lucas Paoli Itaborahy, International Lesbian, Gay Bisexual, Trans and Intersex Association, *State Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults*, May 2015, available at: [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2015.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf).  
  
American Psychiatric Association, *Therapies Focused on Attempts to Change Sexual Orientation: Reparative or Conversion Therapies Position Statement*, March 2000, available at <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200001.aspx>. [scroll down the page and click on the year-2000, then click on “[Therapies focused on attempts to change sexual orientation.](#)”]
12. Victoria Neilson, *Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 *Stanford Law & Policy Review* 417 (2005), available at

<http://www.immigrationequality.org/wp-content/uploads/2011/08/Neilson-Website-Version-Lesbian-article.pdf>.

13. Ellen A. Jenkins, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 Golden Gate U.L. Rev. (2009), available at <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=2008&context=ggulrev>.

**Additional Resources – International and Refugee Adjudications**

**Additional Resources – Asylum Adjudications**

**CRITICAL TASKS**

SOURCE: The Tasks listed below are from the legacy Asylum Division’s 2001 Revalidation. These tasks will need to be modified to reflect the results of the RAIO Directorate – Officer Training Validation study.

<b>Task/ Skill #</b>	<b>Task Description</b>
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ILR9	Knowledge of policies and procedures for processing lesbian, gay, bisexual, transgender, and intersex (LGBTI) claims (3)
ILR14	Knowledge of nexus to a protected characteristic (4)
ILR15	Knowledge of the elements of each protected characteristic (4)
ILR20	Knowledge of the criteria for refugee classification (4)
ILR21	Knowledge of the criteria for establishing a well-founded fear (WFF) (4)
ILR22	Knowledge of the criteria for establishing credibility (4)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
ITK5	Knowledge of strategies and techniques for communicating with survivors of torture and other severe trauma (4)
ITK6	Knowledge of principles of cross-cultural communication (e.g., obstacles, sensitivity, techniques for communication) (4)
ITK8	Knowledge of policies, procedures and guidelines for working with an interpreter (4)
RI1	Skill in identifying issues of claim (4)
RI2	Skill in identifying the information required to establish eligibility (4)
RI3	Skill in conducting research (e.g. legal, background, country conditions) (4)
ITS3	Skill in framing interview questions and requests for information (4)
ITS4	Skill in asking appropriate follow-up questions (4)
ITS6	Skill in conducting non-adversarial interviews (4)
ITS8	Skill in confronting applicant with credibility issues (4)

**SCHEDULE OF REVISIONS**

<b>Date</b>	<b>Section (Number and Name)</b>	<b>Brief Description of Changes</b>	<b>Made By</b>
11/06/2015	Throughout document	Added some discussion of recent cases; fixed links	RAIO Training
12/20/2019	Entire Lesson Plan; section 7.3 (Corroborating Evidence)	Minor edits to reflect changes in organizational structure of RAIO; minor update to reflect change in USCIS policy related to REAL ID provisions; updated links; no other 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

It has been over 25 years since Fidel Armando Toboso Alfonso, a gay man from Cuba, was granted withholding of deportation in the United States based on his sexual orientation.<sup>1</sup> The *Toboso-Alfonso* decision paved the way for hundreds of lesbian, gay, bisexual, and transgender individuals as well as individuals with intersex conditions (LGBTI) to obtain refugee and asylum status in the United States. In 2011, the United Nations marked another “significant milestone in the long struggle for equality, and the beginning of a universal recognition that LGBT[I] persons are endowed with the same inalienable rights – and entitled to the same protections – as all human beings”<sup>2</sup> by passing a Resolution on Human Rights, Sexual Orientation, and Gender Identity.

In 2013, the Supreme Court held that section 3 of the Defense of Marriage Act, which had limited the terms “marriage” and “spouse” to opposite-sex marriage for purposes of federal law, was unconstitutional.<sup>3</sup> Then, in 2015, the Supreme Court struck down state laws denying marriage licenses to couples of the same sex, legalizing same-sex marriage throughout the United States.<sup>4</sup> Legally valid marriages between couples of the same sex are now treated the same as all other marriages under the Immigration and Nationality Act (INA) for all purposes, including the processing of derivative refugees and asylees under INA 207 and 208.<sup>5</sup>

<sup>1</sup> *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990).

<sup>2</sup> *Statement by the President on the UN Human Rights Council Resolution on Human Rights, Sexual Orientation, and Gender Identity*, The White House, Office of the Press Secretary, June 17, 2011.

<sup>3</sup> *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>4</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>5</sup> *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013), reversing a DOMA-based denial of a Petition for Alien Relative because the “Supreme Court’s ruling in *Windsor* has therefore removed section 3 of the DOMA as an impediment

The increasing number of refugee and asylum (protection) claims related to LGBTI and HIV-positive status has resulted in the need for greater awareness of the issues involved in these claims and training on their adjudication.<sup>6</sup> Interviews with LGBTI or HIV-positive refugee and asylum applicants require the individual “to discuss some of the most sensitive and private aspects of human identity and behavior”<sup>7</sup> – sexual orientation, gender identity, and life-threatening illness. These topics may be particularly difficult for applicants to discuss with government officials, where the applicant may have previously had negative encounters with government officials and as a result have a fear of authority.<sup>8</sup>

All officers in the RAIO Directorate should be familiar with the contents of this training module as it constitutes primary field guidance for interviewing LGBTI applicants and analyzing their claims. This module seeks to: 1) increase awareness about the issues sexual minorities face; 2) foster discussion about LGBTI issues; and, 3) provide consistent legal and interview guidance regarding these issues.

The RAIO LGBTI Training Module is the result of a collaborative effort between USCIS and non-governmental organizations (NGOs).

The module first addresses the legal issues you, the interviewing officer, must consider when analyzing cases and making protection determinations. Second, because establishing eligibility for refugee and asylum status presents its own challenges, the module covers the factors you must take into account when interviewing LGBTI individuals. Third, the module addresses proper techniques for assessing credibility.

### *A Note about Terminology*

The terminology involving LGBTI issues is still evolving. For purposes of this module, the term “sexual minorities” and the acronym “LGBTI” are used interchangeably as umbrella terms to refer to issues involving sexual orientation, gender identity, and intersex conditions. The following are some essential LGBTI definitions. For a more comprehensive set of definitions, please click the hyperlink to the [LGBTI Glossary](#) located in the “Other Materials” section of this module.

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to the recognition of lawful same-sex marriages and spouses of the marriage is valid under the laws of the State where it was celebrated.”; Legal Memorandum, Stephen H. Legomsky, USCIS Chief Counsel, *General Guidance to the Field in Same-Sex Marriage Cases* (July 26, 2013).

<sup>6</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraph 1.

<sup>7</sup> *Immigration Equality Draft Model LGBT Asylum Guidance*, Immigration Equality 2010.

<sup>8</sup> *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

The use of the term homosexual is limited in this module. It has a somewhat derogatory connotation within the LGBTI community as it has historically been used in a medical context to describe being gay or lesbian as an illness.<sup>9</sup>

Sexual orientation is the emotional, physical, and romantic attraction a person feels towards another person.<sup>10</sup> The term gay is used to mean men who are attracted to men. The term lesbian is used to mean women who are attracted to women, although homosexual women also sometimes use the term gay to describe themselves. The term gay people or gay community is often used to include both men and women who are attracted to members of the same sex. The term heterosexual or straight is used to mean men or women who are attracted to the opposite sex. The term bisexual is used to mean men or women who are attracted to both sexes.

Gender is what society values as the roles and identities of being male or female. Sex is the assignment of one's maleness or femaleness on the basis of anatomy and reproductive organs. Gender and sex are assigned to every individual at birth. Gender identity is an individual's internal sense of being male, female, or something else. Since gender identity is internal, one's gender identity is not necessarily visible to others. Gender expression is how a person expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice, or body characteristics.<sup>11</sup> Transgender is a term used for people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth. Some transgender people dress in the clothes of the opposite gender; others undergo medical treatment, which may include taking hormones and/or having surgery to alter their gender characteristics.

Intersex refers to a condition in which an individual is born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. The conditions that cause these variations are sometimes grouped under the terms "intersex" or "DSD" (Differences of Sex Development). Individuals with these conditions were previously referred to as "hermaphrodites," but this term is considered outmoded and should not be used unless the applicant uses it. These conditions may be apparent at birth, may appear at puberty, or may be discovered in a medical examination. Intersex is not the same as transgender, although an intersex person may identify themselves as transgender. Keep in mind that an intersex person may identify as male or female, and as lesbian, gay, bisexual, or heterosexual.<sup>12</sup>

<sup>9</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

<sup>10</sup> For more information about sexual orientation, see American Psychological Association (APA), *Answers to Your Questions: A Better Understanding of Sexual Orientation and Homosexuality*, (2008), available at <http://www.apa.org/pubinfo/answers.html>.

<sup>11</sup> For more information on transgender identity, see <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> (National Center for Transgender Equality).

<sup>12</sup> For more information on intersex conditions, see the Advocates for Informed Choice website at [www.aiclegal.wordpress.com](http://www.aiclegal.wordpress.com).



Transgender is a gender identity, not a sexual orientation. Therefore, a transgender person may have a heterosexual, bisexual, gay, or lesbian sexual orientation.

It is also important to be familiar with the issues and terminology related to the Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS). USCIS has encountered claims from applicants who fear persecution because they were incorrectly perceived as gay, based on the fact that they were HIV-positive. We have also encountered claims where the persecutor incorrectly assumed that the applicant was HIV-positive based on the fact that the applicant was gay or was perceived to be gay. Because such claims involve overlapping and related issues, they are being addressed within the same module.

A person who was exposed to HIV and developed anti-bodies to the virus is HIV-positive.<sup>13</sup> AIDS describes people with HIV who have either experienced certain infections or whose T-cells (infection fighting blood cells) have dropped below 200. Not everyone who is HIV-positive has AIDS, but everyone who has AIDS is HIV-positive.<sup>14</sup> HIV is not spread by casual contact. It is only spread through contact with bodily fluids primarily through sex or sharing intravenous needles.

An applicant may prefer to use other terminology regarding their HIV status such as “person living with HIV.” You should use the term most preferable to the applicant.

## 2 LEGAL ANALYSIS – OVERVIEW

This module does not expand the statutory definition of a refugee. The legal criteria used to evaluate an LGBTI applicant's eligibility for asylum or refugee status are the same criteria used in all other protection adjudications. However, because LGBTI applicants' experiences are often different from those of others, it is useful to discuss how these experiences fit into the legal framework of established refugee and asylum law.

## 3 LEGAL ANALYSIS – NEXUS AND THE FIVE PROTECTED GROUNDS

As explained in greater detail in the RAIO training module, *Nexus and the Five Protected Grounds*, to be eligible for asylum or refugee status, the applicant must establish that the

<sup>13</sup> For more information about HIV see <http://www.gmhc.org/hiv-info/hivaids-basics>, (Gay Men’s Health Crisis website).

<sup>14</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, Immigration Equality 2004.

persecution suffered or feared was or will be motivated “on account of” his or her actual or imputed possession of a protected characteristic. This is known as the nexus requirement and it applies equally to LGBTI applicants. The type of harm that may constitute persecution in the context of LGBTI claims will be discussed later in this module.

Depending on the facts of the case, claims relating to sexual orientation and gender identity are primarily recognized under membership in a particular social group but may overlap with other grounds, in particular religion and political opinion.<sup>15</sup>

The nexus analysis first requires consideration of whether the persecutor perceives the applicant as possessing a protected characteristic (either because the applicant does possess it or because the persecutor imputes it to the applicant); then whether the persecutor acted or would act against the applicant because of the persecutor’s perception of that protected characteristic.

### 3.1 Membership in a Particular Social Group – Defining the Group

When deciding if the persecutor perceives in an applicant an actual or imputed characteristic that can define a cognizable particular social group (PSG), you must first identify the characteristics that define the group of which the applicant claims to be a member; then explain why that group does or does not form a PSG within the meaning of the refugee definition.

#### 3.1.1 Possession or Imputed Possession of a Protected Characteristic

Particular social groups based on sexual minority status are well-recognized in case law as providing a valid basis for a protection claim. As mentioned previously, in 1990, the Board of Immigration Appeals (BIA) in *Matter of Toboso-Alfonso*, recognized persons identified as homosexuals by the Cuban Government as a cognizable particular social group.<sup>16</sup> Toboso-Alfonso was a gay man who was subjected to detention and forced labor by the Cuban government for being gay.

Four years later, the U.S. Attorney General designated *Toboso-Alfonso* “as precedent in all proceedings involving the same issue or issues.”<sup>17</sup>

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<sup>15</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraphs 42-43; 50.

<sup>16</sup> See *Toboso-Alfonso*.

<sup>17</sup> Attorney General, Order number 1895 (June 19, 1994).

While the BIA has not specifically issued a precedential decision on claims by other sexual minorities, many U.S. Circuit Courts of Appeals have. Claims involving actual or imputed sexual minority status may qualify under the particular social group category and may involve applicants who:

- identify as gay or lesbian<sup>18</sup>
- are viewed as a sexual minority, regardless of whether the persecutor or society involved distinguishes between sexual orientation, gender, and sex.
- are transgender<sup>19</sup> (note that even if a transgender applicant identifies as heterosexual, he or she may be perceived as gay or lesbian)
- are “closeted” gays and lesbians
- test positive for HIV, regardless of their sexual orientation<sup>20</sup>
- are viewed as “effeminate” or “masculine” but identify as heterosexual
- are not actually gay but are thought to be gay by others<sup>21</sup>
- are from throughout the world, not just Cuba<sup>22</sup>
- are not subject to the kind of government registration requirements that were involved in *Toboso-Alfonso*

For a comprehensive list of court cases involving LGBTI asylum and refugee issues, click LGBTI-Related Case Law found in the “Other Materials” section of this module.

### 3.1.2 Particular Social Group – Common Immutable Characteristic

To determine if an applicant is a member of a PSG, you must decide whether:

The applicant is a member of a group individuals who share a common, immutable characteristic, meaning it is one that members of the group either cannot change or should not be required to change because it is fundamental to the member’s identity or conscience. The defining characteristic can be a shared innate characteristic or a shared past experience.<sup>23</sup>

<sup>18</sup> See, e.g., *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997); *Nabulawala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007).

<sup>19</sup> *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

<sup>20</sup> *Seropositivity for HIV and Relief From Deportation*, Memorandum, David A. Martin, INS General Counsel. (Feb. 16, 1996).

<sup>21</sup> *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003).

<sup>22</sup> This will depend on country of origin information. LGBTI claims are put forward from all over the world.

<sup>23</sup> *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

Sexual orientation, gender identity, and having an intersex condition can be classified as immutable. They are characteristics that an individual cannot change about him or herself or should not be required to change.<sup>24</sup> Even if these traits can be changed, they are traits that are so fundamental to a person's identity that he or she should not be required to change them.

Harm imposed because an applicant was imputed to belong to a sexual minority may also qualify as "on account of" a protected ground, whether that imputation is correct or not.

### 3.1.3 Particular Social Group – Social Distinction

When analyzing whether or not the particular social group is cognizable, you must also determine whether the group is socially distinct, i.e., whether the actual or imputed characteristic is "easily recognizable and understood by others to constitute a social group."<sup>25</sup>

Some adjudicators mistakenly believe that social distinction requires that the applicant "look gay or act gay." See Section 7.1.1, *Evidence Assessment, Credibility Considerations, Plausibility* below. In *Matter of M-E-V-G-* and *Matter of W-G-R-*, a pair of precedent decisions issued in 2014, the BIA clarified that the "social distinction" requirement does not require literal or ocular visibility. Rather, it means that the society in question distinguishes individuals who share this trait from individuals who do not.<sup>26</sup> It is not necessary for the group to identify explicitly and outwardly in order for the social distinction requirement to be met. For example, the fact that the LGBTI community in a country exists mainly in hiding does not prevent such a group for establishing social distinction in the society.

For purposes of the "social distinction" analysis, you must examine the evidence, including country conditions. For social distinction, an examination of the relevant evidence is necessary to determine whether the society in question distinguishes sexual minorities from other individuals in a meaningful way. In *Toboso-Alfonso*, for example, the record established that the Cuban government registered and maintained files on homosexuals, the applicant suffered harm because of his homosexual status, and suspected homosexuals were subjected to physical examinations, interrogations, and beatings. As the BIA noted in *Matter of M-E-V-G-*, this evidence was sufficient to demonstrate that the group was distinct within Cuban society.<sup>27</sup> While government registration of individuals as "homosexuals" would, in general, establish social distinction, it is not required. Information about discriminatory attitudes or behavior toward sexual minorities would also be an example of evidence of social distinction.

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<sup>24</sup> See *Matter of Toboso-Alfonso*, 20 I&N Dec. at 822.

<sup>25</sup> *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).

<sup>26</sup> *Matter of M-E-V-G-*, 26 I&N Dec. 227, 234 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208, 216 (BIA 2014).

<sup>27</sup> *M-E-V-G-*, 26 I&N Dec. at 234.