3.1.4 Particular Social Group – Particularity

Applicants seeking to establish membership in a particular social group must also establish that the group is defined with sufficient particularity. This requirement relates to the group's boundaries. The group must be discrete and have definable boundaries. The group should not be defined so broadly so as to make it difficult to distinguish group members from others in society and should not be outlined so narrowly so that it does not constitute a meaningful grouping. In *Matter of M-E-V-G-*, the BIA noted that the proposed group in *Toboso-Alfonso*, "homosexuals in Cuba," was sufficiently particular because it was a discrete group with well-defined boundaries.

Possible Social Group Formulations

It is important to remember that, in order to conduct an accurate assessment of nexus, a particular social group should not be formulated too broadly or too narrowly. Rather, it should refer to the trait that the persecutor perceives the applicant to possess.

Because LGBTI claims involve individuals with a variety of characteristics, and because the persecutors in given cases may perceive the applicants' traits in a variety of ways, the appropriate formulation will depend on the facts of the case, including evidence about how the persecutor and the society in question view the applicant and people like the applicant.

Consider the following as possible ways to formulate the group:

- Sexual minorities in Country X. This may be an appropriate particular social group in cases where the persecutor in question perceives any sexual minority as "outside the norm" but does not necessarily distinguish between orientation, gender, and sex. It might also be appropriate where there are a variety of traits involved in the claim, but the persecutor's animus toward those different traits stems from a more general animus toward all sexual minorities. This might be the case, for example, in a situation where an applicant has an intersex condition or has undergone Sex Reassignment Surgery (SRS) in the United States after having been harmed in the past for simply being perceived as gay. This prevents the need to analyze past and future harm for two separate groups when past and future harm are both based on the applicant's sexual minority status. (Example: "sexual minorities in Mexico" in lieu of "transgender Mexican women perceived as homosexual Mexican men cross-dressing as women.");

- Gay, lesbian, transgender, or HIV-positive (choose one) / men or women (choose one) / from Country X (choose one) (Example: "Lesbian women from

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Uganda."); or

- Men or women (choose one) / from Country X (choose one) / imputed to be gay, lesbian, transgender, or HIV-positive (choose one) (Example: "men from Ghana imputed to be gay.")

3.2 "On Account Of"/Nexus

3.2.1 The Persecutor's Motive and the Applicant's Experience

The "on account of" requirement focuses on the motivation of the persecutor. The persecutor in most LGBTI cases seeks to harm the individual based on the individual's perceived or actual sexual orientation, on the persecutor's belief that the applicant transgresses traditional gender boundaries, or on the persecutor's more general animus toward sexual minorities of any kind. In some situations, the persecutor may have been trying to "cure" the applicant of his or her sexual orientation or gender identity.[28] Most persecutors may not have been making the distinction between gay, lesbian, bisexual, transgender, intersex, or HIV-positive. They may simply have harmed or want to harm the applicant based on their perception that the applicant is gay or a sexual minority that is "outside the norm."

The applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to act against the applicant because he or she possesses or is believed to possess one or more of the protected characteristics in the refugee definition.[29] For example, in an LGBTI claim, you would consider evidence that the persecutor harmed or tried to change the applicant because the persecutor knows or believes the applicant belongs to a sexual minority.

This evidence may include the applicant's testimony regarding:

- what the persecutor said or did to the applicant
- what the persecutor said or did to others similar to the applicant
- the context of the act of persecution (for example, if the applicant was attacked in a gay bar or while holding hands with a same-sex partner)
- reliable Country of Origin Information (COI) that corroborates such testimony

It is critical that you ask the applicant questions about what the persecutor may

[28] *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Pitcherskaia v. INS*.

[29] *Elias-Zacarias v. INS*, 502 U.S. 478 (1992).

have said to him or her when the harm was inflicted or when the threats were made.

As with other types of refugee or asylum claims, there is no malignant intent required on the part of the persecutor, as long as the applicant experiences the abuse as harm.[30] State and non-state actors may inflict harm on LGBTI persons with the intention of curing or treating them, for example, through what is effectively medical abuse or forced marriage.[31] (*See Types of Harm That May Befall Sexual Minorities, Forced Psychiatric or Other Efforts to "Cure" Homosexuality* below.)

3.2.2 Prosecution vs. Persecution

The U.S. Supreme Court has made it clear that intimate sexual activity between consenting adults is a constitutionally protected activity.[32] This constitutional principle, while not directly applicable to the analysis of an asylum or refugee claim, is consistent with the recognition that punishing conduct or sexual activity between consenting adults of the same sex is tantamount to punishing a person simply for being gay. If a law exists in another country that prohibits intimate sexual activity between consenting adults, enforcement of the law itself may constitute persecution and not simply prosecution.[33]

4 LEGAL ANALYSIS – PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

In evaluating whether harm constitutes persecution in an LGBTI-related case, you should consider the same factors as in any other protection case. The relevant considerations are: 1) does the harm rise to the level of persecution; 2) is the harm inflicted on account of a protected ground; and 3) is the persecutor the government or an individual or entity from which the government is unable or unwilling to provide reasonable protection?

Because the amount of harm that rises to the level of persecution is discussed in detail in the RAIO Training module, *Definition of Persecution and Eligibility Based on Past Persecution*, this section focuses on the types of harm directed at sexual minorities.

4.1 Types of Harm That May Befall Sexual Minorities

[30] Kasinga.

[31] Pitcherskaia.

[32] Lawrence v. Texas, 539 U.S. 558 (2003).

[33] Karouni v. Gonzales, 399 F.3d 1163, 1173 (9th Cir. 2005).

The types of harm directed at LGBTI applicants vary and include the same types of harm that are directed at other applicants. LGBTI individuals, however, may face unique harm or may be more vulnerable to specific types of harm than other applicants.[34]

When considering whether harm will amount to persecution, you must not only consider the objective degree of harm or whether the harm rises to the level of persecution, but also whether the applicant personally experienced or would experience the act(s) as serious harm.[35] You must evaluate the opinions and feelings of each applicant individually. Because each case is unique and each applicant has his or her own psychological makeup, interpretations of what amounts to persecution vary widely.[36]

While discrimination is often a fundamental part of claims made by LGBTI individuals, applicants also frequently reveal having experienced serious physical and sexual violence. These incidents of harm must be assessed in their totality. They must be analyzed in light of prevailing attitudes with regard to sexual orientation and gender identity in the country of origin.

Violation of Fundamental Rights

Being compelled to abandon or conceal one's sexual orientation or gender identity may cause significant psychological and other harms that may amount to persecution.[37] LGBTI persons who live in fear of being publicly identified often conceal their sexual orientation in order to avoid the severe consequences of such exposure - including the risk of incurring harsh criminal penalties, arbitrary arrests, physical and sexual violence, dismissal from employment, and societal disapproval.

Criminal Penalties

[34] *See* UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraphs 20-25.-

[35] *See* RAIO Training module, *Definition of Persecution and Eligibility Based on Past Persecution*, "Whether the Harm Experienced Amounts to Persecution, General Considerations, Individual Circumstances."

[36] *Id.*; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, paragraphs 40, 51, and 52, reedited Geneva, January 1992.

[37] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraph 33.

In some countries, homosexuality is criminalized and, if discovered by the authorities, a lesbian or gay man may be arrested or imprisoned based on her or his sexual orientation.[38]

In some countries, individuals accused of consensual sex with a member of the same sex may be subject to prosecution and even death.[39] For example, in Mauritania any Muslim male who engages in a sexual act with another male is subject to death by stoning; in Kenya, the Penal Code explicitly states that engaging in a consensual sexual act between two men is a felony and punishable by up to imprisonment for five years.[40]

In other countries, there may not be laws that actually prohibit homosexuality, but authorities may still persecute people because of their sexual orientation.[41] Thus, applicants have been arrested, detained, beaten, sexually assaulted, and/or forced to pay bribes by police or army officials because of their sexual orientation, even if a non-discriminatory legal basis is used as a pretext for the action.[42]

Rape and Sexual Violence

Because LGBTI people are often perceived as undermining gender norms, they are at heightened risk for sexual violence in many countries.[43] Rape and sexual assault are types of harm that rise to the level of persecution.[44] Other types of sexual violence, for example being forced to perform sexual acts upon another, may also constitute persecution.[45] Some applicants may have been raped as a measure to "correct" their behavior or status or as a means of punishing them for being gay or "outside the norm."

Beatings, Torture, and Inhumane Treatment

Many LGBTI people are subjected to severe forms of physical violence. An applicant may have been the victim of repeated physical violence that the police never investigated

[38] Aengus Carroll and Lucas Paoli Itaborahy, International Lesbian, Gay Bisexual, Trans and Intersex Association, *State Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity Between Consenting Adults*, May 2015, *available at:* https://www.refworld.org/docid/50ae380e2.html.

[39] *Id*.

[40] *Id*.

[41] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[42] Maldonado v. Att'y Gen. of U.S., 188 F. App'x 101, 103 (3d Cir. 2006); *see also Nowhere to Turn: Blackmail and Extortion Of LGBT People in Sub-Saharan Africa*. International Gay and Lesbian Human Rights Commission IGLHRC.

[43] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[44] *See*, *e.g.*, Haider v. Holder, 595 F.3d 276, 287-288 (6th Cir. 2010); Ndonyi v. Mukasey, 541 F.3d 702, 710 (7th Cir. 2008); Boer-Sedano v. Gonzales, 418 F.3d 1082, 1088 (9th Cir. 2005).

[45] Ayala v. U.S. Atty Gen., 605 F.3d 941 (11th Cir. 2010).

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or that the police themselves perpetrated.[46] Many applicants have been seriously harmed by members of their own family.[47]

Claims made by LGBTI persons often reveal exposure to physical and sexual violence, extended periods of detention, medical abuse, the threat of execution, and honor killing. Generally, these are acts of harm that would rise to the level of persecution.

LGBTI individuals can also experience other forms of physical and psychological harm, including harassment, threats of harm, vilification, intimidation, and psychological violence that can rise to the level of persecution, depending on the individual circumstances of the case and the impact on the particular applicant.

Forced Medical Treatment

The case of an individual with an intersex condition may involve the applicant's fear or history of non-consensual surgery and other non-consensual medical treatment. In other cases, the applicant's fear may involve the lack of medical care in their home country.

Forced Psychiatric Treatment or Other Efforts to “Cure” Homosexuality

Many cultures see homosexuality as a disease, a mental illness, or a severe moral failing. Forced efforts to change an individual’s fundamental sexual orientation or gender identity may rise to the level of persecution; for example, such “treatments” as forced institutionalization, electroshock therapy, and forced drug injections could cause harm serious enough to constitute persecution. It is important to remember that there is no requirement that harm be inflicted with the intent to harm the victim.[48] Rather, you should assess whether it is objectively serious harm and was experienced as serious harm by the applicant.

Discrimination, Harassment, and Economic Harm

Many LGBTI people are disowned by their families if their sexual orientation or transgender identity becomes known.[49] It is important to consider such mistreatment within the context of the applicant’s culture. In many countries, it is virtually impossible for an unmarried person to find housing outside of his or her family home. Likewise, in many cultures, it would be impossible for a woman to find employment on her own. In such cultures, being disowned by one’s family in and of itself could be found to rise to the level of persecution, since it would have such severe consequences.

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[46] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[47] *Gonzalez-Posadas v. Att’y Gen. of the U.S.*, 781 F.3d 677, 680 (3d Cir. 2015); *Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007).

[48] *See Kasinga* and *Pitcherskaia*.

[49] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

Some applicants may have been threatened by neighbors or had their property vandalized. Others may have been repeatedly fired from jobs and found it impossible to engage in any form of employment once their sexual orientation became known. While being fired from a job generally is not considered persecution, if an individual can demonstrate that his or her LGBTI status would make it impossible to engage in any kind of gainful employment, this may constitute persecution. For example, in many countries transgender people face such severe discrimination that the only way they can survive is by engaging in prostitution.

Discrimination and harassment may amount to persecution if cumulatively they are sufficiently severe.[50] This may be the case, for example, where an LGBTI person is consistently denied access to normally available services in his or her private life or workplace, such as education, welfare, health, and access to the courts.

Forced Marriage

LGBTI persons may be unable to engage in meaningful relationships, be forced into arranged marriages, or experience extreme pressure to marry.[51] They may fear that failure to marry will reveal them to be LGBTI to their family and to the public at large. Societal and cultural restrictions that require them to marry individuals in contravention of their sexual orientation may violate their fundamental right to marry and may rise to the level of persecution.[52] For instance, a lesbian who has no physical or emotional attraction to men and is forced to marry a man may experience this as persecution. Likewise, a gay man who is in no way attracted to women who is forced to marry a woman may experience this as persecution.

Gender-Based Mistreatment

Any LGBTI individual may experience gender-based mistreatment. For instance, lesbians often experience harm as a result of their gender as well as their sexual orientation. The types of harm that a lesbian may suffer will frequently parallel the harms in claims filed by women in general more closely than the harms in gay male asylum claims.[53] Likewise, before "coming out," transgender men are generally raised as girls and may experience the same types of harm. In many parts of the world persecution faced by lesbians may be

[50] *See* Kadri v. Mukasey, 543 F.3d 16 (1st Cir. 2008); Matter of T-Z-, 24 I&N Dec. 163, 169-71 (BIA 2007) (adopting the standard applied in *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983), rev'd on other grounds, 750 F.2d 1427 (9th Cir. 1985);*but see* Lopez-Amador v. Holder, 649 F.3d 880, 885 (8th Cir. 2011) (officer's verbal harassment of alien [perceived to be a lesbian] was not persecution).

[51] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraph 23.

[52] *Id*.

[53] *See* Victoria Neilson, *Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 Stanford Law & Policy Review 417 (2005).

less visible than that encountered by gay men. Lesbians and transgender women may be particularly vulnerable to rape by attackers who wish to punish them for their sexual identity. This can include retaliation by former partners or husbands. In addition, gay men may experience harm as a result of their gender or sexual orientation.

Transgender individuals may be more visible and may be viewed as transgressing societal norms more than gay men or lesbians. Therefore, they may be subject to increased discrimination and persecution and may be vulnerable even in regions where lesbians and gay men may have greater protections.[54]

4.2 Agents of Persecution

The second step in the analysis of whether harm constitutes persecution is to determine if the agent of persecution is the government or a nongovernment actor. It is well established that an applicant can qualify for refugee or asylum status whether the persecutor is the government or an individual or entity from whom the government is unable or unwilling to provide reasonable protection. While the applicant must show a nexus between the harm and a protected ground, he or she is not required to show that the government was unwilling to control those actors because of the applicant's protected characteristic, such as being LGBTI.[55]

In LGBTI cases governmental agents of persecution may include the police, military, or militias. Family, relatives, neighbors, and other community members are examples of non-governmental agents of persecution.

In asylum processing, if the applicant establishes past persecution on account of one of the five protected grounds, he or she is presumed to have a well-founded fear of persecution in the future. The burden then shifts to USCIS to show that there has been a fundamental change in circumstances or that the applicant can reasonably relocate within the country of origin. If USCIS does not meet this burden, it must be concluded that the applicant's fear is well-founded.

To be eligible for resettlement as a refugee in the United States, an applicant must establish either past persecution or well-founded fear of persecution on account of a protected ground. Therefore, in general, a refugee applicant who is found to have suffered past persecution but who does not have a well-founded fear of future persecution is still able to establish that he or she meets the refugee definition. There is no rebuttable presumption or burden shifting as there is in asylum

[54] Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1082 (9th Cir. 2015); Ellen A. Jenkins, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers,* 40 Golden Gate U.L. Rev. (2009).

[55] Doe v. Holder, 736 F.3d 872 (9th Cir. 2013).

processing.

4.3 Internal Relocation and Fundamental Change of Circumstances

The issue of internal relocation arises when determining whether an applicant has established a well-founded fear or, in the context of asylum, whether the presumption of a well-founded fear is rebutted by the reasonable possibility of internal relocation. In the asylum context, once an applicant has established past persecution, the burden then shifts to the Government to show that internal relocation is reasonable. In cases where the persecutor is a government or government sponsored, there is a presumption that internal relocation is not reasonable. In some cases there may be evidence to rebut that presumption, such as, for example, evidence that the government's authority is limited to certain parts of the country.[56] Homophobia, "whether expressed in laws or people's attitudes and behavior, often tends to exist nationwide."[57] A law of general applicability, such as a penal code that criminalizes homosexual conduct, which is enforceable in the place of persecution, would normally also be enforceable in other parts of the country of origin.[58]

Where a nongovernmental actor is the persecutor, the government's inability or unwillingness to protect the applicant in one part of the country may also be evidence that it is unwilling or unable to do so in other parts of the country.[59] He or she should not have to depend on anonymity to avoid the reach of the persecutor. While a major capital city "in some cases may offer a more tolerant and anonymous environment, the place of relocation must be more than a 'safe haven.'" The applicant must also be able to access a minimum level of political, civil, and socioeconomic rights.[60] Thus, he or she must be able to access the protection in a genuine and meaningful way. The existence of LGBTI-related nongovernmental organizations does not in itself provide protection from persecution.

In the asylum context, the presumption of a well-founded fear of future persecution also can be rebutted by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of

[56] Ellen A. Jenkins, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 Golden Gate U.L. Rev. (2009).

[57] UNHCR *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* at paragraph 33.

[58] *Id*.

[59] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraph 54.

[60] *Id*. at paragraph 56.

persecution. In making this determination, you must weigh all available evidence, including current country conditions and the circumstances of the individual applicant. Country condition reports can be particularly useful in examining whether there has been a fundamental change after a long absence from a country. For example, in *Neri-Garcia v. Holder*, the Tenth Circuit affirmed an immigration judge's determination of a fundamental change in circumstances based on country reports for 2009 and 2010 of a "growing social acceptance in Mexico" toward sexual minorities, even with continued discrimination.[61] The court, in applying a deferential standard of review that was limited to the record evidence, took into account that the petitioner failed to introduce evidence to counter these country reports, other than his and a witness's assertions that conditions had not changed in nearly twenty years.[62] In contrast, with a different record of evidence, the Seventh Circuit in *Rosiles-Camarena v. Holder*, suggested that both case-specific facts and country-wide conditions should be taken into account in examining the risk of a sexual minority applicant returning to Mexico.[63] In that case, the court noted the petitioner's contention of greater risk of harm to him than "a statistical risk of death for homosexuals as a group," due to such factors as his planning to live openly with his same-sex partner if returned to Mexico, being HIV-positive, not benefiting from familial support in Mexico, and being unfamiliar with the country's contemporary customs as he had spent the bulk of his life in the United States.[64] Further, on a somewhat separate point, in *Avendano-Hernandez v. Lynch*, in examining country conditions information as it related to a fear of torture by a transgender woman from Mexico, the Ninth Circuit ruled that the Board "erred in assuming that recent anti-discrimination laws in Mexico have made life safer for transgender individuals while ignoring significant record evidence of violence targeting them."[65]

5 LEGAL ANALYSIS – WELL FOUNDED FEAR

LGBTI-specific issues may also arise in cases where the applicant has not experienced past persecution, but may nevertheless have a well-founded fear of persecution. Because well-founded fear is discussed in detail in the ADOTC and RDOTC *Well-Founded Fear* lessons, this section focuses on common well-founded fear issues raised in LGBTI claims.

5.1 Objective Elements

[61] *Neri-Garcia v. Holder,* 696 F.3d 1003, 1007 (10th Cir. 2012).

[62] *See id*. at 1008.

[63] *Rosiles-Camarena v. Holder*, 735 F.3d 534, 539 (7th Cir. 2013) (examining facts related to the likelihood of future persecution, rather than a fundamental change in circumstances).

[64] *Id*.

[65] *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015).

An applicant may qualify for asylum or refugee status even if he or she was not persecuted in the past but has a well-founded fear of future persecution. To establish well-founded fear, the applicant must have a subjectively genuine fear and an objectively reasonable fear of return.

The existence of certain objective elements in a particular claim will not necessarily undermine the applicant's subjective fear or credibility. For example, just because a country permits an LGBTI organization to exist or allows an annual public LGBTI event does not mean that LGBTI people are free from ongoing violence and harm in that country.

Some countries with laws that state that their citizens and nationals are guaranteed religious, political, or other freedoms often do not enforce these protections. Similarly, some countries have anti-discrimination laws that seemingly protect LGBTI individuals, but in reality the laws are not enforced or are openly disregarded.

5.2 Fear of Future Persecution

An applicant should not be expected to suppress his or her sexual orientation or gender identity in order to avoid future persecution.[66] Conversely, LGBTI applicants who have concealed their sexual minority status in their home countries might not have experienced harm that rises to the level of persecution.[67] These applicants need not show that the persecutor knew about their sexual orientation before leaving, only that the persecutor may become aware of it if they return. In addition, it is not reasonable to expect an applicant to conceal his or her sexual minority status.

5.3 Refugees *Sur Place*

A *sur place* claim for refugee status may arise as a consequence of events that have occurred in the applicant's country of origin since his or her departure, or as a consequence of the applicant's activities since leaving his or her country of origin. This may also occur where he or she has been "outed" to members of his or her family back home or where his or her LGBTI status or views on sexual orientation have been publicly

[66] *Karouni v. Gonzales*, at 1173 (reasoning that to require the respondent to abstain from future homosexual acts if he wished to avoid persecution would effectively force him "to change a fundamental aspect of his human identity" …. and forsake the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that 'ha[ve] been accepted as an integral part of human freedom in many other counties."")

[67] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, paragraphs 30, 57.

expressed, for example by taking part in advocacy campaigns, demonstrations, or other human rights activism on behalf of LGBTI individuals.

Additionally, LGBTI applicants might have left the country of origin for a reason other than their sexual orientation, for example to pursue employment and educational opportunities in the United States and have "come out" after arrival in the country of asylum or first refuge. These applicants may qualify for refugee or asylum status if they can demonstrate a well-founded fear of future persecution.

You should carefully consider whether the applicant's sexual orientation or gender identity may come to the attention of the authorities or relatives in the country of origin and the ensuing risk of persecution. Keep in mind that in making this analysis, it is not appropriate to assume that an individual who is lesbian, gay, or bisexual could "go back in the closet" or that a transgender individual who is living in their "corrected gender" could go back to living in the gender he or she was assigned at birth.[68]

As with all claims based solely on a fear of future persecution, the claim must meet the four elements in the *Mogharrabi* test. *See RAIO training module Well-Founded Fear*.

In the asylum context, there are some one-year filing deadline issues that may arise specifically in the context of LGBTI *sur place* claims. *See* Asylum Adjudications Supplement - One-Year Filing Deadline, below.

6 INTERVIEW CONSIDERATIONS

It is important to create an interview environment that allows applicants to freely discuss the elements and details of their claims and to identify issues that may be related to sexual orientation or imputed sexual orientation. Like most gender-based claims, LGBTI claims involve very private topics that are difficult for applicants to talk about openly. LGBTI applicants may hesitate to talk about past experiences and may be afraid they will be harmed again because of their actual or perceived sexual orientation or gender identity. For many, it will be very difficult to talk about something as private as sexual orientation, gender identity, or HIV-positive status. Furthermore, discussing some of these issues may also be challenging for you. It is therefore especially important for you to create an interview environment that is open and non-judgmental so that the applicant feels comfortable explaining the details of his or her claim.[69]
This section should be considered along with the guidance contained in the RAIO *Interviewing* modules, which also address issues related to sexual minorities.

The following may help you interact more meaningfully with LGBTI applicants during an interview.

[68] *Id*; *see also* Karouni v. Gonzales, 399 F.3d at 1173.

[69] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

6.1 Pre-Interview Considerations

6.1.1 File Review

Before the interview, when you review each file, be mindful of any LGBTI-related issues in the claim. Due to the delicate and personal issues that surround sexual abuse, sexual orientation, and gender identity, some applicants may have inhibitions about disclosing past experiences to an interviewer of a particular sex. Some LGBTI applicants may be more comfortable discussing their experiences with officers of a particular gender, particularly in cases involving rape, sexual abuse, or other sexual violence.

To the extent that personnel resources permit, an applicant's request for an interviewer of a particular sex should be honored. If a pre-interview review of the file indicates that the case may involve sensitive LGBTI-related issues, you may consult with your supervisor or team leader prior to the interview to evaluate whether it would be more appropriate for an officer of a particular sex to conduct the interview. You may also wish to confirm at the beginning of the interview that the applicant feels comfortable discussing all aspects of the claim with you.

6.1.2 How the Presence of Family and Relatives May Affect the Interview

For a variety of reasons, the presence of relatives may help or impede an applicant's willingness to discuss LGBTI-related persecutory acts or fears. For example:

- The applicant's relatives may not be aware of the harm he or she experienced. He or she may wish that the relative remain unaware of those experiences or may be ashamed to say what he or she has experienced or fears in front of a relative. In addition, the applicant's claim may be based, in part, on fear of the relative who is present.

- Or, the applicant may want a family member or significant other present during the interview. Sometimes having a loved one present can provide support to the applicant when recounting traumatic events.[70]

Therefore, to the extent possible, the choice of whether to be interviewed alone or with a relative present should be left to the applicant. The applicant should be asked his or her preference, when possible, in private, prior to the interview.

If the applicant elects for the relative to be present at the interview, you should exercise sound judgment during the interview, determining whether the presence of the relative is impeding communication. If it appears that relative's presence is interfering with open communication, the relative should be asked to wait in the waiting room.

[70] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

In some cases, an applicant will bring a partner to the interview to testify as corroboration of the applicant's sexual orientation or gender identity. If you feel that this corroboration would be helpful, the partner should be permitted to testify. You may exercise discretion and request that the witness's testimony be submitted in writing.

6.1.3 How the Presence of Interpreters May Affect the Interview

Interpreters play a critical role in ensuring clear communication between you and an LGBTI applicant. The actions of an interpreter can affect the interview as much as those of the interviewing Officer. As in all interviews, you should confirm that the applicant and the interpreter fully understand each other.

As explained in greater detail in the RAIO training module *Working with an Interpreter,* an applicant's testimony on sensitive issues such as sexual abuse may be diluted when received through the filter of an interpreter. The applicant may not feel comfortable discussing such LGBTI issues with an interpreter of the same nationality, ethnicity, or clan, etc.

The same holds true for the interpreter; even if the applicant feels comfortable using a particular interpreter, the interpreter may be inhibited about discussing LGBTI-related issues or using certain terms. For example, the interpreter may substitute the word "harm" for "rape" because the interpreter is not comfortable discussing rape due to cultural taboos.[71]

6.1.4 Reviewing Biographical Information with the Applicant

For transgender applicants, it is best to ask at the beginning of the interview what pronoun the applicant feels more comfortable with and to ask if there is a name he or she prefers using. For example, if an individual with a female appearance who has described her claim as based on transgender identity, has filled in the biographical information of the application form with an obviously male name, you should ask if there is a name she would prefer that you use.

One of the biographical information questions on the forms is "gender." Since this issue may be sensitive and go to the heart of the applicant's claim, it may be better to come back to this question at the end of the interview after the applicant has described the steps he or she has taken to "transition," rather than at the beginning of the interview. The early part of the interview should be devoted, in part, to putting the applicant at ease. If you immediately question the legitimacy of the "gender" box that he or she has checked off, the applicant may be uncomfortable for the rest of the interview.

[71] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

USCIS has issued guidance explaining the process for issuing initial or amended documentation reflecting the applicant's post-transition gender. [72] It is important to note that proof of sex reassignment surgery is *not* required and USCIS will not ask for records relating to any such surgery. [73]

When going through the biographical information on the application form at the beginning of the interview, it is appropriate for you to inquire whether the applicant has legally changed his or her name. If yes, you can request the legal name change documents. If no, you should explain why it is necessary to use the legal name on the form, but that during the interview you will refer to the applicant by the name that the applicant feels most comfortable using.[74]

Note: If the applicant provides any new name or gender information, additional database systems may need to be updated and further security checks may be required. Please refer to USCIS and division procedures for updating name and gender information.

6.2 Suggested Techniques for Eliciting Testimony

6.2.1 Setting the Tone and Putting the Applicant at Ease

While you must conduct all of your interviews in a non-adversarial manner, it is crucial when interviewing LGBTI applicants that you set a tone that allows the applicant to testify comfortably and that promotes a full discussion of the applicant's past experiences. You must conduct the interview in an open and nonjudgmental atmosphere designed to elicit the most information from the applicant.

You should be mindful that for many people there is no topic more difficult to discuss with a stranger than matters relating to sexual orientation, gender identity, and serious illness.[75] Furthermore, many applicants have been physically and sexually abused, harassed, tormented, and humiliated over many years because of their actual or perceived sexual orientation or gender identity.

> Asking questions about difficult or private issues is a sensitive balancing act you face in all interviews. On the one hand, you need to obtain detailed testimony from the applicant. On the other hand, you do not want to badger or traumatize the applicant. The most important thing to understand is that this may be a difficult

[72] USCIS Policy Memorandum on *Adjudication of Immigration Benefits for Transgender Individuals*, August 10, 2012.

[73] *Id.*

[74] *Id.*

[75] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

topic for the applicant to talk about and to be respectful in discussing sexual orientation, gender identity, and serious illness.[76]

You can help alleviate some of the applicant's reluctance to discuss some of these issues by incorporating the following suggestions into your interviews:

Remind the applicant that the interview is confidential. It can also help to ease the applicant's nervousness if you explain confidentiality to the interpreter in the presence of the applicant.

Be particularly sensitive when questioning the applicant about past sexual assault. Applicants may be reluctant to talk about actual or perceived sexual orientation or to disclose experiences of sexual violence. This may be especially true for LGBTI applicants who are not "out of the closet" or where the applicant was sexually assaulted. In many societies, sexual assault is seen as a violation of community or family morality for which the victim is held responsible. The combination of shame and feelings of responsibility and blame for having been victimized in this way can seriously limit an LGBTI applicant's ability to discuss or even to mention such experiences.[77]

Explore all relevant aspects of the claim, even if they may be difficult to discuss. While you must be sensitive as you interview an applicant regarding such delicate topics, at the same time you must not shy away from your duty to elicit sufficient testimony to make an informed adjudication. This may include instances involving sexual violence. It is critical that you ask all necessary and relevant follow-up questions to help the applicant develop his or her claim.[78]

It is important to remember that in the nexus analysis, the relevant inquiry is not whether the applicant actually possesses the protected trait. Rather, it is whether the persecutor believes the applicant possesses the trait (either because the applicant does possess it or because the persecutor imputes it to the applicant). Thus, the issue is not whether the applicant actually is LGBTI, but whether the persecutor believes that he or she is, either because the applicant possesses the characteristic or because the persecutor imputes it to the applicant.

It is not necessary to probe the details of the applicant's personal life beyond what is necessary to make this specific determination. So, once you have established that the persecutor perceives the applicant to have a protected trait, further inquiry into the specific nature of the applicant's LGBTI status is not necessary to establish

[76] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[77] *See* RAIO Training Module, *Gender Related Claims*.

[78] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

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inclusion in a particular social group.

Try to use the same language that the applicant has used in his or her own application. If an applicant refers to himself as "gay," you should use this term, rather than "homosexual" and vice versa. The most important thing is to understand what a difficult topic this may be for the applicant to discuss and to be respectful.[79]

Do not assume that being a sexual minority is a lifestyle or a choice. This will help you avoid asking questions in a way that may put the applicant on the defensive and result in the applicant holding back information rather than imparting it.[80]

Become familiar with the legal issues, terminology, and questioning techniques specific to the LGBTI community. You can use this information to help the applicant tell his or her own story.

Be mindful that the applicant and the interpreter may not be familiar with many of these issues or terms. While many LGBTI individuals in the United States embrace their LGBTI identity and have a language to talk about these issues, for many LGBTI individuals who come from countries where topics of sexuality are taboo, the way that applicants express themselves may be different from what an interviewer would expect from an LGBTI person in the United States.[81]

The fact that an applicant may be uncomfortable with these terms may be a result of the fact that he or she comes from a culture where there is no word for homosexuality or transgender identity. It may be a result of his or her own ingrained homophobia from growing up in a culture where such terms were the equivalent of insults.[82]

Become well-versed in country of origin information. This allows you to ask relevant follow-up questions. The more you know about the applicant's country of origin, the less likely you will be to miss important facts. Additionally, awareness of country conditions may also assist you in conducting the interview with cultural sensitivity and may help you put the applicant at ease during the interview. If the applicant notices that you took the time to try to understand the situation he or she faces in the country of origin as an LGBTI individual, he or she may be more inclined to talk in detail about his or her experiences and fears.

6.2.2 Explore all possible grounds

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

Many LGBTI applicants may not know that their sexual orientation, gender identity, HIV-positive status, or intersex condition is the basis for a protection claim and may be reluctant to talk about these topics because they are so private. This is especially true where applicants are not represented. They may only put forward the elements of their past experiences that their family or members of their communities recommend.

For example, an applicant from Colombia appears before you for an interview. The majority of claims you have adjudicated from Colombia involve fear of the FARC. The applicant tells you about all of the instances when he has had contact with the FARC. At the end of the interview you have already begun to analyze the case and despite being credible, your assessment is that the applicant has not established nexus, past persecution, or well-founded fear.

When you ask the applicant if there is any other reason he fears returning to Colombia, he appears to have something more to say, but hesitates. You suspect that there may be an issue that the applicant has not put forward. In this situation it would be appropriate to try to explain to the applicant that there is more than one ground for asylum or refugee status.

> "Refugee (or asylum) status is a case-by-case determination made based on an individual's unique circumstances and is not just for people fleeing because of political opinion. Individuals who are afraid to return because of their religion, sexual orientation, clan membership, or because of domestic violence may also be eligible. Are there any other circumstances affecting you that you would like to tell me about?"

It is important to remember that the applicant would still be required to provide credible testimony regarding past harm and/or fear of future harm on account of one of the five protected grounds.

6.2.3 Sample Questions

The following are appropriate types of questions to elicit testimony and assess credibility in LGBTI cases. Please note that these questions are intended as starting points and should not be used as a substitute for all necessary lines of inquiry and follow-up questions during your adjudication. In other words, it is good to have a general outline of questions you need to ask or questions you need the answers to, but not a script. Remember, credible testimony alone may be enough and, other than reliable country of origin information, is often the only other evidence the applicant submits to you.

Sexual Orientation

Appropriate Lines of Inquiry

The most common LGBTI claims are based on sexual orientation and involve gay men, and to a lesser extent lesbian women. If the applicant was aware that he or she was lesbian, gay, or bisexual while in the country of origin, it is important to ask about his or her personal experience and his or her awareness of any similarly situated people.[83] The applicant should be able to describe what it was like identifying with his or her sexual orientation. Likewise, the applicant should be able to describe his or her first relationship, and the harm he or she suffered or fears in the home country. Keep in mind that this might only be true if the person is "out."

These questions focus on the possession or perceived possession of a protected characteristic. You must also ask about past harm and fear of future harm.

The following are some suggested questions when adjudicating claims that involve the applicant's sexual orientation:[84]

- When did you first realize you were gay (or lesbian or bisexual)?
- Did you tell anyone?
- Why/why not?
- If yes, when?
- How did they react?
- Did you know other gay people in your home country?
- If yes, how were they treated?
- Did you hear about other gay people in your home country?
- If yes, how were they treated?
- Have you met any other gay people?
- Where?
- Does your family know you're gay?
- If yes, what was their reaction when they found out?
- Have you ever been in a relationship?
- How did you and your partner meet?
- Are you still together/ in touch?
- How do lesbian [or gay, or bisexual] people meet one another in your

[83] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[84] *Id.*

country?

- Were you involved in any LGBTI organizations in your country?
- Are you involved in any LGBTI organizations here?
- When you say people in your country want to kill people like you, can you explain what you mean by "people like you?"

Inappropriate Lines of Inquiry

The applicant's specific sexual practices are not relevant to the claim for asylum or refugee status. Therefore, asking questions about "what he or she does in bed" is never appropriate.[85] If the applicant begins to volunteer such information, you should politely tell him or her that you do not need to hear these intimate details in order to fairly evaluate the claim.

Gender Identity[86]

Appropriate Lines of Inquiry

A transgender applicant may identify as straight, lesbian, gay, or bisexual, and that gender identity has to do with the person's inner feelings about his or her sexual identity.[87] Most transgender people consider themselves to be male or female. Therefore, do not think of "transgender" as a gender.

Male to female (M to F) transgender individuals were assigned the male gender at birth and consider themselves to be female. They are called transgender women.[88] Female to male (F to M) transgender individuals were assigned the female gender at birth and consider themselves to be male. They are called transgender men.[89]

Some individuals do not subscribe to the male/female gender binary. They may identify with neither gender, with a third gender, or with a combination of both genders. These individuals may or may not identify with the broader transgender community but may also face harm because of their gender identity.

When interviewing an applicant who is transgender or has another claim based on gender identity, start off with easy questions and gradually ease into asking the more sensitive ones; be cognizant not to put words in the applicant's mouth. It is important to remember

[85] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[86] For further reading, see National Center for Transgender Equality, *Questionable Questions About Transgender Identity* https://transequality.org/issues/resources/questionable-questions-about-transgender-identity (last updated: Sept. 2, 2016).

[87] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[88] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[89] *Id.*

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that being transgender involves an overall dissatisfaction with the gender assigned at birth; it is not about having one particular surgery. In many cases it will be appropriate to ask the applicant about the steps he or she has taken to transition gender.[90] This question should be framed as one question among many that elicits the applicant's expression of his or her gender identity, as it is perceived by the persecutor and the society in which the applicant lived.[91]

The most important thing to remember is to be respectful and nonjudgmental. If you feel that it is necessary to ask a question that the applicant may perceive as intrusive, you should explain why the answer to the question is legally necessary. If you are confused about the applicant's self-identification, you should respectfully admit to feeling confused and ask the applicant to explain in his or her own words.[92]

The following are some suggested questions that, depending on the facts, may be appropriate when adjudicating a claim that involves the applicant's gender identity:[93]

- When did you first realize you were transgender? Or: When did you first realize that although you were born as a male (female) you felt more like a female (male)?
- How did you realize this?
- Did you know other transgender people in your country? Or: Did you know other people who felt like you in your country?
- If yes, how were they treated?
- Did you hear about other transgender people in your country?
- If yes, how were they treated?
- When did you begin to transition from a man to a woman or woman to a man?
- What steps have you taken to transition?
- Do you now live full-time as a man (or woman?) When did you begin to live full-time as a man (or woman)?
- Does your family know you're transgender?
- If yes, how did they react when they found out?

Many transgender applicants will not have begun to live full-time in their corrected gender until they have come to the United States.[94] In many cases, a person may discuss past mistreatment in terms of perceived sexual orientation. In these cases, it is appropriate to ask questions that pertain to sexual orientation as well as gender identity.

[90] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[91] *Id.*

[92] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[93] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[94] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

Inappropriate Lines of Inquiry

If an applicant testifies that he or she was not accepted in his or her home country because "people think I look like a girl, but I'm a guy," do not follow up by asking "So, what are you?" Furthermore, do not put words in the applicant's mouth by asking such questions as: "You haven't had any surgery or anything like that, right? So you're a male who looks effeminate?"[95]

If the applicant has not indicated that he or she was harmed or fears being harmed for being gay, do not begin by asking the applicant if he or she is gay. It is important to remember that gender identity and sexual orientation are two different issues. A transgender applicant may also be gay, lesbian, or bisexual, but that is not necessarily the case. It is also important to remember that even if the applicant is heterosexual, he or she may be perceived as homosexual because he or she does not fit the societal norms for his or her gender. Instead, focus on the problems the applicant experienced in the country of origin and address the issue of sexual orientation later, if necessary.

This approach also ensures that your questioning is tailored to eliciting information that allows you to determine what trait the persecutor, and the society in question, perceives in the applicant. Since this is the evidence required to analyze the nexus requirement and the social distinction of the relevant social group, lines of questioning that focus on what the applicant experienced and how he or she was or would be viewed will likely be the most effective.

HIV Status

Appropriate Lines of Questioning

You should be mindful that HIV is a very serious illness and that many individuals, especially those from countries with fewer treatment options, see an HIV diagnosis as a death sentence. It is therefore imperative for you to be extremely sensitive in asking about the applicant's HIV status.[96]

If an applicant's case is based in whole or in part on his or her HIV-positive status, you will need to ask questions about this. It is appropriate to ask about the applicant's state of health, current treatment regimen, and the availability of treatment in the home country.[97]

In some cases, the applicant's HIV status may be directly related to the persecution, for example, where a lesbian was raped and believes this was her only possible risk for HIV exposure. If the applicant's HIV status is related to the harm the applicant suffered, it will be relevant for you to ask questions about this as well.

[95] *Id.*

[96] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[97] *Id*.

Many cases involve an applicant's fear of harm based on the fact that his or her HIV-positive status may lead community members to assume, whether correctly or not, that he or she is gay.[98] If a claim is not based on the applicant's sexual orientation or gender identity and HIV status is not mentioned, it is not appropriate for you to ask the applicant if he or she is HIV-positive.

Some cases will involve an applicant's fear of violence, stigma, and extreme discrimination based on his or her HIV-positive status. In other instances, the applicant's primary fear may be the lack of medical care in his or her home country.

It is important to keep in mind that if an applicant's case is based on sexual orientation or gender identity and is not based on his or her HIV status, that you should not presume that he or she is HIV-positive.

Inappropriate Lines of Questioning

Generally, the risk factor for HIV infection is not relevant to the applicant's claim, so it is not appropriate to ask the applicant how he or she thinks that he or she contracted HIV.[99]

In some asylum cases, an applicant's HIV status may also be relevant to a one-year filing deadline exception, for example, if the applicant was extremely ill during his or her first year in the United States or the applicant may not have been diagnosed until several years after entering the United States. (*See* Asylum Adjudications Supplement – One-Year Filing Deadline, below).

Intersex Conditions

Appropriate Lines of Inquiry

When questioning applicants with intersex conditions, use the same type of sensitive questioning techniques suggested for sexual orientation, gender identity, and HIV-positive status claims.

Some intersex people will never have heard of anyone else like themselves, but others will. There are some intersex conditions that run in families or are more common in certain populations. Where the condition is known in a given culture, an applicant should be able to describe how people like them are treated. Where the condition is known to run in a family (but not throughout the culture), the entire family may face stigma, or family members may be on the lookout for signs of the condition in order to keep the family secret. For example, Androgen Insensitivity Syndrome (AIS) is an inherited condition. People with this condition will have a typical-looking female body, but will be infertile and will have only a shallow vaginal opening or none at all. Female relatives of an

[98] *Id*.

[99] *Id*.

affected woman may be carriers and can pass it on to their children. Normally it is not discovered until puberty when the girl does not menstruate.

Many persons with intersex conditions may have difficulty understanding and articulating their own physical conditions and medical history. Therefore, some of these questions may be more appropriate for parents or families of young intersex children who face persecution.

The following are some suggested questions that, depending on the facts, may be appropriate when adjudicating a claim that involves the applicant's intersex condition:

- When did you first learn about your condition?
- How did you learn about it?
- Did you tell anyone?
- Why/why not?
- If yes, when?
- How did they react?
- Does your family know about your condition?
- If yes, how did they react when they found out?
- Did you go to a doctor or other medical professional?
- Have you ever received medical treatment for your condition?
- What were you told about your condition?
- How much do you understand about your condition?
- Did you know other people with similar conditions in your country? Or did you know other people like you in your country?
- If yes, how were they treated?

7 EVIDENCE ASSESSMENT

As explained in greater detail in the RAIO training modules *Eliciting Testimony* and *Evidence,* while the burden of proof is on the applicant to establish eligibility, equally important is your duty to elicit all relevant testimony. Establishing eligibility means the applicant must establish past persecution or a well-founded fear of future persecution based on actual or imputed (perceived) sexual orientation or gender identity. Your duty includes always recognizing the non-adversarial nature of the adjudication, applying interviewing techniques that best allow you to elicit detailed testimony from an LGBTI applicant, and diligently conducting relevant country of origin information research.

In addition to the applicant's testimony, reliable country of origin information may be the only other type of evidence available to you when you make your decision in a case involving LGBTI applicants. It is important to remember that reliable information regarding the treatment of LGBTI individuals may sometimes be difficult to obtain and that the absence of such information should not lead you to presume that LGBTI individuals are not at risk of mistreatment.

7.1 Credibility Considerations During the Interview

If an applicant is seeking refugee or asylum status based on his or her sexual orientation, gender identity, intersex condition, or HIV-positive status, he or she will be expected to establish that the persecutor views the applicant as a sexual minority or HIV-positive, either because the applicant actually has such status or because the persecutor imputes it to him or her. Under either basis, the critical point to establish is what trait the persecutor perceived in the applicant.

Credible testimony alone may be enough to satisfy the applicant's burden. Sexual minority or imputed sexual minority claims tend to rely heavily on the applicant's own testimony to establish all of the elements of the claim. Therefore, your job will be to fully and fairly elicit all testimony with regard to the harm the applicant suffered or fears based on his or her actual status as a sexual minority or perceived status as a sexual minority.

7.1.1 Plausibility

The fact that an applicant testifies about events that may appear unlikely or unreasonable does not mean it is implausible that the events actually occurred. You must take care not to rely on your views of what is plausible based on your own experiences, which are likely to be quite different from the applicant's.

What if the Applicant is Married or Has Children?

An applicant may have gotten married in his/her home country and/or have children.[100] This, by itself, does not mean that the applicant is not gay. "Many applicants describe enormous social pressure to marry and being forced into a marriage by their family or society. Other applicants, while grappling with their sexual identity, have tried to lead a heterosexual life and 'fit in' within their society."[101]

Even in the United States, it is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to societal norms.[102] While some lesbians and gay

[100] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

[101] *Id.*

[102] *Id.*

men may feel that they have always known their sexual orientation, many others do not come to terms with their sexual identity until much later in life.[103]

If you have concerns about the credibility of an LGBTI applicant who is married, it may be appropriate to ask the applicant a few questions surrounding the reasons for marriage. If the applicant is able to provide a consistent and reasonable explanation of why he or she is married and/or has children, that portion of the testimony should be found credible.

What if the Applicant Does Not Appear to be Familiar With LGBTI Terminology?

While most Americans are accustomed to reading and hearing about LGBTI issues in the news, these terms may be unfamiliar to applicants from other cultures. "Some countries do not even have words for different sexual orientations other than homophobic slurs. The fact that an applicant may be uncomfortable with these terms may be a result of his or her own ingrained homophobia from growing up in a country where such terms were the equivalent of vile curses."[104] Therefore, you should not assume that it is implausible for an applicant to be gay, lesbian, or transgender if he or she is not familiar with LGBTI terms.

What if The Applicant Does Not "Look" or "Act" Gay?

Some applicants with LGBTI-related claims will not "look" or "act" gay.[105] If an applicant provides detailed testimony about his or her experiences in the country of origin,[106] it would be inappropriate to expect the applicant to fit a stereotypical notion for how LGBTI people should look or behave.

While there are some individuals who identify as gay who may also consider themselves effeminate and some individuals who identify as lesbian who may also consider themselves masculine, many men who identify as gay will not consider themselves effeminate and many women who identify as lesbians will not consider themselves masculine.

For some LGBTI people, the harm they suffer, especially in their youth before accepting their LGBTI identity, may be related to their feminine characteristics (for males) or their masculine characteristics (for females). Regardless of whether the applicant was "out" at

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[103] *Id.*

[104] *Id.*

[105] Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007) (remanding case to new Immigration Judge in part because IJ had improperly relied on his own stereotypes and found an Albanian applicant's claim to be gay not credible because he did not exhibit gay "mannerisms," "dress" or "speech"); Razkane v. Holder, 562 F.3d 128 (10th Cir. 2008) (rejecting IJ's finding that applicant's appearance was not gay enough for persecution to be likely to occur). *See also* Ali v. Mukasey, 529 F.3d 478 (2d Cir. 2008) (rejecting IJ's conclusion that a "dangerous criminal" could not be identified as a "feminine . . .homosexual" in his native Guyana).

[106] *See* Credibility-Detail below for appropriate credibility considerations.

the time he or she was harmed, this harm may, in many cases, be considered related to his or her LGBTI status.[107]

In some cases, an applicant will testify that he or she was harmed or fears future harm because his or her appearance makes his or her LGBTI identity apparent, that is, he or she fits the accepted stereotype for LGBTI people in his or her culture. Cultural signals about a person's sexual orientation or gender identity may vary between individuals from other countries and your own. Thus, if an applicant tells you that he or she appears obviously LGBTI, it is necessary to ask the applicant appropriate follow-up questions to explore what the applicant means.

Whether or not an applicant claims that his or her LGBTI identity is apparent, it is appropriate for you to elicit testimony about why the applicant fears harm. For example, in many countries, the fact that a person is unmarried or childless after young adulthood may result in others questioning his or her sexual orientation. In other countries, the only way for LGBTI people to meet other LGBTI people is to go to gay clubs, or parks, which may put them at higher risk of being identified as a sexual minority. For transgender applicants, having identity documents that do not match their name or outward gender appearance may put them at risk. (See *Interviewing Considerations* above for appropriate lines of questioning to determine credibility.)

As discussed above, it is important to remember that gender identity and sexual orientation are distinct concepts. While it may be obvious from the appearance of some transgender individuals that they are transgender, other transgender individuals may "pass," or blend in quite well as their corrected gender. By way of contrast, transgender people who are at the beginning of their transition also may not "look transgender."[108] In these cases, as in other categories of protection cases, you should not base your decision on the applicant's outward appearance. Instead, you should elicit relevant testimony about the applicant's identity and, if appropriate, request corroborating evidence.

What if Country of Origin Information Does Not Address LGBTI Issues?

The fact that little or no corroboration of mistreatment against LGBTI individuals is included in reports that generally address human rights violations does not render the applicant's claim of past harm or fear of future harm implausible in light of or inconsistent with country of origin information.[109] The weight to be given to the fact that country conditions information fails to corroborate a claim will depend on the specific allegations, the country, and the context of the claim.

7.1.2 Consistency

[107] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[108] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[109] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

Claims Not Initially Put Forth

An LGBTI individual may initially assert a claim based on another protected ground such as political opinion or religion and later reveal that he or she was harmed or fears harm based on his or her sexual orientation. This may be because the applicant was reluctant to talk about his or her sexual orientation or gender identity or because he or she was unable to articulate a connection to a particular protected ground.

There may be situations where the applicant does not initially put forward a claim based on sexual orientation or gender identity but does so later on. For example, a newly arrived applicant may not feel comfortable or safe revealing his or her sexual orientation or gender identity to an Immigration Officer during primary or secondary inspection or to an officer during a Credible Fear interview. Then, he or she may subsequently reveal this information on his or her asylum application.

In the case of Dominic Moab, a gay asylum seeker from Liberia, the IJ denied the case and the BIA affirmed, in part because Mr. Moab "failed to mention his homosexuality to the immigration officers at the airport or to the examining official during his credible fear interview."[110] The Seventh Circuit remanded the case, finding that the BIA had not considered the fact that, for several reasons, "airport interviews… are not always reliable indicators of credibility" including that "it is unclear, what if any follow-up questions were posed" and he may "not have wanted to mention his sexual orientation for fear that revealing this information could cause further persecution…."[111]

In overseas refugee processing, an applicant may not initially tell the referring agency, such as UNHCR or the Resettlement Support Center (RSC) about being gay or transgender, but then subsequently tell the USCIS Interviewing Officer about his or her LGBTI status. If you are confronted with such a scenario, do not automatically assume the applicant is not credible but follow the guidance above about what information the application should generally be able to relay.

It is important to take into account all of the factors mentioned in this module in assessing the applicant's ability to articulate his or her claim. When exploring these claims, remember that the applicant may have other grounds upon which he or she may qualify for refugee status or asylum. If a claim can clearly be established on another ground, that may form the basis for the decision.

As with all other credibility determinations, you must give the applicant the opportunity to explain any inconsistencies or omissions in his or her case. In a situation where an applicant does not initially mention his or her sexual orientation or gender identity and later does as a basis for protection, you would ask for an explanation:

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[110] Moab v. Gonzales, 500 F. 3d 656, 657 (7th Cir. 2007).

[111] *Id*. at 660 (citing Dong v. Gonzales, 421 F.3d 573, 579 (7th Cir. 2005).

"Help me understand. Why are you telling me this now, but did not mention it to the officer at the airport? Or to UNHCR or the RSC?"

Seemingly Inconsistent Use of LGBTI Terms

If the application form states in one place that the applicant is bisexual, but he or she testifies that he or she is homosexual, do not assume this is a contradiction. It is appropriate to provide the applicant with an opportunity to explain the apparent inconsistency, but do not pursue an adversarial line of questioning such as: "Homosexual? Your application says bisexual. Well, which is it – homosexual or bisexual?"

7.1.3 Detail

An essential component of an LGBTI claim is that the applicant must establish that the persecutor perceived him or her to be a sexual minority. This perception can be based on the applicant's actual status, or on a status imputed to the applicant. Where the persecutor's perception is based on a status that the applicant in fact has, appropriate details about the applicant's experience as LGBTI may help to substantiate the claim.

It is important to remember however, that the ultimate legal question is whether the persecutor targets the victim because the persecutor perceives a protected trait in the victim. Questions about the applicant's sexual orientation should be filtered through that lens. The purpose of establishing LGBTI status is to show why the persecutor perceived this trait in the individual. In a claim based on imputation of the protected trait, the reasons why the persecutor viewed the applicant as having that trait will be different, and it would be those different reasons that the applicant would have to establish.

As with any other type of refugee or asylum case, an applicant's detailed, consistent, credible testimony may be sufficient to prove his or her sexual orientation.

The applicant should be able to describe his or her experiences identifying as LGBTI. He or she should be able to explain when he or she first began to feel attracted to members of the same sex, if and when he or she first engaged in a romantic or sexual relationship with a member of the same sex, how this made him or her feel, whether he or she told other people or kept this aspect of his or her identity secret, etc.[112]

Acceptable lines of questioning to develop the applicant's claim and to test credibility are listed above in *Sample Questions*.

7.2 Country of Origin Information

[112] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

USCIS00339

Country of origin information on LGBTI issues can sometimes be more difficult to find than on other issues.[113] You should not conclude that if these issues are not mentioned that no problems exist. Many organizations that report on human rights issues lack sufficient contacts within local LGBTI communities to know what LGBTI individuals experience in their countries, or do not have the resources to investigate and/or monitor all types of human rights violations in a particular country.

Often the countries where homosexuality is most taboo have the least country conditions information available. In many countries, for example those with conservative, religious governments, there is little or no mention of the existence of LGBTI citizens in any media. This may also be true in countries with antidemocratic, authoritarian governments, where LGBTI groups may not be allowed to exist.

Where there is a lack of sufficiently specific country of origin information, you may have to rely on the applicant's testimony alone to make your decision.[114]

Useful resources in gathering information on LGBTI claims include:

- The *International Gay and Lesbian Human Rights Commission* at http://iglhrc.org/
- The International Lesbian and Gay Association (http://ilga.org/) website, which contains a legal survey where you can search legal codes and country conditions.
- The Human Rights Watch LGBT division and HIV division at www.hrw.org/en/category/topic/lgbt-rights
- Refugee, Asylum, and International Operations Directorate (RAIO)Library at https://u95026.eos-intl.net/U95026/OPAC/Index.aspx
- Council on Global Equality at http://www.globalequality.org/
- European Country of Origin Information Network at https://www.ecoi.net/

7.3 Corroborating Evidence

In some situations, where it is necessary to establish that the persecutor perceived a protected trait in the applicant, you may ask the applicant to provide evidence that corroborates his or her sexual orientation, gender identity, or HIV-positive status. Pursuant to amendments to INA section 208 made by the REAL ID Act of 2005, an applicant for asylum must provide this evidence unless he or she does not have the

[113] *See Id*.

[114] UNHCR *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*.

evidence and cannot reasonably obtain the evidence. Although the REAL ID Act did not explicitly amend INA section 207, which addresses applications for refugee status, as a matter of policy, USCIS applies the same standards to refugee adjudications.[115]

> It is very important to remember that because of the different ways overseas refugee and asylum applicants obtain interviews with USCIS, the evidence that refugee applicants can reasonably obtain compared with the corroborating evidence some asylum seekers can reasonably obtain varies greatly.

Corroborating Sexual Orientation

You may ask the applicant to provide evidence that corroborates his or her sexual orientation as a means of establishing that the persecutor perceived or would perceive the protected trait in the applicant. The applicant's detailed, consistent, credible testimony may be sufficient to establish this status. The applicant must provide this evidence unless he or she does not have the evidence and cannot reasonably obtain the evidence.[116] Again, it is important to remember that the evidence refugee applicants can reasonably obtain varies greatly compared with the evidence some asylum applicants can reasonably obtain. Examples include a letter from a current or ex-partner; a letter from a friend with whom the applicant has discussed his or her sexual orientation; a letter from a family member; proof that he or she is involved in an LGBTI political or social organization; or a psychological evaluation, etc.[117]

There may be situations where the applicant will not be able to provide any corroboration, for example, if he or she is no longer in contact with an ex-partner in his or her country, where his or her family has disowned him or her, and where he or she does not yet know any LGBTI people in the United States or the country of first asylum. As in any other case, the applicant should not automatically be denied for lack of corroboration. Rather, it is appropriate for you to question the applicant about why corroboration is unavailable, and factor this explanation into your decision-making process.

Corroborating Transgender Identity

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

[116] *See* _Eke v. Mukasey_, 512 F.3d 372 (7th Cir. 2008)(holding that the BIA did not err in requiring alien to corroborate his claim of persecution based on membership in social group of homosexual men.) In _Eke v. Mukasey_, the respondent argued that the Immigration Judge and the Board erred "by requiring him to corroborate his claim of persecution based on his membership in the social group of homosexual men." *Id.* at 381. The court rejected this argument, reasoning that there "is nothing in the nature of [applicant's] claims that would compel us to find that corroborating evidence was unavailable to him." _Id._

[117] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

Again you may ask the applicant to provide evidence that corroborates his or her transgender identity as a means of establishing that the persecutor perceived or would perceive the protected trait in the applicant. The applicant's detailed, consistent, credible testimony may be sufficient to establish this status. The applicant should be able to describe his or her experience identifying as a transgender individual. That is he or she should be able to explain when he or she first started to feel "different" or uncomfortable with the gender he or she was assigned at birth; ways in which his or her behavior and feelings differed from gender norms; steps he or she has taken to express the gender that he or she feels comfortable with, etc.

It may be appropriate to elicit information about what steps the applicant has taken in his or her transition but remember how personal and difficult it will be for the applicant to talk about these issues.

A number of transgender individuals receive necessary medical treatment to help their outward appearance correspond with their internal identity. Bear in mind, however, that the treatment plan for every transgender person is different. There is not a single surgery which transforms a transsexual from one gender to another. If a transgender applicant is receiving treatment from a medical doctor or mental health professional (such as counseling, hormones, implants, or other surgeries), it is reasonable to expect corroboration of this treatment.[118]

Many transgender individuals do not receive ongoing treatment, however. Some transgender individuals self-administer hormones, while others identify with their chosen gender without undergoing any medical treatment as part of their transition. Many others would like to access transition-related medical care but cannot, because of immigration status or lack of financial resources. In any event, an applicant should be able to corroborate any treatment he or she has received from a medical professional or explain why such corroboration is not available.[119]

Corroborating HIV-Positive Status

An applicant who is requesting refugee or asylum status in whole or in part based on being HIV-positive, should generally be able to provide some external corroboration that he or she is HIV-positive, such as a letter from a doctor or the results of an HIV test. You may ask for such corroboration as a means of determining that the persecutor did or would perceive this trait in the applicant. Again, this expectation may vary in the context of overseas refugee processing.

8 CONCLUSION

[118] *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

[119] *Id.*

Adjudicating LGBTI refugee and asylum claims presents certain unique challenges. It is important to remember to be sensitive to the issues, familiar with the terminology, and familiar with relevant country of origin information. By definition, these claims involve the most private of matters – sexual orientation, gender identity, and sometimes serious illness. Always remain respectful and nonjudgmental, and do not be afraid to acknowledge to yourself and to the applicant that these are sensitive topics that are difficult to discuss. Familiarize yourself with the legal nuances involved in these types of cases and do your best to elicit all relevant details without re-traumatizing the applicant or being insensitive.

9 SUMMARY

9.1 LGBTI and HIV Terminology

Becoming familiar with relevant terminology helps you become more aware of the nuances involved in adjudicating LGBTI claims. It is important to be familiar with the terminology but also to keep in mind that the applicant may come from a culture where sensitivity to these issues is not as high as in other countries and may not be familiar with the terms himself or herself. The terms "sexual minorities" and LGBTI are used in this module interchangeably to refer to both sexual orientation and gender identity.

9.2 Legal Analysis – Nexus and the Five Protected Characteristics

LGBTI refugee and asylum claims are primarily analyzed under the ground membership in a particular social group. Sexual orientation, gender identity (or the right to live in one's "corrected gender"), and having an intersex condition can be classified as a common immutable characteristic that the individual should not be required to change. Social distinction does not require that the trait be literally visible to the eye. Where there are clear benchmarks for delineating the group, the group is defined with sufficient particularity.

Ways to formulate the PSG have included "sexual minority from Russia," "gay man from Columbia," "lesbian from Iran," or "transgender female from Mexico." Ask questions about what the persecutor may have said to him or her and about the circumstances surrounding the harm inflicted on or threats made against the applicant.

9.3 Legal Analysis – Types of Persecution

The two questions you must ask yourself to determine whether the applicant suffered or fears persecution are: 1) did the harm rise to the level of persecution; and, 2) did the applicant experience the incident as harm? Examples of harm that LGBTI applicants may have faced or fear and that may rise to level of persecution include: physical and sexual

violence; execution; imprisonment; forced marriage; long-term, systemic discrimination; threats of violence and to "out" the applicant; and forced psychiatric treatment.

Lesbians may have suffered the harms that befall many women in addition to harms that befall members of the LGBTI community. Transgender individuals may be more visible and may be more commonly viewed as transgressing societal norms than gay men or lesbians. They may be subjected to increased discrimination and persecution.

9.4 Legal Analysis – Well-Founded Fear

The fact that LGBTI organizations are permitted to hold a parade once a year or the mere existence of LGBTI organizations does not mean that LGBTI people are free from ongoing violence and harm in that country.

An applicant who was forced to conceal his or her sexual orientation or gender identity in the home country in order to avoid harm and did not suffer harm that rose to the level of persecution may still qualify for refugee or asylum status if he or she has a well-founded fear of future persecution. In some cases, the experience of having to conceal sexual orientation or gender identity may itself result in suffering severe enough to constitute persecution. Some LGBTI applicants come to the United States for work or study and subsequently “come out” to themselves and to others.

9.5 Legal Analysis – One-Year Filing Deadline (asylum only)

In many instances an individual does not “come out” as lesbian, gay, bisexual, or transgender until he or she is in the country where he or she sees that it is possible to live an open life as an LGBTI person. If an individual has recently ”come out,” this may qualify as an exception to the one-year filing deadline based on changed circumstances.

An individual may qualify for a one-year exception based upon serious illness, for example being diagnosed as HIV-positive.

LGBTI individuals who suffer from internalized homophobia and transphobia or who may have been subjected to coercive mental health treatment to “cure” them in their home countries may find it especially difficult to seek the mental health treatment they may need to proceed with their applications. Also, many LGBTI asylum-seekers in the United States live with extended family members or with members of the very community they fear.

9.6 Interviewing Considerations

USCIS00344

It is important to create an interview environment that allows applicants to freely discuss the elements and details of their claims. LGBTI claims involve very private topics that are difficult for the applicants to talk openly about and may be difficult to discuss.

You may help to set the applicant at ease by reminding him or her that the interview is confidential. You may also specifically remind the interpreter, in the presence of the applicant, that the interpreter must also keep all information confidential.

The early part of the interview should be devoted, in part, to putting the applicant at ease, while reviewing the biographical information on the application. For transgender applicants, it may be better to come back to the question about "gender" at the end of the interview as this issue may be sensitive and go to the heart of the claim.

It is important to conduct the interview in an open and nonjudgmental atmosphere. Try to use the same language that the applicant has used. For example if the applicant refers to himself as gay, you should use this term rather than homosexual and vice versa. Become familiar with the legal issues, terminology, and country of origin information to help the applicant to tell his or her own story.

Keep in mind that while you have familiarized yourself with LGBTI-related terms, neither the applicant nor the interpreter may be as familiar with them as you are. You may then have to adjust the formulation of your questions accordingly.

It is never appropriate to ask questions about the applicant's specific sexual practices or about "what he or she does in bed." If the applicant begins to testify graphically about sexual practices, you should politely tell him or her that you do not need to hear these intimate details in order to fairly evaluate the claim.

If the applicant was "out" as lesbian, gay, or bisexual in the home country, he or she should be able to provide details about his or her experiences there; what it was like coming to terms with his or her sexual orientation; and, if relevant, to describe his or her first relationship. The applicant may also be able to provide details as to his or her awareness of people who are similarly situated in the home country.

Keep in mind that sexual orientation and gender identity are two different concepts. A transgender applicant may identify as straight, lesbian, gay, or bisexual. Being transgender involves an overall dissatisfaction with the gender assigned at birth; it is not about having one particular surgery. If you were confused about an applicant's self-identification, you should respectfully admit to feeling confused and ask the applicant to explain in his or her own words.

When interviewing an applicant who is HIV-positive, be mindful that it may be appropriate to ask about the applicant's state of health, current treatment regimen, and the availability of treatment in the home country. DO NOT ask the applicant where he or she may have contracted HIV.

9.7 Burden of Proof and Evidence – Credibility

An applicant's credible testimony may be the only evidence available for you to take into consideration when adjudicating LGBTI-related refugee and asylum claims. If the applicant is seeking refugee status or asylum based on his or her sexual orientation, gender identity, or HIV-positive status, he or she will be expected to establish that the persecutor perceived this protected trait in him or her. In some cases, the reason for the persecutor's perception is that the applicant is actually gay, lesbian, or bisexual, transgender, or HIV-positive. In other cases, where the applicant does not identify as LGBTI but is only imputed to be, he or she will need to establish the other reasons why he or she was perceived that way.

The fact that an applicant was married or has children does not mean that it is impossible that the applicant is gay. Even in the United States, it is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to societal norms.

Do not assume that an applicant must conform to a particular stereotype in order to be lesbian or gay. A man may identify as gay and not appear or consider himself effeminate. A woman may identify as lesbian and not appear or consider herself masculine. This does not mean that it is not plausible that he or she is gay or lesbian.

If an applicant does not initially tell the first official he or she comes into contact with about his or her sexual orientation or gender identity and subsequently reveals this in his or her claim, do not automatically assume that the applicant is not credible. Instead, follow the guidance about what testimony such an applicant should reasonably be expected to provide and try to elicit that information.

9.8 Burden of Proof and Evidence – Country of Origin Information

For various reasons, detailed, reliable country of origin information may be difficult to obtain. This does not render the applicant's claim of past harm or fear future harm implausible in light of or inconsistent with country of origin information.

<u>PRACTICAL EXERCISES</u>

NOTE: Practical Exercises will be added at a later date.

<u>Practical Exercise # 1</u>

- **<u>Title:</u>**
- **<u>Student Materials:</u>**

OTHER MATERIALS

LGBTI Terminology/Glossary[120]

There are a number of terms that may be used by LGBTI applicants in their protection claims. Although not all LGBTI applicants will use these terms, it will be important for you to be familiar with these terms prior to conducting an interview. The glossary is divided into sections that distinguish between sexual orientation terms and gender identity terms, and also includes medical and legal terms. This glossary is comprised of terms generally used by the LGBTI community and others in the United States.

Please note: The definition of the term intersex sometimes overlaps with sexual orientation, gender identity, and medical issues and is therefore found in its own separate section.

Sexual Orientation Terms[121]

Bisexual – (noun or adjective) a man or woman who has an enduring emotional and/or physical attraction to both sexes. It is important to understand that although bisexual individuals may feel attraction to members of either sex, they cannot "choose" whom (or which gender) to feel attracted to any more so than a heterosexual or homosexual individual can.

"Closeted" – (adjective) describes a person who keeps his or her sexual orientation secret. Also, "living in the closet."

"Come Out" – (verb) the process by which an individual comes to terms with his or her sexual orientation. For most people this process first involves self-acceptance ("coming out" to one's self) and then may involve telling other people ("coming out" to others.) It is important to remember, however, that some people choose not to "come out" to others for fear of their safety. Some people realize as children that they are lesbian or gay, whereas others may not come out to themselves until they are adults. Many lesbian and gay people enter into opposite sex marriages before coming to terms with their sexual orientation.

Gay – (adjective) a man who has an enduring emotional and/or physical attraction to men. Some women who are attracted to women use the term gay to describe themselves as well.

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[120] Immigration Equality and HIAS Refugee Trust of Kenya.

[121] For more general information about sexual orientation, see http://www.apa.org/pubinfo/answers.html on the American Psychological Association website.

Heterosexual – see "Straight" below

Homosexual – (noun or adjective) an individual who has an enduring emotional or physical attraction to members of the same sex. This term is often considered clinical with a slightly derogatory connotation within the LGBTI community.

Homophobia – (noun) deeply ingrained feelings of prejudice toward lesbian, gay and bisexual people; the irrational fear, based upon myths and stereotypes, of homosexuals or those perceived to be homosexual.

Lesbian – (noun or adjective) a woman who has an enduring emotional or physical attraction to women; homosexual women also sometimes use the term "gay" to describe themselves.

"Outed" – (verb) the involuntary disclosure of a person's lesbian or gay sexual orientation. For example, an applicant may say, "My cousin saw me with my partner and then he 'outed' me to the whole community."

Sexual Orientation – (noun) an umbrella term that describes an individual's enduring romantic and/or physical attraction to those of a particular sex; an aspect of human identity developed in the early stages of a person's life that is highly resistant to change.

Straight – (noun) (also heterosexual) or an individual's enduring romantic and/or physical attraction to individuals of the opposite sex.

Gender Identity Terms[122]

Birth Sex – (noun) the gender that an individual was assigned at birth which is usually indicated on his or her original birth certificate.

"Corrected Gender" – (noun) the gender with which a transgender individual identifies. For example, for an MTF transgender woman, female would be her "corrected gender."

FTM – (noun) a female to male transsexual; that is, an individual assigned the female gender at birth who now identifies as male. Also referred to as a transgender man or transman.

Gender – (noun) the social construction of what society values as the roles and identities of being male or female; assigned at birth to every person; does not always align with gender identity.

[122] For more information about transition, see World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, available at https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf (Vol. 7, 2012).

Gender Identity – (noun) a person's inner sense of being male or female, both, or neither, resulting from a combination of genetic and environmental influences.

Gender Roles – (noun) what a given society considers "masculine" or "feminine" behaviors and attitudes; how individuals express their assigned gender or the gender they identify with. For example, a traditional gender role for a man is to be competitive, athletic, and aggressive. A traditional gender role for a woman is to want to have and take care of children. Gender roles in many societies have expanded in recent years for both men and women.

Heterosexism – (noun) the assumption that everyone is or ought to be heterosexual and that a person's gender identity will be fixed at birth in accordance to his or her birth sex.

Hormone Therapy – (noun) one medical step that a transgender person may take to transition. For transgender men this involves taking testosterone. For transgender women this involves taking estrogen.

MTF – (noun) a male to female transsexual, that is an individual assigned the male gender at birth who now identifies as female. Also referred to as a transgender woman or transwoman.

"Passing" – (verb) a transgender person living in his or her corrected gender without it being readily apparent that he or she is transgender.

Sex (noun) – biological maleness or femaleness; the division of male and female on the basis of reproductive organs.

Sex Reassignment Surgery (SRS) – (noun) refers to any of more than two dozen potential surgeries that a transgender person may undergo. Not all transsexuals choose or can afford SRS. This is a preferred term to "sex change operation."

Transgender[123] – (adjective) an umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth or the stereotypes associated with that sex. The term may include transsexuals and others who do not conform to gender stereotypes. Many people who fit the definition of "transsexual" below, continue to refer to themselves as transgender. Transgender is a gender identity, not a sexual orientation. Thus, like any other man or woman, a transgender person may have a heterosexual, bisexual, or homosexual orientation.

Transition – (noun or verb) the process of changing a gender expression from one gender to another. This process may be very different for different people. It may involve

[123] For more information, see National Center for Transgender Equality, *Understanding Transgender People: The Basics*, July 9, 2016, *available at* https://transequality.org/issues/resources/understanding-transgender-people-the-basics.

"coming out" as transgender to one's self and to others; living in one's chosen gender; changing legal documents; and/or accessing necessary medical treatment.

The medical treatment that transgender people receive is specific to each individual. There is no one specific procedure that changes a person's gender. Rather, medical transition is a process which may include any number of possible treatments such as: hormone therapy, electrolysis, and surgeries such as, hysterectomy, mastectomy, and genital reconstruction.

Transsexual – (adjective) is a term used for people who seek to live in a gender different from the one assigned to them at birth. They may seek medical treatment to "transition." It is important to note, however, that being "transsexual" does not necessarily mean that a person has undergone any particular surgery or treatment.

Transvestite or "Cross-Dresser" (noun) - means an individual who chooses to wear clothes generally associated with the opposite sex. Sometimes this is related to transgender identity, and sometimes it is not. Note, however, that Spanish language articles often refer to transgender people as "travestis" which translates to "transvestites." "Transvestite" is considered an outmoded term and should not be used by the interviewer unless the applicant himself or herself uses it.

Transphobia (noun) – deeply ingrained feelings of prejudice toward transgender people; the irrational fear, based on myths and stereotypes, of people who are transgender or are perceived to be a transgender person.

Intersex Terms

Intersex[124] (noun, adjective) – Intersex refers to a condition in which an individual is born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. The conditions that cause these variations are sometimes grouped under the terms "intersex" or "DSD" (Differences of Sex Development). These conditions include androgen insensitivity syndrome, some forms of congenital adrenal hyperplasia, Klinefelter's syndrome, Turner's syndrome, hypospadias, and many others. Individuals with this condition were previously referred to as "hermaphrodites," but this term is considered outmoded and should not be used unless the applicant uses it.

Legal Terms

Civil Union – formal recognition of committed same-sex relationships recognized by some states and foreign countries. Similar to but not the same as marriage. Civil unions

[124] For more information on intersex issues, see the Advocates for Informed Choice website, https://aiclegal.wordpress.com/.

confer many of the same rights, benefits, and privileges enjoyed by opposite sex marriages such as estate planning or medical decisions.

Domestic Partnership – A civil or legal contract recognizing a partnership or a relationship between two people which confers limited benefits to them by their employer.

Sodomy Laws – laws that prohibit consensual, adult, private, noncommercial sex. Used mostly against gays and lesbians.

Medical Terms Related to HIV

AIDS or Acquired Immunodeficiency Syndrome - is the medical term used for people with the HIV virus who have either experienced certain opportunistic infections (such as PCP pneumonia or Kaposi's Sarcoma), or whose T-cells (infection fighting blood cells) have dropped below 200.

CD4 Count or T-Cell Count – this is a test used to measure the well-being of the immune system of an individual who is HIV-positive. People with healthy immune systems generally have between 800-1200 T-cells. If T-cells drop below 200, a person is considered to have AIDS.

HIV-Positive [125] – means that a person has been exposed to the Human Immunodeficiency Virus (HIV) and developed anti-bodies to the virus. Once a person has tested positive for HIV, he or she will always test positive for HIV, regardless of his or her health.

Not everyone who is HIV-positive has AIDS, but everyone who has AIDS is HIV-positive. HIV is transmitted through the transfer of bodily fluids from an infected individual to an uninfected individual. People are primarily infected with HIV through sexual contact which involves the exchange of bodily fluids; from sharing intravenous drug paraphernalia; during childbirth and breast-feeding; and from receiving contaminated blood transfusions. There is no risk of HIV transmission from casual contact, such as shaking hands or sharing a drinking glass.

[125] For more information about HIV see http://www.gmhc.org/ on the Gay Men's Health Crisis website.

LGBTI-Related Case Law[126]

2015

Avendano-Hernandez v. Lynch, --- F.3d ----, (9th Cir. 2015) (transgender woman from Mexico)

Gonzalez-Posadas v. Att'y Gen. of the U.S., 781 F.3d 677 (3d Cir. 2015) (gay man from Honduras)

2014

Malu v. U.S. Att'y Gen., 764 F.3d 1282 (11th Cir. 2014) (lesbian from Democratic Republic of the Congo)

Konou v. Holder, 750 F.3d 1120 (9th Cir. 2014) (gay man from the Marshall Islands)

2013

Doe v. Holder, 736 F.3d 871 (9th Cir. 2013) (gay man from Russia)

Rosiles-Camarena v. Holder, 735 F.3d 534 (7th Cir. 2013) (HIV positive man from Mexico)

Vitug v. Holder, 723 F.3d 1056 (9th Cir. 2013) (gay man from Philippines)

2012

R.K.N. v. Holder, 701 F.3d 535 (8th Cir. 2012) (HIV positive man from Kenya)

Vrljicak v. Holder, 700 F.3d 1060 (7th Cir. 2012) (gay man from Serbia)

Matter of M-H-, 26 I&N Dec. 46 (BIA 2012) (gay man from Pakistan)

Neri-Garcia v. Holder, 696 F.3d 1003 (10th Cir. 2012) (gay man from Mexico)

Desai v. Attorney Gen. of U.S., 695 F.3d 267 (3rd Cir. 2012) (HIV positive man from India)

Omondi v. Holder, 674 F.3d 793 (8th Cir. 2012) (gay man from Kenya)

[126] In descending order by year.

2011

Lopez-Amador v. Holder, 649 F.3d 880 (8th Cir. 2011) (lesbian from Venezuela)

Castro-Martinez v. Holder, 641 F.3d 1103 (9th Cir. 2011) (amended by Castro-Martinez v. Holder, WL 6016162, Dec. 5, 2011 (9th Cir. 2011) (gay man from Mexico)

2010

Todorovic v. Att'y Gen. of the U.S., 621 F.3d 1318 (11th Cir. 2010) (gay man from Serbia)

Ayala v. Att'y Gen. of the U.S., 605 F.3d 941 (11th Cir. 2010) (gay, HIV+ man from Venezuela)

Eneh v. Holder, 601 F.3d 943 (9th Cir. 2010) (man living with AIDS from Nigeria)

Aguilar-Mejia v. Holder, 616 F.3d 699 (7th Cir. August 6, 2010) (HIV+ man from Mex./Guatemala)

2009

N-A-M- v. Holder, 587 F.3d 1052 (10th Cir. 2009) (M to F transsexual woman from El Salvador)

Martinez v. Holder, 557 F.3d 1059 (9th Cir. 2009) (gay man from Guatemala)

Pangilinan v Holder, 568 F.3d 708 (9th Cir. 2009) (transsexual woman from the Philippines)

Manani v. Filip, 552 F.3d 894 (8th Cir. 2009) (HIV+ woman from Kenya)

2008

Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2008) (gay man from Morocco)

Bromfield v. Mukasey, 543 F.3d 1071 (9th Cir. 2008) (gay man from Jamaica)

Eke v. Mukasey, 512 F.3d 372 (7th Cir. 2008) (gay man from Nigeria)

Bosede v. Mukasey, 512 F.3d 946 (7th Cir. 2008) (HIV+ man from Nigeria)

Ali v. Mukasey, 529 F.3d 478 (2nd Cir. 2008) (gay man from Guyana)

Kadri v. Mukasey, 543 F.3d 16 (1st Cir. 2008) (gay man from Indonesia)

2007

Jean-Pierre v. Att'y Gen. of the U.S., 500 F.3d 1315 (11th Cir. 2007) (HIV+ man from Haiti)

Morales v. Gonzales, 478 F.3d 972 (9th Cir. 2007) (transgender woman from Mexico)

Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (lesbian woman from Uganda)

Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007) (gay man from Albania)

Ixtlilco-Morales v. Keisler, 507 F.3d 651 (8th Cir. 2007) (gay man from Mexico)

Moab v. Gonzales, 500 F.3d 656 (7th Cir. 2007) (gay man from Liberia)

Lavira v. Att'y Gen. of the U.S., 478 F.3d 158 (3d. Cir. 2007) (HIV+ man from Haiti) *overruled by Pierre v. Attorney Gen. of U.S.*, 528 F.3d 180 (3d Cir. 2008).

Joaquin-Porras v. Gonzales, 435 F.3d 172 (2d. Cir. 2006) (gay man from Costa Rica)

2006

Ornelas Chavez v. Gonzales, 458 F.3d 1052 (9th Cir. 2006) (transgender woman from Mexico)

2005

Salkeld v. Gonzales, 420 F.3d 804 (8th Cir. 2005) (gay man from Peru)

Boer-Sedano v. Gonzales, 418 F.3d 1082 (9th Cir. 2005) (gay man with AIDS from Mexico)

Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005) (gay, HIV+ man from Lebanon)

Kimumwe v. Gonzales, 431 F.3d 319 (8th Cir. 2005) (gay man from Zimbabwe)

Galicia v. Ashcroft, 396 F.3d 446 (1st Cir. 2005) (gay man from Guatemala)

2004

Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004) (gay man with female sexual identity from El Salvador)

Gebremaria v. Ashcroft, 378 F.3d 734 (8th Cir. 2004) (HIV+ woman from Ethiopia)

Molathwa v. Ashcroft, 390 F.3d 551 (8th Cir. 2004) (gay man Botswana)

2003

Amanfi v. Ashcroft, 328 F.3d 719 (3rd Cir. 2003) (man imputed to be gay from Ghana)

1990-2000

Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000) (gay man with female sexual identity from Mexico) overruled by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005)

Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (lesbian woman from Russia)

Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990) (gay man from Cuba)

SUPPLEMENT A – 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. *Medical Examination of Aliens – Removal of Human Immunodeficiency Virus (HIV) Infection from Definition of Communicable Disease of Public Health Significance*. Centers for Disease Control and Prevention (CDC) and U.S. Department of Health and Human Services (HHS). 74 FR 56547-62 (Nov. 2, 2009). Final rule, January 4, 2010, *available at* http://www.cdc.gov/immigrantrefugeehealth/laws-regs/hiv-ban-removal/final-rule.html.

ADDITIONAL RESOURCES

See Additional Resources listed at the beginning of this module.

SUPPLEMENTS

There are no international and refugee adjudications supplements for this training module.

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

See Required Reading listed at the beginning of this module.

ADDITIONAL RESOURCES

See Additional Resources listed at the beginning of this module.

SUPPLEMENTS

Asylum Adjudications Supplement – One-Year Filing Deadline

This module does not alter the legal criteria used to evaluate the one-year filing deadline. There are, however, some factual scenarios that may arise specifically in the context of LGBTI claims that are useful to discuss within the legal framework of established guidance on the one-year filing deadline.

Changed Circumstances Specific to LGBTI Applicants

Changed Country Conditions

As with any other type of asylum claim, if conditions in the applicant's country of origin have changed substantially, the applicant may be able to establish a changed circumstances exception to the one year filing deadline.[127] For example, after the applicant came to the U.S., a fundamentalist government may have come to power and instituted criminal sanctions for consensual homosexual activity.

"Coming Out" as LGBTI

In many instances an individual does not feel comfortable accepting himself or

[127] *See* Victoria Neilson and Aaron Morris, The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal, 8 New York City Law Review 233 (Summer 2005), *available at* http://www.asylumlaw.org/docs/sexualminorities/GayBar091798.pdf.

herself as LGBTI until he or she is in a country where the applicant can see that it is possible to live an open life as an LGBTI person. If an individual has "come out" as lesbian, gay, bisexual, or transgender, the applicant may be able to establish a changed circumstances exception.

Recent Steps in Gender Transitioning

As noted above, transitioning from the gender assigned at birth to the gender with which the applicant identifies is a process which may involve many steps. At some point during this process, the applicant may realize that he or she could no longer "pass" as his or her birth gender and therefore may become more fearful of returning to his or her country of origin. For example, a transgender woman (MTF) may have recently had breast implants which would now make it impossible to "pass" as male.

Recent HIV Diagnosis

Some individuals will apply for asylum only after they have been diagnosed with HIV. For some applicants, the claim will be based wholly on his or her HIV status and the fear of persecution upon return to the country of origin. For other individuals who may also be LGBTI, the HIV diagnosis may materially affect their eligibility for asylum. Many countries do not have confidentiality laws protecting HIV status, so some LGBTI people fear that their HIV status could become widely known. In many countries, being HIV-positive is equated with being LGBTI, and so their LGBTI identity would become known.

In *Manini v. Filip* 552 F.3d 894, (8th Cir. 2009), a Kenyan woman entered the U.S. in October 2001, was diagnosed with HIV in January 2003, and filed affirmatively for asylum in May 2004. The Asylum Office accepted her recent HIV diagnosis as a "changed circumstance," but found that the 16 month delay in filing after the diagnosis fell outside the "reasonable period of time" required by law. The BIA upheld the decision and the Eight Circuit found that it lacked jurisdiction to review the one year issue. *See also Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007), where the Eight Circuit also accepted the applicant's recent HIV diagnosis as a changed circumstance but upheld the BIA and IJ decisions to deny the case on other grounds.

The following are some suggested lines of questioning when adjudicating a claim that involves the applicant's HIV status:[128]

- When did you learn that you are HIV-positive?
- How did you feel when you received your diagnosis?

[128] *Id.*

- Does your family know that you're HIV-positive?
- How did they react?
- Have you experienced any HIV-related symptoms?
- Have you ever been hospitalized because of HIV?
- Are you taking any HIV-related medications?
- When did you begin taking them?
- Do you experience any side effects from the medications?
- Have you ever seen a mental health provider because of your diagnosis?

Extraordinary Circumstances Specific to LGBTI

HIV-Positive Status

Applicants who are HIV-positive may exhibit life-threatening symptoms and require hospitalization. An individual may be able to establish an extraordinary circumstances exception based upon serious illness, if the illness was present during the first year following arrival into the United States. Additionally, many individuals living with HIV experience extreme depression and other mental health issues as a result of their diagnosis which may affect the applicant's ability to timely file and/or may affect what period of time is "reasonable" to file after an HIV diagnosis.

PTSD or Other Mental Health Issues

As with any other asylum seekers, LGBTI applicants may suffer from Post Traumatic Stress Disorder (PTSD) or other mental health issues which make it difficult to file within a year of entry into the United States. LGBTI individuals who suffer from internalized homophobia and transphobia, or who have been subjected to coercive mental health treatment to "cure" them in their home countries, may find it especially difficult to access the mental health treatment that they may need to proceed with their applications.

Example: The applicant, a transgender male from Honduras, suffered severe and continuous sexual and other physical abuse for many years as well as familial and societal discrimination and ostracism on account of his sexual orientation. He last entered the US in 2003 but did not file for asylum until 2009. The applicant credibly explained that he felt isolated and was afraid to come forward sooner because he was ashamed and fearful of ostracism by friends and colleagues and society in general. According to medical reports he submitted, he suffered from PTSD as a result of the years of trauma he suffered in Honduras. His PTSD can be

seen as an extraordinary circumstance related to the delay in filing during the year after he arrived; the 5-year delay afterwards may also be considered reasonable based on that medical condition.[129]

LGBTI individuals may have fled to the United States leaving behind a partner. This may result in emotional or psychological distress that could affect their ability to file in a timely manner. With the repeal of DOMA, if the applicant is legally married, he or she would be able to sponsor a same-sex partner for immigration benefits. Given, however, that many countries do not permit same sex marriage the applicant may also be dealing with the possible permanent separation from a partner by coming to the United States.[130]

Severe Family or Community Opposition or Isolation

LGBTI people who arrive in the United States may stay with extended family members or with other members of their community. Being surrounded by family or community members may make it impossible for the LGBTI applicant to timely file for fear that if the family member learns of the applicant's LGBTI identity, he or she will be thrown out of the home, the applicant's family at home will be told, and/or the applicant and his or her family will be disgraced.

Extreme isolation within a particular immigrant community may qualify as an exception. Foreign nationals who have newly arrived in the United States may be steered to immigration attorneys from within their own cultural community. While some applicants may be aware that they can seek asylum in the United States based on their political beliefs or religion, many foreign nationals are not aware that sexual orientation or transgender identity might form the basis of an asylum claim.[131] This problem may be compounded for LGBTI individuals who come to the U.S. and immediately take up residence in an immigrant community with people from their own country. An LGBTI applicant could be fearful of disclosing his or her LGBTI status to any community member, and might be informed by members of his community that his or her only option to legalize would be to marry.

For example, a gay Tunisian man who was admitted to the United States on a non-immigrant visa is helped by men from Egypt and other Arab immigrant communities to find housing and employment. These men are not aware that the

[129] See Asylum Lesson Plan, *One-Year Filing Deadline*, Section VII, *Credibility*, Subsection B, *Totality of the Circumstances*, Subsection c, *Extraordinary Circumstances*.

[130] See: AAPM section III.E. "Dependents."

[131] *See Explore All Possible Grounds* in Section 6, *Interview Considerations*, and *Claims Not Initially Put Forward* in Section 7*, Burden of Proof and Evidence* above.

applicant is gay and tell him that asylum is generally not a means for legalizing one's status in the United States. It is not until the applicant meets a gay man from the United States that he becomes aware that he may be a refugee under U.S. law.

U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

NEXUS – PARTICULAR SOCIAL GROUP

TRAINING MODULE

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RAIO Directorate – Officer Training / RAIO Combined Training Course

NEXUS – PARTICULAR SOCIAL GROUP

Training Module

MODULE DESCRIPTION:

This module discusses membership in a particular social group (PSG), one of the protected grounds in the refugee definition codified in the Immigration and Nationality Act. The discussion describes membership in a particular social group (PSG) and examines its interpretation in administrative and judicial case law. The primary focus of this module is the determination as to whether an applicant has established that past harm suffered or future harm feared is on account of membership in a particular social group.

TERMINAL PERFORMANCE OBJECTIVE(S)

Given a request to adjudicate either a request for asylum or a request for refugee status, the officer will be able to apply the law (statutes, regulations and case law) to determine whether an applicant is eligible for the requested relief.

ENABLING PERFORMANCE OBJECTIVES

1. Explain factors to consider in determining whether persecution or feared persecution is on account of membership in a particular social group.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Practical Exercises

METHOD(S) OF EVALUATION

REQUIRED READING

1. Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014).
2. Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014).
3. Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014)

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. Matter of C-A-, 23 I&N Dec. 951 (BIA 2006).
2. Matter of Acosta, 19 I&N Dec. 211, 233-34 (BIA 1985)
3. Lynden D. Melmed, USCIS Chief Counsel. Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).
4. United Nations High Commissioner for Refugees, Guidelines on International *Protection: "Membership of a particular social group" within the context of Article* 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. HCR/GIP/02/02, 7 May 2002, 5 pp.
5. Phyllis Coven. INS Office of International Affairs. Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Gender Guidelines), Memorandum to all INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p. See also RAIO Training Module, Gender-Related Claims.
6. Rosemary Melville. INS Office of International Affairs. Follow Up on Gender Guidelines Training, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 7 July 1995), 8 p.
7. Paul W. Virtue. INS Office of General Counsel. Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA, Memorandum to Kathleen Thompson, INS Office of International Affairs (Washington, DC: 9 December 1993), 7 p.

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

Task/ Skill #	Task Description
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ILR9	Knowledge of policies and procedures for processing lesbian, gay, bisexual and transgender (LGBT) claims (3)
ILR10	Knowledge of policies and procedures for processing gender-related claims (3)
ILR14	Knowledge of nexus to a protected characteristic (4)
ILR15	Knowledge of the elements of each protected characteristic (4)
DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence) (5)
RI1	Skill in identifying issues of claim (4)
RI2	Skill in identifying the information required to establish eligibility (4)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
11/06/2013	Summary (of 4/30/2013 edition)	Revised last sentence of paragraph 1 of Summary and corrected corresponding footnote # 114; added an additional sentence as clarification.	J.Kochman
2/4/2014	Additional Resources	Removed Dea Carpenter memo (not yet accepted)	L. Gollub (incorporated by V. Conley and Joyce)
7/27/15	Throughout LP	Substantial revision of LP for updated case law and new guidance:	ASM QA, ASM Training, RAD TAQA, RAIO Training

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

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

1. INTRODUCTION

The refugee definition at INA §101(a)(42) states that an individual is a refugee if he or she establishes past persecution or a well-founded fear of future persecution on account of one or more of the five protected grounds. All of the elements of the refugee definition are reviewed in the RAIO Training Module, Refugee Definition. The requirements for an applicant to establish eligibility based on past persecution are discussed in the module, Persecution. The elements necessary to establish a well-founded fear of future persecution are discussed in the module, Well-Founded Fear. The analysis of the persecutor's motive and the requirements needed to establish that persecution or feared persecution is "on account of" race, religion, nationality, or political opinion are discussed in the module, Nexus and the Protected Grounds (minus PSG).

This module provides you with an understanding of the requirements needed to establish whether persecution or feared persecution is "on account of" membership in a particular social group (PSG).

The nexus analysis for particular social group claims is fundamentally the same as it is for cases involving the other protected characteristics; you must determine:

1. whether the applicant possesses or is perceived to possess a protected characteristic;

   and

2. whether the persecution or feared persecution is on account of that protected characteristic.

2. DOES THE APPLICANT POSSESS A PROTECTED CHARACTERISTIC?

USCIS00371

The first question is the starting point for all protected grounds – whether the applicant possesses, or is perceived to possess, a protected characteristic: membership in a particular social group. Membership in a particular social group may overlap with other protected grounds, such as political opinion, and you should also consider whether the applicant can establish eligibility based on a different protected ground.

For cases based on membership in a particular social group, the analysis is expanded, requiring you to identify the characteristics that form the particular social group and explain why persons with those characteristics form a particular social group within the meaning of the refugee definition.

Determining whether a specific group constitutes a particular social group can be a complicated task. Recognizing this complexity, the Board of Immigration Appeals has set forth a three-part test for evaluating whether a group meets the definition of a particular social group.[1] While looking to precedential decisions from the Board and the circuit courts of appeals may help inform your decision, you must apply the analysis discussed below to the facts of each individual case.

2.1 Is the Applicant a Member of a Particular Social Group?

An applicant who is seeking asylum based on membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity.[2] All three elements must be established.

It is important to remember that membership in a particular social group may be imputed to an applicant who is not, in fact, a member of a particular social group.

Step One: Common Immutable Characteristic

The group must comprise individuals who share a common, immutable characteristic, meaning it is one that the members of the group either cannot change, or should not be required to change because it is fundamental to each member's identity or conscience.[3] The defining characteristic can be a shared innate characteristic, a shared past experience, or a social or other status.[4]

Unchangeable Characteristics

[1] Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014); Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014).

[2] Matter of M-E-V-G-, 26 I&N Dec. at 237; Matter of W-G-R-, 26 I&N Dec. at 212-218; see also Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014)(applying to a domestic violence scenario the three-part test put forth in Matter of M-E-V-G- and Matter of W-G-R-.)

[3] Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985).

[4] Id. at 233-34; W-G-R-, 26 I&N Dec. at 212-13; A-R-C-G-, 26 I&N Dec. at 392-393.

USCIS00372

Unchangeable characteristics are traits that cannot be changed. Some examples of characteristics that cannot be changed include innate ones, like gender, race, ethnicity, skin color, and family relationships.[5] Some of these characteristics are biological traits of a person. Others might be shared past experiences that cannot be changed because a person is unable to change the past.

Fundamental Characteristics

Fundamental characteristics are traits, beliefs, or statuses that a person should not be required to change because they are essential to the individual's identity or conscience. In analyzing this type of claim, you should consider both how the applicant experiences the trait as part of his or her identity and whether the trait is fundamental from an objective point of view. With regard to the latter, you may consider whether human rights norms suggest the characteristic is fundamental. An example of a shared trait that is fundamental to an individual's identity or conscience is having intact genitalia in the female genital mutilation (FGM) context. In contrast, even though an applicant may consider being a member of a terrorist or criminal organization as being fundamental to his or her identity or conscience, there is no basic human right to pursue such an association, and it would not be considered fundamental from an objective point of view.[6]

In Matter of Acosta, 19 I&N Dec. 211, 234 (BIA 1988), the Board explained that the unchangeable characteristic or fundamental characteristic is part of the definition of a particular social group because each of the other four protected grounds describe persecution aimed at an immutable characteristic.[7] Therefore, the Board interpreted the term "particular social group" consistently with the other grounds of persecution in the INA, explaining that "the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution."[8]

Assumption of Risk Considerations

In some cases, the applicant's voluntary assumption of an extraordinary risk of serious harm in taking on the trait that defines the group may be evidence of fundamentality.[9] An applicant's decision to assume significant risks can, in some cases, provide evidence that the belief or trait is fundamental to the applicant's identity or conscience.[10] The relevance

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[5] See Fatin v. INS, 12 F.3d 1233, 1239 (3d Cir. 1993); Matter of Kasinga, 21 I&N Dec. 357, 366 (BIA 1996).

[6] See Arteaga v. Mukasey, 511 F.3d 940, 946 (9th Cir. 2007) (the court noted, "we would be hard-pressed to agree with the suggestion that one who voluntarily associates with a vicious street gang that participates in violent criminal activity does so for reasons so fundamental to 'human dignity' that he should not be forced to forsake the association").

[7] Matter of Acosta, 19 I&N Dec. at 233-34.

[8] Id.

[9] See Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[10] Id. at 3.

of an applicant's voluntary assumption of risk must be considered on a case-by-case basis. Not all individuals assume the risk of a particular activity because the activity is fundamental to their identity.[11] For example, an individual may assume the risk of a particular activity for monetary gain, and in such a case that assumption of risk may undercut fundamentality.[12]

Step Two: Social Distinction

A group's shared characteristic must be perceived as distinct by the relevant society.[13] This element has sometimes been referred to as "social visibility." However, in its rulings in Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014) and Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014), the Board renamed "social visibility" as "social distinction" to avoid confusion.[14] The Board emphasized that "social distinction" does not require the shared characteristic to be seen by society (i.e., visible); instead the group characteristic must be perceived as distinct by society.[15] There must be evidence indicating "that a society in general perceives, considers, or recognizes persons" as a group.[16] This requirement can be met by showing that the society in question sets apart or differentiates between people who possess the shared belief or trait and people who do not, even if individual group members are not visibly recognized as group members. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.[17] The Board's interpretation of "social distinction" is consistent with USCIS's longstanding interpretation of the term.[18]

In some circumstances, members of a group may be visibly recognizable, but society may also consider persons to be a group without being able to identify the members by sight. Board cases have recognized groups that were not ocularly visible. For instance, in Matter of Kasinga, 21 I&N Dec. 357, 365-66 (BIA 1996), the Board determined that young women from a certain ethnic group in Togo who have not been previously subjected to FGM but are opposed to it constitute a particular social group. In Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822-23 (BIA 1990) the Board held that "homosexuals" in Cuba were a particular social group. In Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988), the Board concluded that former national police members could be

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[11] Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[12] Id.

[13] Matter of W-G-R-, 26 I&N Dec. at 216.

[14] Matter of M-E-V-G-, 26 I&N Dec. at 240; W-G-R-, 26 I&N Dec. at 216.

[15] M-E-V-G-, 26 I&N Dec. at 240; W-G-R-, 26 I&N Dec. at 216.

[16] W-G-R-, 26 I&N Dec. at 217.

[17] M-E-V-G-, 26 I&N Dec. at 238.

[18] See, e.g., Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

USCIS00374

a particular social group in some circumstances. These cases illustrate the point that ocular visibility is not required. In such cases, it may not be easy or possible to identify who has not been subjected to or is opposed to FGM, who is gay, or who is a former member of the national police.[19]

Social distinction must be evaluated on a case-by-case basis and society-by-society basis

As previously noted, for social distinction, there must be evidence showing that society in general perceives or considers people who share a particular characteristic as distinct.[20] Evidence such as country conditions, witness testimony, and press accounts may establish that a group is distinct.[21] The Board has emphasized that the social distinction determination must be made on a case-by-case basis.[22] Laws, policies, or cultural practices of a society, as well as governmental or non-governmental programs targeting certain groups, may also establish social distinction. For instance, in evaluating whether Guatemalan widows are socially distinct, you could research whether the Guatemalan government has laws and policies addressing the needs of widows, and whether NGOs have assistance programs helping widows. In Matter of A-R-C-G-, the Board explained that evidence that a certain group is protected within a society could establish social distinction.[23] The Board and the courts have not limited the types of society-specific evidence upon which you can rely. In another context, a society might have songs or poetry about witnesses who testify in court against members of criminal groups, and this could serve as some evidence that such witnesses might be distinct in that society. The individual group member's treatment may be relevant to whether such a group is socially distinct. The relevant society may include the entire country or a particular region or community within the country. Accordingly, you should consider all evidence before you to determine whether or not the proposed group is socially distinct.

Examining the Board's holdings in M-E-V-G-and W-G-R-, the Ninth Circuit also has emphasized that the analysis must be case-specific and society-specific.[24] The Ninth Circuit noted that "[i]t is an error…to assume that if a social group related to the same international gang…has been found non-cognizable in one society, it will not be cognizable in any society. Honduras, El Salvador, Guatemala, Nicaragua, and Panama have used different strategies for combating gang violence…[and] these different local responses to gangs in nations with distinct histories…may well result in a different social

[19] M-E-V-G-, 26 I&N Dec. at 240.

[20] W-G-R-, 26 I&N Dec. at 217 (BIA 2014).

[21] M-E-V-G-, 26 I&N Dec. at 244 (BIA 2014); see also Matter of A-R-C-G-, 26 I&N Dec. 388, 394 (BIA 2014) (discussing the types of evidence that may show social distinction in domestic violence-related particular social groups, including evidence that the society recognizes the need to offer protection to victims of domestic violence and other sociopolitical factors).

[22] M-E-V-G-, 26 I&N Dec. at 242.

[23] A-R-C-G-, 26 I&N Dec. at 394.

[24] Pirir-Boc v. Holder, 750 F.3d 1077 (9th Cir. 2014).

recognition of social groups opposed to gang violence….” The Ninth Circuit concluded that “the agency must make a case-by-case determination as to whether the group is recognized by the particular society in question . . . [and] may not reject a group solely because it had previously found a similar group in a different society to lack social distinction.”[25] The Second Circuit also has examined the Board’s holdings in M-E-V-G- and W-G-R- and remanded a case for the Board to conduct additional case-specific analysis.[26]

This case-specific approach is not new. In Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69 (BIA 2007), the Board indicated that determining whether a group has a socially distinct shared characteristic must be “considered in the context of the country of concern and the persecution feared.”[27] In A-M-E- & J-G-U-, the Board reviewed country conditions to evaluate whether, in context, the proposed particular social group members shared socially distinct characteristics. The Board found that the applicants did not establish the existence of a particular social group because the proposed particular social group – “affluent Guatemalans” – did not share a common trait that was socially distinct in Guatemalan society.[28] In that case, the country of origin information before the Board demonstrated that “affluent Guatemalans” were not at greater risk of criminality or extortion than the general population. Instead the country of origin information demonstrated that criminality is pervasive in all Guatemalan socio-economic groups. The report indicated that impoverished Indians were also subjected to both crimes. For the same reason, the Board also rejected the following possible formulations of the group: “wealth,” “upper income level,” “socio-economic level,” “the monied class,” and “the upper class.” The Board specifically noted, however, that wealth- or class-based social groups must be analyzed in context, and that, under some circumstances, such groups might qualify as particular social groups.[29] For example, should a government institute a policy of imprisoning and mistreating persons with assets or income above a fixed level, there could be a basis for a societal perception that the class of wealthy persons, as defined by the government, would constitute a particular social group.[30]

Because case-specific analysis is required, it is critical for you to look at all relevant information, including the applicant’s individual circumstances, the circumstances surrounding the events of persecution, and country of origin information, before making a

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[25] Id. at 1084 n.7.

[26] Paloka v. Holder, 762 F.3d 191, 198 (2d Cir. 2014) (instructing the Board to determine whether the proposed groups of “young Albanian women” or “young Albanian women between the ages of 15 and 25” qualified as cognizable social group).

[27] Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 74 (BIA 2007); cf.Tapiero de Orejuela v. Gonzales, 423 F.3d 666, 672 (7th Cir. 2005).

[28] See also Donchev v. Mukasey, 553 F.3d 1206, 1218-1219 (9th Cir. 2009) (“friends of Roma individuals or of the Roma people” not a socially distinct group, in part, because country conditions did not show that members of the group, such as the applicant’s family members, were viewed or treated by Bulgarian society in a uniform manner).

[29] A-M-E- & J-G-U-, 24 I&N Dec. at 75,n.6.

[30] Id.; see also Tapiero de Orejuela, 423 F.3d at 672 (finding that a particular social group of educated, wealthy, landowning, cattle-farming Colombians, was a cognizable group because the group was not defined merely by wealth).

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social distinction determination. Country of origin information indicating that the immutable characteristic reflects societal distinctions is relevant when analyzing whether a group constitutes a particular social group.[31]

The group does not have to self-identify as a group and members may hide their membership

It is not necessary for a group to identify itself explicitly as a group in order for the social distinction requirement to be met. In addition, the fact that a member of a particular social group may make efforts to hide his or her membership to avoid persecution does not prevent such a group from constituting a cognizable particular social group.[32] Accordingly, a group may not appear cohesive and may not display the traditional hallmarks of a group that shows its existence openly. If the society in question distinguishes people who possess the immutable trait from others because of their shared belief or characteristic, then the group is socially distinct.[33]

Step 3: Particularity

Applicants seeking to establish membership in a particular social group must also establish that the group is defined with sufficient particularity. The particularity requirement relates to the group's boundaries or the need to put outer limits on the definition of a particular social group.[34] The term "particular[ity]" is included in the plain language of "particular" social group and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined.[35] The characteristics defining the group must provide a clear benchmark for determining who falls within the group and who does not.[36] The group must be discrete and have definable boundaries.[37]

The Board has made clear that this particularity inquiry must take into account the perspectives of the society in question.[38] Thus, the Board noted in W-G-R- that

[31] See Castellano-Chacon v. INS, 341 F.3d 533, 548 (6th Cir. 2003) (noting that a society's reaction to a group may provide evidence that a particular social group exists, so long as the persecutors' reaction to the members of the group is not the central characteristic of the group); see also Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) ("A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor – or in the eyes of the outside world in general.").

[32] Matter of W-G-R-, 26 I&N Dec. 208, 217 (BIA 2014).

[33] Id.

[34] Matter of M-E-V-G-, 26 I&N Dec. 227, 238 (BIA 2014) (citing Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003)).

[35] Id. at 239.

[36] Id. (citing Matter of A-M-E- & J-G-U-, 24 I&N Dec. at 76).

[37] Id. (citing Ochoa v. Gonzales, 406 F.3d 1166, 1170-71 (9th Cir. 2005)); see also Matter of A-R-C-G-, 26 I&N Dec. 388, 393 (BIA 2014) (noting that "married," "women," and "unable to leave the relationship" have commonly accepted definitions within Guatemalan society, and that these terms may be combined to create a group with discrete and definable boundaries).

[38] W-G-R-, 26 I&N Dec. at 214.

"landowners" might be able to meet the particularity requirement in an undeveloped, oligarchical society but would be considered too ill-defined in the United States or Canada.[39]

The Board has upheld the principle that "major segments of the population will rarely, if ever, constitute a distinct social group."[40] This principle, however, does not preclude the possibility that a large segment of society could constitute a particular social group in some situations. The "particularity" requirement means that the group must be identifiable and have clearly defined boundaries, and major segments of a society frequently are not sufficiently "particular."

You should avoid an overly broad or overly narrow characterization of a group. Courts have held that a particular social group should not be defined so broadly as to make it difficult to distinguish group members from others in the society in which they live, or so narrowly that what is defined does not constitute a meaningful grouping.[41] Moreover, even when such groups are cognizable, claims based on groups that are defined too broadly or too narrowly may fail the nexus requirement.

It also is important to remember that you should not analyze each characteristic of a group separately and reject one piece at a time. In a case involving a proposed social group of Tanzanians who exhibit erratic behavior and suffer from bipolar disorder, the Fourth Circuit concluded that the Board "erred because it broke down [the petitioner's] group into pieces and rejected each piece, rather than analyzing his group as a whole."[42] The court noted that "erratic behavior," by itself, might lack particularity, but when combined with bipolar disorder, the group would satisfy the particularity requirement.[43] The Fourth Circuit cautioned not to "miss the forest for the trees."[44]

2.2 General Principles for Formulating Particular Social Groups

A social group cannot be defined by terrorist, criminal, or persecutory activity or association, past or present

[39] Id. at 214-15.

[40] M-E-V-G-, 26 I&N Dec. at 239 (citing Ochoa v. Gonzales, 406 F.3d 1166, 1171 (9th Cir. 2005) (holding a group of business persons were not particular)).

[41] See Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575-1577 (9th Cir. 1986); Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991); Lukwago v. Ashcroft, 329 F.3d 157, 172 (3d Cir. 2003); Raffington v. INS, 340 F.3d 720, 723 (8th Cir. 2003).

[42] Temu v. Holder, 740 F.3d 887, 895 (4th Cir. 2014).

[43] Id.

[44] Id.

Under general principles of refugee protection, the shared characteristic of terrorist, criminal, or persecutory activity or association, past or present, cannot form the basis of a particular social group.[45]

Three federal courts have found that groups consisting of former gang members may constitute particular social groups in some circumstances. For asylum cases arising within the jurisdiction of the Fourth, Sixth, and Seventh Circuits, former membership in a gang may form a particular social group if the former membership is immutable and the group of former gang members is socially distinct and particular.[46] It is important to note, though, that these court decisions were issued before the BIA's rulings in M-E-V-G- and W-G-R- and did not analyze whether these groups met the "social distinction" and "particularity" criteria as articulated in those cases. Asylum officers in these circuits must analyze whether proposed groups meet these criteria on a case-by-case basis.[47] See Asylum Supplement – Former Gang Membership as a Particular Social Group.

Current gang membership, however, may not be the basis for a particular social group even in these circuits. For example, the Fourth Circuit noted:

> We agree that current gang membership does not qualify as an immutable characteristic of a particular social group….It is not the case that current gang members "cannot change" their status as gang members, as they can leave the gang. Nor do we think that they "should not be required to change because [gang membership] is fundamental to their individual identities or consciences." To so hold would "pervert the manifest humanitarian purpose of the statute."[48]

[45] Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007). See, e.g., Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992) ("Whatever its precise scope, the term 'particular social groups' surely was not intended for the protection of members of the criminal class in this country…."); Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007) (holding that current or former gang membership does not give rise to a particular social group due to gang members' criminal activities); Cantarero v. Holder, 734 F.3d 82, 85-88 (upholding the BIA's conclusion that recognizing former members of a gang as members of a particular social group would undermine the legislative purpose of the INA).

[46] Urbina-Mejia v. Holder, 597 F.3d 360, 365–67 (6th Cir.2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of a "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); Benitez Ramos v. Holder, 589 F.3d 426, 431 (7th Cir. 2009); Martinez v. Holder, 740 F.3d 902, 911-13 (4th Cir. 2014) (holding that the petitioner's membership in a group of former MS-13 members was immutable, and remanding the case to the Board to analyze the other particular social group criteria); see also USCIS Asylum Division Memorandum, Notification of Ramos v. Holder: Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit (Mar. 2, 2010).

[47] See also Matter of W-G-R-, 26 I&N Dec. 208, 220-222 (BIA 2014) (holding that an applicant's proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not sufficiently particular, because it could include people of any age, sex, and background and their participation in the gang could vary widely in terms of strength and duration, or socially distinct, because there was not enough evidence in the record about the treatment or status of former Mara 18 members in Salvadoran society).

[48] Martinez, 740 F.3d at 912 (citations omitted).

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The Fourth Circuit's position on gang membership not being a fundamental trait is consistent with USCIS's position that a particular social group may not be based on present criminal activity.[49]

Avoid Circular Reasoning

A group cannot be defined solely by the fact that its members are subject to the harm that the applicant claims to have suffered or to fear as persecution. The shared characteristic of persecution by itself, however, does not disqualify an otherwise valid social group.[50] An otherwise valid group may be defined in part by the fact that its members are subject to persecution if the group is defined by other viable immutable characteristics separate from the feared persecution, or the fact of past persecution itself a basis for additional persecution.[51]

In some cases, the fact that an individual has been harmed in the past can create an independent reason why that individual would be targeted for additional harm in the future. In some societies, a shared past experience of having been harmed in the past may give rise to a socially distinct, particularly defined group. For example, in some circumstances, survivors of rape, if the rape is or were known to others, may be treated differently from other individuals by the surrounding society and/or may face social ostracism, or be more vulnerable to further harm as a result of their past harm. In such a case, the fact that the initial rape was not on account of a protected trait does not preclude a finding that subsequent harm, whether it is in the form of repeated rape or of some other kind of harm, may be on account of a shared characteristic that the applicant obtained by virtue of the initial rape.[52] In such scenarios, the inclusion of the initial incident of past harm as part of the particular social group definition does not violate the rule against circularity. Such a group formulation, however, could not provide the required nexus for the initial incident of mistreatment for purposes of any past persecution analysis.

Another example of past harm forming the basis of a valid particular social group is the Lukwago v. Ashcroft case, involving a Ugandan man who was forcibly recruited by the Lord's Resistance Army (LRA) as a child.[53] He claimed past persecution based on his membership in the particular social group of "children from Northern Uganda who are

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[49] See also W-G-R-, 26 I.&N. Dec. at 215 n. 5.

[50] Matter of M-E-V-G-, 26 I&N Dec. 227, 243 (BIA 2014) (citing Cece v. Holder, 733 F.3d 662, 671 (7th Cir. 2013)); see also Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 74 (BIA 2007) (noting that the fact that members of a group have been harmed may be a relevant factor in considering the group's social distinction within society).

[51] Cece, 733 F.3d at 671-72.

[52] Cf. Gomez v. INS, 947 F.2d 660, 663-4 (2d Cir. 1991) (rejecting an applicant's claim that she would be harmed in the future as a member of a particular social group "women previously battered and raped by Salvadoran guerrillas" because there was no evidence that the applicant would be targeted for future harm on that basis).

[53] Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003) (remanding to the BIA to consider an applicant's claim of well-founded fear on account of being a former child soldier).

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abducted and enslaved by the LRA."[54] The Third Circuit rejected the past persecution claim, holding that the LRA was motivated to recruit the applicant by a desire to grow its ranks, and not by his membership in the proposed particular social group.[55] The applicant was not a member of the group at the time he was recruited. However, the court held that the applicant might be able to present a claim based on his well-founded fear of future persecution on account of a similar particular social group.[56] There may be a valid particular social group since the experience of having been a child soldier for the LRA is immutable, and assuming former child soldiers are socially distinct and well-defined in Ugandan society, it could form a valid particular social group with regard to well-founded fear.

While evidence that members of a group are harmed by either the government or private actors can be evidence that they share a distinct trait, you should be careful to avoid defining a particular social group solely or primarily by the harm the applicants suffer.

No size limitation

There are no maximum or minimum limits to the size of a particular social group. While the Board has cautioned that major segments of the population will rarely constitute distinct social groups, particular social groups may contain only a few individuals or a large number of people.[57]

The perception of the society in question, rather than the perception of the persecutor, is most relevant to social distinction.

The Board has held that defining a particular social group from the perspective of the persecutor is inconsistent with prior holdings that a social group cannot be defined "exclusively" by the fact that a member has been subjected to harm.[58] The perception of the applicant's persecutors may be relevant, as it can be indicative of whether society views the group as distinct.[59] The persecutors' perception by itself, however, is insufficient to make a group socially distinct.[60]

No voluntary associational relationship needed

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[54] Id. at 167.

[55] Id. at 170.

[56] Id. at 178-79.

[57] Matter of M-E-V-G-, 26 I&N Dec. 227, 239 (BIA 2014); Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010) (reasoning "that the size and breadth of a group alone does not preclude a group from qualifying as such a social group").

[58] M-E-V-G-, 26 I&N Dec. at 242 (disagreeing with the Ninth Circuit's suggestion, in Henriquez-Rivas v. Holder, 707 F.3d 1081,1089 (9th Cir. 2013), that the perception of the persecutor may matter the most).

[59] Id.

[60] Id.

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A voluntary association is not a required component of a particular social group, but can be a shared trait that defines a particular social group.[61] Thus, a voluntary association should be analyzed as any other trait asserted to define a particular social group.

Cohesiveness or homogeneity not required

Cohesiveness or homogeneity of group members is not a required component of a particular social group.[62] It is not necessary that group members be similar in all or many aspects and it is not required that the group members know each other or associate with each other. The relevant inquiry is whether there is a shared characteristic or belief that members share.

3. Is the Persecution or Feared Persecution "On Account Of" the Applicant's Particular Social Group Membership?

Even if an applicant establishes that he or she is a member of a particular social group, the applicant must still establish that he or she was persecuted, or has a well-founded fear of persecution, on account of his or her membership in the group. To determine whether an applicant has established a nexus, you must elicit and consider all evidence, direct and circumstantial, relevant to the motive of the persecutor.

You must keep this step in the analysis distinct from your determinations of 1) whether a particular social group exists, and 2) whether the applicant is a member of the group. This step in the process is the same analysis that you must conduct with any of the four other protected grounds.

4. Precedent Decisions (Specific Groups)

Below are summaries of precedent decisions that have identified certain groups that are particular social groups and other groups that were found not to be particular social groups based on the specific facts of the case. These examples are not an exhaustive list. Since this area of law is evolving rapidly, it is important to be informed about current cases and regulatory changes. It also is important to emphasize that these decisions were limited to the records before the Board and courts. Unlike the appellate context where the record is already developed, you have a duty to develop the record, eliciting testimony

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[61] Matter of C-A, 23 I&N Dec. 951,956 (BIA 2006); see Henriquez-Rivas v. Holder, 707 F.3d 1081, 1097 (9th Cir. 2013) (acknowledging that the Board does not require members of a particular social group to share a voluntary associational relationship); Hernandez-Montiel v. INS, 225 F.3d 1084, 1092-93 (9th Cir. 2000) (holding that a particular social group "is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members).

[62] C-A-, 23 I&N Dec. at 957. See also Henriquez-Rivas v. Holder, 707 F.3d 1081, 1097 (9th Cir. 2013); UNHCR Guidelines On *International Protection: "Membership of a Particular Social Group*', para. 15.

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and researching country conditions, news reports, laws, policies, and other evidence, to determine whether a group is cognizable in the relevant society.[63]

4.1 Family Membership

When analyzed on a case-by-case basis under the framework set out in this lesson plan, in many cases a family may constitute a particular social group. This approach is consistent with existing case law recognizing family as a "particular social group." For instance, the First Circuit has held that a family constitutes the "prototypical example" of a particular social group. The court found a link between the harm the applicant experienced and his family membership, and concluded that the harm experienced was persecution on account of the applicant's membership in a particular social group (his nuclear family).[64] The Seventh Circuit has found that parents of Burmese student dissidents share a common, immutable characteristic sufficient to constitute a particular social group.[65] The Fourth Circuit has found that "family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses" is a viable particular social group where evidence showed that street gang members often intimidate their enemies by attacking those enemies' families. The court found that "[t]he family unit – centered around the relationship between an uncle and his nephew – possesses boundaries that are at least as 'particular and well-defined' as other groups whose members have qualified for asylum," thus meeting the particularity requirement.[66]

In analyzing whether a specific family group qualifies as a particular social group, the shared familial relationship should be analyzed as the common trait that defines the group. The immutability criterion can easily be satisfied. The right to have a relationship with one's family is fundamental, as it is protected by international human rights norms. Also, familial relationships for the most part cannot be changed. Often, the determinative question is whether the familial relationship also reflects social distinctions. That would depend on the circumstances, including the degree and nature of the relationship asserted

[63] See Pirir-Boc v. Holder, 750 F.3d 1077 (9th Cir. 2014) (reiterating that "[i]t is an error . . . to assume that if a social group . . . has been found non-cognizable in one society, it will not be cognizable in any society"); Matter of S-M-J-, 21 I&N Dec. 722, 729 (BIA 1997) (noting that the adjudicator has the duty to develop the record). As refugee officers have limited ability to research country conditions when interviewing applicants abroad, RAD generally provides guidance at pre-departure briefings regarding particular social groups that have been recognized in certain regions. See RAD Supplement. In addition, RAD adjudicates applications abroad and outside of the jurisdiction of any federal circuit court of appeals. Consequently, while case law on particular social groups may be informative, refugee officers must ensure that they have elicited sufficient testimony consistent with specific, relevant country conditions to support a social group-based claim regardless of whether or not the particular social group has been recognized in circuit court case law.

[64] Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993).

[65] See Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998); see also Iliev v. INS, 127 F.3d 638, 642 (7th Cir. 1997) (recognizing that family could constitute a particular social group).

[66] Crespin-Valladares v. Holder, 632 F.3d 117, 125-26 (4th Cir. 2011) (reversing BIA's rejection of particular social group comprised of family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses).

to define the group and the cultural context that would inform how that type of relationship is viewed by the society in question. The question here is not generally whether a specific family is well-known in the society. Rather, the question is whether the society perceives the degree of relationship shared by group members as so significant that the society distinguishes groups of people based on that type of relationship.

In most societies, for example, the nuclear family would qualify as a particular social group, while those in more distant relationships, such as second or third cousins, may not. In other societies, however, extended family groupings may have greater social significance, such that they could meet the "social distinction" element.[67] You should carefully analyze this issue in light of the nature and degree of relationship within the family group and pay close attention to country of origin information about social attitudes toward family relationships.

It is important to keep in mind that it is the family membership itself that forms the basis for the particular social group. A case that at first glance may appear to be a personal dispute may satisfy the nexus requirement with regard to family members; it is not necessary that the persecutor have initially targeted the family on account of a different protected characteristic. For example, the persecutor may target the applicant to seek revenge on a family member with whom the persecutor has a personal dispute. Where the persecutor is motivated to harm the victim because of the victim's family membership, the targeting is not in fact because of a personal dispute with the applicant or for revenge against the applicant.[68]

In many cases, multiple members of a family may have been threatened or targeted by the same persecutor, and there may be evidence that the persecutor may have been motivated both by the applicant's family membership and by other factors. You must determine whether the applicant's family membership was a sufficient part of the persecutor's motive to meet the nexus standard.

In Aldana-Ramos v. Holder, for example, the First Circuit considered a case in which two brothers applied for asylum after their father, a successful business owner, was kidnapped for ransom by members of a criminal gang in Guatemala. Although the brothers paid the

[67] Matter of H-, 21 I&N Dec. 337, 342-43 (BIA 1996) (indicating that a Somali clan or subclan represents a familial-type relationship that is socially distinct).

[68] See, e.g., Hernandez-Avalos v. Lynch, 784 F.3d 944, 950 (4th Cir. 2015) ("Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities. The BIA's conclusion that these threats were directed at her not because she is his mother but because she exercises control over her son's activities draws a meaningless distinction under these facts. It is therefore unreasonable to assert that the fact that Hernandez is her son's mother is not at least one central reason for her persecution."); Cordova v.Holder, 759 F.3d 332, 339 (4th Cir. 2014) ("The BIA certainly did not err in holding that Aquino [Cordova]'s cousin and uncle were targeted because of their membership in a rival gang and not because of their kinship ties. But that holding does not provide a basis for concluding that MS–13 did not target Aquino on account of his kinship ties to his cousin and uncle.").

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ransom, their father was killed, and they continued to receive threats from the gang. The First Circuit reversed the Board's conclusion that the brothers had been threatened solely on the basis of wealth and held that the Board had erred by failing to consider the applicants' contention that they had been targeted on account of their membership in their immediate family.[69] It remanded the case to the Board for further consideration of whether the applicants' family membership was "one central reason" they had been targeted as required for them to be eligible for asylum.[70] In Perlera-Sola v. Holder, by contrast, the First Circuit upheld the Board's determination that a Guatemalan applicant had not met his burden to show that his family membership was a central reason for the harm he suffered where the applicant had, along with several members of his family, been attacked and threatened by unknown criminals because of their perceived wealth.[71]

4.2 Clan Membership

A clan is an extended family group that has been found to be a particular social group. The BIA has held that membership in a Somali sub-clan may form the basis of a particular social group.[72] In 1993, the Immigration and Naturalization Service (INS) Office of the General Counsel issued a legal opinion that a Somali clan may constitute a particular social group.[73] Although extended family groups may not always be recognized as particular social groups, in the Somali context, a clan is a discrete group, whose members are linked by custom and culture.[74] Clan members also are usually identifiable within their countries of origin as members of their clan.

4.3 Age

The Board noted in Matter of S-E-G- that a particular social group may be valid where the age of the members is one of the shared characteristics. The Board stated that although age is not strictly immutable, it may give rise to a particular social group since "the mutability of age is not within one's control and … if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a

[69] Aldana-Ramos v. Holder, 757 F.3d 9, 18-19 (1st Cir. 2014).

[70] Id. at 19.

[71] Perlera-Sola v. Holder, 699 F.3d 572, 576-577 (1st Cir. 2012).

[72] Matter of H-, 21 I&N Dec. at 338 (BIA 1996).

[73] Paul W. Virtue, INS Office of General Counsel, Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA, Memorandum to Kathleen Thompson, Director, Refugee Branch, OIA (Washington, DC: 9 December 1993).

[74] Matter of H-, 21 I&N Dec. 337, 342-43 (BIA 1996); Malonga v. Mukasey, 546 F.3d 546 (8th Cir. 2008) (concluding that Lari ethnic group of the Kongo tribe is a particular social group for purposes of withholding of removal; members of the tribe share a common dialect and accent, which is recognizable to others in Congo, and members are identifiable by their surnames and by their concentration in southern Congo's Pool region).

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claim for asylum may still be cognizable."[75] In other words, in the context of age-based particular social groups, you should consider the immutability of age at the time of the events of past persecution or at the time the applicant expresses a fear of future persecution.

Several Board and circuit court cases have addressed the validity of using age, in conjunction with other characteristics, as the basis for a particular social group. The Board and some courts have rejected social groups composed of young, urban males who feared either conscription by the military or forcible recruitment by guerrillas.[76] In those cases, the persecutors targeted the young men because they were desirable combatants. It appears that the courts rejected the claims because of the applicants' failure to establish the requisite motive ("on account of"), and not because of their failure to establish membership in a valid particular social group.

The Third Circuit, in Lukwago v. Ashcroft, noted that age changes over time, "possibly lessening its role in personal identity." The court further noted that children as a class represent a large and diverse group, suggesting that the class is not particular enough. Nevertheless, age did make up an important component in the particular social group based on the applicant's shared past experience in Lukwago. The court held that "former child soldiers who escaped [Lord's Resistance Army] enslavement" were a particular social group at risk of persecution by the LRA and the Ugandan government because they could not undo the shared past experience of being child soldiers.[77]

The immutability of age was also taken into account by the Seventh Circuit in considering a case involving an Albanian woman who feared being trafficked in the future due to her youth, gender, and living alone. The court stated, "the Petitioner is part of a group of young Albanian women who live alone. Neither their age, gender, nationality, or living situation are alterable."[78] Without considering the Board's requirements of social distinction and particularity, the Seventh Circuit held, "These characteristics qualify Cece's proposed group as a protectable social group under asylum law."[79]

4.4 Gender

[75] Matter of S-E-G-, 24 I&N Dec. 579, 583-84 (BIA 2008).

[76] Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); Matter of Sanchez and Escobar, 19 I&N Dec. 276 (BIA 1985). See also Civil v. INS, 140 F.3d 52 (1st Cir. 1998); Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008); Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008).

[77] Lukwago v. Ashcroft, 329 F.3d 157, 178 (3d Cir. 2003).

[78] Cece v. Holder, 733 F.3d 662, 673 (7th Cir. 2013) (en banc).

[79] Id.

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Gender is an immutable trait and has been recognized as such by the BIA and some federal courts.[80] Courts have not yet addressed whether broad social groups based solely on an applicant's gender may meet the "particularity" and "social distinction" requirements as outlined in M-E-V-G- and W-G-R-,[81] but some earlier circuit court decisions have indicated that gender may form the basis of a particular social group in combination with the applicant's nationality or ethnicity and that there may be a nexus between an applicant's membership in that group and the harm he or she fears.[82]

In most cases, though, an applicant's status as a man or woman is not, by itself, a central reason motivating the persecutor to harm him or her. Rather, the persecutor is motivated to harm him or her based on membership in a group defined by gender in combination with some other characteristic he or she possesses, such as a person's social status in a domestic relationship.[83] In general, you will formulate gender-related particular social groups based on gender, nationality and/or ethnicity, and at least one other relevant trait or characteristic. The following sections discuss some of the common gender-related particular social groups.

4.4.1 Female Genital Mutilation (FGM)[84]

FGM cases also raise gender-related issues. In Matter of Kasinga, the BIA held that gender, in conjunction with other characteristics, formed the basis of a particular social group. The BIA granted asylum to the applicant, who feared persecution on account of her membership in the particular social group defined as "young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice."[85]

Case law has taken a variety of approaches to defining a particular social group in cases involving FGM. As stated in the Attorney General's decision on certification in Matter of

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[80] See, e.g., Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985) (listing "sex" as a paradigmatic example of an immutable characteristic); Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993); Matter of Kasinga, 21 I&N Dec. 357, 365-66 (BIA 1996).

[81] See Paloka v. Holder, 762 F.3d 191 (2d Cir. 2014) (remanding to the BIA for consideration of whether the proposed social groups of "young Albanian women" or "young Albanian women between 15 and 25" are proposed social groups under the M-E-V-G- framework).

[82] See Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005) (finding that "gender plus tribal membership" may identify a social group); Mohammed v. Gonzales, 400 F.3d 785, 797 ("the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law"); Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007). See also Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993); Bah v. Mukasey, 528 F.3d 99, 112 (2d Cir. 2008); Perdomo v. Holder, 611 F.3d 662, 668 (9th Cir. 2010).

[83] See, e.g., Cece v. Holder, 733 F.3d 662, 676 (7th Cir. 2013) (en banc) (finding that the petitioner had a well-founded fear of persecution on account of her membership in a particular social group of "young Albanian women living alone" and noting that "the social group is defined by gender plus one or more narrowing characteristics.").

[84] Sometimes referred to as female genital cutting.

[85] Matter of Kasinga, 21 I&N Dec. 357, 367 (BIA 1996).

A-T-, the framework for analyzing such cases depends in critical ways on how the group is formulated.[86]

In FGM cases, you should consider whether the relevant social group should be defined as females of a certain nationality or ethnicity who are subject to gender-related cultural traditions. For additional guidance on FGM cases in the asylum context, see RAIO Training Module, Well-Founded Fear.

Eligibility Based on Feared FGM of *Applicant's* Children

In Matter of A-K-, the BIA made clear that an applicant cannot establish eligibility for asylum based solely on a fear that his or her child would be subject to FGM if returned to the country of nationality. The persecution an applicant fears must be on account of the *applicant's* protected characteristic (or protected characteristic imputed to the applicant). When a child is subjected to FGM, it is generally not because of a parent's protected characteristic. Rather, the FGM is generally imposed on the child because of the *child's* characteristic of being a female who has not yet undergone FGM as practiced by her culture.[87]

If the child of an applicant were specifically targeted for FGM in order to harm the parent because of the parent's opposition to FGM, it might be possible to establish a nexus to the parent's membership in a particular social group defined as parents who oppose FGM, if that group, viewed in the applicant's society, meets the requirements to be considered a particular social group.[88] More simply, however, in most cases involving parent(s) who oppose FGM, the claim would fit better within a political opinion analysis. Accordingly, you should first explore any evidence that supports whether the persecutor may seek to harm the parent on account of his or her political opinion.

4.4.2 Widows

A group consisting of widows from a country is another potential gender-related particular social group. The Eighth Circuit has held that a group consisting of Cameroonian widows is a cognizable particular social group.[89] The court reasoned that widows share the past experience of losing a husband—an experience that cannot be changed. The court also found that Cameroonian society perceives widows as a distinct

[86] Matter of A-T-, 24 I&N Dec. 617 (AG 2008).

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

[88] Gatimi v. Holder, 578 F.3d 611, 617 (7th Cir. 2009).

[89] Ngengwe v. Mukasey, 543 F.3d 1029, 1034-35 (8th Cir. 2008); see also Sibanda v. Holder, 778 F.3d 676, 681 (7th Cir. 2015) (noting, in a case involving a widowed applicant who was expected to marry her deceased husband's brother, that her "proposed social group – married women subject to the bride-price custom – appears to fall easily within this court's established definition of particular social group").

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group, noting the pervasiveness of discrimination against widows.[90] In cases involving widows, social distinction also may be demonstrated by laws providing benefits to widows, government or non-governmental programs specifically targeted to widows, testimony, or any other relevant evidence. Although the Eighth Circuit did not analyze particularity, a group comprised of widows seems to be defined with precision, such that it is clear who falls within the group: widowhood does not contain various permutations, as one is either widowed or not widowed.

4.4.3 Gender-Specific Dress Codes

Where refusal to abide by gender-specific dress codes could result in serious punishment or consequences, an applicant may establish that treatment resulting from his or her noncompliance amounts to persecution on account of membership in a particular social group.

Both the Third Circuit, in Fatin v. INS, and the Eighth Circuit, in Safaie v. INS, stated that Iranian women who would refuse to conform to the country's gender-specific laws may constitute a particular social group. However, neither applicant in the cases before those courts established that she was a member of such a group, because each applicant failed to demonstrate that she would refuse to comply with the gender-specific laws.[91]

In Fatin, the Third Circuit found the applicant to be a member of the particular social group of "Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them."[92] The court examined whether, for this applicant, compliance with the laws would be so abhorrent to her that wearing the chador would itself be tantamount to persecution. Because the applicant testified that she would only try to avoid compliance and did not testify that wearing the chador would be abhorrent to her, the court concluded that the applicant had not established that her compliance with the gender-specific laws was so abhorrent to her such that it could be considered persecution.

Similarly, the Seventh Circuit in Yadegar-Sargis v. INS considered whether an applicant who established her membership in the particular social group of "Christian women in Iran who do not wish to adhere to the Islamic female dress code" would suffer persecution by her compliance with the dress code. Looking to Fatin for guidance, the court found that because the applicant did not testify that compliance with the dress code violated a tenet of her Christian faith and testified that she was not prevented from attending church or practicing her faith when she complied with the dress code, the evidence could be interpreted such that the dress requirements were "not abhorrent to [the

[90] Id.

[91] Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994).

[92] Fatin, 12 F.3d at 1241-42.

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applicant's] deepest beliefs."[93] The issue in this case did not turn on whether the group constituted a particular social group, but rather on whether forced compliance with dress codes constituted persecution.

4.5 Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI)

Persecution on account of sexual orientation constitutes persecution on account of membership in a particular social group. The Board found that a gay male in Cuba who was harmed on account of his homosexuality was persecuted on account of his membership in a particular social group.[94] In that case, where the applicant was registered as "homosexual" by the Cuban government, the Board found that the applicant was being targeted because of his status as a gay man, and that this status defined a particular social group.[95] A persecutor's perception of an applicant as a sexual minority can be established by a variety of types of evidence. For example, harm an applicant experiences because he or she engages in intimate sexual activity with a consenting adult of the same sex may constitute persecution on account of membership in a particular social group defined by its members' actual or imputed sexual minority status.[96]

The Ninth Circuit has held that gay men with female sexual identities in Mexico constitute a particular social group.[97] The court held that the applicant's female identity was immutable because it was an inherent characteristic. In Matter of M-E-V-G-, the Board emphasized that a gay male applicant does not need to be literally visible to society; instead the question is the extent to which the group is understood to exist as a recognized component of society.[98]

The Third Circuit, in Amanfi v. Ashcroft, recognized that harm suffered or feared on account of an applicant's perceived homosexuality, even where the applicant is not gay, could be sufficient to establish past or future persecution on account of an imputed membership in a particular social group.[99]

For more information, see RAIO Training Module, Guidance for Adjudicating LGBTI Refugee and Asylum Claims.

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[93] Yadegar-Sargis v. INS, 297 F.3d 596, 604-605 (7th Cir. 2002).

[94] Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822-23 (BIA 1990) (designated by the Attorney General as a precedent decision on June 16, 1994); see also Boer-Sedano v. Gonzales, 418 F.3d 1082, 1089 (9th Cir. 2005).

[95] Toboso-Alfonso, 20 I&N Dec. at 821.

[96] See Karouni v. Gonzales, 399 F.3d 1163, 1173 (finding "no appreciable difference between an individual…being persecuted for being a homosexual and being persecuted for engaging in homosexual acts").

[97] Hernandez-Montiel v. INS, 225 F.3d 1084, 1094-95 (9th Cir. 2000).

[98] Matter of M-E-V-G-, 26 I&N Dec. 227, 238-39 (BIA 2014).

[99] Amanfi v. Ashcroft, 328 F.3d 719, 730 (3d Cir. 2003).

4.6 Domestic Violence

4.6.1 Women Who Are Unable to Leave a Domestic Relationship or Women Who Are Viewed as Property by Virtue of their Position within a Domestic Relationship

The Board has addressed the issue of "whether domestic violence can, in some instances, form the basis for a claim of asylum."[100] In Matter of A-R-C-G-, the applicant married at the age of 17 and suffered physical and sexual abuse by her husband. The respondent repeatedly attempted to leave the relationship by staying with relatives, but her husband continued to find her and threaten her.[101] Based on these facts, the group before the Board was articulated as "married women in Guatemala who are unable to leave their relationship." The Board found that the proposed group satisfied the three necessary criteria. It was immutable because it involved gender and a marital status that the applicant could not change.[102] The Board also found that the group was defined with particularity, as the terms "married," "women," and "unable to leave the relationship" have commonly accepted definitions within Guatemalan society. The Board noted that evidence of social distinction for women in marriages they cannot leave would include "whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors."[103]

Although the specific facts in A-R-C-G- involved a married woman, the absence of a formal marriage does not defeat the cognizability of the group if the domestic relationship (or imputed relationship) that gives rise to a group meets all three criteria. As the Board stated, the group "must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question."[104] For instance, even in the absence of a formal marriage, there may be a valid particular social group. DHS's brief to the Board in Matter of L-R-, another case that involved domestic violence, noted that the groups of women unable to leave a domestic relationship or women who are viewed as property by virtue of their positions within a domestic relationship could be cognizable particular social groups.[105] L-R- involved a woman who, although not married, was in a domestic relationship for two decades. This brief, which continues to represent the DHS position, argued that under these two social group formulations, an applicant's status within a domestic relationship is immutable where the applicant is economically,

[100] Matter of A-R-C-G-, 26 I&N Dec. 388, 390 (BIA 2014).

[101] Id. at 389.

[102] Id. at 392-93.

[103] Id. at 394.

[104] Id. at 392.

[105] DHS's Supplemental Brief in Matter of L-R- , April 13, 2009.

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socially, or physically unable to leave the abusive relationship, or where "the abuser would not recognize a divorce or separation as ending the abuser's right to abuse the victim."[106]

The particularity requirement for either of these groups can be established by a showing that the domestic relationship has a clear definition.[107] The L-R-brief also emphasized that the term domestic relationship could be "tailored to the unique situation" in the applicant's society.

4.6.2 Other Types of Domestic Relationships

Of course, abuse serious enough to amount to persecution can also occur within other domestic relationships. Where claims are based on assertions of harm within a relationship that is not spousal or spouse-like, the adjudicator must identify the relationship, and determine whether such a relationship is a domestic relationship. Once the relationship is determined to be a domestic relationship, you can assess whether the applicant is a member of a cognizable particular social group similar to the ones discussed in the previous section. If you determine that the applicant is a member of a cognizable group, of course, the applicant must also establish a nexus and the other requirements for asylum or refugee status.

In Ming Li Hui v. Holder, for example, the Eighth Circuit addressed an asylum applicant's claim for asylum based on physical and emotional abuse by her mother.[108] In that case, the applicant asserted that "her mother severely abused her as a child 'because she hated girl[s].' The abuse included the mother burning her hand with a cigarette butt, withholding food, calling her 'trash, garbage,' and telling her she 'wish[ed] you'd die soon.'[109] The applicant also testified that at the age of 20, she got a job that paid well enough for her to be able to leave the home and escape the abuse. She was able to live away from her mother for five years, and although her mother threatened her during this period, she did not harm the applicant.[110] The Eighth Circuit, without specific analysis, accepted the applicant's proposed particular social group of "Chinese daughters [who are] viewed as property by virtue of their position within a domestic relationship."[111] The court concluded, however, that a fundamental change in circumstances rebutted the

[106] Id. at n.12.

[107] See id. at 19 (citing section 237(a)(2)(E)(1), which defines "crimes of domestic violence" to include offenses "against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws."

[108] Ming Li Hui v. Holder, 769 F.3d 984 (8th Cir. 2014).

[109] Id. at 985.

[110] Id.

[111] Id. at 985-86.

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presumption of a well-founded fear on account of her membership in that group because the applicant testified that she had only been abused when she lived with her mother, and not after she was able to leave her mother's household.[112]

4.6.3 Children in Domestic Relationships

As reflected in the decision in Ming Li Hui, claims involving child abuse can involve some of the same dynamics of power and impunity as claims involving other kinds of domestic violence. In some cases, a child's vulnerable status and lack of protection within the family and society may make a persecutor believe that he or she can harm the child with impunity and is entitled to do so, which in combination may form a significant part of the persecutor's motivation. In analyzing a child abuse case, you, following the proposed group before the court in Ming Li Hui and one of the groups analyzed in DHS's brief in Matter of L-R-, could formulate the particular social group as [nationality] children who are viewed as property by virtue of their position within a domestic relationship.

All claims require case-by-case analysis, but it is generally established in precedent that when persecution is suffered or feared on account of a characteristic that includes being a child, that characteristic is immutable within the meaning of Acosta. This is because a child cannot change his or her age at the time of persecution.[113] Similarly, a child is typically unable to leave the family or other domestic relationship in which the child is situated, due to the inherent dependency of minors as well as the established legal and cultural expectations in most societies that children are subordinate to the authority of their parents or other adults acting in the role of parents. [114] A child is not expected to leave his or her family.

In child abuse cases, social distinction could be established by evidence such as the existence of laws that are designed to protect children from domestic abuse, programs to assist such children, reports about the prevalence of domestic violence and prosecution of domestic violence or lack of prosecution, or other evidence that members of this group are distinguished from others in the society in which they live.[115] Additionally, although

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[112] Id. at 986. Note that the fundamental change in circumstances analysis would not apply to refugee resettlement cases, as the past persecution, by itself, would be sufficient to establish a claim. For asylum cases, the assessment of what would constitute a fundamental change in circumstances under such an analysis would be specific to the facts of each case.

[113] See Matter of S-E-G-, 24 I&N Dec. 579, 583-84 (BIA 2008).

[114] Cf. Matter of A-R-C-G-, 26 I&N Dec. 388, 393 (BIA 2014) (In the separate context of intimate partner domestic violence, discussing the definable boundaries of a group involving married women unable to leave the relationship, noting "that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation").

[115] See id. at 394 (for a particular social group of married Guatemalan women who are unable to leave the relationship, noting that evidence of social distinction "would include whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors.")

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past persecution by itself cannot be used to define a particular social group, a group's being subjected to harm is a good indication that it is socially distinct.[116] At the same time, social distinctions do not have to be discriminatory or punitive. Many of the ways in which society distinguishes children are benign or are intended to protect them.

The group of children who are viewed as property by virtue of their position within a domestic relationship also can be described with sufficient particularity because it is possible to determine who falls within the group: they are (1) minors[117] (2) who fall within the boundaries of a domestic relationship, and (3) are treated and perceived as property because of their subordinate status within that relationship.[118] As noted by the Board in examining the particularity of a group involving violence within the domestic relationship, "the terms can combine to create a group with discrete and definable boundaries."[119]

Even where an applicant whose claim is based on child abuse can establish membership in a cognizable particular social group, all the other eligibility requirements must also be met. The dynamics of domestic relationships between children and their parents or other parental figures are different from the dynamics of domestic relationships between adults. In claims involving child abuse, nexus must be analyzed in the context of a parent's role (or that of another person acting in a parental capacity) in raising a child. The relevance of power and authority of an adult over a child is assessed differently than in the context of adult domestic partnerships. Strong deference is generally shown to parents in determining the child's best interests. Where a parent or person acting in a parental capacity is motivated by legitimate disciplinary or child-rearing goals and the discipline is reasonable in degree, the punishment is not on account of a protected ground. Only where harm is clearly inflicted for purposes other than discipline or other legitimate child-rearing goals or is clearly disproportionate to such goals could it objectively constitute persecution on account of a protected ground. Factors that may indicate that the harm is not legitimately related to discipline or other child-rearing goals (and hence there may be persecution and a nexus to a protected ground) could be: (1) where the harm inflicted is clearly disproportionate or unrelated to any child-rearing goal; (2) where the abuse is coupled with repeated remarks devaluing the child; or (3) where the abuser tries to cover up the abuse. Rape is an example of harm that would never further a legitimate child-rearing goal.

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[116] Matter of C-A-, 23 I&N Dec. 951 (BIA 2006); see also Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 74 (BIA 2007) ("the fact that its members have been subjected to harm...may be a relevant factor in considering the group's visibility in society").

[117] The Convention on the Rights of the Child defines children as individuals under the age of 18, and provides a benchmark for determining who is a minor.

[118] Cf. A-R-C-G-, 26 I&N Dec. at 393 (In the separate context of intimate partner domestic violence, discussing the definable boundaries of a group involving married women unable to leave the relationship, noting "that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation").

[119] Id.

In the asylum context, in cases where the applicant has been found to have suffered past persecution based on his or her membership in a particular social group related to domestic violence, it is necessary to assess whether there is a fundamental change in circumstances or a reasonable possibility of internal relocation to rebut the presumption of well-founded fear. When an applicant is a child at the time of the asylum interview, the applicant remains dependent on caregivers, potentially including former abusers, and there is no obvious fundamental change in circumstances that rebuts the presumption of a well-founded fear, and children are not expected to relocate outside of the family. In such cases, you will generally find that the applicant is a member of a particular social group consisting of children who are viewed as property because of their position within a domestic relationship. If the applicant suffered past persecution within a domestic relationship and the applicant is no longer a child at the time of the asylum interview, you should examine whether the applicant continues to be viewed as property because of his or her position within a domestic relationship, such as due to being a daughter or son in the domestic relationship or a female or male in the domestic relationship.

In such cases, you will need to thoroughly analyze whether there has been a fundamental change in circumstances due to the applicant no longer being a child or whether the applicant could safely and reasonably relocate outside of the domestic relationship. Once an applicant is an adult, the conditions that created his or her subordinate and vulnerable status at the time the applicant was harmed may have fundamentally changed.[120] You must elicit testimony and review country conditions to determine whether there are specific facts showing that the dynamics of power and control within the relationship had fundamentally changed. Among other things, you must analyze whether the applicant can live independently and safely outside of the domestic relationship considering the applicant's age, economic resources, marriage, or other reasons.[121] In some circumstances, the harm to the applicant may have begun when he or she was a child and continued into adulthood, and the applicant continued to be in a subordinate and vulnerable status. In such circumstances, there would generally not be a fundamental change in circumstances.

4.7 Ancestry

The Board has found that "Filipinos with Chinese ancestry" could define a particular social group, because of the immutability of the characteristic.[122] Note that this protected characteristic can also be appropriately analyzed under the nationality or race protected grounds.

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[120] Cf. Ming Li Hui v. Holder, 769 F.3d 984 (8th Cir. 2014) (finding, in examining another proposed group involving the parent-child relationship, that there had been a fundamental change in circumstances because Hui, as an adult, could control whether she lived with her mother).

[121] If the presumption of well-founded fear is rebutted, you must complete a Chen analysis to determine whether an exercise of discretion to grant asylum may be warranted. Similarly, you must consider whether there is a reasonable possibility of other serious harm.

[122] Matter of V-T-S, 21 I&N Dec. 792, 797 (BIA 1997).

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4.8 Individuals with Physical or Mental Disabilities

In an opinion later vacated and remanded by the Supreme Court, the Ninth Circuit held in Tchoukhrova v. Gonzales that Russian children with serious disabilities that are long-lasting or permanent constitute a particular social group. The court reserved the question of whether individuals with disabilities from any country would constitute a particular social group, but found that in Russia, children with disabilities constitute a specific and identifiable group, as evidenced by their "permanent and stigmatizing labeling, lifetime institutional[ization], denial of education and medical care, and constant, serious, and often violent harassment."[123]

The Supreme Court vacated the Ninth Circuit's opinion in Tchoukhrova v. Gonzales, so this opinion is no longer precedent. However, the concerns with the case that were raised on appeal were unrelated to the formulation of the particular social group. The particular social group formulation in the Ninth Circuit's opinion is consistent with USCIS's interpretation. The Asylum Division has granted asylum to people with disabilities when the applicant established that he or she was persecuted in the past or would be persecuted in the future on account of his or her membership in a particular social group, defined as individuals who share those disabilities. The proper analysis is whether 1) the disability is immutable; 2) persons who share that disability are socially distinct in the applicant's society; and 3) the group is particularly defined.

More recently, in Temu v. Holder, the Fourth Circuit held that individuals with bipolar disorder, who exhibit erratic behavior, can constitute a viable particular social group.[124] The applicant credibly testified that he was persecuted by nurses and prison guards because of his illness. The court concluded that the Board's decision, finding no particular social group, was "manifestly contrary to the law and an abuse of discretion."[125] Using the term "social visibility," but essentially applying the social distinction test, the court found that the petitioner "appears to have a strong case for social visibility," as Tanzanians with severe mental illnesses are singled out for abuse in hospitals and prisons and are labeled "mwenda wazimu."[126] The court also rejected the Board's reasoning that if a persecutor targets an entire population ("the persecutor's net is too large"), "social visibility" must be lacking. The court highlighted that the "folly of this legal conclusion can be demonstrated with a hypothetical," specifically to assume "that an anti-Semitic government decides to massacre any Jewish citizens [and] imagine that in putting its policy into practice, the government collects a list of surnames of individuals who are

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[123] Tchoukhrova v. Gonzales, 404 F.3d 1181, 1189 (9th Cir. 2005), *reh'g and reh'g en banc denied,* 430 F.3d 1222 (9th Cir. 2005), vacated, 127 S.Ct. 57 (U.S. 2006).

[124] Temu v. Holder, 740 F.3d 887, 892-96 (4th Cir. 2014).

[125] Id. at 892.

[126] Id. at 893.

known to be Jewish and then kills anyone with the same surname. Jews and Gentiles alike might be murdered, but this does not change the fact that Jews have social visibility as a group."[127]

The court in Temu also rejected the Board's analysis related to particularity, noting that the Board "missed the forest for the trees."[128] Specifically, the Board "erred because it broke down [the petitioner's] group into pieces and rejected each piece, rather than analyzing his group as a whole." The court recognized that a group characterized as people with "mental illnesses" without additional defining characteristics might lack particularity, as the group would cover "a huge swath of illness that range from life-ending to innocuous."[129] Similarly, the court recognized that "erratic behavior," by itself, would likely lack particularity. The petitioner's group, however, did not "suffer from the same shortcoming" because his group was defined by people who exhibit erratic behavior and who suffer from bipolar disorder.[130] The court emphasized that the group as a whole must be analyzed for particularity. Finally, the court found that the proposed group "easily satisfies" the immutability requirement, as there is no cure for bipolar disorder and the petitioner would be unable to access medication to control his disorder.[131]

The Seventh Circuit also has held that mental illness can form the basis of a valid particular social group, disagreeing with the BIA's finding that mental illness is not a basis for a particular social group in that case because it is not immutable.[132]

4.9 Unions

In Matter of Acosta, a case that involved a member of a Salvadoran taxi cooperative, the BIA considered a social group with the defining characteristics of "being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages."[133] The BIA found that neither characteristic was immutable, because the members of the group could either change jobs or cooperate in work stoppages. However, the BIA did not address whether being a member of a cooperative or union is a characteristic an individual should not be required to change.

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127 Id. at 894.

128 Id. at 895.

129 Id.

130 Id.

131 Id. at 896-97.

132 Kholyavskiy v. Mukasey, 540 F.3d 555, 572-73 (7th Cir. 2008). While the Eighth Circuit found that the groups of "mentally ill Jamaicans" or "mentally ill female Jamaicans" do not constitute a particular social group because the members of the group are not "a collection of people closely affiliated with each other, who are actuated by some common impulse or purpose," Raffington v. INS, 340 F.3d 720, 723 (8th Cir. 2003), the Board rejected the need for cohesiveness or a voluntary associational relationship in its decision in Matter of C-A-, 23 I&N Dec. 951, 956-57 (BIA 2006).

133 Matter of Acosta, 19 I&N Dec. 211, 234 (BIA 1985).

USCIS00397

The Fifth Circuit, in Zamora-Morel v. INS, assumed without deciding that a trade union may constitute a particular social group. The court held that the applicant was not persecuted and did not have a well-founded fear on account of his membership in the union, analyzing the case as if the union was a particular social group.[134]

Depending on the facts, cases involving union membership, labor disputes, or union organizing also may be analyzed under political opinion.

4.10 Students and Professionals

Courts have held that particular social groups of students are either not cognizable particular social groups,[135] or that the harm applicants suffered was not on account of their membership in student groups.[136] These holdings do not preclude a finding that a specific, identifiable group of students could constitute a particular social group.

The First Circuit has recognized that persons who are associated with a former government, members of a tribe, and educated or professional individuals could be members of a social group.[137] On the other hand, the Board has rejected a particular social group where the applicant, who was a former government soldier, testified that guerrillas targeted him due to his expertise as an artillery specialist.[138] The Second Circuit has determined that a particular social group of experts in computer science "was not cognizable because its members possess only 'broadly-based characteristics.'"[139]

4.11 Small-Business Owners Indebted to Private Creditors

The Tenth Circuit held in Cruz-Funez v. Gonzales that being indebted to the same creditor is not the kind of group characteristic that a person either cannot change or should not be required to change.[140] Therefore, the court concluded that the applicants in that case could not establish that they were members of a cognizable particular social group.

4.12 Landowners

[134] Zamora-Morel v. INS, 905 F.2d 833, 838 (5th Cir. 1990).

[135] Civil v. INS, 140 F.3d 52, 56 (1st Cir. 1998) (social group of pro-Aristide young students is not cognizable because it is overbroad).

[136] Matter of Martinez-Romero, 18 I&N Dec. 75, 79 (BIA 1981).

[137] Ananeh-Firempong v. INS, 766 F.2d 621, 626-27 (1st Cir. 1985).

[138] Matter of C-A-L-, 21 I&N Dec. 754, 756-57 (BIA 1997).

[139] Delgado v. Mukasey, 508 F.3d 702, 704-05 (2d Cir. 2007).

[140] Cruz-Funez v. Gonzales, 406 F.3d 1187, 1191 (10th Cir. 2005).

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The Seventh Circuit has found that the "educated, landowning class" in Colombia who had been targeted by the Revolutionary Armed Forces of Colombia (FARC) constituted a particular social group for asylum purposes. The court distinguished the situation in Colombia from other situations where the risk of harm flowing from civil unrest affects "the population in a relatively undifferentiated way" and found that members of this group were the "preferred victims" of the FARC.[141]

The court further distinguished this group from groups based solely on wealth, a characteristic that had been rejected as the basis of a particular social group when considered alone by the BIA in Matter of V-T-S, because it included the members' social position as cattle farmers, their level of education, and their land ownership. These shared past experiences were of a particular type that set them apart in society such that the FARC would likely continue to target the group members, even if they gave up their land, cattle farming, and educational opportunities.[142]

In a separate case, the Seventh Circuit found that Colombian landowners who refuse to cooperate with the FARC constituted a particular social group.[143] The Seventh Circuit emphasized that "there can be no rational reason for the Board to reject a category of 'land owners' when the Board in Acosta specifically used land owning as an example of a social group."[144]

The Board opined in Matter of M-E-V-G- that "in an underdeveloped, oligarchical society," a group of landowners may meet the particularity and social distinction criteria.[145] If analyzing a claim involving landowners, the Board instructed adjudicators to "make findings whether 'landowners' share a common immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers 'landowners' as a significantly distinct group within the society."[146]

Additionally, the Ninth Circuit has held that landownership may form the basis of a particular social group.[147] The court emphasized that "landownership [is] an illustrative example of a characteristic that might form the basis of a particular social group."[148] The

[141] Tapiero de Orejuela v. Gonzales, 423 F.3d 666, 672 (7th Cir. 2005), citing Ahmed v. Ashcroft, 348 F.3d 611, 619 (7th Cir. 2003).

[142] Id., citing Matter of V-T-S, 21 I&N Dec. 792, 799 (BIA 1997); cf. Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 75 (BIA 2007) (finding that the group of "affluent Guatemalans" was not sufficiently distinct in society to constitute a particular social group. Country conditions indicated that "affluent Guatemalans" were not at greater risk of criminality or extortion in particular.) See section on "Wealth or Affluence," below for further discussion and comparison to the "landowner" particular social group.

[143] N.L.A. v. Holder, 744 F.3d 425, 439 (7th Cir. 2014).

[144] Id.

[145] 26 I&N Dec. 227, 241 (BIA 2014).

[146] Id.

[147] Cordoba v. Holder, 726 F.3d 1106, 1114 (9th Cir. 2013).

[148] Id.

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court also pointed out that both petitioners offered evidence suggesting that landowners in their respective countries (Colombia and Mexico) are targets of persecution. One petitioner offered country conditions showing that the FARC specifically targets "wealthy landowners." The other petitioner relied on testimony of a professor specializing in Latin American politics to show that the applicant's family had been established landowners in Mexico for generations and this was a significant factor in why the applicant had been targeted by drug cartels.[149]

4.13 Groups Based on "Wealth" or "Affluence"

In Matter of A-M-E- & J-G-U-, the BIA found that groups defined by wealth or socio-economic levels alone often will not be able to establish that they possess an immutable characteristic, because wealth is not immutable.[150] Wealth is, however, a characteristic that an individual should not be required to change, and therefore could be considered fundamental within the meaning of Acosta. In evaluating groups defined in terms of wealth, affluence, class, or socio-economic level, you must closely examine whether the proposed group can be defined with enough particularity and whether it is socially distinct. In A-M-E- & J-G-U-, the BIA concluded that the proposed group failed the particularity requirement, noting that the terms "wealthy" and "affluent" standing alone fail to provide an adequate benchmark for determining group membership. To support its particularity conclusion, the BIA stated that the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more.[151]

In the context of the facts established in A-M-E & J-G-U-, the BIA rejected various particular social group formulations involving wealth and socio-economic status for failure to establish social visibility (or social distinction). The BIA stressed that this analysis must take into account relevant country of origin information. Considering Guatemalan country conditions, the BIA found a variety of groups failed as particular social groups, including groups defined by "wealth," "affluence," "upper income level," "socio-economic level," "the monied class," and "the upper class."[152]

The BIA, however, did not reject altogether the possibility that a group defined by wealth could constitute a particular social group. The court noted that these types of social groups must be assessed in the context of the claim as a whole. For example, the Board opined that such a group might be valid in a case where persecutors target individuals within certain economic levels.[153]

[149] Id. at 1114-15.

[150] Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 76 (BIA 2007).

[151] Id.

[152] Id.

[153] Id.

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The BIA's emphasis on social context is consistent with the Seventh Circuit's approach in Tapiero de Orejuela v. Gonzales, where members of the "educated, landowning class" in Colombia were recognized as members of a particular social group. Although affluence was a shared trait for this group, group members also shared a distinctive social status (albeit one derived in significant part from affluence and the attributes of affluence) that made them preferred targets of the FARC.[154] The significance of this social status was evident when the claim was viewed in the context of the country conditions that showed that the FARC is a "leftist guerilla group that was originally established to serve as the military wing of the Colombian Communist Party" and that membership in an economic class, not merely "wealth," was an important motivating factor for them.[155]

When encountering claims involving particular social groups based in whole or in part on wealth, you must assess the viability of the particular social group asserted in each case and carefully consider relevant country of origin information and other relevant evidence to determine if the group constitutes a particular social group as defined by the BIA and other courts. As the Seventh Circuit pointed out, "[t]here may be categories so ill-defined that they cannot be regarded as groups-the 'middle class,' for example. But this problem is taken care of by the external criterion-if a Stalin or a Pol Pot decides to exterminate the bourgeoisie of their country, this makes the bourgeoisie 'a particular social group,' which it would not be in a society that didn't think of middle-class people as having distinctive characteristics; it would be odd to describe the American middle class as 'a particular social group.'"[156]

4.14 Present or Former Employment in Either Law Enforcement or the Military

When an applicant asserts membership in a particular social group that involves either past or present service as a police officer or soldier, you must first determine whether, in the context of the applicant's society, persons employed, or formerly employed, as police officers or soldiers form a particular social group.

Note, however, that often claims by persons employed, or formerly employed, as police officers or soldiers may also be analyzed under another protected ground, such as actual or imputed political opinion, depending on the facts of the case.

4.14.1 Former Military/Police Membership

[154] Tapiero de Orejuela v. Gonzales, 423 F.3d 666, 672 (7th Cir. 2006).

[155] Id. at 668.

[156] Benitez Ramos v. Holder, 589 F.3d 426, 431 (7th Cir. 2009).

The BIA recognized in both Matter of C-A- and Matter of Fuentes that former military leadership is an immutable characteristic that may form the basis for a particular social group under some circumstances. Similarly, while holding that the dangers arising solely from the nature of employment as a policeman in an area of domestic unrest do not support a claim, the Board indicated in Fuentes that former service in the national police is an immutable characteristic that, in some circumstances, could form the basis for a particular social group. In order to satisfy the definition of a particular social group, the applicant also must demonstrate that the purported social group has a distinct identity in society to meet the "social distinction" test.[157]

The USCIS interpretive memo on C-A- clarifies that "harm inflicted on a former police officer or soldier in order to seek revenge for actions he or she took in the past is not on account of the victim's status as a former police officer or soldier."[158] In other words, if the former officer is being targeted for his or her "status" as a former officer, he or she could establish an asylum claim, but not if he or she is being targeted only for his or her actions as a former police officer. It is important to note, however, that many of these cases will involve mixed motives, and it is possible that a former officer is being targeted on account of both status and former acts. An applicant would satisfy the "status" requirement where (1) there is a cognizable particular social group, (2) he or she is a member of the group, and (3) he or she is being targeted because of his or her membership, regardless of whether there may be evidence that he is also being targeted on account of past acts. As long as the membership in a cognizable particular social group is a sufficient reason to meet the requisite nexus standard, evidence that he is also targeted on account of past acts should not undermine the claim.

The Ninth Circuit, in Madrigal v. Holder, reviewed a case where the petitioner based his past persecution claim partially on the mistreatment he suffered while serving in the military and partially on events that occurred after he left the military.[159] The Ninth Circuit analyzed the petitioner's proposed particular social group of "former Mexican army soldiers who participated in anti-drug activity," and noted that case law distinguishes between current versus former military or police service when determining whether a particular social group is cognizable.[160] The Ninth Circuit concluded that the petitioner's proposed particular social group was valid and remanded the case to the

[157] Lynden D. Melmed, USCIS Chief Counsel. Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007); Matter of C-A-, 23 I&N Dec. 951, 959 (BIA 2006); see also Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988); Estrada-Escobar v. Ashcroft, 376 F.3d 1042, 1047 (10th Cir. 2004) (finding that the rationale of Fuentes applies to threats from terrorist organizations resulting from an applicant's work as a law enforcement official targeting terrorist groups because the threat was received as a result of the employment, not the applicant's political opinion).

[158] Lynden D. Melmed, USCIS Chief Counsel. Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[159] Madrigal v. Holder, 716 F.3d 499, 503-04 (9th Cir. 2013).

[160] Id. at 504.

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Board.[161] Specifically, the Ninth Circuit noted, "Although mistreatment motivated purely by personal retribution will not give rise to a valid asylum claim, if a retributory motive exists alongside a protected motive, an applicant need show only that a protected ground is 'one central reason' for his persecution…. In Tapia Madrigal's case, even if revenge partially motivated Los Zetas' mistreatment of him, the record makes clear that their desire to intimidate members of his social group was another central reason for the persecution."[162]

The Seventh Circuit has indicated that "former law-enforcement agents in Mexico" can be a viable particular social group.[163] In that case, drug organizations initially offered the applicant, an investigator, bribes to cooperate with them; however, when he refused, they tried to kill him under their "plata o plomo" policy— "money or bullets." Afraid of being killed, the applicant resigned from his position and opened an office supply business, trying to conceal his former position. The Seventh Circuit concluded that being a former law enforcement agent is an immutable characteristic, as the applicant cannot erase his employment history.[164] The record also contained evidence supporting that the feared persecution was because the applicant was a former agent. The record contained evidence that drug organizations have tried to kill other officers who resigned from the police. The Seventh Circuit noted that "[p]unishing people after they are no longer threats is a rational way to achieve deterrence . . . [and] there's nothing implausible about [the applicant's] testimony that drug organizations in Mexico share this view of deterrence."[165]

4.14.2 Current Military/Police Membership

Current service as a soldier or police officer, under some circumstances, could define a particular social group if that service is so fundamental to the applicant's identity or conscience that he or she should not be required to change it. The applicant would also have to demonstrate that the purported social group has a distinct identity in the society, and that the group is particular. If these requirements are met, it is possible that an applicant could establish a cognizable social group in such circumstances.[166]

Even if membership in a particular social group is established in such a case, however, the determination that the persecution was or will be "on account" of the particular social group is especially difficult. The determination requires special scrutiny.

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[161] Id. at 505.

[162] Id. at 506 (internal citations omitted).

[163] R.R.D. v. Holder, 746 F.3d 807, 810 (7th Cir. 2014).

[164] Id.

[165] Id.

[166] See Lynden D. Melmed, USCIS Chief Counsel. Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

Harm inflicted on a police officer or soldier because of his role as a public servant carrying out his official government duties in an ongoing armed struggle or civil war is not on account of the applicant's membership in a group of police officers or soldiers.[167] Such a claim would therefore fail on the "on account of" element, even if the applicant has established membership in a group that constitutes a particular social group.

Under a different set of circumstances, if the evidence showed that the applicant was targeted because he or she was a police officer or soldier, the nexus requirement may be met. It is only where the harm is inflicted because of the applicant's membership in a group, rather than to interfere with his or her performance of specific duties, that the nexus requirement may be met. This is a particularly difficult factual inquiry. One factor that may assist in making this determination is whether the harm inflicted on the applicant or threats occur while the applicant is on official duty, as opposed to once the applicant has been taken out of combat or is no longer on duty.

The Ninth Circuit also has held that the general risk associated with military or police service does not, in itself, provide a basis of eligibility. The Ninth Circuit, like the BIA, recognizes a distinction between current service and former service when determining the scope of a cognizable social group.[168]

It is important to note that the fact of current service does not preclude eligibility. A police officer or soldier may establish eligibility if he or she can show that the persecutor is motivated to harm the applicant because the applicant possesses, or is perceived to possess, a protected characteristic. The following passage from Cruz-Navarro v. INS, is instructive:

> Fuentes, therefore, does not flatly preclude "police officers and soldiers from establishing claims of persecution or fear of persecution." [citing Velarde at 1311] Rather, Fuentes suggests that persecution resulting from membership in the police or military is insufficient, by itself, to establish persecution on account of membership in a particular social group or political opinion.[169]

The Seventh Circuit has not adopted the distinction between current and former police officers set forth in Fuentes. In dicta, the Court expressed disapproval of any reading of Fuentes that would create a per se rule that dangers encountered by police officers or military personnel during service could never amount to persecution. However, in the case before it, the Court upheld the BIA's determination that the dangers the applicant

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

[168] Cruz-Navarro v. INS, 232 F.3d 1024, 1029 (9th Cir. 2000); Velarde v. INS, 140 F.3d 1305 (9th Cir.1998) (former bodyguard of daughters of Peruvian President threatened by Shining Path with reference to the applicant's specific duties); see also Duarte de Guinac v. INS, 179 F.3d 1156 (9th Cir. 1999) (suffering while in military on account of applicant's race, not participation in military).

[169] Cruz-Navarro v. INS, 232 F.3d at 1029.

experienced while serving as a military and police officer arose from the nature of his employment and were not on account of a protected characteristic.[170]

4.15 Drug Traffickers

Under general principles of refugee protection, the shared characteristic of terrorist, criminal, or persecutory activity or association, past or present, cannot form the basis of a particular social group.[171] In Bastanipour v. INS, an applicant was convicted of trafficking in drugs in the United States and faced removal to Iran. He claimed a well-founded fear, asserting that the Iranian government executes individuals who traffic in illegal drugs. The Seventh Circuit held that:

> [w]hatever its precise scope, the term "particular social groups" surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do. A contrary conclusion would collapse the fundamental distinction between persecution on the one hand and the prosecution of nonpolitical crimes on the other. We suppose there might be an exception for some class of minor or technical offenders in the U.S. who were singled out for savage punishment in their native land, but a drug felon sentenced to thirty years in this country (though Bastanipour's sentence was later reduced to fifteen years) cannot be viewed in that light.[172]

4.16 Criminal Deportees

Similarly, the USCIS position that criminal activity or association may not form the basis of a particular social group is consistent with courts' views of criminal deportees as an invalid particular social group. In Elien v. Ashcroft, the First Circuit upheld a finding by the BIA that a group defined as "deported Haitian nationals with criminal records in the United States" does not qualify as a particular social group for the purposes of asylum. The First Circuit agreed with the BIA that it would be unsound policy to recognize criminal deportees as a particular social group, noting that the BIA had not extended particular social group to include persons who "voluntarily engaged in illicit activities."[173]

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[170] Ahmed v. Ashcroft, 348 F.3d 611, 616 (7th Cir. 2003).

[171] Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[172] Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992) (citations omitted).

[173] Elien v. Ashcroft, 364 F.3d 392, 397 (1st Cir. 2004); see also Toussaint v. Attorney General of U.S., 455 F.3d 409, 417 (3d Cir. 2006) (adopting the reasoning of the First Circuit in ruling that criminal deportees to Haiti do not constitute a particular social group).

USCIS00405

4.17 Persons Returning from the United States

The Ninth Circuit has held that "returning Mexicans from the United States" does not constitute a valid particular social group.[174] The applicant in that case pointed to reports of crime against Americans on vacation, as well as Mexicans who had returned to Mexico after living in the United States, to support the fear of harm based on membership in the proposed social group.[175]

The First Circuit has also upheld the BIA's conclusion that a group defined as "Guatemalan nationals repatriated from the United States" did not constitute a particular social group. In that case, the court reasoned that the applicant was essentially arguing that he would be targeted by criminals for perceived wealth, and "being a target for thieves on account of perceived wealth, whether the perception is temporary or permanent, is merely a condition of living where crime is rampant and poorly controlled."[176]

4.18 Tattooed Youth

The Sixth Circuit has found that a group of "tattooed youth" does not constitute a particular social group under the INA. The court found that having a tattoo is not an innate characteristic and that "tattooed youth" are not closely affiliated with one another. Further, the court stated that "the concept of a refugee simply cannot guarantee an individual the right to have a tattoo."[177]

4.19 Individuals Resisting and Fearing Gang Recruitment, and Opposition to Gang Authority

In Matter of S-E-G-, the BIA rejected a proposed particular social group defined as "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities," because it lacked "well-defined boundaries" that make a group particular and, therefore, lacked social visibility.[178] Similarly, in Matter of E-A-G-, the BIA held that the applicant, a young Honduran male, failed to establish that he was a member of a particular social group of "persons resistant to gang membership," as the evidence failed to establish that members of Honduran

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[174] Delgado-Ortiz v. Holder, 600 F.3d 1148, 1151-1152 (9th Cir. 2010).

[175] Id. at 1151-52.

[176] Escobar v. Holder, 698 F.3d 36, 39 (1st Cir. 2012).

[177] Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003).

[178] Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008).

society, or even gang members themselves, would perceive those opposed to gang membership as members of a social group.[179]

In Matter of M-E-V-G-, a Honduran gang threatened to kill the applicant if he refused to join the gang.[180] The applicant claimed that he was persecuted on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs. Citing S-E-G-, the BIA recognized that it is often difficult to conclude that such a group is much narrower than the general population, and noted that it might be difficult to satisfy the social distinction and particularity requirements.[181] The BIA, however, remanded the case for the immigration judge to analyze updated country conditions and arguments regarding the applicant's particular social group claim.[182] The BIA reasoned that its holdings in S-E-G- and E-A-G- should not be read as a blanket rejection of all factual scenarios involving gangs; the applicant's proposed particular social group had evolved during the pendency of his appeal; and the BIA's guidance on particular social group claims had been clarified since the case was last before the immigration judge.[183]

After the BIA's decision in M-E-V-G-, the Ninth Circuit, in Pirir-Boc v. Holder, held that a group characterized as individuals "taking concrete steps to oppose gang membership and gang authority" may be cognizable.[184] Prior to the Board's decision in M-E-V-G-, the Board had rejected the proposed group that Ninth Circuit analyzed in Pirir-Boc.[185] In Pirir-Boc, the petitioner's younger brother had joined the Mara Salvatrucha gang in Guatemala. Gang members overheard the petitioner instructing his brother to leave the gang. After his brother left the gang, gang members severely beat the petitioner and threatened to kill him. Without conducting case-specific analysis, the Board rejected the petitioner's proposed particular social group, citing to S-E-G-. On petition for review, the Ninth Circuit remanded the case to the Board to determine whether Guatemalan society recognizes the petitioner's proposed social group.[186]

In Rodas-Orellana v. Holder, the Tenth Circuit, applying M-E-V-G- and W-G-R-, upheld the BIA's determination that a social group characterized as "El Salvadoran males threatened and actively recruited by gangs, who resist joining because they opposed the gangs" was not socially distinct.[187] The Court found that the petitioner, a Salvadoran who

[179] Matter of E-A-G-, 24 I&N Dec. 591, 594-95 (BIA 2008).

[180] Matter of M-E-V-G-, 26 I&N Dec. 227, 228 (BIA 2014).

[181] Id. at 249-50.

[182] Id. at 253.

[183] Id. at 251-52.

[184] Pirir-Boc v. Holder, 750 F.3d 1077, 1084 (9th Cir. 2014).

[185] Id.

[186] Id. at 1084.

[187] Rodas-Orellana v. Holder, 780 F.3d 982, 992 (10th Cir. 2015).

USCIS00407

was threatened and beaten for refusing to join the Mara Salvatrucha, had not presented evidence suggesting that Salvadoran society perceived individuals who resisted gang recruitment as a distinct group; rather, the record in that case showed that "Salvadoran gangs indiscriminately threaten people for monetary gain or for opposing them."[188] The Court rejected the petitioner's argument that the case needed to be remanded for additional analysis in light of M-E-V-G and W-G-R-, finding that, unlike in Pirir-Boc, the Board had properly considered the record before it.

4.20 Non-Criminal Informants, Civilian Witnesses, and Assistance to Law Enforcement

The question of whether and when serving as a witness or providing other law enforcement assistance may form the basis of a particular social group is an evolving area of the law. In Matter of C-A-, the Board concluded that a group composed of confidential non-criminal informants did not constitute a particular social group.[189] The Board pointed out that "social visibility" is "limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members."[190]

Circuit courts have subsequently recognized select circumstances where serving as a witness or cooperating with law enforcement may form the basis of a particular social group. In *Garcia v. Att'y Gen. of U.S.*, involving an individual placed in witness protection and relocated by the Guatemalan Public Ministry outside of her country, the Third Circuit recognized that "[c]ivilian witnesses who have the 'shared past experience' of assisting law enforcement against violent gangs that threaten communities in Guatemala" share an immutable characteristic.[191] In Gashi v. Holder, involving an individual who observed alleged military crimes by a leader of the Kosovo Liberation Army and cooperated with international investigators by being placed on a list of potential witnesses though ultimately not testifying in court, the Second Circuit held that a group of cooperating witnesses could constitute a particular social group.[192] The Ninth Circuit held in Henriquez-Rivas v. Holder that witnesses "who testified in court against gang members" in El Salvador may be a cognizable particular social group.[193] The

[188] Id. at 993.

[189] Matter of C-A-, 23 I&N Dec. 951 (BIA 2006).

[190] Id. at 960 (emphasis added).

[191] *Garcia v. Att'y Gen. of U.S.*, 665 F.3d 496, 504 n.5 (3d Cir. 2011) (distinguishing case from C-A- because the applicant's identity was "known to her alleged persecutors," whereas in C-A- the assistance to law enforcement was confidential).

[192] Gashi v. Holder, 702 F.3d 130, 137 (2d Cir. 2012) (holding that the group was immutable due to the shared past experience, was socially visible due to Gashi being labeled as a traitor for meeting with international investigators, and particular due to the finite number of people who have cooperated with official war crimes investigators).

[193] Henriquez-Rivas v. Holder, 707 F.3d 1081, 1092 (9th Cir. 2013) (finding that the BIA erred in applying its own precedents in deciding whether Henriquez-Rivas was a member of a particular social group, citing to language in C-A- that those who testify against cartel members are socially visible); see also Madrigal v. Holder, 716 F.3d 499, 506 (9th Cir. 2013) (citing Henriquez-Rivas for the principle that a retributive motive may exist alongside a protected motive, noting, "Gang persecution of adverse witnesses would certainly have revenge as one motive, but group-based intimidation would be another.").

Henriquez-Rivas court concluded that "for those who have publicly testified against gang members, their 'social visibility' is apparent," as it involves "a distinct group of persons."[194] In addition, Henriquez-Rivas met the particularity criterion, as her "group can be easily verified – and thus delimited – through court records documenting group members' testimony."[195]

While the public nature of the past experience in Garcia[196] and Henriquez-Rivas[197] helped establish social distinction, the Ninth Circuit has emphasized that it "by no means intend[s] to suggest that the public nature of [the applicant's] testimony is essential" for a viable particular social group.[198] Further, in Garcia, the Third Circuit case, the assistance was not completely public in that the applicant testified while wearing a disguise.[199] The Board, in Matter of M-E-V-G-[200] and Matter of W-G-R-,[201] has since made clear that literal visibility in the public or elsewhere is not a requirement to show social distinction.

Some courts have rejected particular social groups where gangs were targeting and harming the petitioners, and then the petitioners reported the gangs to the police. For instance, in Zelaya v. Holder, the Fourth Circuit rejected a group consisting of young Honduran males who (1) refuse to join a gang, (2) have notified authorities of gang harassment, and (3) have an identifiable tormentor within the gang.[202] In Garcia v. Holder, the Eighth Circuit rejected a particular social group consisting of "young Guatemalan men who have opposed the MS–13, have been beaten and extorted by that gang, reported those gangs to the police[,] and faced increased persecution as a result" because the group was insufficiently particular and the petitioner failed to produce sufficient evidence of social distinction.[203]

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[194] Id. at 1093.

[195] Id.

[196] Garcia, 665 F.3d at 504.

[197] Henriquez-Rivas, 707 F.3d at 1092.

[198] Id. n.14.

[199] Garcia, 665 F.3d at 500.

[200] Matter of M-E-V-G-, 26 I&N Dec. 227, 240 (BIA 2014).

[201] Matter of W-G-R-, 26 I&N Dec. 208, 216 (BIA 2014).

[202] Zelaya v. Holder, 668 F.3d 159, 162 (4th Cir. 2012). While the Fourth Circuit rejected the proposed group in Zelaya due to lack of particularity, the court subsequently held in another case that "[e]ach component of the group…might not have particular boundaries[;]…[o]ur case law is clear, however, that the group as a whole qualifies." Temu v. Holder, 740 F.3d 887, 896 (4th Cir. 2014) (citing Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011) (recognizing a particular social group of family members of those who actively oppose gangs by agreeing to be prosecutorial witnesses, even if on its own, "'[p]rosecutorial witnesses' might reach too broad a swath of individuals" and "'those who actively oppose gangs' might be too fuzzy a label for a group.")).

[203] Garcia v. Holder, 746 F.3d 869, 872-73 (8th Cir. 2014).

USCIS00409

In Carvalho-Frois v. Holder, the First Circuit rejected a group of "witnesses to a serious crime whom the government is unable or unwilling to protect" as not socially visible.[204] The applicant in that case heard two gunshots at a neighbor's home, and was warned by two men leaving the home that she was in danger and not to reveal anything about what she saw. She subsequently learned that a murder had occurred. The applicant relocated after receiving a phone call that the callers knew where she lived and they would kill her if she said anything to the police. This decision was based on lack of social visibility, and was reached before the BIA's decisions in M-E-V-G- and W-G-R- on social distinction and particularity.

In addition, in Bathula v. Holder, the Seventh Circuit upheld the BIA's determination that an Indian applicant who was threatened after testifying in court against a land mafia had not established nexus to a protected ground because he "was the victim of intimidation and then retaliation for his specific testimony in a specific case against the land mafia" rather than on account of his membership in a particular social group, which he had defined as "those willing to participate, despite personal risk, in the orderly administration of justice against criminal elements."[205] The court only considered the nexus issue and did not address the validity of the group.

Several circuit courts have upheld decisions that applicants who served as informants in the U.S. did not establish persecution on account of a protected ground.[206] In Costa v. Holder, the First Circuit considered the case of a Brazilian applicant who had worked as an ICE informant in the United States and received indirect threats from the family of a man named Lelito who had been arrested because of the applicant's work. It upheld the BIA's conclusion that she had not established that the threats were on account of her membership in the particular social group of "former ICE informants."[207] The Court reasoned, "Although Costa participated in multiple sting operations, the record indicates that only Lelito's arrest triggered the threats that form the basis of her application....There is little to suggest that the scope of persecution extends beyond a 'personal vendetta.'."[208] Similarly, in Martinez-Galarza v. Holder, the applicant proposed two groups: people who have provided information to ICE to enable that organization to remove individuals residing illegally in the United States, and witnesses for ICE. The Eighth Circuit rejected

[204] Carvalho-Frois v. Holder, 667 F.3d 69, 73 (1st Cir. 2012) ("[t]he fact that the petitioner was known by a select few to have witnessed a crime tells us nothing about whether the putative social group was recognizable to any extent by the community… Because we discern no feature of the group that would enable the community readily to differentiate witnesses to a serious crime from the Brazilian populace as a whole, the claimed group is simply too amorphous to satisfy the requirements for social visibility.").

[205] Bathula v. Holder, 723 F.3d 889, 900-01 (7th Cir. 2013).

[206] See, e.g., Jonaitiene v. Holder, 660 F.3d 267 (7th Cir. 2011); Wang v. Gonzales, 445 F.3d 993 (7th Cir. 2006); U.S. v. Aranda-Hernandez, 95 F.3d 977 (10th Cir. 1996).

[207] Costa v. Holder, 733 F.3d 13, 17 (1st Cir. 2013).

[208] Id. See also Scatambuli v. Holder, 558 F.3d 53 (1st Cir. 2009); Amilcar-Orellana v. Mukasey, 551 F.3d 86, 91 (1st Cir. 2008) (involving a Salvadoran man who provided information to the police and testified before a grand jury concerning arson committed in the U.S. by two gang members, the First Circuit held, "Amilcar-Orellana's fear of persecution stems from a personal dispute with X and Y, not his membership in a particular social group.").

USCIS00410

a nexus to these proposed groups, stating, "Sanchez's alleged reason for wanting to harm Martinez–Galarza—because Martinez–Galarza ended Sanchez's American dream—is motivated by purely personal retribution, and thus not a valid basis for an asylum claim."[209] The court acknowledged, "There may be asylum protections for an applicant who shows the threatened persecution is motivated by both personal retaliation and a protected motive, but Martinez–Galarza presents no evidence to suggest this is the situation here. He does not allege that Sanchez has threatened or attacked other ICE informants."[210] Based on the specific facts of the case, it may nonetheless be possible that an informant to U.S. law enforcement officials may be able to establish eligibility.

When you encounter potential particular social groups related to testifying against criminals or cooperating with law enforcement against criminals, there is no bright-line rule about what type of testimony or law enforcement assistance will establish a cognizable particular social group. As the Board held in M-E-V-G- and W-G-R-, the viability of a particular social group must be analyzed on a society-by-society and case-by-case basis. You should analyze country reports, news articles, testimony, and other evidence to determine whether someone who assists law enforcement through courtroom testimony or other means is perceived by society as distinct. Depending on the evidence, a certain type of law enforcement assistance or witness testimony might be socially distinct in one society, but not in another society. You also would need to articulate how the proposed group has definable boundaries, so it is clear who fits within the group and who does not.

The nexus inquiry may be difficult in cases where an applicant claims to have been targeted for having assisted law enforcement. Even where such a social group is cognizable and the applicant is a member of the group, you should examine the evidence to determine whether the applicant was targeted on account of his or her membership in a group defined by past assistance to law enforcement.

It is possible that an applicant who appears to have been targeted out of revenge for having cooperated with law enforcement may also be able to establish nexus to a particular social group defined by this shared past experience. You must carefully consider any direct evidence in the record of the persecutor's motive and indirect evidence such as the timing and circumstances of the harm or threats the applicant claims to have experienced, the applicant's testimony about the experiences of similarly situated individuals in the society, and country conditions reports or news articles relating to the treatment of other members of the group to make this determination. You should generally first examine whether there exists a group that meets the requirements of a particular social group, and then should analyze whether the applicant was or will be persecuted on account of any cognizable particular social group.

[209] Martinez-Galarza v. Holder, 782 F.3d 990, 993 (8th Cir. 2015).

[210] Id. at 994 (internal citation omitted).

USCIS00411

4.21 Gang Members

The Ninth Circuit has found that "tattooed gang members" is not a particular social group, because the group is not defined with particularity. The court also found that neither former nor current gang membership constitutes a valid particular social group.[211]

A group defined as "gang members" is not a particular social group, despite having the shared immutable trait of past experience and arguably being able to establish the social distinction prong, because the group's shared experience stems from criminal activity.[212] Groups based upon criminality do not form the basis for protection, because the shared trait is "materially at war with those [characteristics] we have concluded are innate for purposes of membership in a social group."[213] To find otherwise, said the court, would pervert the humanitarian purpose of refugee protection by giving "sanctuary to universal outlaws." The court also found that "participation in criminal activity is not fundamental to gang members' individual identities or consciences."[214]

The court also analyzed whether current gang membership gives rise to a particular social group using the Ninth Circuit's alternate "voluntary association" test. The court found that current gang membership does not constitute a particular social group, because the gang association is for the purpose of criminal activity. Thus, it is not an association that is fundamental to human dignity; i.e., it is not the kind of association that a person should not be required to forsake. Therefore, current gang members are not members of a particular social group on the basis of their gang membership.[215]

The applicant also failed to establish a particular social group of "former" gang members. Disassociation from a gang does not automatically result in the creation of a new social group. Citing to Matter of A-M-E- & J-G-U-, the court found that "non-association" and "disaffiliation" are unspecific and amorphous terms, even if qualified with the word "tattooed," as in "former tattooed gang members."[216]

4.22 Former Gang Members

Some circuit courts have found that "former gang members" may be a particular social group. This finding is not consistent with USCIS's and RAIO's legal interpretation, according to which a particular social group may not be based on criminal activity or

[211] Arteaga v. Mukasey, 511 F.3d 940, 945 (9th Cir. 2007).

[212] Id. at 945-46.

[213] Id. at 945.

[214] Id. at 946.

[215] Id.; see also Henriquez-Rivas v. Holder, 707 F.3d 1081, 1097 (9th Cir. 2013) (acknowledging that the Board does not require members of a particular social group to share a voluntary associational relationship).

[216] Id.

associations, past or present.[217] However, for cases arising within the jurisdiction of those circuits, asylum officers must follow these rulings[218] as well as the analytical framework laid out by the BIA in Matter of W-G-R- and Matter of M-E-V-G.[219] See Asylum Supplement – Former Gang Membership as a Particular Social Group. Because refugee applications are adjudicated outside of the jurisdiction of any circuit court of appeals, refugee officers are not bound by these circuit court decisions and should follow USCIS, RAIO and RAD guidance.

5. SUMMARY

An applicant who is seeking asylum based on membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity. A common, immutable characteristic is one that the members of the group either cannot change, or should not be required to change because it is fundamental to the member's identity or conscience. For social distinction, a group's shared characteristic must be perceived as distinct by the relevant society. Social distinction does not require the shared characteristic to be seen by society (i.e., literally visible). To satisfy the particularity requirement, there must be a benchmark and definable boundaries for determining who falls within the group and who does not. All three elements are required, and the elements must be analyzed on a case-by-case basis and society-by-society basis. In analyzing particular social groups, it also is important to consider the other general principles discussed in this lesson plan, including: to avoid circular reasoning; to avoid defining a group by terrorist, criminal, or persecutory activity; and to recognize that voluntary association, cohesiveness, or homogeneity are not required.

You should also avoid conflating nexus with the validity of a particular social group. Even if an applicant establishes that he or she is a member of a particular social group, the applicant must still establish that he or she was persecuted, or has a well-founded fear of persecution, on account of his or her membership in the group. Membership in a particular social group also may be imputed to an applicant who, in fact, is not a member of a particular social group. Finally, membership in a particular social group may overlap

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[217] See Lynden D. Melmed, USCIS Chief Counsel, Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

[218] Urbina–Mejia v. Holder, 597 F.3d 360, 365–67 (6th Cir. 2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); Benitez Ramos v. Holder, 589 F.3d 426, 431 (7th Cir. 2009); Martinez v. Holder, 740 F.3d 902, 911-13 (4th Cir. 2014) (concluding that Martinez's membership in a group that constitutes former MS-13 members is immutable, but did not address the social distinction and particularity criteria. The court remanded the case to consider other criteria).

[219] Matter of W-G-R-, 26 I&N Dec. 208, 215 n.5 (BIA 2014) (opining that "[g]ang members willingly involved in violent, antisocial behavior are more akin to persecutors and criminals, who are barred from establishing eligibility for asylum and withholding of removal, than to refugees, whom the Act is intended to protect"); Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014).

USCIS00413

with other protected grounds, such as political opinion, and you should also consider whether the applicant can establish eligibility based on a different protected ground.

PRACTICAL EXERCISES

Practical exercises will be added at a later time.

Practical Exercise # 1

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

USCIS00415

OTHER MATERIALS

There are no "Other Materials" for this module.

USCIS00416

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

RAD Supplement

Given the nature of access to the U.S. Refugee Admissions Program (USRAP), many refugee applicants abroad are able to establish eligibility through nexus to one of the four protected grounds apart from membership in a particular social group (PSG). For that reason, a nexus to the other protected grounds should always be analyzed first. At pre-departure briefings, refugee officers will usually be informed of PSGs that have previously been recognized in populations they will be interviewing in that region. New PSGs are generally reviewed by the RAD Policy Branch to ensure consistency in RAD adjudications throughout all regions.

In the past, RAD has recognized PSGs of, for example, sexual minorities in certain countries as well as women from certain countries who have been subjected to sexual and gender-based violence (SGBV) who face familial and social ostracism, and other stigmatization or harm as a result. Before applying any of these PSGs to other populations, refugee officers must first ensure that the PSG meets the requisite three-part test and that country conditions support all elements of the PSG. For example, for women from a certain country who have been subjected to SGBV, country conditions should indicate that such women are socially distinct as

stigmatized, ostracized or facing other harm as a result of the violence before any such PSG claim is recognized to avoid circularity in the PSG definition.

For gender based PSG claims, it is also important to distinguish between UNHCR's designation of "women at risk" from any possible PSG to which such women may belong. "Women at risk" refers to one of UNHCR's seven categories for submission of refugees for resettlement and is one way in which a refugee may be granted access to the USRAP through a Priority 1 referral. However, UNHCR's identification of a refugee applicant as a "woman at risk" cannot be conflated with her eligibility for refugee status. Any gender-based PSG to which the applicant may belong must be fully analyzed and supported by the record and relevant evidence of country conditions where appropriate.

For further guidance, see RAIO Training Module, Gender-Related Claims; RAD Policy Branch, Responses to Queries: PSGs within the context of Afghan Women at Risk and PSGs within the context of sexual and gender based violence against Congolese women. Please note that these RAD documents were issued prior to the Board's articulation of the three-part test in 2014. Nonetheless, the documents contain other relevant guidance and suggested lines of inquiry.

SUPPLEMENT B – ASYLUM DIVISION

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

ASM Supplement - Former Gang Membership as a Particular Social Group in the Fourth, Sixth, and Seventh Circuits

Prior to the Board of Immigration Appeals' decisions in Matter of M-E-V-G- and Matter of W-G-R, the Sixth and Seventh Circuits issued decisions holding that former gang membership can form the basis of a particular social group.[220] The Fourth Circuit has also held that former members of the MS-13 gang in El Salvador shared an immutable characteristic and rejected the argument that a particular social group may not be defined by former criminal associations, though it did not decide whether the group met the "particularity" or "social distinction" criteria and remanded for the Board to consider whether the proposed group met those criteria.[221] On the other hand, the First and Ninth Circuits have held that former gang membership does not give rise to a particular social group.[222]

[220] Urbina–Mejia v. Holder, 597 F.3d 360, 365–67 (6th Cir.2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

[221] Martinez v. Holder, 740 F.3d 902, 911-13 (4th Cir. 2014).

USCIS00419

In W-G-R-, the Board considered the case of an applicant who claimed that he had been targeted by the Mara 18 gang in El Salvador for retribution because he had left the gang.[223] The Board held that the applicant's proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not sufficiently particular, because it could include people of any age, sex, and background and their participation in the gang could vary widely in terms of strength and duration, or socially distinct, because there was not enough evidence in the record about the treatment or status of former Mara 18 members in Salvadoran society.[224] In addition, the Board opined that "[g]ang members willingly involved in violent, antisocial behavior are more akin to persecutors and criminals, who are barred from establishing eligibility for asylum and withholding of removal, than to refugees, whom the Act is intended to protect."[225] The Board quoted from its decision in Matter of E-A-G-, stating, "Treating affiliation with a criminal organization as being protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior."[226]

As the Fourth, Sixth, and Seventh Circuits have issued decisions that conflict with USCIS's interpretation of the term "particular social group" not to include groups based on past or present criminal, persecutory, or terrorist activity or association, and the Board has not expressly held that these decisions have been superseded, asylum officers adjudicating cases in those circuits may not rely on this principle. No circuit court, however, has yet considered whether social groups based on former membership in a criminal gang may be cognizable according to the three-part test set forth in M-E-V-G- and W-G-R-. Asylum Officers in the Fourth, Sixth, and Seventh Circuits must consider whether groups based on former criminal activities or associations are valid by applying all three criteria as articulated in the Board decisions.

[222] See Cantarero v. Holder, 734 F.3d 82, 86 (1st Cir. 2013) ("The shared past experiences of former members of the 18th Street gang include violence and crime. The BIA's decision that this type of experience precludes recognition of the proposed social group is sound."); Arteaga v. Mukasey, 511 F.3d 940, 945-46 (9th Cir. 2007) ("We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft."); cf. Elien v. Ashcroft (1st Cir. 2004) (in rejecting repatriated Haitian criminals as a particular social group, stating, "the BIA has never extended the term 'social group' to encompass persons who voluntarily engaged in illicit activities"); Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992) (rejecting drug traffickers as a particular social group).

[223] Matter of W-G-R-, 26 I&N Dec. 208, 209 (BIA 2014).

[224] Id. at 221.

[225] Id. at 215 n. 5.

[226] Id. (quoting Matter of E-A-G-, 24 I&N Dec. 591, 596 (BIA 2008)).

SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

USCIS00421

U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

NEXUS AND THE PROTECTED GROUNDS*

TRAINING MODULE

***Note:** There are five protected grounds in the refugee definition. "Particular social group" (PSG) is one of these grounds but is not discussed in this module. PSG is covered in a separate module, *Nexus – Particular Social Group.*

DATE (see schedule of revisions): 12/20/2019

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USCIS00423

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

NEXUS AND THE PROTECTED GROUNDS*

Training Module

MODULE DESCRIPTION:

This module discusses the definition of a refugee as codified in the Immigration and Nationality Act (INA), including the five protected grounds and their interpretation in administrative and judicial case law. The primary focus of this module is the determination as to whether an applicant has established that past harm suffered or future harm feared is on account of one of the five protected grounds. Only four of the grounds are discussed in this module; the fifth ground, "particular social group" is the topic of another module: *Nexus – Particular Social Group*.

TERMINAL PERFORMANCE OBJECTIVE(S)

Given a request to adjudicate either a request for asylum or a request for refugee status, the officer will be able to apply the law (statutes, regulations and case law) to determine whether an applicant is eligible for the requested relief.

ENABLING PERFORMANCE OBJECTIVES

1. Summarize factors to consider in evaluating the motive of the persecutor.
2. Explain factors to consider in determining whether persecution or feared persecution is on account of one or more of the protected grounds, i.e., race, religion, nationality, (membership in a particular social group), or political opinion.
3. Analyze factors to consider in determining whether an applicant possesses, or is imputed to possess, a protected belief or characteristic.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Practical Exercises

METHOD(S) OF EVALUATION

REQUIRED READING

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

1. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).
2. United Nations High Commissioner for Refugees, *Note on Refugee Claims Based on Coercive Family Planning Laws or Policies* (Aug. 2005)
3. United Nations High Commissioner for Refugees, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*. HCR/GIP/04/06, 28 April 2004, 12 pp. See RAIO Training Module, The International Religious Freedom Act (IRFA) and Religious Persecution Claims.
4. David A. Martin. INS Office of General Counsel. *Asylum Based on Coercive Family Planning Policies -- Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Memorandum to Management Team (Washington, DC: 21 October 1996), 6 p. *See* RAIO Training Module, Refugee Definition.
5. Phyllis Coven. INS Office of International Affairs. *Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Gender Guidelines)*, Memorandum to all INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p. *See also* RAIO Training Module, Gender-Related Claims.
6. Grover Joseph Rees III. INS Office of General Counsel. *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion -- Addendum,* Memorandum to John Cummings, INS Office of International Affairs (Washington, DC: 4 March 1993), 3 p.
7. Grover Joseph Rees III. INS Office of General Counsel. *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion*, Memorandum to Jan Ting, INS Office of International Affairs (Washington, DC: 19 January 1993), 12 p.

Additional Resources – International and Refugee Adjudications

Additional Resources – Asylum Adjudications

CRITICAL TASKS

Task/ Skill #	Task Description
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ILR9	Knowledge of policies and procedures for processing lesbian, gay, bisexual and transgender (LGBT) claims (3)
ILR10	Knowledge of policies and procedures for processing gender-related claims (3)
ILR14	Knowledge of nexus to a protected characteristic (4)
ILR15	Knowledge of the elements of each protected characteristic (4)
DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence) (5)
RI1	Skill in identifying issues of claim (4)
RI2	Skill in identifying the information required to establish eligibility (4)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
12/12/2012	Entire Lesson Plan	Lesson Plan published	RAIO Training
4/29/2013	2.1 Establishing Motive: (Mixed Motive section); Asylum Supplement	Language modified; ASM Supplement section “At Least One Central Reason” added and linked from section 2.1	J. Kochman, RAIO Training
1/21/2016	Throughout document	Fixed links, added some new case citations	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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SUPPLEMENT B – ASYLUM ADJUDICATIONS 52

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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 refugee definition at INA § 101(a)(42) states that an individual is a refugee if he or she establishes past persecution or a well-founded fear of future persecution on account of one or more of the five protected grounds. All of the elements of the refugee definition are reviewed in the RAIO Training Module, *Refugee Definition.* The requirements for an applicant to establish eligibility based on past persecution are discussed in the RAIO Training module, *Definition of Persecution and Eligibility Based on Past Persecution*. The elements necessary to establish a well-founded fear of future persecution are discussed in the RAIO Training module, *Well-Founded Fear*.

This module provides you with an understanding of the requirements needed to establish that persecution or feared persecution is "on account of" one or more of the five protected grounds in the refugee definition: race, religion, nationality, membership in a particular social group, or political opinion. Note: "particular social group" is not being discussed in this module; it is covered in a separate module, *Nexus – Particular Social Group*.

To properly determine whether persecution is on account of a protected ground, you must identify: 1) the persecutor; 2) the harm suffered or feared; 3) the applicant's characteristic or belief (actual or imputed); and 4) the motivation of the persecutor.

2 "ON ACCOUNT OF" (NEXUS) – ANALYZING MOTIVE

The persecution the applicant suffered in the past, or fears in the future, must be "on account of" at least one of the five protected grounds. This means the applicant must establish that the persecutor was, or will be, motivated to harm the applicant because of

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his or her race, religion, nationality, membership in a particular social group, or political opinion. [1] The persecutor may be motivated to harm the applicant because the applicant actually possesses a protected belief or characteristic, or because the persecutor wrongly believes that the applicant possesses a protected belief or characteristic.

2.1 Determining Motive

Exact Motive Need Not Be Established

Although the applicant must establish that the persecutor harmed or will harm him or her because of one of the five protected grounds, the applicant does not "bear the unreasonable burden of establishing the [persecutor's] exact motivation." [2] The BIA has recognized that "[p]ersecutors may have differing motives for engaging in acts of persecution." [3] You should make reasonable inferences, keeping in mind the difficulty, in many cases, of establishing with precision a persecutor's motives.

Mixed Motives

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.

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.[4] 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.[5] 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

[1] INA § 101(a)(42); *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

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

[3] *Matter of S-P-*, 21 I&N Dec. at 489.

[4] 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." *Matter of Fuentes*, 19 I&N Dec. at 662.

[5] INA § 208(b)(1)(B)(i), as amended by Section 101(a) of the Real ID Act of 2005, as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, P.L. 109-13 (2005) (hereinafter, "REAL ID Act"). The REAL ID Act added the words "at least one central reason" to describe the extent to which persecution must be on account of a protected ground. *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211(BIA 2007), *reversed in part by Ndayshimiye v.Att'y Gen. of the U.S.*, 557 F.3d 124, 129–30 (3d Cir. 2009). This provision of the REAL ID Act applies to asylum applications filed on or after May 11, 2005.

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motivations.[6] These are the same cases governing mixed motivation cases in refugee processing; thus, the analysis in cases involving mixed motivation is similar in both the refugee and asylum contexts.

The conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of persecution.[7] For example, a rebel group may extort money to fund its operations, but target its political opponents for extortion based on their political opinion.

For further discussion, see Asylum Adjudications Supplement – At Least One Central Reason.

Persecutor's Perception of the Applicant

The persecution must be motivated by a protected belief or trait possessed by ***the applicant***. The persecutor's own political goals or representation of a political entity is not sufficient in itself, nor is it necessary, to establish persecution on account of political opinion. Rather, the evidence must show that the persecutor is motivated to persecute the applicant because ***the applicant*** possesses (or is believed to possess) a protected belief or trait.[8]

Initial Motivation Not Determinative

The persecutor's motives may change over time. There is no requirement that the persecutor's harmful contact with the applicant be initially motivated by the applicant's possession of a protected belief or characteristic.[9]

Example

In *Sharma v. Holder*, Maoists in Nepal first contacted the applicant and kidnapped him in order to recruit him. At the point when he was abducted, there was no evidence that the Maoists were motivated to harm him because of a protected ground.

After he was abducted, the applicant expressed his opposition to the Maoists and his support for a group that opposed them, the Nepal Student Union (NSU). The Maoists did not directly state that they were motivated by the applicant's expression of his

[6] *Matter of J-B-N- & S-M-*, 24 I&N Dec. at 214 ("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.")

[7] *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994).

[8] *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992); *See also* *Pedro-Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000) (holding that the evidence did "not indicate that the Kanjobal Indians have been recruited *because* of their race, political opinion, or any other protected ground")(emphasis in original).

[9] *See* *Sharma v. Holder*, 729 F.3d 407, 412–13 (5th Cir. 2013).

political opinion, but he was then subjected to harsher mistreatment and a longer detention than other individuals who had been abducted at the same time.

Although the Maoists had attempted to force the applicant to join them and work for them for reasons unrelated to a protected ground and there was no direct evidence of a protected ground, the Fifth Circuit Court of Appeals found that the escalation of the abuse and the prolonged detention after he expressed his views was evidence of a nexus between the persecution and his political opinion.[10]

No Punitive or Malignant Intent Required

In most cases, the persecutor intends to harm or punish the applicant. Punitive or malignant intent, or an intent to overcome the protected trait, however, is not required for an applicant to establish a nexus to a protected ground.[11] For example, the persecutor may believe that he or she is helping the applicant by attempting to change the protected characteristic or that he or she has the right to harm the applicant because the applicant has the protected characteristic.[12] The relevant inquiry regarding motivation, therefore, is whether the persecutor has committed an intentional action, or intends to commit an intentional action, because of a characteristic (or perceived characteristic) of the victim.[13]

Examples

- The applicant was detained, harassed, beaten, and forced to undergo psychiatric treatment because of her sexual orientation. The court found that it was improper to conclude that the applicant did not suffer persecution when the authorities' intent was to "cure" the applicant, not "punish" her.[14] "The fact that a persecutor believes the harm inflicted is 'good for' his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution."[15]

- The applicant established the required motive by showing that female genital mutilation (FGM), as described in her case, was practiced "in some significant part, to

[10] *Id.* at 412.

[11] For additional information on whether "harm" is "persecution," see RAIO Training Module, Definition of Persecution and Eligibility Based on Past Persecution. *See also* Dea Carpenter, USCIS Deputy Chief Counsel, Guidance on Demiraj v. Holder, 631 F.3d 194 (5th Cir. 2011), Memorandum to Ted Kim, Acting Director, Asylum Division (Washington, DC: February 23, 2012).

[12] *See*, *e.g.*, *DHS's Supplemental Brief in Matter of L-R-*, April 13, 2009 (arguing that an individual in the particular social groups of "Mexican women in domestic relationships who are unable to leave" or "Mexican women who are viewed as property by virtue of their positions within a domestic relationship" could establish a nexus to a particular social group if the persecutor believed that he had the right to abuse the victim because she possessed the characteristics that defined the group).

[13] *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *see also* *Pitcherskaia v. INS*, 118 F.3d 641, 648 (9th Cir. 1997).

[14] *Pitcherskaia v. INS*, 118 F.3d at 647–48.

[15] *Id*. at 648.

overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM."[16] The required persecutory motive was established even though the FGM was inflicted by the applicant's tribe with a "subjectively benign intent."[17]

Prosecution vs. Persecution

All countries have the right to investigate, prosecute, and punish individuals for violations of legitimate laws.[18] This can create serious complications in refugee and asylum adjudication, as government actors often use the guise of legitimate prosecution to harm applicants on account of a protected ground.[19] Conversely, applicants may also claim that a government has instituted criminal prosecution against them because of a protected ground when, in fact, the government is seeking to punish the applicant because he or she violated a criminal law of general applicability. It is also possible that the government has mixed motives and punished the applicant for both a violation of a criminal law and on account of his or her possession of a protected belief or characteristic. You must consider all the facts in the case, along with relevant country of origin information, in determining the government's motivation in instituting criminal processes against an applicant.

Laws of General Applicability

You must also determine if the law that is being used to punish the applicant is a law of general applicability, in that it is neutral in intent. If the law is generally applicable, then, you must determine if the government in question enforces the law fairly. In general, fear of prosecution for a law that is fairly administered is not a basis for asylum or refugee status. Under certain circumstances, *i.e.*, where the law punishes an individual because of a protected ground and the punishment rises to the level of persecution, a person may qualify for protection.[20]

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[16] Matter of Kasinga, 21 I&N Dec. at 367.

[17] *Id.*

[18] UNHCR Handbook, para. 56; Dinu v. Ashcroft, 372 F.3d 1041, 1044–45 (9th Cir. 2004) (harassment resulting from an investigation does not give rise to an inference of political persecution where police are trying to find evidence of criminal activity and there is a logical reason for pursuit of the individual).

[19] Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996); UNHCR Handbook, para. 57–59.

[20] *See, e.g.*, Long Hao Li v. Holder, 633 F.3d 136, 141 (3d Cir. 2011); Chang v. INS, 119 F.3d 1055 (3d Cir. 1997) (determining that "if the law itself is based on one of the enumerated factors and if the punishment under that law is sufficiently extreme to constitute persecution, the law may provide the basis for asylum or withholding of deportation even if the law is "generally" applicable."); Cruz-Samayoa v. Holder, 607 F.3d 1145, 1152 (6th Cir. 2010); Perkovic v INS, 33 F.3d 615 (6th Cir. 1994) (holding that prosecution for violation of laws against expressing political opinions hostile to the government or engaging in political activity outside of country constitutes persecution on account of political opinion). *But see* Kimumwe v. Gonzales, 431 F.3d 319, 322 (8th Cir. 2005) (finding that expulsion from school and arrestdid not amount to persecution on account of the applicant's homosexuality where the applicant had been accused of sexual misconduct prohibited for straight as well as gay people).

Examples

- A law prohibits all religious groups from meeting on Fridays. This law would be considered a law of general applicability. However, because the law would punish Muslims, whose day of prayer is on Friday, the harm inflicted by the government under this law would be considered harm inflicted on account of religion.

- A law prohibits all political rallies in a certain city square. In practice, many political rallies are held in the square, but only members of the Socialist Party are arrested and prosecuted under the law. Unequal enforcement of a law that appears neutral may be evidence of persecutory intent. Here, the harm inflicted on a member of the Socialist Party under the law would be considered harm inflicted on account of the member's political opinion.

- A law that criminalizes attending unregistered religious group meetings is not a law of general applicability and harm suffered by an applicant under such a law would be considered harm suffered on account of his or her religion.

However, it is important to remember that simply because a law has some impact on one of the protected grounds, does not mean the law is not a law of general applicability.[21]

Examples

- In Germany, all children are required by law to attend public or state-sanctioned private schools. Parents who fail to ensure their children's attendance may be subject to fines, imprisonment, or loss of custody. In *Romeike v. Holder*, a German couple who homeschooled their children in accordance with their religious values claimed that they feared persecution on account of their religion for violating the compulsory attendance law. The Sixth Circuit Court of Appeals held that because the law applies equally to all parents who fail to comply, is not intended to target the applicants' religion, and does not impose disproportionately harsh penalties on parents who homeschool for religious reasons or homeschoolers in general, no nexus had been established.[22]

- A curfew imposed during a period of civil unrest prevents individuals from attending evening religious services. If the law is not intended to target individuals because of their religious beliefs, but rather to ensure public safety, no nexus to religion would be established.

Unduly Harsh Punishment

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[21] *See* Romeike v. Holder, 718 F.3d 528 (6th Cir. 2013).

[22] *Id.* at 533–34.

Punishment that is unduly harsh or disproportionately severe given the nature of the offense committed may be evidence that a government was motivated to harm an applicant on account of one of the protected grounds. In such cases, you should examine country conditions for information on how the country's law enforcement community generally handles violations of the same or similar laws. If the applicant's treatment is significantly worse, this may show that the government harmed the applicant on account of a protected ground.

The government's deprivation of an applicant's basic due process rights, along with serious harm inflicted during detention, suggests the government may have been motivated to harm the applicant on account of a protected ground. However, a showing that an applicant did not receive the due process expected in the United States, without more, does not establish that the investigation or prosecution is pretextual.

The BIA has provided the following list of considerations to aid in identifying motive in this context:[23]

- Indications that the abuse was directed toward modifying or punishing opinion rather than conduct. This includes statements or actions by the government out of proportion to legitimate government functions
- Treatment of others in the population who might be confronted by government agents in similar circumstances
- Conformity to procedures for criminal prosecution or military law, including developing international norms regarding the law of war
- The extent to which anti-terrorism laws are defined and applied to suppress political opinion as well as illegal conduct (e.g., an act may broadly prohibit "disruptive" activities and be applied to peaceful as well as violent expressions of views)
- The extent to which suspected political opponents are subjected to arbitrary arrest, detention, and abuse

Some general issues to consider in evaluating claims involving the use of law-enforcement mechanisms include:

- Is the law generally applicable?
- Is the law equally or unequally enforced?
- How does the persecutor view those who violate the law?
- How does compliance with the law affect the applicant's life with regard to the protected characteristics?

[23] _Matter of S-P-_, 21 I&N Dec. 486, 494 (BIA 1996).

Violation of Departure Laws

Punishment for violating departure laws does not, without more, establish an applicant's eligibility for asylum or refugee resettlement. A government has legitimate authority to establish and enforce laws governing departure from the country.[24]

Punishment for violation of travel laws might be used as a pretext to persecute the individual on account of one of the protected grounds.[25] Evidence that the punishment is used as a pretext for persecution may include punishment disproportionate to the crime or country of origin information showing the country in question views individuals who violate departure laws as traitors or subversives.[26]

2.2 Evidence of Motive

Both direct and circumstantial evidence are relevant to determining whether a persecutor was motivated to harm an applicant on account of a protected ground.

Duty to Elicit Testimony

Asylum and refugee applicants are not expected to understand the complexities of the law and may not realize that they are required to establish the motive of the persecutor.[27] Applicants may not know what evidence is relevant to establishing the persecutor's motive. Applicants may not understand the scope of the five protected grounds, and they may be unable to articulate which ground motivated the persecutor.

Although the applicant bears the burden of proof to establish a nexus between the harm, or feared harm, and a protected ground, you have an affirmative duty to elicit all information relevant to the nexus determination.[28] You should fully explore the motivations of any persecutor involved in a case. Reasonable inferences regarding the

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[24] Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983); Nazaraghaie v. INS, 102 F.3d 460 (10th Cir. 1996).

[25] *See* UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para. 61, which states:

The legislation of certain States imposes severe penalties on nationals who depart from the country in an unlawful manner or remain abroad without authorization. Where there is reason to believe that a person, due to his illegal departure or unauthorized stay abroad is liable to such severe penalties his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons enumerated in Article 1 A (2) of the 1951 Convention . . .

[26] *See* Rodriguez-Roman v. INS, 98 F.3d 416, 430 (9th Cir. 1996) ("[A] state which severely punishes unlawful departure views persons who illegally leave as disloyal and subversive and seeks to punish them accordingly."); Chang v. INS, 119 F.3d 1055 (3rd Cir. 1997) .

[27] *See* Jacinto v. INS, 208 F.3d 725, 733–34 (9th Cir. 2000) ("Applicants for asylum often appear without counsel and may not possess the legal knowledge to fully appreciate which facts are relevant." IJs "are obligated to fully develop the record in [such] circumstances…").

[28] 8 C.F.R. § 208.9(b). *See also* Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); RAIO Training Module, *Evidence*.

motivations of persecutors should be made, taking into consideration the culture and patterns of persecution within the applicant's country of origin.

You may use country of origin information to help you determine the motivation of the persecutor to harm the applicant, especially if the applicant is having difficulty answering your questions regarding motivation.

Many applicants may not know a belief or characteristic is the basis for a refugee or asylum claim and may be reluctant to share information for a variety of reasons, including fear, shame, and ignorance. This is especially true where applicants are not represented. They may only put forward the elements of their past experiences that their family or members of their communities recommend. It is important to explore all possible grounds, despite the applicant's difficulty in articulating a basis for the claim.

The UNHCR *Handbook* points out that the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the adjudicator. Your role is to "ensure that the applicant presents his case as fully as possible and with all available evidence."[29]

Direct Evidence

Sometimes an applicant is able to provide direct evidence of motive.

Examples of Direct Evidence of Motive

- The persecutor warned the applicant to stop all political activities or face arrest.

- The persecutor's statements and actions are evidence of motive. For example, in a case where a police officer arrested an asylum applicant after having asked if the applicant was gay, and made statements about the applicant's sexuality during a sexual assault, the Ninth Circuit held that these facts constituted sufficient grounds to establish that the officer was motivated to target the applicant on account of his homosexuality.[30]

- The persecutor uses derogatory language, such as a racial, ethnic, or religious slur, when harming or threatening the applicant.

- There are laws in the applicant's country prohibiting the practice of certain religions or punishing apostasy.

- There are laws in the applicant's country that punish homosexual activity.

Circumstantial Evidence

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[29] *UNHCR Handbook*, para.196.

[30] *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1089 (9th Cir. 2005).

Often an applicant will not be able to provide direct evidence of motive, since persecutors do not generally announce their motives or explain their actions. However, motive may be established by circumstantial evidence.[31]

Examples of Circumstantial Evidence of Motive

- Evidence that the persecutor has harmed other individuals who share the applicant's protected belief or characteristic may support an applicant's claim that he or she was targeted on account of a protected characteristic.[32] While evidence that the persecutor seeks to harm others is relevant, it is not required.
- Close proximity in time of arrest to participation in an opposition party meeting may be circumstantial evidence of a connection between the arrest and the applicant's political opinion.
- Country of origin information may provide circumstantial evidence of motive. For example, a reliable report may establish that the persecutor views individuals who are similarly situated to the applicant (e.g., human rights workers or student activists) as political opponents.

Circumstantial evidence may be sufficient to satisfy the nexus requirement, even when the identity of the persecutor cannot be proven precisely. In *Bace v. Ashcroft*, the Court of Appeals for the Seventh Circuit pointed to both the proximity in time between the applicant's political activity and the harm he suffered, as well as his attackers' statements suggesting that they were likely members of the opposing political party.[33] Although the applicant could not establish the identity of the attackers, he provided sufficient evidence that he was harmed on account of his political opinion.

3 PROTECTED GROUNDS

3.1 Broad Construction

The five protected grounds should be construed broadly. They often include attributes that may not fit an everyday understanding of the terms.

Examples

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

[32] *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).

[33] Bace v. Ashcroft, 352 F.3d 1133, 1139 (7th Cir. 2003).

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- An individual may face persecution on account of religion, even if he does not characterize his belief, identity, or way of life, as a "religion."[34] Additionally, an individual may establish a nexus based on his choice not to participate in religion.

- Persecution based on political opinion can encompass a much broader array of actions beyond political party membership, including whistleblowing,[35] refusal to follow orders to commit human rights abuses,[36] and, in some instances, opposition to gang violence or recruitment.[37]

- Persecution that at first glance may appear to be based on a personal vendetta or dispute may actually be on account of a protected ground. For example, this may be true in cases where the persecution feared is an honor killing by a family member.[38]

You should analyze the existence of a protected ground in the context of the culture of the country of origin. To the extent possible, you should avoid viewing the case through the prism of your own experiences and world view. However, claims based on purely personal matters, criminal activity, economic gain and laws of general applicability fall outside the protection of asylum and refugee law.[39]

3.2 Duty to Elicit Information regarding all Potential Connections to Protected Ground

An applicant may be unable to articulate a connection to a particular protected characteristic. He or she may state that the claim is based on one ground, while the facts indicate that there is an alternative connection to another ground, or that a connection to another ground may be more relevant to whether the applicant is a refugee. You must determine which protected ground, if any, has a relation to the experiences of the applicant.

Example

If the applicant states that he or she fears harm on account of religion, but the facts of the case indicate that the persecutor was motivated by the applicant's political opinion, then you must evaluate the claim based on political opinion as well as religion.

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[34] *See* *Zhang v. Ashcroft*, 388 F.3d 713 (9th Cir. 2004) (per curiam) (holding that Falun Gong practitioner faced persecution on account of his spiritual and religious beliefs even though Falun Gong does not consider itself a religion).

[35] *Zhang v. Gonzales*, 426 F.3d 540 (2d Cir. 2005).

[36] *Barraza Rivera v. INS*, 913 F. 2d 1443 (9th Cir. 1990).

[37] *Marroquin-Ochoma v. Holder*, 574 F. 3d 575 (8th Cir. 2009).

[38] *Sarhan v. Holder*, 658 F.3d 649, 656 (7th Cir. 2011)

[39] For more information on crime and personal disputes, see below Section 9.7, Crime and Personal Disputes.

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3.3 Imputation of Protected Ground

An applicant is not required to actually possess the protected trait that motivates the persecutor. Persecution inflicted on an applicant because the persecutor attributes to the applicant a protected ground constitutes persecution "on account of" that characteristic, regardless of whether the applicant actually possesses the characteristic.[40] Any of the five protected grounds can be imputed to an applicant.

Examples

- In *Amanfi v. Ashcroft,* the Third Circuit held that an applicant who was targeted because his persecutors believed he was gay could establish persecution on account of imputed membership in a particular social group defined as "homosexuals in Ghana" although "he testified that he was not in fact a homosexual." [41]

- An individual who has relatives who are members of the Baha'i Faith is arrested and badly beaten by the police during a government crackdown on Baha'is. If the evidence supports the conclusion that the authorities believed she was Baha'i, the harm she experienced would be considered to have been inflicted on account of her imputed religion, even though she is not a believer.

The determinative inquiry is whether the persecutor believes the applicant possesses a protected belief or characteristic and whether the persecutor is motivated to harm the applicant because of that imputed belief or characteristic. Some factors to consider include:

- Actions the applicant has taken that would lead the persecutor to believe that he or she possesses a protected belief or characteristic

  Example

  During the exile of President Aristide, the *de facto* government in Haiti associated members of neighborhood improvement committees with President Aristide. In the eyes of the Haitian military and their supporters, sweeping a street or participating in a literacy campaign indicated support for the exiled president.

- Statements the persecutor makes that may constitute evidence that he or she believes the applicant, or persons similarly situated to the applicant, possesses a protected trait

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[40] *See* Grover Joseph Rees III, INS Office of General Counsel, *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion,* Memorandum to Jan Ting, Acting Director, Office of International Affairs, at 12 (Jan. 19, 1993).

[41] *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003).

- Treatment of similarly situated individuals
- Country of origin information that may provide an understanding of the overall situation in the applicant's country, and provide a context for the persecutor's actions
- Severity of any punishment the applicant received or fears, which may be so far out of proportion "as to seem obviously directed at real or perceived enemies rather than at ordinary lawbreakers"[42]
- Reasons, unrelated to a protected ground, for the persecutor to harm the applicant[43]

4 RACE

4.1 Definition

"Race" should be understood broadly to include all kinds of ethnic groups that are "referred to as races in common usage."[44] Race sometimes overlaps with nationality as a protected ground.

While the idea of "race" is often popularly understood to involve distinct biological groupings, such ideas are scientifically discredited.[45] National and regional cultures vary greatly in their construction of racial groupings. You should, to the extent possible, avoid viewing the case through the prism of your own experiences and world view regarding which "race" an applicant belongs to. The relevant inquiry is how the country of origin or segments of the population delineate racial groupings, and where the applicant fits into that delineation.

4.2 Harm Suffered Because of the Applicant's Disregard of Racial Barriers

Harm suffered because of an applicant's violation of or refusal to adhere to legal or cultural racial barriers within a society may be considered to have been inflicted on account of the applicant's race.[46]

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[42] *See* Grover Joseph Rees III, INS Office of General Counsel, "Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion," Memorandum to Jan Ting, Acting Director, Office of International Affairs, at 12 (Jan. 19, 1993).

[43] *Matter of S-P-*, 21 I & N Dec. 486, 495–96 (BIA 1996) (finding that although the applicant may have been initially detained for intelligence gathering purposes, the severity and duration of harm suffered exceeded any legitimate intelligence motive).

[44] UNHCR Handbook, para. 68. *See*, *e.g.*, *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 n.5 (9th Cir. 1999).

[45] "Scientific and Folk Ideas about Heredity," Jonathan Marks, available at http://www.pbs.org/race/000_About/002_04-background-01-12.htm

[46] *See*, *e.g.*, UNHCR Handbook, para. 69; *cf.* *Bob Jones University v. United States*, 461 U.S. 574, 612 (1983) (concluding, in the civil rights context, that a university's ban on interracial relationships constituted racial discrimination).

Example

A statute prohibits interracial marriage. A black applicant is arrested and prosecuted when she attempts to marry a person of a different race. Any harm she suffers related to this incident is on account of her race.

Depending on the facts of the case, a finding that the harm was inflicted on account of the applicant's political opinion may also be appropriate.

5 RELIGION

5.1 Definition

The protected ground of religion has been broadly defined to include the right to freedom of thought, conscience, and belief. Religion, as a protected ground, is not limited to familiar religious beliefs and practices. For purposes of establishing refugee and asylum eligibility, persecution suffered or feared on account of a non-traditional belief system may be considered persecution "on account of religion."[47] The International Religious Freedom Act (IRFA) refers to religious freedom without defining what makes a particular practice or belief a religion and does not place any particular religious group in a position of privilege over any other.[48] While many applicants base their claim to refugee or asylum status on their inclusion in well-known faith groups (*e.g.*, Hindus, Christians, or Muslims), other individuals may seek protection based on religious beliefs and practices that may be unfamiliar or based on their non-belief. The protected ground of religion includes the individual's right to be an atheist, an agnostic, or to otherwise reject religious practice.

If an individual's faith or faith group is not familiar to you or a particular practice or belief appears unusual to you, do not allow your unfamiliarity to affect your judgment. Neither courts nor adjudicators may inquire into the popularity, truth, validity, or reasonableness of an applicant's religious beliefs or choice not to believe.

The *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* proclaim the right to freedom of religion. This includes the right to have or adopt a religion of one's choice; the freedom, either individually or in a community with others and in public or private, to manifest a religious belief in worship observance, practice, and teaching; and the right not to be subjected to coercion that would impair freedom to have or adopt a religion or belief of one's choice.[49] Accordingly, the applicant

[47] *See* UNHCR*Guidelines on International Protection: Religion-Based Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*. HCR/GIP/04/06Section II (Apr. 28, 2004).

[48] International Religious Freedom Act of 1998, Pub. L. 105-292. For additional information on the IRFA, see RAIO Training Module, *IRFA (International Religious Freedom Act) and Religious Persecution*.

[49] Universal Declaration of Human Rights art. 18; International Covenant on Civil and Political Rights art. 18(1).

has the right to live an openly religious life in his or her country of origin, and there is no requirement that an applicant conceal his or her religion to be eligible for protection.

In 1998 Congress passed IRFA, which expressed concern about religious freedom throughout the world and established an Annual Report on International Religious Freedom to be prepared by the Department of State.[50] IRFA requires that the Annual Report, with other relevant documentation, serve as a resource for you in cases involving claims of persecution on the grounds of religion.[51] However, you may not deny an applicant's claim solely because the Annual Report does not confirm the conditions described by the applicant.

5.2 General Forms of Religious Persecution

Drawing from international human rights law, the UNHCR Handbook explains that persecution on account of religion takes a number of different forms. Some examples of harm that may be found to have been inflicted on account of an applicant's religion are:

- Prohibition of membership in a religious community
- Prohibition of worship in private or in public
- Prohibition of religious instruction
- Forced renunciation of religious beliefs or desecration of objects of religious importance
- Serious measures of discrimination imposed on persons because they practice their religion or belong to a religious community[52]

5.3 Conversion

In some countries it may be illegal to convert from one religion to another, and the penalties may be severe. For example, in Iran, conversion from Islam to another religion is considered apostasy (renunciation of faith), which is punishable by death. Such punishment is persecution on account of religion.[53]

5.4 Laws Based on Religious Principles

[50] International Religious Freedom Act of 1998, Pub. L. 105-292, Section 102(b).

[51] *Id.*, Section 601.

[52] *UNHCR Handbook*, para. 72.

[53] *See*, *e.g.*, *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992) (prosecution under law against apostasy found to be persecution "on account of" religion).

Punishment for refusal to comply with religious norms or laws, such as dress codes or gender roles based on religious principles, may constitute persecution on account of religion.

Note that in some countries, religious principles are inseparable from civil and criminal laws. In such countries harm on account of religion may overlap with harm on account of political opinion.

You should focus on whether the persecutor sees the applicant as a simple law-breaker, or as someone who should be punished for possessing "improper" religious values. In many cases the persecutor will view the applicant as both a law-breaker and as an individual possessing "improper" religious values. Although the persecutor may have mixed motives, if the applicant's real or perceived religious values are "at least one central reason" motivating the persecutor,[54] such motivation may be sufficient to establish that the harm is on account of religion in asylum adjudications. In refugee processing, you need to determine if "a reasonable person would fear that the danger arises 'on account of' one of the five grounds,"[55] in this case real or perceived religious values. For further discussion, *see* Asylum Adjudications Supplement – At Least One Central Reason.

When a civil or criminal law is itself based on religious laws or principles in a country with little separation between church and state, the evaluation of the persecutor's intent may be complex. A thorough understanding of country of origin information will help you evaluate how the authorities view individuals who violate religious laws.

5.5 Differing Interpretation of the "Same" Religion

The persecutor does not have to adhere to a different religion from the applicant. Large religious groupings such as Christianity, Islam, and Buddhism have a wide variety of sects and denominations. Even within smaller religious groupings, individual members may differ greatly as to what practices or beliefs are required by their religion. Harm suffered on account of these differences is harm suffered on account of religion.

Example

> Where a daughter's religious opinions were different from her father's concerning how she should dress and with whom she should associate, and the father attempted to impose his religious opinion on his daughter through physical force, the serious

[54] *See infra* Section 2.1 on "Mixed Motives."

[55] For further discussion, *see* International and Refugee Adjudications Supplement – Motivation. You should not rely on case law that interprets the "one central reason" standard, but you may find such cases helpful in understanding general principles of the nexus requirement. These standards are not the same. You should follow the guidance specific to the type of adjudication you are performing on how to analyze this issue.

harm that the daughter suffered was "persecution on account of religion."[56] Although the daughter and father both practiced Islam, the father harmed his daughter because her religious beliefs did not conform to his, particularly with respect to the way women should behave.[57]

6 NATIONALITY

6.1 Definition

For purposes of asylum and refugee adjudications, the term "nationality" is defined more broadly than it is in the first part of the refugee definition (that defines a refugee as someone outside his or her country of "nationality," i.e. citizenship). "Nationality," as a protected ground, is a broad concept that includes ethnic groups, linguistic groups, and groups defined by common cultures.

Note that harm on account of nationality may also overlap with harm on account of race or religion.

Examples

- In the former Soviet Union, "Jewish" was considered a nationality and marked as such on identification documents. A Jewish father and son from the Ukraine, who were attacked by a member of a nationalistic, pro-Ukrainian movement were targeted because of their Jewish nationality.[58]

- Consider a K'iche' (Quiché) applicant from Guatemala. Country conditions reports indicate that the characteristic of being K'iche' may be perceived by the persecutor or feared persecutor as a racial characteristic, an ethnic characteristic (nationality), an immutable characteristic shared with other members of a distinct group (particular social group), a religious characteristic (some communities still practice indigenous religions), or a political characteristic (indigenous communities were often perceived to be linked with guerrilla organizations). The important inquiry is whether the persecutor is motivated to harm the applicant on account of his or her being K'iche'; if so, several protected characteristics may apply.[59]

6.2 Conflicts Between National Groups

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[56] *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000).

[57] *Id*. at 1336.

[58] *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998).

[59] *See Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 n.5 (9th Cir. 1999) (noting that ethnicity may be analyzed as both race and nationality).

When conflict between two or more national (ethnic, linguistic) groups exists in a country, persecution on account of nationality may overlap with persecution on account of political opinion, particularly where a political movement is identified with a specific nationality.[60]

In some conflicts, members of an ethnic group may be at risk of harm even though they are not directly involved in the conflict. Such cases involve persecutors who associate all members of a cultural grouping with the limited pool of persons from that cultural grouping who are involved in the hostilities.

When there is conflict between one or more "nationalities," you should not assume that claims arising from the conflict are based solely on civil strife. Rather, you must consider carefully the nature of the strife and determine whether the harm the applicant suffered or fears is connected to his or her nationality.[61]

6.3 Examples of Claims Based on Nationality

As noted above, claims based on nationality often overlap with other protected grounds. In the former Soviet Union, nationalities were listed on citizens' passports, including entries for Jews, Germans, Chechens, Russians, and, at one point, 168 others.[62] Other examples of individuals who have been harmed on account of nationality include Armenians in Azerbaijan (may overlap with religion); Bosniaks, Croats, and Serbs in the former Yugoslavia (may overlap with religion); Tibetans in the People's Republic of China (may overlap with religion); or Roma in Bulgaria (may also be analyzed as a particular social group).[63]

7 PARTICULAR SOCIAL GROUP (PSG)

NOTE: Particular Social Group is one of the five grounds in the refugee definition, but it is not being discussed in this module. It is covered in a separate module, *Nexus – Particular Social Group*.

8 POLITICAL OPINION

8.1 Definition

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[60] UNHCR Handbook, para. 75.

[61] *See* Civil Strife section, below; *see also* *Matter of H*-, 21 I&N Dec. 337 (BIA 1996).

[62] *See* Sven Gunnar Simonsen, *Inheriting the Soviet Policy Toolbox: Russia's Dilemma Over Ascriptive Nationality*, 51 Europe-Asia Studies1069 (1999).

[63] *Mihalev v. Ashcroft*, 388 F.3d 722 (9th Cir. 2004).

Expression of a political opinion should not be viewed only in the narrow sense of participation in a political party or the political process. The meaning of "political opinion" in the refugee definition "should be understood in the broad sense, to incorporate . . . any opinion on any matter in which the machinery of state, government and police may be engaged."[64]

The Fourth Circuit has described political opinion as "prototypically" exhibited by "evidence of verbal or openly expressive behavior by the applicant in furtherance of a particular cause."[65] In recognizing that "less overtly symbolic acts may also reflect a political opinion," the court set as a baseline that "whatever behavior an applicant seeks to advance as political, it must be motivated by an ideal or conviction of sorts before it will constitute grounds for asylum."[66] Of course, an action could be imputed as political, even if the applicant does not hold an ideal or conviction.

Expression of a political opinion may take various forms, and many types of opinions or views may fall within the broad category of "political." Examples of expression of political opinions outside the traditional political process include:

- Expression of feminist beliefs[67]
- Exposure of government human rights abuses[68]
- Activities to protect or establish the right to association (such as union membership), workers' rights, or other civil liberties[69]
- Participation in certain student groups[70]
- Participation in community improvement organizations or cooperatives, or movements for land reform[71]
- Opposition to a political group's strategy for promoting its ideology[72]

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[64] Guy Goodwin-Gill, *The Refugee in International Law* 30 (1983) .

[65] Saldarriaga v. Gonzales, 402 F.3d 461, 466 (4th Cir. 2005).

[66] *Id*.

[67] *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

[68] *Gao v. Gonzales*, 407 F.3d 146, 153 (3d Cir. 2005).

[69] *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1993); *Bernal-Garcia v. INS*, 852 F.2d 144 (5th Cir. 1988).

[70] *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1993); *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990).

[71] *See, e.g.*, *Zamora-Morel v. INS*, 905 F.2d 833 (5th Cir. 1990); *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998).

[72] *Regalado-Escobar v. Holder*, 717 F.3d 724, 729 (9th Cir. 2013) ("When a political organization has a pattern of committing violent acts in furtherance of, or to promote, its politics, such strategy is political in nature…Therefore,

- Opposition to gangs and drug cartels

Opposition to a gang may have a political dimension, but a general aversion to gangs and their criminal activity or refusal to join the gang is not necessarily politically motivated.[73] The mere refusal to join a gang, without more, does not establish that the gang's threats against the applicant were on account of an imputed political opinion.[74] Cases involving refusal to join gangs, however, may be mixed motive cases. The fact that an applicant refuses to join a gang, while not alone sufficient to support a conclusion that he was perceived to be politically opposed to gangs, certainly does not undermine such a conclusion. There may well be cases where refusal to join a gang is an element of a cognizable political opinion claim.

To show that violence inflicted by gang members has a nexus to the applicant's actual or imputed political opinion, an applicant needs evidence that he or she was politically or ideologically opposed to the gang's particular ideals or to gangs in general (or that the gang believes this) and not merely that he or she did not want to be personally involved in or had an aversion to specific activities of the particular gang.[75] Even if the applicant shows that he or she possesses an anti-gang political opinion, the applicant must show that the gang targeted him or her on account of that political opinion, and not merely to grow its ranks or to increase its wealth.

- Refusal to follow orders to commit human rights abuses[76]

  For more information, see Section below on "Refusal to serve in a military or commit an action that is condemned by the international community."

- Whistleblowing or otherwise exposing government corruption

In some circumstances, opposition to state corruption may be motivated by an applicant's political convictions, or may cause a persecutor to impute such convictions to the applicant.[77] However, showing retaliation for opposing governmental corruption is not by

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opposition to the strategy of using violence can constitute a political opinion that is a protected ground for asylum purposes.")

[73] Santos-Lemus v. Mukasey, 542 F.3d 738, 747 (9th Cir. 2008) (holding that a "general aversion to gangs does not constitute a political opinion"); Barrios v. Holder, 581 F.3d 849, 855 (9th Cir. 2009).

[74] Marroquin-Ochoma v. Holder, 574 F.3d 574, 578–79 (8th Cir. 2009).

[75] Santos-Lemus v. Mukasey, 542 F.3d 738, 747 (9th Cir. 2008); Barrios v. Holder, 581 F.3d 849, 855 (9th Cir. 2009).

[76] *See, e.g.*, Barraza Rivera v. INS, 913 F. 2d 1443 (9th Cir. 1990).

[77] Ruqiang Yu v. Holder, 693 F.3d 294 (2d Cir. 2012); Zhang v. Gonzales, 426 F.3d 540 (2d Cir. 2005); Hu v. Holder, 652 F.3d 1011, 1019–20 (9th Cir. 2011) (". . . the Chinese police officials who arrested Hu did not accuse him of illegally gathering without a permit. Rather, they accused him of 'gathering a crowd to cause trouble and disturb the order of society, [and] acting against the government and against the party."); Grava v. INS, 205 F.3d 1177 (9th Cir. 2000) ("When the alleged corruption in inextricably intertwined with governmental operation, the

itself sufficient to establish a nexus to a political opinion. You also should consider the variety of reasons that persecutors act in such cases. In *Matter of N-M-*, the BIA held that the following factors should be considered when analyzing nexus in whistleblowing cases:

- Whether and to what extent the individual engaged in activities that could be perceived as expressions of anti-corruption beliefs;

- Any direct or circumstantial evidence that the persecutor was motivated by the individual's actual or perceived anti-corruption beliefs; and

- Any evidence regarding the pervasiveness of corruption within the governing regime.[78]

State actors may be motivated to harm whistleblowers for a variety of reasons that are not related to protected grounds, including a desire for revenge. Personal motivation does not preclude a grant of asylum or refugee status, however, if the state actor is also motivated by the applicant's efforts to "expose" corruption.[79] Even in cases where the applicant's reasons for exposing corruption were purely personal, there may be evidence indicating that state actor perceived the applicant as having a political motive.[80] In other words, state actors may have mixed motives in harming whistleblowers.

Also, campaigning against state corruption through classic political activities such as being active in a political party that opposes state corruption, attending or speaking at rallies against corruption, or writing pamphlets criticizing state corruption would constitute the expression of a political opinion.[81]

Harm suffered for having provided the government information about individuals involved in illegal activities may, or may not, constitute harm suffered on account of a political opinion. Providing the government with information about a guerrilla group, for example, where the guerrilla group would see informing as an expression of opposition,

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exposure and prosecution of such an abuse of public trust is necessarily political."); Baghdasayan v. Holder, 592 F.3d 1018 (9th Cir. 2010) ("Whistle-blowing against government corruption is an expression of political opinion."); Reyes Guerrero v. INS, 192 F.3d 1241, 1245 (9th Cir. 1999).

[78] Matter of N-M-, 25 I&N Dec. 526, 532–33 (BIA 2011). *See also* Ruqiang Yu v. Holder, 693 F.3d 294 (2d Cir. 2012) (rejecting the BIA's finding that the applicant opposed "aberrational" corruption where the applicant protested several months of nonpayment of wages and personally escorted 10 employees to confront factory officials).

[79] Antonyan v. Holder, 642 F.3d 1250, 1256 (9th Cir. 2011).

[80] Khudaverdyan v. Holder, 778 F.3d 1101, 1107 (9th Cir. 2015).

[81] *Id.*; *but see* Liu v. Holder, 692 F.3d 848 (7th Cir. 2012) (writing an anonymous letter asserting corruption in layoffs does not transform an economic protest into a political one where the applicant never acknowledged he wrote the letter or testified that anyone knew he wrote it).

would be considered expressing a political opinion.[82] Providing information on more routine criminal matters, outside of a political context, however, likely would fail to satisfy the nexus requirement for political opinion.[83]

- Neutrality

Political neutrality may include the absence of any political opinion. Neutrality can be established by pronouncement or actions. In certain refugee and asylum claims, the refusal to take sides in a political controversy may be considered expressing a political opinion. The critical issue is how the persecutor views the applicant's decision to remain neutral, and whether he or she targets the applicant because of that decision.[84] During periods of conflict, a persecutor may believe that no one can be neutral. In such cases, the persecutor may impute an opposition political opinion to anyone who remains neutral.

Although the BIA has not granted asylum or withholding based on an applicant's decision to remain neutral, the BIA has analyzed claims under the principle that, in some cases, neutrality may be a political opinion.[85]

The First and Ninth Circuits have held that neutrality may constitute a political opinion.[86] The Eighth Circuit has indicated that neutrality might, in some cases, form a political opinion.[87] The Ninth Circuit follows the doctrine of "hazardous neutrality."[88] Remaining neutral in an environment where neutrality brings hazards from a persecutor is an expression of political opinion.[89] For example, the failure to favor either side in a civil war may be perceived as opposition by participants from either side of the conflict. The Sixth Circuit has noted that expression of a political opinion may be affirmative or negative; in some circumstances, refusal to join or express support for a political party may be perceived as an expression of opposition to that party.[90]

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[82] Saldarriaga v. Gonzales, 402 F.3d 461, 467 (4th Cir. 2005); *see also* Antonyan v. Holder, 642 F.3d 1250, 1255 (9th Cir. 2011) ("In pursuing Andranik's prosecution, Antonyan sought more than an end to his drug-dealing and violence in her community; she also hoped to expose his crooked ties to law enforcement agencies who refused to protect the citizenry.").

[83] Thuri v. Ashcroft, 380 F.3d 788 (5th Cir. 2004) (the evidence did not compel a finding that reporting a single incident of crime by police officers was viewed by the government as an expression of political opinion).

[84] Ramos-Vasquez v. INS, 57 F.3d 857 (9th Cir.1995); Arriaga-Barrientos v. INS, 937 F.2d 411, 414 (9th Cir. 1991).

[85] *See* Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); Matter of Maldonado-Cruz, 19 I&N Dec. 509, 516 (BIA 1988); Novoa-Umania v. INS, 896 F.2d 1 (1st Cir. 1990) (indicating BIA used neutrality analysis).

[86] Umanzor-Alvarado v. INS, 896 F.2d 14 (1st Cir. 1990); Arriaga-Barrientos v. INS, 937 F.2d 411 (9th Cir. 1991).

[87] Lopez–Zeron v. INS, 8 F.3d 636 (8th Cir. 1993).

[88] Rivera-Moreno v. INS, 213 F.3d 481, 483 (9th Cir. 2000).

[89] *Id.*; *See also* Sangha v. INS, 103 F.3d 1482, 1488 (9th Cir. 1997).

[90] Mandebvu v. Holder, 755 F.3d 417, 429 (6th Cir. 2014).

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- Professional Activities or Associations

Harm inflicted on an applicant because of his or her profession or occupation at the time the harm occurred is generally not, in itself, sufficient to establish that the applicant was persecuted on account of one of the protected grounds.[91] Ideologically motivated groups often seek to harm government employees, such as police officers or members of the military forces, in order to frustrate their official duties or to publicly undermine the regime. Members of other professions may be targeted for recruitment because the persecutors have particular need of their services, or for extortion, because they are perceived to be wealthy.

In such cases, "the mere existence of a generalized political motive underlying the persecutor's actions" is inadequate to establish the requisite nexus.[92] Rather, the applicant must demonstrate that the persecutor is targeting the applicant **on account of** a belief or characteristic that **the applicant** possesses or is imputed to possess.

The fact that an applicant is targeted in relation to his or her professional status, however, does not preclude him or her from establishing the requisite nexus to a protected ground.[93] An applicant's profession may cause the persecutor to impute a protected characteristic to him or her, or an applicant may express the belief or opinion that causes him or her to be targeted in the course of his or her official duties. Applicants who work for or have close professional associations with the government may sometimes be targeted as supporters of the government or the ruling political party, whether or not their work is political in nature.

Examples

- A Pakistani "special police officer" began receiving threatening letters and phone calls after, in the course of his official duties, he began going to mosques and social spaces to encourage citizens to oppose the Taliban. The immigration judge found that he was targeted because of his work as a police officer and, therefore, he had not established a nexus to a protected ground, and the BIA affirmed the IJ's decision. The First Circuit Court of Appeals vacated and remanded the case, holding that the fact that the applicant expressed the political views for which he

[91] *See* Matter of Acosta, 19 I&N Dec. 211, 234 (BIA 1985); *Matter of Fuentes*, 19 I&N Dec.658, 662 (BIA 1988). Note, however, that several courts have found groups defined by former occupation to constitute particular social groups. In some circumstances, moreover, a group defined by a current profession or occupation may be sufficiently fundamental to its members' identity, distinct in society, and defined with particularity to constitute a particular social group. In such cases, it is necessary to analyze whether the applicant was targeted or fears harm on account of his or her membership in that group. *See* RAIO Training Module, *Nexus – Particular Social Group*.

[92] *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

[93] *See* Acharya v. Holder, 761 F.3d 289, 301 (2d Cir. 2014); *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000).

was targeted while on duty did not preclude him from establishing the requisite nexus.[94]

- A Colombian applicant owned a catering business that supplied food to governmental and military institutions. The Revolutionary Armed Forces of Colombia (FARC) made several threatening phone calls in which they attempted to recruit him as an informant and demanded that he stop providing services to the Colombian military, but the applicant repeatedly refused their demands. The immigration judge found that the FARC was motivated to recruit the applicant because he would be useful to them rather than because of any protected ground.[95] The Third Circuit Court of Appeals held that the IJ's decision was not supported by substantial evidence; given the applicant's long association with and economic dependence on Colombian government and political institutions and the fact that he had repeatedly refused the FARC's overtures, the court was compelled to find that the FARC was motivated by an imputed political opinion.[96]

Governments may also impute opposing political opinions to applicants because of their professional associations. For example, in *Javed v. Holder*, a Pakistani attorney who represented an opposition political party in litigation was threatened and beaten by a faction of the governing party. The applicant testified that he was not a supporter of either group but that, as a result of his representation of the opposition party, the governing party thought of him as their enemy. The First Circuit Court of Appeals held that this testimony established that the persecutors imputed a political opinion to the applicant.[97]

8.2 Opinion Must Be Applicant's or Attributed to Applicant

Persecution on account of political opinion means persecution on account of the ***applicant's*** political opinion, or one attributed to the applicant.[98]

Showing that the persecutor is motivated by political goals or represents a political entity does not in itself establish that the persecution is on account of political opinion. The persecutor must be motivated by the applicant's opinion or perceived opinion.

8.3 Attempts to Overthrow the Government

Prosecution for an attempt to overthrow a government may constitute persecution on account of political opinion if there are no legitimate political means in place to change

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[94] *Khattak v. Holder*, 704 F.3d 197, 204–05 (1st Cir. 2013).

[95] *Espinosa-Cortez v. Att'y Gen. of U.S.*, 607 F.3d 101, 104–05 (3d Cir. 2010).

[96] *Id.* at 111–12.

[97] *Javed v. Holder*, 715 F.3d 391, 397 (1st Cir. 2013).

[98] *INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992).

the government.[99] Legitimate government investigation and punishment of individuals who fight against the government, however, is generally not persecution on account of political opinion.[100]

In such cases, your analysis is similar whether the applicant is a participant in an attempted *coup d'etat* or an armed insurrection. If the harm rises to the level of persecution, then you must determine the motivation of the government in harming the applicant.[101] If institutions exist to provide peaceful means to change the government, prosecution of an individual who attempts to violently overthrow the government will not usually be found to be persecution. A "duly established" government has the right to investigate suspected traitors.[102]

In analyzing an applicant's fear of prosecution for actions he or she took to overthrow the government, you should look at the legitimacy of the law being enforced. When a government does not recognize the international human right to peacefully protest, punishment for a politically motivated act against it may not constitute a legitimate exercise of authority.[103]

You must also consider the actions taken by the applicant in furtherance of the attempt to overthrow the government. Actions involving persecution or torture of others, severe harm to civilians, or terrorist activity may lead you to find that the applicant is barred or ineligible for protection. Note that this is a basis for denial that is separate from the question of whether the nexus requirement has been met.[104]

9 COMMON NEXUS ISSUES

The following section provides guidance on a number of nexus issues that have been commonly encountered in the field.

9.1 Civil Strife

[99] *Chanco v. INS*, 82 F.3d 298 (9th Cir. 1995); *Matter of Izatula,* 20 I&N Dec. 149 (BIA 1990); *Perlera-Escobar v. EOIR and INS*, 894 F.2d 1292 (11th Cir. 1990); *Dwomoh v. Sava*, 696 F. Supp. 970 (S.D.N.Y. 1988).

[100] *Perlera-Escobar v. EOIR and INS*, 894 F.2d 1292, 1299 (11th Cir. 1990) (noting a duly established government's internationally recognized right to defend itself against attack and rebellion).

[101] *See Chanco v. INS*, 82 F. 3d 298 (9th Cir. 1996); *Perkovic v. INS*; 33 F.3d 615 (6th Cir. 1994).

[102] *Perlera-Escobar v. EOIR and INS*, 894 F.2d 1292, 1299 (11th Cir. 1990).

[103] *Chanco v. INS*, 82 F.3d at 302.

[104] *See*, *e.g.*, *Abdoulaye v. Holder*, 721 F.3d 485, 490 (7th Cir. 2013) (upholding a determination that an applicant who had participated in an attempted coup against the military regime in Niger was barred from asylum for having engaged in terrorist activity). *See also* RAIO Training Modules, *National Security*, *Grounds of Inadmissibility,* and *Discretion*.

Fear of general civil strife or war, and incidental harm resulting from such violence, does not, by itself, establish eligibility for asylum or refugee status. Such incidental harm is not persecution, because it is not directed at the applicant on account of a protected ground. The applicant may be caught in the middle of crossfire or other violence that would occur regardless of his or her presence.

However, the existence of civil strife or war in the applicant's country does not preclude finding the applicant eligible for asylum or refugee status if the applicant is harmed or at risk for reasons related to a protected ground.[105] The BIA has found that widespread chaos and violence caused by civil strife and the type of individualized harm that constitutes persecution on one of the five protected grounds are not mutually exclusive.[106] Indeed, persecution often occurs during civil war.

Example

> Inter-clan violence in Somalia became common during a period of civil war. Harmful acts committed by members of one clan against another because of clan membership during that civil war are on account of the victims' membership in a particular social group. That a large number of people in Somalia might be at risk of clan violence is not relevant to the decision.[107]

Conditions of political upheaval that affect the populace as a whole or in large part, may not be sufficient to establish an individual claim for asylum.[108] When an applicant claims harm from a rival political group, you must determine whether the persecutor was motivated to harm the applicant because of a protected ground.

9.1.1 Considerations

To evaluate whether the harm suffered or feared is incidental to strife or whether it was or might be directed at the applicant on account of one of the protected grounds, you need a firm understanding of the applicant's specific situation and the nature of the civil strife.

- Specific threats

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

[106] Matter of H-, 21 I&N Dec. 337, 343 (BIA 1996).

[107] *Id.*

[108] Meghani v. INS, 236 F.3d 843, 847 (7th Cir. 2001) (citing Mitev v. INS, 67 F.3d 1325, 1330 (7th Cir.1995)); Ali v. Ashcroft, 366 F.3d 407 (6th Cir. 2004) (finding that a leader of the Jamaat party of Bangladesh who was detained by police as a result of his participation in violent conflicts with members of opposing political parties had not established persecution on account of his political opinion).

The significance of a specific threat against an applicant is not weakened because the applicant lives in a country where the lives and freedom of many people are threatened. To the contrary, such conditions may make the threat more serious or credible.[109]

- Targeting of non-combatants

In any situation in which non-combatants are intentionally targeted, you should try to ascertain why non-combatants are targeted, whether the non-combatants share a protected characteristic in the refugee definition, and whether the applicant also possesses that characteristic. Cases that at first glance appear to be isolated incidents or random acts of violence during a period of civil strife may, upon further inquiry, become valid asylum or refugee claims. For example, in some situations, the civil strife in itself may be rooted in a protected ground, such as nationality or race.[110] If so, the targeting of non-combatants on account of nationality or race would be "on account of" a protected ground.

Example

> During the conflict in Iraq, fighting occurred between Sunni and Shi'a militias. The conflict was religious in nature, and militias targeted people of the other denomination. The applicant, a Sunni Muslim, lived in a predominantly Sunni neighborhood. During a battle between the two militias, she was shot when a stray bullet passed through the wall of her home. A witness told her and her family that it appeared the shot was fired by a Shi'a militia man. She would be able to satisfy the nexus requirement as the militia man was motivated to harm residents of the neighborhood on account of religion.

- Legitimate acts of war or violations of humanitarian law

You should consider whether the harm the applicant suffered or fears is a result of a legitimate act of war or a violation of humanitarian law. Even if the applicant is a combatant, he or she may be subject to persecution if the opponent (either government or an insurgent group) acts outside of the internationally recognized parameters of "legitimate" warfare.[111]

- Specific treatment of the applicant

Though the experiences of others mistreated during a period of civil strife are relevant to an applicant's claim, the applicant's specific experience must be considered.
For example, in *Ndom v. Ashcroft*, the Ninth Circuit overturned a decision by an immigration judge that two arrests of a Senegalese applicant living in the Casamance

[109] *M.A. v. INS*, 899 F.2d 304, 315 (4th Cir. 1990); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985).

[110] *See*, *e.g.*, *Mendoza-Pablo v. Holder*, 667 F.3d 1308 (9th Cir. 2012) (applicant targeted because he was a member of an indigenous Mayan ethnic group).

[111] *See* RAIO Training Module, *International Human Rights Law*.

region of the country at the time of civil unrest were not on account of the applicant's political opinion. The immigration judge had concluded that the applicant was "indiscriminately arrested" with others living in the town and thus was a "victim of civil and military strife."[112]

In reversing this conclusion, the Ninth Circuit identified evidence showing that the applicant was targeted on account of his imputed political opinion. Though he was arrested during mass arrests in his town, the applicant was individually accused of supporting the Mouvement des forces démocratiques de Casamance (MFDC), a group seeking independence for Casamance, and was ordered to sign a confession form stating that he participated in a "rebellious manifestation." The court found that this evidence compelled the conclusion that the applicant had been targeted on account of his political opinion.[113]

9.2 Conscription by Military

A government has a sovereign right to conscript its citizens and maintain a military.[114] Laws pertaining to required military service ordinarily are not intended to punish individuals on account of any of the protected grounds, but rather to form and maintain a military. Punishment for refusing to serve, without evidence of a nexus to a protected ground, is not persecution, but prosecution for refusing to obey the law.[115]

Draft evasion and desertion from the military are not always motivated by a person's religion, political opinion, or other protected characteristic. There are a variety of reasons why an individual might refuse to perform military service.[116]

Even when the avoidance of military service is motivated by an applicant's religion or political opinion, the government may not be motivated to harm the applicant on account of the protected ground.[117] Punishment for draft evasion or desertion, without some evidence that the government's motivation in punishing the evader or deserter is connected to something other than the act of evasion or desertion, generally is not persecution on account of any of the protected grounds.

[112] Ndom v. Ashcroft, 384 F.3d 743, 750 (9th Cir. 2004), *superseded by statute on other grounds as recognized in* Parussimova v. Mukasey, 533 F.3d 1128 (9th Cir. 2008).

[113] *Id*. at 755.

[114] Matter of Vigil, 19 I&N Dec. 572, 578 (BIA 1988); Nguyen v. Reno, 211 F.3d 692 (1st Cir 2000), *citing* Foroglou v. INS, 170 F.3d 68, 71 (1st Cir. 1998); see also Islami v. Gonzales, 412 F.3d 391, 397 (2d Cir. 2005).

[115] *See Matter of A-G-*, 19 I&N Dec. 502, 507 (BIA 1987).

[116] UNHCR Handbook, para. 167; Nguyen v. Reno, 211 F.3d 692 (1st Cir 2000); Castillo v. INS, 951 F.2d 1117 (9th Cir. 1991); M.A. v. INS, 899 F.2d 305, 312 (4th Cir. 1990); Canas-Segovia v. INS, 970 F.2d 599, 601 (9th Cir. 1992).

[117] Milat v. Holder, 755 F.3d 354, 363 (5th Cir. 2014); Zehayte v. Gonzales, 453 F.3d 1182 (9th Cir. 2006).

- **Disproportionate punishment**

To make a claim based on desertion or draft evasion, the applicant must establish a nexus to a protected characteristic by demonstrating that he or she was or would be subject to disproportionate punishment for military desertion or draft evasion because of an actual or imputed protected characteristic. Disproportionate punishment in this context can be used to describe situations where the penalty for draft evasions for desertion is out of proportion with international norms or where the penalty is out of proportion with that experienced by others who do not share an applicant's protected characteristic.

If an applicant may be subject to disproportionate punishment on account of a protected characteristic he or she actually possesses or is believed to possess because of his or her refusal to serve or to perform an action during service, the applicant may be able to establish a nexus between this punishment and a protected ground.[118]

- **Refusal to serve in a military or commit an action that is condemned by the international community as contrary to basic rules of human conduct**

UNHCR guidance states that when an individual is punished for refusing to participate in a military action that is condemned by the international community, the punishment could be regarded as persecution.[119] U.S. courts have interpreted "military action" as encompassing both a specific military action that would be internationally condemned, and a refusal to serve in a military unit or army that engages in internationally condemned activities.[120] Further, the phrase "condemned by the international community as contrary to basic rules of human conduct" has been interpreted to mean that such condemnation must at a minimum come from "recognized international governmental bodies."[121]

U.S. law requires you to determine whether the evidence shows that the persecutor is motivated by the applicant's opposition to the condemned acts.[122] The Fifth Circuit emphasized the need for evidence of the persecutor's motivation in *Gomez-Mejia.* The applicant in that case never revealed his opposition to the Nicaraguan military's actions and presented no evidence that the military imputed an opposition viewpoint to him. Therefore, any punishment he faced as a result of desertion was not on account of a protected ground.[123] In contrast, the Ninth Circuit has held that an applicant who was

[118] *Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988); *Vujisic v. INS*, 224 F.3d 578 (7th Cir.2000) *M.A. v. INS*, 899 F.2d 305 (4th Cir. 1990); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 126 (1st Cir. 2004); *UNHCR Handbook*, para. 169.

[119] *UNHCR Handbook*, para. 171.

[120] *Mojsilovic v. INS* 156 F.3d 743, 748 (7th Cir. 1998); *M.A. v. INS*, 899 F.2d 304, 321 (4th Cir. 1990).

[121] *M.A. v. INS*, 899 F.2d 304 (4th Cir. 1990).

[122] *Gomez-Mejia v. INS*, 56 F.3d. 700, 703 (5th Cir. 1995); *Matter of A-G-*, 19 I. & N. Dec. 502 (BIA 1987), *aff'd*, 899 F.2d 304 (4th Cir.1990).

[123] *Gomez-Mejia*, 56 F.3d at 703.

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punished after he openly voiced his opposition to internationally condemned actions was persecuted on account of his political opinion.[124]

The First Circuit upheld an immigration judge's requirement that an applicant demonstrate that he or she would not be permitted to complete the required service by performing an alternate non-combat role, rather than serving in the military.[125] In this case, the First Circuit concluded that "the record clearly establishes that the Algerian military is a military whose acts are condemned by the international community."[126] The court rejected the applicant's argument that it would have been futile to ask for alternate service because he failed to make any inquiry or provide a justification for his failure.[127]

9.2.1 Conscientious Objectors

Military service is generally not considered persecution. Some individuals, for reasons of religion or conscience refuse to serve in the military, but such refusal does not result in a *per se* determination that these individuals are eligible for refugee or asylum status.[128] At least one court has found an applicant eligible for asylum because he was from a country that barred adherents of his religion from conscientious objector status but granted it to adherents of other religions.[129] Another court, in *dicta*, noted that conscientious objection might be a form of protected activity that would qualify an individual for asylum but rejected the claim on other grounds.[130] Also, as noted above, refusal to participate in specific acts contrary to international standards governing human conduct may, in some cases, provide eligibility for asylum or refugee status.

U.S. asylum and refugee law regarding conscientious objection diverges from guidance in the *UNHCR Handbook,* which indicates that refusal to perform military service may be the sole basis for a claim to refugee status if the refusal is due to valid reasons of conscience.[131] U.S. law requires evidence that the persecutor is motivated to harm the applicant on account of a protected ground. You must always follow U.S. law, even where it differs from *UNHCR Handbook* guidance.

9.2.2 Assignments to Life-threatening Duties

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[124] *Barraza Rivera v. I.N.S.*, 913 F.2d 1443 (9th Cir.1990).

[125] *Mekhoukh v. Ashcroft*, 358 F.3d 118, 127 (1st Cir. 2004).

[126] *Id.*

[127] *Id.*

[128] *Matter of Canas*, 19 I&N Dec. 697 (BIA 1988); *Canas-Segovia v INS*, 970 F.2d 599 (9th Cir. 1992).

[129] *Ilchuk v. Att'y Gen. of the U.S.*, 434 F.3d 618, 626 (3d Cir. 2006) ("[I]f members of some religions may avoid service without penalty based on conscientious objection, but adherents of other religions are denied the exemption outright, resulting imprisonment is on account of religion, not failure to serve").

[130] *Najafi v. INS*, 104 F.3d 943, 947 (7th Cir. 1997)

[131] *UNHCR Handbook*, paras. 170, 172.

The Seventh Circuit has held that individuals who are assigned to life-threatening duties on account of a protected characteristic may establish persecution on account of that protected trait.

In *Begzatowski v. Ashcroft*, the court found that an ethnic Albanian conscripted into the Yugoslav military who was deprived of bathing facilities, denied adequate military training, experienced physical abuse by the Serbian officers, and was sent to the front lines of battle without bullets or a shovel, suffered persecution on account of his ethnicity. The court reasoned that because the applicant was singled out to "provide a human shield for Serbian soldiers," he was subjected to treatment distinct from the dangerous conditions affecting an entire nation during a time of war.[132]

9.3 Recruitment by Insurgent Groups

Forced recruitment by insurgent groups and harm for refusing to join or cooperate with insurgents do not, ***per se***, satisfy the requirement that the applicant show the harm feared or experienced is on account of a protected ground.[133]

Insurgents may recruit for reasons unrelated to a protected ground, such as the need to increase their ranks or because they believe an individual possesses certain knowledge or expertise.[134] Individuals may refuse to cooperate with insurgents for a variety of reasons unrelated to a protected ground (e.g., the fear of reprisal or the need to remain home to work on the farm). Therefore, there must be some additional evidence, aside from the recruitment effort, to establish a connection to a protected ground.

9.4 Considerations in Conscription and Recruitment Cases

- Duty to elicit information

While forcible recruitment and threats or harm for refusal to cooperate do not in themselves satisfy the nexus requirement, you must elicit information from the applicant to determine whether any additional evidence connects the persecutor's actions to any of the protected grounds.

- Consider the entire record for evidence of a nexus

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[132] Begzatowski v. Ashcroft, 278 F.3d 665, 670 (7th Cir. 2000); *see also* Miljkovic v. Ashcroft, 376 F.3d 754, 756 (7th Cir. 2004) (finding that an ethnic Croatian applicant who fled Yugoslavia because he was drafted to perform hazardous duties could be a victim of persecution even though he fled prior to being forced into service).

[133] INS v. Elias-Zacarias, 502 U.S. 478 (1992); Matter of C-A-L- 21 I&N Dec. 754 (BIA 1997); Miranda v. INS, 139 F.3d 624 (8th Cir. 1998); Pedro Mateo v. INS, 224 F.3d 1147 (9th Cir. 2000); Habtemicael v. Ashcroft, 370 F.3d 774 (8th Cir. 2004).

[134] INS v. Elias-Zacarias, 502 U.S. 478 (1992); Matter of C-A-L- 21 I&N Dec. 754 (BIA 1997) (applicant testified that guerrillas contacted him to obtain information and to attempt to recruit him due to his expertise as an artillery specialist).

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Consider the content of the threats and any statements the applicant made when refusing to cooperate, including relevant country of origin information.

Even if an applicant does not express an opinion to the guerrillas when refusing to cooperate, other evidence may connect the threats or harm to a protected ground. Such evidence may include:

- Accusations by the guerrillas that the applicant sympathizes with the government
- Prior utterances against the guerrillas or military
- Activities in support of an opposing force
- A family member's association with an opposing force[135]

You must consider all the facts in evaluating the government's or guerrillas' perception of the applicant's refusal to assist them.

Example

> While beating a K'iche' (Quiché) man after he had refused to join them, the Guatemalan military accused him of being a guerrilla and demanded information about his "guerrilla friends." The Ninth Circuit found that the statements of the military together with country of origin information documenting the Guatemalan military belief that indigenous people were pro-guerrilla, was sufficient evidence to support a finding that the harm occurred on account of the applicant's (imputed) political opinion.[136]

- Country of origin information

In many conflicts the warring parties may view refusal to cooperate as opposition. Therefore, country of origin information may be useful in evaluating how a guerrilla group views those who refuse to cooperate with its cause.

9.5 Extortion

In some cases, extortion may form the basis for a valid asylum or refugee claim if evidence connects the threats or harm to one of the protected grounds.[137] However, when the persecutor is motivated solely by a desire to obtain money, the applicant will not satisfy the nexus requirement. You must consider why the persecutor chose to extort the applicant. Such cases may also be mixed-motive cases, where the persecutor is motivated

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[135] *See Rivas-Martinez v. INS*, 997 F.2d 1143 (5th Cir. 1993).

[136] *Chanchavac v. INS*, 207 F.3d 584 (9th Cir. 2000).

[137] *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988) (government-sponsored extortion found to be "on account" of victim's political opinion because people who resisted extortion were marked as subversives); *Tapiero de Orejuela*, 423 F.3d 666, 673 (7th Cir. 2005).

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both by a protected ground and a desire to obtain money. If you are adjudicating an asylum claim, remember that the protected ground must be "at least one central reason for persecuting the applicant."[138] In refugee processing, you must determine if "a reasonable person would fear that the danger arises on account of" one of the five grounds."[139]

Evidence that the extortionist is a political entity or is extorting money to support a political cause is not sufficient to establish the requisite nexus. The applicant must show that the persecutor is motivated by the applicant's protected belief or characteristic.[140]

Where the extortionist has branded the applicant a political opponent, the applicant may establish that she has been targeted on account of her political opinion, despite the likelihood that the extortionist also is interested in the applicant's wealth.[141] The Ninth Circuit held an applicant was persecuted on account of his political opinion where the extortion was instigated by the government, and the applicant belonged to an anti-government party.[142]

9.6 Coercive Population Control Policies

On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act,[143] which added the following sentence to the statutory definition of refugee:

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

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[138] INA § 208(b)(1)(B)(i).

[139] *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988). *See also* *In re S-P-*, 21 I&N Dec. 486 (BIA 1996).

[140] *See* *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

[141] *De Brenner v. Ashcroft*, 388 F.3d 629, 637 (8th Cir. 2004); *Tapiero de Orejuela*, 423 F.3d 666, 672 (7th Cir. 2005).

[142] *Yazitchian v. INS*, 207 F.3d 1164 (9th Cir. 2000).

[143] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Section 601, 110 Stat. 3009 (Sept.30, 1996); *Matter of X-P-T-*, 21 I&N Dec. 634 (BIA 1996) (recognizing a change in the law and granting asylum to an applicant who was forcibly sterilized); *see generally* David A. Martin, INS Office of General Counsel, Memorandum to Management Team, et al., *Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, HQCOU 120/11.33-P, 6 (Oct. 21, 1996).

> or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.[144]

The amendment effectively overruled previous BIA precedent decisions in which the BIA concluded that imposition of national population-control policies (including forced sterilization and abortion) did not in itself constitute persecution on account of a protected characteristic in the refugee definition.[145]

Claims based on this amended definition of refugee typically arise only in asylum claims. They have not, to date, arisen in the refugee resettlement context. For a more detailed discussion of this type of claim, *see* Asylum Adjudications Supplement – Coercive Population Control.

9.6.1 Nexus to a Protected Characteristic

The applicant is not required to demonstrate that the population control program was being selectively applied to him or her on account of a protected ground. The statute requires that the harm (either the forced abortion or sterilization itself, or harm for other resistance to a coercive population-control program) be considered to be on account of political opinion. The applicant still must meet the other elements in the refugee definition to establish eligibility.[146]

9.6.2 "Other Resistance"

In *Matter of S-L-L-* the BIA indicated that "other resistance" may take many forms and cover a wide range of circumstances. Resistance can include

- expressions of general opposition;
- attempts to interfere with enforcement of government policy in particular cases; or
- other overt forms of resistance to the requirements of the family planning law.[147]

Forms of "other resistance" could include removing an IUD or failing to attend a mandatory gynecological appointment.[148] Additionally, refusing to abort a pregnancy and

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[144] INA § 101(a)(42).

[145] *See* *Matter of X-P-T-*, 21 I&N Dec. 634 (BIA 1996); *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989); *Matter of G-*, 20 I&N Dec. 764 (BIA 1993).

[146] *See* David A. Martin, INS Office of General Counsel, Memorandum to Management Team, et al., *Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, HQCOU 120/11.33-P, 6 (Oct. 21, 1996).

[147] *Matter of S-L-L-*, 24 I&N Dec. 1, 11-12 (BIA 2006) (holding that the applicant's efforts in seeking waivers of the age restrictions were not indicative of resistance but rather were indicative of a desire to comply with the coercive population control program), *overruled on other grounds*, *Matter of J-S-*, 24 I&N Dec. 520, 521 (BIA 2008).

[148] *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 638 (BIA 2008). *See also* *Lin v. Ashcroft*, 385 F.3d 748, 757 (7th Cir. 2004); *Feng Chai Yang v. U.S. Att'y Gen.*, 418 F.3d 1198, 1205 (11th Cir. 2005).

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subsequently having a child out of wedlock in violation of Chinese law has also been found to be "other resistance" to a coercive population control program.[149]

In *Cao v. Gonzales*, the Third Circuit found that writing an article critical of population-control practices and exposing the practice of infanticide constitutes "other resistance" to a coercive population-control program. An applicant engaged in such activities could establish eligibility for asylum based on harm resulting from that resistance, even if the applicant was not personally subjected to forced abortion or sterilization.[150] The Ninth Circuit has held that hardships, including economic deprivation and denial of access to education, suffered by a child as a result of her parents' resistance to a population-control program were on account of an imputation of the parents' resistance to the child.[151]

The BIA held, however, that impregnating a girlfriend or fiancée or seeking permission to marry or have children outside age limits did not constitute "resistance" under the facts of the case.[152] At least one court has held, however, that similar conduct was "other resistance."[153] In *Shi Liang Lin*, the Second Circuit held that a spouse or partner needs to demonstrate "past persecution or a fear of future persecution for 'resistance' that is directly related to his or her own opposition to a coercive family planning policy."[154] The court also held that where an applicant has not demonstrated resistance to coercive family-control policies, but his spouse or partner has, he or she may be able to demonstrate that his partner's resistance has been or will be imputed to him.[155]

9.7 Crime and Personal Disputes

Applicants who fear harm by criminals or harm related to personal disputes often have difficulties establishing a nexus.[156] If the persecutor is motivated solely by a desire for economic gain, or purely personal vengeance, there is no nexus to a protected ground.[157] For example, an applicant who fears that the victim of a car accident that he or she caused

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[149] *Fei Mei Cheng v. Att'y Gen. of the U.S.*, 623 F.3d 175, 191 (3d Cir. 2010). *See also* *Nai Yuan Jiang v. Holder*, 611 F.3d 1086 (9th Cir. 2010)(cohabiting and conceiving a child in defiance of Chinese law prohibiting underage marriage and marrying in a traditional ceremony fall within the court's interpretation of "other resistance").

[150] *Cao v. Gonzales*, 407 F.3d 146, 153 (3d Cir. 2005).

[151] *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239, 1246 (9th Cir. 2005).

[152] *Matter of S-L-L-*, 24 I&N Dec. at 11-12.

[153] *Nai Yuan Jiang v. Holder*, 611 F.3d 1086 (9th Cir. 2010)

[154] *Shi Liang Lin v. United States Dep't. of Justice*, 494 F.3d 296, 313 (2d Cir. 2007) (en banc).

[155] *Id. See also* *Xu Ming Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc).

[156] *See* *Cruz-Funez v. Gonzales*, 406 F.3d 1187 (10th Cir. 2005) (finding that applicants who feared an unscrupulous private creditor connected to the allegedly corrupt Honduran government did not fear harm on account of membership in a particular social group, especially where the applicants' debt was settled by a court, which ordered them to pay their creditor back).

[157] *See e.g.*, *Cuevas v. INS*, 43 F.3d 1167 (7th Cir. 1995); *Kozulin v. INS*, 218 F.3d 1112 (9th Cir. 2000).

might retaliate would be unlikely to satisfy the nexus requirement. Similarly, an applicant who fears high levels of robbery in his or her country would be unlikely to establish a nexus.

Applicants who, at first glance, appear to have fear of crime or flee because of a personal dispute, may upon further inquiry prove to have a valid basis for their asylum or refugee claims.[158] For example, a woman who feared that she would be the victim of an honor killing at the hands of her brother was eligible for protection and was not the victim of a personal dispute.[159]

The persecutor may have more than one motive for threatening or harming the applicant. One motive may be a protected belief or characteristic that the applicant possesses or that the persecutor imputes to the applicant and one may be a personal or criminal reason. The persecutor's additional personal or criminal reason does not render the claim invalid.

Personal relationship with persecutor

Having a personal relationship with the persecutor does not, in itself, mean the applicant cannot satisfy the nexus requirement.[160] In many cases, the persecutor is a spouse or other family member.

When the persecutor and the applicant have a personal relationship, the persecutor might target the applicant because of a belief or trait that is not immediately obvious to the adjudicator. You should carefully consider whether the applicant is in fact being targeted because of a belief or trait that might define a social group.[161] Characteristics to consider include the applicant's social status based on his or her position within a domestic relationship, a physical trait, a voluntary association, past experience, beliefs about religion and cultural practices, and cultural identity.

9.8 Minorities and Majorities

Claims based on persecution or feared persecution on account of nationality are often brought by individuals who belong to a national minority.[162] However, in some situations, individuals belonging to a national majority have reason to fear persecution by a minority.[163]

Examples

[158] *See* Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011).

[159] Id. at 656.

[160] *See*, *e.g.*, Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011); Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000).

[161] For more information, see RAIO Training Module, *Nexus – Particular Social Group*.

[162] UNHCR Handbook, para. 76.

[163] Id.

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- Hutu is the majority ethnic group in Rwanda, while Tutsi, the minority group, controls the government. Both Hutus and Tutsis have presented valid claims for asylum and refugee status.

- In Iraq, Shi'a Muslims comprise about 60 percent of the population while Sunni Muslims comprise about 37 percent. Both Shi'a and Sunni Muslims from Iraq have presented valid claims for asylum and refugee status.

10 CONCLUSION

You must determine whether or not persecution or feared persecution is "on account of" one or more of the five protected grounds in the refugee definition: race, religion, nationality, membership in a particular social group, or political opinion.

To properly determine whether persecution is on account of a protected ground, the officer must understand 1) the "on account of" requirement, which involves the motive of the persecutor, and 2) the parameters of the five grounds for refugee status listed in the refugee definition.

While the burden of proof is on the applicant to prove a nexus to a protected ground, you must elicit sufficient information from the applicant about any possible connection to protected grounds so that you are able to make a determination.

11 SUMMARY

11.1 General Principles Regarding Nexus

11.1.1 Nexus

To be eligible for asylum or refugee status, the applicant must establish that the persecutor harmed or seeks to harm the applicant because the ***applicant*** possesses, or is believed to possess, one or more of the protected grounds.

11.1.2 Motive of the Persecutor

The motive of the persecutor is determinative in evaluating whether a nexus to one of the protected grounds has been established. The applicant's possession or imputed possession of a protected characteristic must be part of the motivation for persecuting the applicant. Motive may be established by either direct or circumstantial evidence.

11.1.3 Exact Motive Need Not Be Established

The applicant does not bear the burden of establishing the exact motive of the persecutor. If you are adjudicating asylum applications under INA § 208, you must determine whether the applicant's actual or imputed possession of one of the five protected grounds

is at least one central reason motivating the persecutor. If you are processing refugee applications overseas under INA § 207, you must determine that a ***reasonable person*** would fear that the danger arises on account of the applicant's actual or imputed possession of a characteristic connected to one of the protected grounds in the refugee definition.

The persecutor may be motivated by several factors; there is no requirement that the persecutor be motivated only by a desire to overcome or change a protected belief or characteristic.

11.1.4 Motive need NOT be Punitive

There is no requirement that the persecutor's motive be punitive, although it may be punitive.

11.1.5 Imputed Ground

Persecution inflicted upon an individual because the persecutor attributes to the individual one of the protected grounds constitutes persecution on account of that ground.

11.2 Protected Grounds [with Particular Social Group Omitted]

11.2.1 Race

"Race" includes all kinds of ethnic groups and may also entail membership in a specific social group of common descent. Serious harm imposed for disregard of racial barriers may also constitute persecution on account of race.

11.2.2 Nationality

"Nationality" as a protected ground refers to membership in an ethnic or linguistic group as well as country of citizenship. Persecution on account of nationality often overlaps with persecution on account of other protected grounds, such as race, membership in a particular social group, and political opinion.

In some ethnically-based conflicts, members of an ethnic group may be at risk of harm, even though they are not themselves directly involved in the conflict, because the persecutor associates them with the members of their ethnic group who are involved in a conflict.

11.2.3 Religion

Some forms of persecution on account of religion may include actions that seriously impede an individual's ability to practice his or her religion; serious harm for conversion from one religion to another; punishment for violating religious-based laws; and forced compliance with religious laws that are abhorrent to an applicant's own beliefs.

11.2.4 Political Opinion

"Political opinion" should not be interpreted narrowly to include only participation in a political party or the political process. It should be interpreted broadly and may include opinions regarding women's rights, workers' rights, and other human and civil rights. The persecutor's association with a political entity does not establish that the harm or feared harm is on account of political opinion. Persecution on account of political opinion means persecution on account of the ***applicant's*** opinion or one that has been attributed to the applicant.

Forced abortion or forced sterilization, persecution for refusal to undergo such procedures, and persecution for resistance to population control policies, by law are considered to be persecution on account of political opinion. Coercive family planning cases do not require specific evidence of motivation.

11.3 Common Nexus Issues

Generally, U.S. law requires specific evidence, either direct or circumstantial, that the persecutor is motivated by a protected belief or characteristic that the applicant possesses or is perceived to possess. Evidence that the applicant is in a conflict situation is generally not specific enough to establish nexus. You are responsible for eliciting evidence surrounding the circumstances of the applicant's claim to determine if such specific evidence exists.

PRACTICAL EXERCISES

Note: Practical Exercises will be added at a later time.

Practical Exercise # 1

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

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OTHER MATERIALS

There are no Other Materials for this module.

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SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

International and Refugee Adjudications Supplement - Motivation

NOTE:

The Immigration and Nationality Act (INA) is the governing statute for asylum and refugee adjudications. INA § 207 is the statutory provision for refugee admissions, and 8 C.F.R. Part 207 contains the corresponding regulations. INA § 208 is the statutory provision for asylum adjudications and 8 C.F.R. Part 208 contains the corresponding regulations.

The REAL ID Act of 2005 amended INA § 208 but did not amend INA § 207. Therefore, the changes the REAL ID Act made to asylum nexus provisions do not apply in the overseas refugee processing context. The principal change the REAL ID Act makes to the law surrounding nexus is the requirement that asylum applicants establish that one of the five protected grounds was, or would be, at least one central reason in motivating the persecutor. Officers adjudicating refugee cases should disregard the word “central” when they see it in this context and should refrain from making it part of their analysis. In the refugee processing context, you must determine whether a reasonable person would fear that the danger arises on account of one of the five grounds.

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SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

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

2. Memorandum from David A. Martin, INS Office of General Counsel, to Management Team, et al., *Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, (21 Oct. 1996) (HQCOU 120/11.33-P).

3. UNHCR, *Note on Refugee Claims Based on Coercive Family Planning Laws or Policies* (Aug. 2005).

SUPPLEMENTS

Asylum Adjudications Supplement - Coercive Population Control

General Overview

In 1996, Congress amended the refugee definition to allow for claims based upon certain types of harm related to coercive population control programs.[164] Under the amended INA:

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.[165]

According to the BIA, the amended refugee definition created four new and specific classes or categories of refugees:[166]

- persons who have been forced to abort a pregnancy;
- persons who have been forced to undergo involuntary sterilization;[167]
- persons who have been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program; and
- persons who have a well-founded fear that they will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance.

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

[164] *See* David A. Martin, INS Office of General Counsel, Memorandum to Management Team, et al., *Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, HQCOU 120/11.33-P (Oct. 21, 1996).

[165] INA § 101(a)(42).

[166] *Matter of J-S-*, 24 I&N Dec 520 (AG 2008).

[167] *See Matter of X-P-T-*, 21 I&N Dec 634 (BIA 1996) (recognizing change in law and granting asylum to applicant who was forcibly sterilized).

for failing or refusing to undergo such a procedure, or for resisting a coercive population control program, may provide a basis for refugee status under the fourth category above.

Element of "force"

In order for an abortion or sterilization procedure to constitute persecution, the applicant must establish that he or she was "forced" to undergo the procedure. In *Matter of T-Z-*,[168] the BIA held that a procedure is "forced" within the meaning of the INA when:

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

The applicant does not have to demonstrate physical harm or threats of physical harm because "persecution" is not limited to physical harm or threats of physical harm. However, the applicant must demonstrate that the harm he or she feared, if carried out, would rise to the level of persecution.[169]

Threats of economic harm, for example, could suffice, "so long as the threats, if carried out, would be of sufficient severity that they amount to past persecution."[170] However, not all threats involving economic sanctions will rise to the level of persecution. The harm must involve:

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

However, "pressure" or persuasion applied to submit to a course of action not preferred is not "force" unless the harm suffered or feared rises to the level of persecution. Thus, for example, economic harm that would not rise to the level of

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

[169] *Id*. at 170-72. *See also* Matter of M-F-W- & L-G-, 24 I& N Dec. 633, 636-40 (BIA 2008) (holding that the insertion or removal of an IUD in a routine medical procedure does not rise to the level of persecution, unless aggravating circumstances exist, because unlike sterilization and abortion, the insertion of an IUD is not a permanent measure).

[170] Matter of T-Z-, 24 I&N Dec. at 169-70 (rejecting Lidan Ding v. Ashcroft, 387 F.3d 1131, 1139 (9th Cir. 2004) and Wang v. Ashcroft, 341 F.3d 1015 (9th Cir. 2003) in so far as those decisions suggest that economic harm that does not rise to the level of persecution could establish that an abortion was "forced").

persecution would constitute pressure but would not make an abortion "forced." In Yuqing Zhu v. Gonzales,[171] a case involving an unmarried woman who underwent an abortion before the authorities discovered that she was pregnant, the Fifth Circuit adopted the *Matter of T-Z-* standard for determining whether an abortion was "forced," but reversed the BIA's finding that the applicant's abortion was not forced. The applicant underwent an abortion because she believed that the law required abortion, and she feared: (1) a later physically compelled abortion; (2) loss of her job, benefits and housing; (3) imprisonment; (4) sterilization; (5) that her child would not be recognized as a Chinese citizen; and (6) her child would be denied services. The court held that the applicant's "abortion was indeed forced, as a reasonable person in Zhu's position 'would objectively view the threats for refusing the abortion to be genuine,' and that harm, 'if carried out, would rise to the level of persecution.'"[172] Specifically, the threat of a later physically compelled abortion or forcible sterilization rose to the level of persecution. The fact that the applicant's boyfriend wanted her to undergo an abortion did not keep the abortion from having been "compelled" by the government.

In *Xiu Fen Xia v. Mukasey*, the Second Circuit held that an applicant's abortion was not forced, under the interpretation set forth in *Matter of T-Z-*. Fearing sterilization, a "really heavy fine," arrest, forced abortion, and arrest of her family members, the married applicant from Zhejiang Province obtained an abortion from a private hospital before government authorities knew of her pregnancy. The court held that "force" requires evidence as to the pressure actually exerted on a particular petitioner. Here, no government official was aware of Xia's pregnancy, and therefore no government official forced her to terminate her pregnancy or threatened her with other harm. Additionally, the court held that even if she would face some harm when her pregnancy was discovered, the applicant did not show that she risked anything more than modest fees or fines, which would not be severe enough to rise to the level of persecution.[173]The Ninth Circuit has held, and the BIA recognizes, that an applicant seeking to prove that he or she was subjected to a coercive population control program "need not demonstrate that he [or she] was physically restrained during a 'forced' procedure. Rather, 'forced' is a much broader concept, which includes compelling, obliging, or constraining by mental, moral, or circumstantial means, in addition to physical restraint."[174]

[171] *Yuqing Zhu v. Gonzales*, 493 F.3d 588 (5th Cir. 2007).

[172] *Id*. at 590.

[173] *Xiu Fen Xia v. Mukasey*, 510 F.3d 162 (2d Cir. 2007).

[174] *Lidan Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9th Cir. 2004) (finding that an applicant who was forced from her home into a van, taken to a hospital, pulled off the floor by two officials when she refused to get up, forced onto a hospital bed, and watched over by two officials underwent a "forced" abortion, despite the fact that she was not physically restrained during the procedure). *See also Zi Zhi Tang v. Gonzales*, 489 F.3d 987 (9th Cir. 2007) (Abortion was "forced" even though applicant and wife did not express opposition to or attempt to avoid the

Eligibility of Spouses and Partners of Persons Who Have Been Physically Subjected to a Forced Abortion or Forced Sterilization Procedure

- **No *Per Se* Spousal Eligibility**

In 2008, the Attorney General ruled that individuals who have not physically undergone a forced abortion or sterilization procedure, such as spouses of persons forced to undergo these procedures, are no longer *per se* entitled to refugee status.[175]

The Attorney General reasoned in *Matter of J-S-*, as did the Second Circuit in *Shi Liang Lin*, that the statutory text is limited to the person who was forced to undergo the involuntary procedure. Accordingly, the unambiguous meaning of these clauses is that *per se* refugee protection is to be afforded only to the person forced to undergo the procedure. Spouses or other partners of individuals who have been physically subjected to a procedure may be able to qualify for asylum on a case-by-case basis, but may not benefit from a presumption of eligibility. Although the Attorney General noted "that application of coercive population control procedures may constitute 'obtrusive government interference into a married couple's decisions regarding children and family' that may 'have a profound impact on both parties to the marriage,'" the Attorney General found no basis to afford automatic eligibility to the spouse who was not physically subjected to a forced procedure.[176] The Attorney General's decision in *Matter of J-S-* vacated the BIA's earlier decisions in *Matter of C-Y-Z-* and *Matter of S-L-L-*, in so far as those decisions held that an applicant whose spouse was forced to undergo an abortion or sterilization procedure was *per se* eligible for asylum on the basis of past persecution on account of political opinion.[177]

- **Eligibility of Other Family Members**

Even before the Attorney General's decision in *Matter of J-S-*, circuit courts had found that *per se* asylum eligibility did not extend to family members, including

procedure, where the gynecological test was mandatory, performed by wife's employer on whom she was economically dependent, the employer's policy required that the abortion take place, the employer actually took her to have the procedure performed, and the procedure was "barbarically" performed without the benefit of anesthetics).

[175] *See* Matter of J-S-, 24 I&N Dec. 520 (AG 2008) (overruling BIA's *per se* rule of spousal eligibility); Shi Liang Lin v. USDOJ, 494 F.3d 296 (2d Cir. 2007) (en banc) (same).

[176] Matter of J-S-, 24 I&N Dec. at 541 (AG 2008); *see also* Definition of Resistance section, below.

[177] Matter of J-S-, 24 I&N Dec. 520 (AG 2008).

parents, parents-in-law, and children of individuals subject to coercive population control measures.[178] These individuals may be able to qualify for asylum on a case-by-case basis, considering the factors set forth below.

- **Case-by-Case Consideration of Eligibility Based on Resistance to Coercive Population Control**

In order to determine whether an applicant who has not physically undergone a forced abortion or sterilization procedure can demonstrate eligibility for asylum, you must conduct a case-by-case assessment of the relevant factors.[179] The applicant must show that he or she meets the following three elements:

- failed or refused to undergo an abortion or sterilization procedure, or resisted a coercive population control program;
- suffered harm, or has a well-founded fear of suffering harm, rising to the level of persecution;
- the persecution was inflicted, or he or she has a well-founded fear that it would be inflicted, for resistance to the coercive population control program or for failure or refusal to undergo the procedure.[180]

Definition of "Resistance" in the Context of Coercive Population Control

In *Matter of S-L-L-* the BIA indicated that "resistance" may take many forms and cover a wide range of circumstances.[181] Resistance can include, for example:

- expressions of general opposition
- attempts to interfere with enforcement of government policy in particular cases
- other overt forms of resistance to the requirements of the family planning law

The BIA held, however, that merely impregnating a girlfriend or fiancée or seeking

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

[179] *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), *vacated in part by Matter of J-S-*, 24 I&N Dec. 520 (AG 2008); *Matter of S-L-L-*, 24 I&N Dec. 1, 6 (BIA 2006) (same). *See also Lin v. U.S. Att'y Gen.*, 555 F.3d 1310, 1315-16 (11th Cir. 2009) ("unmarried partners ….do not automatically qualify for protection under the forced abortion and sterilization provisions").

[180] *See Matter of J-S-*, 24 I&N Dec. 520 (AG 2008); *Shi Liang Lin v. USDOJ*, 494 F.3d 296 (2d Cir. 2007) (en banc). For additional information, see section, *Definition of Resistance in the Context of Coercive Population Control*, below

[181] *Matter of S-L-L-*, 24 I&N Dec. at 10-11.

permission to marry or have children outside age limits does not constitute "resistance" under the refugee definition.[182]

In *Matter of M-F-W- & L-G-*, the BIA stated that removal of an intrauterine device or failure to attend a mandatory gynecological appointment could constitute other resistance to family planning policies. "[S]uch acts, while arguably not comprising active or forceful opposition to China's family planning policy, would certainly thwart the goals of the plan and be viewed with disfavor by Chinese officials implementing the plan."[183] The Board warned, however, that the harm must rise to the level of persecution, and the applicant must establish that the harm was inflicted on account of her "resistance" to the family planning policies, not just as part of a routine procedure.

In *Xu Ming Li v. Ashcroft*, the Ninth Circuit held that the applicant demonstrated both vocal and physical resistance to a coercive population control program. The applicant "vocally resisted the marriage-age restriction when she told the village official that she wanted 'freedom for being in love' and when she publicly announced her decision to marry even after a license was refused. She also resisted the one-child policy when she told the official she intended 'to have many babies,' that she did 'not believe in the policy' limiting family size, and that she did not want him to 'interfere.' Second, she resisted physically by kicking and struggling when forced to undergo a gynecological examination."[184]

Harm Rising to the Level of Persecution

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

- **Physical Harm/Restraint**

  In *Yi Qiang Yang v. Gonzales*, the Eleventh Circuit upheld the BIA's finding that the harm – a brief physical altercation with family planning officials, a summons to a local security office, and an ongoing interest in the applicant by family planning authorities – suffered by an applicant whose wife was subsequently forced to abort her pregnancy, did not rise to the level of persecution.[185]

- **Psychological Harm**

[182] Id. at 11-12. *See also* Zhang v. Ashcroft, 395 F.3d 531 (5th Cir. 2004).

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

[184] Li v. Ashcroft, 356 F.3d 1153, 1160 (9th Cir. 2004) (en banc). *See also* Lin v. Gonzales, 472 F.3d 1131 (9th Cir. 2007).

[185] Yang v. U.S. Att'y Gen., 494 F.3d 1311 (11th Cir. 2007).

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In *Matter of J-S-*, the Attorney General recognized that the application of coercive population control policies may have a profound impact on both parties to the marriage. When judging the psychological harm to an unmarried applicant based on a forced abortion or sterilization procedure performed on a partner, DHS has identified relevant factors, including:[186]

- whether the couple has children together
- the length of cohabitation
- whether the couple holds itself out as a committed couple
- whether the couple took any steps to have the relationship recognized in some fashion
- whether the couple is financially interdependent
- whether there is objective evidence that the relationship continues while the applicant is in the United States

Other Forms of Harm Resulting from Forced Compliance with a Coercive Population Control Program

The Ninth Circuit has found that a forced gynecological exam that lasted for half an hour and was followed by threats of being subjected to a similar procedure at any time in the future was harm serious enough to rise to the level of persecution.[187]

Other measures imposed on an individual as part of a coercive population control program, such as substantial monetary fines, the denial of schooling, and forced medical examinations and procedures, may cumulatively rise to the level of persecution.[188] Claims of such experience should be examined for severity, accumulation, and effect on the individual, as would any claim of past mistreatment.

- **Continuing Nature of Harm Resulting from Forced Abortions and Sterilizations**

Forced abortion or sterilization has been found by the BIA to be a "permanent and continuing act of persecution that ...deprive[s] ...couple[s] of the natural fruits of

[186] *Matter of S-L-L-*, 24 I&N Dec. at 10-11 (citing to factors identified in DHS briefing to the BIA in the case).

[187] *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc); *cf. Huang v. U.S. Att'y Gen.*., 429 F.3d 1002 (11th Cir. 2005)(holding that an intrusive state-ordered gynecological exam, which caused pain and discomfort, along with a 20-day detention because of her refusal to submit to a second exam, amounted to persecution).

[188] *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007).

conjugal life, and the society and comfort of the child or children that might eventually have been born to them."[189]

- **Harm for Resistance to Coercive Population Control**

The applicant must show that the past or threatened persecution was or would be inflicted for the resistance to a coercive population control program. In *Shi Liang Lin*, the Second Circuit held that an individual must demonstrate "past persecution or a fear of future persecution for 'resistance' that is directly related to his or her own opposition to a coercive family planning policy."[190] In *Matter of M-F-W- & L-G-*, the BIA explained that "[t]he statute requires more than proof of an act of resistance and an unconnected imposition of harm that rises to the level of persecution. There must be a link between the harm and the 'other resistance.'"[191] The BIA held that the applicant could not meet this requirement because the reinsertion of her IUD was carried out as part of a routine medical procedure, rather than to target her for her opposition or resistance to the family planning policy.

The Second Circuit held in *Shi Liang Lin* that where an applicant himself has not demonstrated resistance to coercive population control policies, but his spouse or partner has, whether by failure or refusal to undergo a procedure, or for other resistance, the applicant may be able to demonstrate, through direct or circumstantial evidence, that his partner's resistance has been or will be imputed to him.[192]

Persecution of a parent due to resistance to population control measures does not automatically make the child of that parent eligible for asylum. The child, however, may be able to establish eligibility for asylum if the child establishes that he or she suffered persecution on account of any political opinion imputed to the child based on the parent's resistance.[193]

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[189] *See* Matter of Y-T-L-, 23 I&N Dec. 601, 607 (BIA 2003); Yuqing Zhu v. Gonzales, 493 F.3d 588 (5th Cir. 2007), Qu v. Gonzales, 399 F.3d 1195 (9th Cir. 2005). For additional information, see RAIO Training Module, *Well-Founded Fear.*

[190] Shi Liang Lin v. USDOJ. 494 F.3d 296, 313 (2d Cir. 2007) (en banc). *See also* Li v. Ashcroft, 356 F.3d 1153 (9th Cir. 2004) (en banc).

[191] Matter of M-F-W- & L-G-, 24 I&N Dec. 633, 643 (BIA 2008).

[192] Shi Liang Lin v. USDOJ, 494 F.3d 296, 313 (2d Cir. 2007) (en banc).

[193] Zhang v. Gonzales, 408 F.3d 1239 (9th Cir. 2005) (finding that the hardships suffered by the applicant, including economic deprivation resulting from fines against her parents, lack of educational opportunities, and trauma from witnessing her father's forcible removal from home, were on account of an imputed political opinion based on her parent's resistance to CPC measures). *But see* Tao Jiang v. Gonzales, 500 F.3d 137 (2d Cir. 2007) (no evidence that resistance was imputed to child of woman who was forcibly sterilized).

Asylum Adjudications Supplement – At Least One Central Reason

The REAL ID Act requires that the protected ground be at least one central reason motivating the persecutor to harm the applicant in asylum adjudications. Officers should cite this standard in their assessments.

While several courts have suggested that the "one central reason" requirement is a more onerous burden than the applicant's burden under pre-REAL ID case law,[194] the BIA has held that the "one central reason" standard is not a radical departure from most pre-REAL ID Act case law.[195] The BIA analyzed the legislative history of the REAL ID Act, coming to the conclusion that the "at least one central reason" standard was specifically designed to overrule certain circuit court case law.[196]

In applying the "at least one central reason" standard, the Ninth Circuit has held that, in order for a protected ground to be a central motivating factor, it must have been important enough that the persecutor would not have acted had it not existed.[197] There is no requirement that the motivation relating to the protected ground be dominant or primary.[198]

The applicant must establish that the protected ground was "at least one central reason" and played more than a "minor," "tangential," or "superficial" role.[199] While the applicant is not required to show that the protected characteristic is the sole reason for the persecutor's action, the protected characteristic cannot be tangential or incidental to the persecutor's motivation.[200] The BIA has held that a tangential motivation is one that is only "superficially relevant" and an incidental motivation is one that is minor or casual.[201]

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[194] *Parussimova v. Mukasey*, 555 F.3d 734, 740 (9th Cir. 2009) (finding that the REAL ID Act's "one central reason" standard is more onerous than the Ninth Circuit's "at least in part" rule, and overruled the Ninth Circuit's presumption of political motivation absent a legitimate prosecutorial interest); *Singh v. Mukasey*, 543 F.3d 1, 4-5 (1st Cir. 2008).

[195] *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007) ("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.").

[196] *Id*. at n.9. (Congress sought to overrule the Ninth Circuit's approach in mixed motive cases and overruled the Ninth's Circuit's presumption of political motivation absent a legitimate prosecutorial interest.)

[197] *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009).

[198] *Id*.

[199] *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211 (BIA 2007).

[200] *Id*. at 213 (citing House Conf. Rpt., 109-72, 2005 USCCAN 240, 288).

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

Example: In *J-B-N- & S-M-*, the applicant and his wife, citizens of Rwanda who were born in Burundi, moved to Rwanda in 1996. In 2004, the applicant's aunt took over a valuable parcel of land that had been deeded to him by his uncle. After a legal ruling declared him the land's owner, the applicant's cousin called him and demanded that he return to Burundi. He testified that his cousin, a major in the national police, placed the calls because he could not bear to lose the property and was hostile to the applicant because the applicant was from Burundi. Later, the applicant's cousin came to the applicant's home with three other men dressed in police uniforms. They demanded that the applicant and his wife return to Burundi, which they did.

An expert witness testified that citizens of Rwanda who are born in Burundi have low social status in Rwanda, and that land disputes are common there. Country conditions also indicated that land disputes are common in Rwanda, and that the disputes frequently turn violent.

The applicant claimed that his aunt and cousins' motivation was his Burundian origins and because they were "old case-load" refugees. Both he and his wife testified that, before the land dispute, relations between the applicant and his family had been friendly. The BIA rejected the applicant's asylum claim, finding that he was unable to show that his Burundian origins or his status as a repatriated refugee was more than a tangential motivation for the threats against him and his wife.[202]

Asylum may not be granted if a protected ground is only an "'incidental, tangential, or superficial' reason for the persecution of an asylum applicant."[203] Notably, the Third Circuit rejected the BIA's interpretation that the protected ground may not be "subordinate" to other reasons for the persecution.[204]

*<u>**Note:**</u> There are five protected grounds in the refugee definition. "Particular social group" (PSG) is one of these grounds but is not discussed in this module. PSG is covered in a separate module, *Nexus – Particular Social Group*.

[202] *Id.*

[203] *Ndayshimiye v. Att'y Gen. of U.S.*, 557 F.3d 124, 130 (3d Cir. 2009).

[204] *Id.*

Lesson Plan Overview

Course	Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	One-Year Filing Deadline
Rev. Date	May 6, 2013
Lesson Description	This lesson describes the statutory bar to applying for asylum more than one year after an alien's date of last arrival. Through discussion of the statute, the implementing regulation, and the review of examples, the lesson explains the standard of proof and exceptions to the one-year filing deadline.
Terminal Performance Objective	Given an asylum application to adjudicate in which the one-year filing deadline or a previous denial is at issue, the asylum officer will be able to properly determine if an applicant is eligible to apply for asylum.
Enabling Performance Objectives	1. Identify to what extent the one-year filing rule is at issue in a given case. (ACRR4)(AA1) 2. Apply the clear and convincing evidentiary standard to determine if an asylum application complies with the one-year filing rule. (ACRR4)(AA1) 3. Explain the exceptions to the one-year filing rule. (AA3)(AIL1) 4. Identify all relevant factors in evaluating credibility with respect to the one–year filing rule. (AAS5) 5. Determine whether an applicant is barred from applying for asylum. (ACRR3)(AA3)
Instructional Methods	Lecture, discussion, practical exercises
Student References / Materials	INA §§ 208(a); 101(a)(42); 8 C.F.R. § 208.4(a); Matter of Y-C-, 23 I & N Dec. 286, 288 (BIA 2002); Vahora v. Holder, 641 F.3d 1038 (9th Cir. 2011).
Method of Evaluation	Practical exercise, written exam
Background Reading	Joseph E. Langlois. Asylum Division, Office of International Affairs. Procedures for Implementing the One-Year Filing Deadline and Processing Cases Previously Denied by EOIR, Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 4, 2002), 11 p. plus attachments. (See Asylum lesson plan, Mandatory Bars Overview and Criminal Bars to Asylum and RAIO Discretion Training Module)

Critical Tasks

Skill in identifying information required to establish eligibility. (4)
Knowledge of policies and procedures for one-year filing deadline. (4)
Knowledge of mandatory bars and inadmissibilities to asylum eligibility. (4)
Knowledge of the criteria for establishing credibility. (4)
Skill in determining materiality of facts, information, and issues. (6)
Skill in analyzing complex issues to identify appropriate responses or decisions. (5)

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Presentation

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I. INTRODUCTION

Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), eligibility for asylum was not linked to how long an applicant had been in the United States. IIRIRA introduced a new eligibility requirement: an asylum applicant filing after April 1, 1998, must apply within one year of his or her last arrival or April 1, 1997, whichever is later, unless there are changed circumstances that materially affect his or her eligibility for asylum, or extraordinary circumstances relating to the delay in filing. This lesson provides guidance on determining whether an applicant has applied for asylum within one year from date of arrival in the United States and, if not, whether an exception exempting the applicant from this requirement applies.

Pub. L. No. 104-208, 110 Stat. 3546 (Sept. 30, 1996).

See 8 USC § 1158(a)(2)(B); INA § 208(a)(2)(B) (an alien must "[demonstrate] by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States");and 8 C.F.R. § 208.4 (a). Exceptions to the rule are provided in INA § 208(a)(2)(D) and 8 C.F.R. § 208.4(a).

II. OVERVIEW

Any asylum applicant who applies for asylum on or after April 1, 1998 (or April 16, 1998, for those applying affirmatively), must establish that he or she filed for asylum within one year from the date of last arrival (or April 1, 1997, whichever is later), or establish that he or she is eligible for an exception to the one-year filing requirement. If an applicant fails to establish either timely filing of the application or that an exception applies, the application must be referred to the Immigration Court. Only an asylum officer, immigration judge or the Board of Immigration Appeals (BIA) is authorized to make this determination. The determination may be made only after an interview with an asylum officer or hearing before an Immigration Judge.

8 C.F.R. § 208.4(a).

See discussion of 14-day grace period in Section III below for April 16, 1998 date.

Note: An applicant who is not eligible to apply for asylum for failure to meet the one-year filing requirement is still eligible to apply for withholding of removal before an immigration judge.

An asylum interview is the method asylum officers use to determine an applicant's last arrival date, basis for asylum claim, and whether any exceptions to the filing deadline apply. No applicant is to be denied a full asylum interview based solely on one-year filing deadline issues. A full and thorough asylum interview includes a pre-interview check of country conditions and post-interview research where necessary.

Decisions by an asylum officer must be supported by the officer's written assessment of the case. Because changed conditions may provide an exception to the one-year filing requirement (as discussed below), all referrals on the basis of the one-year filing deadline must address pertinent country conditions and must analyze whether there has been any change in country conditions.

III. APPLICABILITY

Only affirmative applications with a filing date on or after April 16, 1998, are subject to the one-year rule. Applications with a filing date on or before April 15, 1998, are not subject to the one-year filing deadline as implemented by the Asylum Division. Although April 1, 1998, is the effective date provided by regulation for those who arrived before April 1, 1997, legacy-INS extended an administrative 14-day grace period for applications filed with the INS. This 14-day period only applies to those applications filed in the first 15 days of April, 1998.

See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A).

The Trafficking Victim's Protection Reauthorization Act (TVPRA) amended the INA to state that the one-year filing deadline does not apply to unaccompanied alien children. As of the TVPRA's effective date of March 23, 2009, when you determine that a minor principal applicant is an unaccompanied alien child, you should forego the one-year filing deadline analysis and conclude that the one-year filing deadline does not apply.

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).

IV. DETERMINING WHETHER THE APPLICATION WAS FILED WITHIN THE ONE-YEAR PERIOD

A. Calculating the One-Year Period

1. Date one-year period begins

The one-year period is calculated from the date of the applicant's last arrival in the United States or from April 1, 1997, whichever date is later. The date of arrival is counted as day zero, so the first day in the calculation is the day after the last arrival.

8 C.F.R. § 208.4(a)(2)(ii); Matter of F-P-R, 24 I. & N. Dec. 681 (BIA 2008) (holding that the term "last arrival" refers to the alien's most recent arrival in the United States from a trip abroad).

For example, if an applicant enters the United States on February 2, 2000, leaves the United States on February 25, 2000, and returns to the United States on March 1, 2000, the one-year period begins on March 2, 2000.

Note: The regulations, at 8 C.F.R. § 208.4(a), state that an applicant has the burden of proving that her "application has been filed within 1 year of the date of the alien's arrival in the United States," and that "[t]he 1-year period shall be calculated from the date of the alien's last arrival in the United States . . .". Before the Ninth Circuit's opinion in Minasyan v. Mukasey, the Asylum Division counted the day of arrival as "day one" for purposes of calculating the one-year period. In order to maintain a consistent national

See Minasyan v. Mukasey, 553 F.3d 1224 (9th Cir. 2009) ("[T]he statute specifically provides that the one-year period for filing an asylum application commences after the date of arrival, meaning that his date

approach--in accord with the INA, the regulations, and Minasyan, the Asylum Division now calculates the day of arrival as "day zero."

of arrival does not count as "day one" for purposes of the filing deadline.")

2. Date one-year period ends

The one-year period is calculated from the last arrival date up to the same calendar day the following year. For example, an applicant who arrives on February 23, 2000, and files on February 23, 2001, will have timely filed. Note that for an applicant who last arrived before April 1, 1997, the one-year period is calculated from April 1, 1997.

If the last day for timely filing falls on a Saturday, Sunday, or legal holiday, filing on the next business day will be considered timely. For example, an applicant who last arrives on June 24, 2000, can timely file on June 25, 2001, because June 24, 2001, is a Sunday.

8 C.F.R. § 208.4(a)(2)(ii) See Jorgji v. Mukasey, 514 F.3d 53 (1st Cir. 2008) (finding that the applicant filed timely where she entered on March 4, 2001 and provided documentary evidence that she filed on Monday, March 4, 2002).

3. Filing date

The filing date is found on the Service Center's date/time stamp on the I-589 and on the RAPS "I589" and "CSTA" screens. If any of these dates are different, the earliest date is to be used.

An affirmative asylum application is considered filed when received by the USCIS Service Center. However, the application can be considered timely if "clear and convincing" documentary evidence demonstrates that the application was mailed within the statutory one-year period. The "clear and convincing" standard is explained in Section IV.B.

8 C.F.R. § 208.4(a)(2)(ii); see Nakimbugwe v. Gonzales, 475 F.3d 281 (5th Cir. 2007).

B. Burden and Standard of Proof

There are two different standards of proof that are operative in making determinations related to the one-year filing requirement: a) the standard of proof to establish that an applicant applied within one year and b) the standard of proof to establish that an exception to the requirement applies, if the applicant failed to meet the one-year requirement. This section focuses on the standard of proof required to establishing filing within one year.

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1. Applicant's burden

The burden of proof is on the applicant to establish that he or she applied for asylum within one year from the date of last arrival in the United States.

2. Standard of proof

Pursuant to INA section 208(a)(2), the standard of proof required to establish that an applicant filed within one year from last arrival is the clear and convincing standard.

"Clear and convincing" is that degree of proof that will produce a "firm belief or conviction as to the allegations sought to be established," and "where the truth of the facts asserted is highly probable."

Black's Law Dictionary, 5th and 6th Editions; Woodby v. INS, 385 U.S. 276 (1966); Matter of Carrubba, 11 I&N Dec. 914 (BIA 1966); Matter of Patel, 19 I&N Dec. 774 (BIA 1988).

The proof need not be "conclusive" or "unequivocal;" if put on a scale, the clear and convincing standard would be somewhere between the "preponderance of evidence" standard (greater than 50% standard, or "more likely than not") and the "beyond a reasonable doubt" standard used in criminal trials.

Asylum officers should avoid trying to place the clear and convincing standard on a particular point on a percentage scale. Clear and convincing evidence does not fall precisely on any point between the "preponderance of evidence" standard and the "beyond a reasonable doubt" standard. Instead, it is the degree of evidence necessary to create a firm belief that the asserted fact is true.

3. Establishing timely filing

An applicant may establish that an application was filed within one year from the date of last arrival by providing either—

a. clear and convincing evidence that the date of last arrival was within the applicable one-year period, or

b. clear and convincing evidence that the applicant was outside of the United States during the previous year immediately before the date of filing.

In 2008, a Ninth Circuit decision held that, "the BIA erred in concluding that proof of an exact departure date was necessary when other clear and convincing

Khunaverdiants v. Mukasey, 548 F.3d 760, (9th Cir. 2008).

evidence established . . . that [the applicant] was released from prison in Iran less than one year before filing his asylum application."

4. Evidence

The evidence provided may be testimony, documentation, or a combination of both.

a. Testimony

Testimony is evidence. Standing alone without witness corroboration or documentary evidence, when credible, testimony can be sufficiently clear and convincing to lead an asylum officer to a "firm belief" that the applicant arrived within one year before the filing date.

8 C.F.R. § 208.13(a); Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); see RAIO Training Module, Evidence.

b. Documents

Documentary evidence such as passport entries, boarding passes, leases, etc., are probative as to when an applicant entered the United States, when presence outside the United States ended, and when presence in the United States began.

While the INA requires that an asylum applicant provide reasonably available corroborating evidence to establish eligibility for asylum, neither the statute nor regulations specifically address requirements for establishing that the one-year filing requirement has been met. However, consistent with the reasoning of case law addressing corroboration is the premise that corroboration should not be required when there are reasonable explanations for the inability to provide corroborating evidence. Due to circumstances that give rise to a refugee's flight, it generally would be unreasonable to expect a refugee to have documentary proof of presence outside the United States within a year from last arrival. Furthermore, at least one circuit has held that an applicant cannot be required to provide corroborating evidence to show he or she has met the one-year filing deadline.

See RAIO Training Module, Evidence.

In Singh v. Holder, 649 F.3d 1161 (9th Cir. 2011) (holding that the requirement for corroborating evidence to establish asylum eligibility added by the REAL ID Act of 2005 does not apply to the statutory provision establishing the one-year filing deadline for asylum applications, but not considering whether, in the absence of credible testimony meeting the clear and convincing standard, an IJ may weigh the lack of corroborating evidence in

Note: There may be instances in which the asserted arrival date is uncertain or not believable. These credibility issues are explored in Section VII.

assessing compliance with the standard).

V. EXCEPTIONS TO THE ONE-YEAR RULE

If an applicant did not apply for asylum within one year from last arrival in the United States, he or she may still be eligible to apply for asylum if the applicant establishes that there are changed circumstances materially affecting the applicant's eligibility for asylum or extraordinary circumstances related to the delay in filing. Once an applicant establishes the existence of such a changed or extraordinary circumstance, the applicant must demonstrate that the application was filed within a reasonable amount of time given those circumstances.

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

Keep in Mind:

The analysis of whether an applicant qualifies for asylum is not relevant to examining one-year filing deadline issues; rather, the task at this initial stage is to determine whether an exception to the one-year filing deadline applies. If an exception to the one-year filing deadline applies, then the applicant is entitled to a full adjudication of his or her asylum application.

A. Changed Circumstances

1. General considerations

INA § 208(a)(2)(D).

The statute allows for an exception due to changed circumstances that materially affect an applicant's eligibility for asylum. To show that the exception applies, the applicant must establish the following:

a. the existence of a changed circumstance that occurred on or after April 1, 1997, the effective date of the statute;

b. that the changed circumstance is material to the applicant's eligibility for asylum; and

c. that the application was filed within a reasonable period of time after the changed circumstance.

In evaluating whether a delay in filing was reasonable, the asylum officer must take into account any delayed awareness the applicant may have had of the changed circumstance.

Note: An exception may result regardless of when the changed circumstance occurs, so long as it occurred after the effective date of the statute. The changed circumstance need not occur during the period when filing would be timely.

8 C.F.R. § 208.4(a)(4)(ii). This is discussed further in Section VI, Filing Within a Reasonable Period of Time, below.

2. Types of changed circumstances

The federal regulations on filing the asylum application provide a non-exhaustive list of the types of changed circumstances that may provide an exception to the one-year filing rule, as long as they materially affect the applicant's eligibility for asylum. These include:

a. changed conditions in the applicant's country of nationality or, if stateless, the applicant's country of last habitual residence

8 C.F.R. § 208.4(a)(4)(i)(A).

b. changes in applicable U.S. law

8 C.F.R. § 208.4(a)(4)(i)(B).

c. changes in the applicant's circumstances, such as recent political activism outside the country of feared persecution, conversion from one religion to another, etc.

8 C.F.R. § 208.4(a)(4)(i)(B).

d. the ending of the applicant's spousal or parent-child relationship to the principal applicant in a previous application.

8 C.F.R. § 208.4(a)(4)(i)(C).

Examples

1) Applicant was forced by her government to undergo an abortion. She arrives in the U.S. in 1992. The 1996 change to the refugee definition related to harm pursuant to a coercive population control program materially affects her asylum eligibility. She files for asylum on April 18, 1998. This applicant is not entitled to the changed circumstance exception because the change did not occur on or after April 1, 1997. If no other exceptions apply, her application will be referred.

Zhu v. Gonzales, 493 F.3d 588, 595 n.25 (5th Cir. 2007) (rejecting Zhu's argument that changed circumstances exist, given that China's family planning laws existed as a basis for eligibility for asylum when Zhu arrived in the US).

2) Applicant is a member of the XYZ party in his country. He is briefly jailed in September 1999. He arrives in the U.S. in November 1999 and files for asylum in December 2000. On the day of the interview, XYZ members are still routinely being jailed. Because there has been no change of country conditions, the application will be referred provided no other exceptions apply.

Mabasa v. Gonzales, 455 F.3d 740 (7th Cir. 2006) (holding that applicant did not show changed or worsened circumstances because the political climate in Zimbabwe remained as oppressive as it was at the time of his departure, and the applicant's renewed political

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Note: If conditions for XYZ members worsened after applicant departed his country, he may be eligible for the changed circumstance exception.

activity in the US was the very activity that caused his original flight); see also, Ramadan v. Gonzales, 479 F.3d 646, 657-58 (9th Cir. 2007), rehearing and rehearing en banc denied by, Ramadan v. Keisler, 504 F.3d 973 (9th Cir. 2007) (no changed circumstances where applicant expressed her political opinions in the U.S. on women's liberty in Egypt but had already been outspoken on women's issues while in Egypt).

In Vahora v. Holder, the Ninth Circuit further clarified this point. Vahora had already been subjected to serious physical harm in India because of his religion but, after he left, conditions worsened significantly. The country experienced the worst religious violence in decades and the religious rioting directly affected Vahora's family, property, and safety in India – his home and farm were destroyed and his family members were pursued by the police and went missing. Mr. Vahora did not file his affirmative asylum application within a year of his last arrival in the U.S. The IJ found, and the BIA upheld, no changed circumstance, finding instead that these events and their impact on Vahora were insufficient to show a material effect on his eligibility for asylum because he had already experienced mistreatment in India and should have expected it would continue if he returned.

Vahora v. Holder, 641 F.3d 1038 (9th Cir. 2011); see also Fakhry v. Mukasey, 524 F.3d 1057 (9th Cir. 2008) (where there are objectively changed circumstances, "there can be 'changed circumstances which materially affect the applicant's eligibility for asylum' even if the alien always meant to apply for asylum and always feared persecution; a sudden 'Eureka!' state of mind is not necessary.").

The Ninth Circuit reversed, finding that there were changed circumstances because the new facts make it substantially more likely that Vahora's claim will entitle him to relief, and that such events did materially effect his eligibility as required by 8 C.F.R. § 208.4(a)(4)(i)(a). Such a material effect is one that increases in a non-trivial way the likelihood of success in an application.

3) Applicant arrived in the U.S. in 1989 and has never left. She was included as a derivative on her mother's I-589, which was filed in September 1998, while Applicant was still a minor. Applicant's mother died in May 1999 before receiving her asylum interview. In June 2000, Applicant filed her own I-589. Due to the change in Applicant's derivative relationship, an exception to the filing deadline would apply provided the asylum officer considered the delay in filing from May 1999 to June 2000 to be a reasonable period of time.

Note: The fact that minors customarily leave immigration and other legal paperwork to older family members should be taken into account when evaluating the reasonableness of the delay in filing.

4) Applicant was a derivative on his father's I-589, which was filed in January 1999. In July 2000, Applicant got married. As a result, he lost his eligibility for derivative status in relation to his father. Applicant filed his own I-589 in November 2000. An exception to the filing deadline would apply in the son's case, provided the asylum officer considered the delay in filing from the date of marriage to the I-589 filing date to be a reasonable period of time.

Note: It will be rare that an asylum officer will encounter an applicant who was a derivative on his or her parent's claim and who subsequently filed as a principal because he or she is no longer under 21 years of age. This is because under the Child Status Protection Act, a derivative applicant continues to be considered a child for purposes of the parent's pending I-589, even though the dependent turned 21 years of age.

INA § 208(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208. See also Asylum lesson, *Guidelines for Children's* Asylum Claims. Note: reference to the Asylum lesson is accurate as of this date. At a future date, this will reference the RAIO training module, *Children's* Claims, Asylum Supplement.

3. Refugees sur place

The term "refugees sur place" refers to those who became refugees after leaving their home country. The changed circumstance exception to the one-year filing deadline reflects the principle that some individuals become refugees after they have left their countries and even after they may have been residing in another country for several years ("refugees sur place").

8 C.F.R. § 208.4 (a)(4)(i)(A); UNHCR Handbook, Paragraphs 94-95; Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); See RAIO Training Module, Well-Founded Fear, .

Changes occurring in an applicant's country or place of last habitual residence, and/or activities by an applicant outside his or her country may make the applicant a refugee sur place. Examples include but are not limited to:

a. a change of government which is now hostile to an applicant's profession, such as journalists

b. an applicant's involvement in political organizing or other activities in the U.S. that are critical of the applicant's government

c. an applicant's conversion from one religion to another, or abandonment of religion altogether recent antagonism in an applicant's country toward the applicant's race or nationality

d. recent antagonism in an applicant's country toward the applicant's race or nationality

e. threats against an applicant's family member living abroad

Taslimi v. Holder, 590 F.3d 981 (9th Cir. 2010) (finding that the delay between the applicant's conversion ceremony and the filing of her asylum application was reasonable, as religious conversion is a subjective process that may begin on a certain date but takes time to incorporate into one's life).

Example

A Russian citizen of West African ancestry has lived in the United States since 1989. She filed an I-589 in June 2000. Country conditions information shows that since the 1991 breakup of the former Soviet Union, individuals with West African ancestry have been targeted by ordinary citizens in Russia. The police have tolerated this abuse. Depending on the particular circumstances of the case, this applicant could be considered a refugee sur place. Provided there are no additional exceptions, because the change in country conditions occurred before April 1997, the applicant's failure to file for asylum within one year of arrival would result in her application being referred. Note: If there had been an escalation of violence between ethnic Russians and West Africans after April 1, 1997, the applicant would be eligible for an exception, provided the delay in filing is a reasonable period of time.

See Matter of A-M-, 23 I&N Dec. 737 (BIA 2005) (where applicant entered the U.S. on January 22, 2001, and filed for asylum over 2 years later, the nightclub bombing in Bali, Indonesia on October 12, 2002 did not constitute a material change in circumstances because the bombing did not materially affect or advance applicant's claim: he was from a different island and of a different ethnicity and religion than both those generally in Bali and the specific victims of the Bali bombing).

B. Extraordinary Circumstances

1. General considerations

8 C.F.R. § 208.4(a)(5).

Events or factors in an applicant's life that caused the applicant to miss the filing deadline may except the applicant from the requirement to file within one year of the last arrival or April 1, 1997, whichever is later. To be eligible for this exception, the applicant must:

a. establish the existence of an extraordinary circumstance;

b. establish that the extraordinary circumstance was directly related to the failure to timely file;

c. not have intentionally created the extraordinary

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circumstance, through his or her action or inaction, for the purpose of establishing a filing-deadline exception; and

d. file the application within a reasonable period given the circumstances that related to the failure to timely file.

Although an extraordinary circumstance can occur before or after an applicant's arrival in the U.S., and before or after the April 1, 1997, the effective date of the statutory provision, the extraordinary circumstance must directly relate to an applicant's failure to file within the one year period when filing would be timely.

Note: Because an extraordinary circumstance must directly relate to the failure to file, it must occur in the period when filing would be timely for an exception to exist (in contrast with a changed circumstance, which may occur at any time).

2. Types of circumstances that may be "extraordinary"

The federal regulations describe several situations that could fall under the extraordinary circumstances exception. This list is not exhaustive or all-inclusive. There are other circumstances that might apply if the applicant is able to show that those circumstances were extraordinary and directly related to the failure to timely file.

The Asylum Division considers the examples of extraordinary circumstances listed in the regulation as circumstances that, if experienced by an applicant, are likely to relate to the failure to timely file. When an applicant establishes the existence of an enumerated extraordinary circumstance, the officer should verify that the extraordinary circumstance is directly related to the failure to timely file.

Extraordinary circumstances include but are not limited to:

a. serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past

8 C.F.R. § 208.4(a)(5)(i).

The illness or disability must have been present, although not necessarily incurred, during at least part of the one-year period after arrival.

If the applicant has suffered torture or other severe trauma in the past, the asylum officer should elicit information about any continuing effects from that torture or trauma, which may be related to a delay in

Effects of persecution can include inability to recall details, severe lack of focus, problems with eating and sleeping, and other post-

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filing. Torture may result in serious illness or mental or physical disability.

traumatic stress disorder (PTSD) symptoms. See RAIO training module Interviewing - Survivors of Torture. See also RAIO training module Guidance for Adjudicating Lesbian, Gay, Bisexual and Intersex Claims.

b. the death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

8 C.F.R. § 208.4(a)(5)(vi).

Applicant's legal guardian, or holder of power of attorney, is also considered a family member.

The degree of interaction between the family members, as well as the blood relationship between applicant and the family member must be considered. For example, an estranged brother with whom the applicant has never had much contact would not qualify, but a grandparent or uncle for whom the applicant has sole physical responsibility would qualify.

c. legal disability

8 C.F.R. § 208.4(a)(5)(ii).

This is best described as an incapacity for the full enjoyment of ordinary legal rights; it includes minors and mental impairment.

Black's Law Dictionary, 5th Ed.

The legal disability must have existed at a point during the one-year period after arrival.

The regulations specifically include "unaccompanied minors" as an example of a category of asylum applicants that is viewed as having a legal disability that constitutes an extraordinary circumstance. Keeping in mind that the circumstances that may constitute an extraordinary circumstance are not limited to the examples listed in the regulations, the Asylum Division's policy is to find that all minors who have applied for asylum, whether accompanied or unaccompanied, also have a legal disability that constitutes an extraordinary circumstance.

8 C.F.R. § 208.4(a)(5)(ii); see Matter of Y-C-, 23 I & N Dec. 286 (BIA 2002).

A minor applicant is defined as someone under the age of eighteen at the time of filing. See USCIS Memorandum, "Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS," Aug. 14, 2007, p.5.

The same logic underlying the legal disability ground listed in the regulations applies to accompanied minors: minors are generally dependent on adults for

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their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.

As long as an applicant applies for asylum while still a minor (while the legal disability is in effect), the minor should be found to have not only established the existence of an extraordinary circumstance, but also to have filed within a reasonable period of time given the circumstance, thus meriting an exception to the one-year filing deadline.

See section VI, below, "Reasonableness…."

(i) Unaccompanied Alien Children (UAC)

The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 amended the INA to state that the one-year filing deadline does not apply to unaccompanied alien children. An unaccompanied alien child is a child who has no legal guardian in the United States, or for whom no parent or legal guardian in the United States is available to provide care and physical custody. As of March 23, 2009, the effective date of the TVPRA, when an asylum officer determines that a minor principal applicant is an unaccompanied alien child, the asylum officer should forego the one-year filing deadline analysis and conclude that the one-year filing deadline does not apply.

See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A); See also Asylum lesson, Guidelines *for Children's Asylum* Claims. Note: reference to the Asylum lesson is accurate as of this date. At a future date, this will reference the RAIO training module, *Children's Claims*, Asylum Supplement.

(ii) Minors Who Are Not Found To Be Unaccompanied Alien Children

The one year filing deadline continues to be applicable for minor principal applicants in lawful immigration status and minor principal applicants who are accompanied. Such cases should be analyzed according to the general guidance above.

Note: As passage of the TVPRA exempts only unaccompanied alien children from the one-year filing deadline, the deadline still applies to minors who are not found to be unaccompanied alien children. As a result, the examples listed in 8 CFR § 208.4(a)(5)(ii) are still valid.

d. ineffective assistance of counsel (limited to attorneys or accredited representatives)

8 C.F.R. § 208.4(a)(5)(iii)

The following are required for this exception:

(i) the applicant must file a written affidavit explaining the agreement in detail and listing what promises the attorney made or did not

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make, and

(ii) testimony or documentary evidence that the accused counsel was informed of the allegation and was given an opportunity to respond, and

(iii) testimony or documentary evidence that indicates whether there has been a complaint filed with the appropriate disciplinary authorities and, if not, an explanation why there has been no complaint.

Note: Regulations and case law that address whether counsel's assistance was ineffective are not relevant here. The asylum officer is not evaluating whether applicant was given poor counsel; rather, the responsibility of the asylum officer is to decide whether the above asylum regulatory elements have been fulfilled and that the counsel's actions were related to the delay in filing. Therefore, a recent ruling of the Attorney General that an alien has no right to effective assistance of counsel in removal proceedings is not relevant in determining whether an extraordinary circumstance exists and if an exception is warranted.

8 C.F.R. § 292.3(a); Matter of Lozada, 19 I&N Dec. 637 (BIA 1988); Matter of B-B-, Int. Dec. #3367 (BIA 1998).

See Matter of Compean, 24 I&N Dec. 710 (AG 2009)

e. maintenance of TPS, lawful status, or parole until a reasonable period before filing an asylum application

8 C.F.R. § 208.4(a)(5)(iv).

The regulations specifically provide that maintaining lawful immigration status during at least part of the one-year period qualify as an extraordinary circumstance. Thus, maintaining lawful status may enable an applicant to establish an exception to the requirement to file within the one-year period. As with all extraordinary circumstances that affect filing, maintaining lawful status excuses the failure to file within the one-year period so long as the application was filed within a reasonable period given the circumstance that relate to the failure to timely file.

The Department of Justice included these possible extraordinary circumstances exceptions to avoid forcing a premature application for asylum in cases in which an individual believes circumstances in his or her country may improve. For example, an individual admitted as a student who expects that the political situation in her country may soon change for the better

See 65 Fed. Reg. 76121, 76123 (Dec. 6, 2000).

as a result of recent elections may wish to refrain from applying for asylum until absolutely necessary.

Given the rationale for the inclusion of legal status as an extraordinary circumstance, the Asylum Division has determined that the "maintaining lawful status" extraordinary circumstance will generally relate to the failure to timely file, even where the applicant does not reference having status as a reason for the delay in filing.

An applicant has not "maintained lawful status" when:

(i) the admission is based on fraudulent documents,

(ii) he or she appears to be in lawful status, but has actually violated that status, or

(iii) the term parole specifically require that asylum be filed within one year.

Note: The applicant is not precluded from establishing an extraordinary circumstance where legal status has not been maintained. Consider if the case involves a "delayed awareness" of the violation of status. See section VI.B., Delayed Awareness, below.

Although applicants in the above circumstances have not maintained lawful status, some still may establish extraordinary circumstances exceptions. In evaluating whether an exception applies, the asylum officer should determine whether the applicant believed that he or she was maintaining lawful status.

In some circumstances, where the visa allows an applicant to be admitted to the United States for a specific function or purpose, and the applicant never performs that function or purpose, the applicant will be unable to establish that he or she qualifies for an extraordinary circumstances exception.

For example, an applicant who was admitted as an F-1 student, but never attended school (where the purpose of the visa is to permit the applicant to attend school in the United States) would be unable to establish that he or she qualifies for an extraordinary circumstances exception to filing within the one-year deadline.

On the other hand, an F-1 student may work, mistakenly, or transfer schools without permission, believing that this does not violate the terms of the admission. The applicant's belief that he or she is maintaining F-1 status may provide for an extraordinary circumstances exception, provided that the applicant filed within a reasonable period of time

See section VI., Filing Within a Reasonable Period of Time, below.

given the circumstances that relate to the failure to timely file.

In evaluating whether an extraordinary circumstances exception applies, asylum officers should keep in mind the rationale for including "maintaining lawful status" among the exceptions to the filing deadline (see note above). Although not actually maintaining status, the applicant who believes he or she is maintaining lawful status also may delay filing for asylum until there is no alternative.

Parole of one year or less for the purpose of submitting an asylum application may not be considered an exception to the one-year filing deadline. Applicants paroled for the purpose of filing asylum are expected to file their asylum applications within one year of the parole and are given notice to that effect. Therefore, unless such applicants are granted an extension of this parole or granted some other form of legal status, they are not eligible for the lawful status exception to a timely filing.

Applicants who are not paroled for the purpose of submitting an asylum application during the required filing period may qualify for an extraordinary circumstances exception. In such cases, applicants still must file within a reasonable time after the period of parole ends.

The same logic that applies for asylum applicants who are maintaining a status or parole may apply to asylum applicants who are derivatives on a principal's asylum application. For instance, where a child is a derivative on her parent's asylum application and the child decides to file her own asylum application as the principal applicant, the child's having been a derivative on a pending asylum application at a point during the one-year following the child's last entry could constitute an extraordinary circumstance.

An alien with a pending application, who is not in any lawful status, may be considered to be an alien whose period of stay is authorized by the Attorney General. The types of "stay authorized by the Attorney General" that the asylum officer might encounter could include pending applications for adjustment of status, Such applicants would not be analyzed specifically under the "lawful status" exception to the one-year

For examples of periods of stay authorized by the Attorney General, see Michael Pearson, Executive Associate Commissioner, Field Office Operations, Period of stay authorized by the Attorney General after 120-day tolling period for

filing deadline. However, insofar as the "extraordinary circumstances" exception is not limited to the precise scenarios outlined, the Asylum Officer should consider the totality of the circumstances when determining whether an applicant with a pending application can establish an exception to the requirement that the application be filed within one year of last arrival.

purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act). (AD 00-07), Memorandum to INS field offices, March 3, 2000.

f. initial attempted submission of application was timely

(i) defect in first submission

8 C.F.R. § 208.4(a)(5)(v).

The I-589 was mailed within one year of the last arrival, but the USCIS Service Center returned it as improperly filed. It was subsequently refiled more than one year after the arrival. In cases such as this, the applicant is presumed to have attempted a timely request for protection with USCIS. The application will not be referred on the basis of the one-year filing deadline, provided the applicant refiles within a reasonable period of time from the date the application was returned by the Service Center. Note: The file must always be thoroughly checked to ensure that correspondence to an applicant from the Service Center is not overlooked.

(ii) administrative closure

Where a case was initially filed before April 16, 1998 or prior to the expiration of the one-year period, then closed and subsequently reopened by USCIS, there is no filing deadline issue because the application was timely filed.

(iii) previous asylum case was terminated by an immigration judge

Provided the first filing was before April 16, 1998, or before the expiration of the one-year period, an asylum officer should examine the period of time from the termination date to the second filing date in order to determine whether the delay was reasonable.

g. other circumstances

See also RAIO training module Guidance for Adjudicating Lesbian, Gay,

Other circumstances that are not specifically listed in

the non-exclusive list in the regulations, but which may constitute extraordinary circumstances, depending on the facts of the case, include, but are not limited to, severe family or spousal opposition, extreme isolation within a community, profound language barriers, or profound difficulties in cultural acclimatization. Any such factor or group of factors must have had a severe enough impact on the applicant's functioning to have produced a significant barrier to timely filing.

Bisexual and Intersex Claims.

C. Burden and Standard of Proof

1. Applicant's burden

The burden of proof is on the applicant to establish the existence of a changed circumstance materially affecting eligibility for asylum or of an extraordinary circumstance related to the applicant's failure to apply for asylum within one year from the last arrival.

2. Standard of proof

The standard of proof to establish changed or extraordinary circumstances is proof to the satisfaction of the Attorney General. This is a lower standard of proof than the "clear and convincing" standard that is required to establish that the applicant timely filed.

INA § 208(a)(2)(D); see RAIO Training Module, Evidence.

The standard "to the satisfaction of the Attorney General" places the burden on the applicant to demonstrate that an exception applies. The applicant is not required to establish "beyond a reasonable doubt" or by "clear and convincing evidence" that the exception applies. Rather, this standard has been described in another immigration context as requiring the applicant to demonstrate that the exception applies through "credible evidence sufficiently persuasive to satisfy the Attorney General in the exercise of his reasonable judgment, considering the proof fairly and impartially."

See Matter of Barreiro, 12 I&N Dec. 277, 282 (BIA 1967) (interpreting the "satisfaction of the Attorney General" standard as applied when adjudicating an exception to deportability for failure to notify the Service of a change of address).

This standard has also been interpreted in other immigration contexts to require a similar showing as the "preponderance of evidence" standard, requiring an individual to prove an issue:

- "by a preponderance of evidence which is reasonable, substantial and probative," or

See e.g. Matter of Barreiros, 10 I&N Dec. 536, 538 (BIA 1964) (interpreting same standard for rescinding LPR status by establishing that applicant was not eligible for adjustment); Matter of V-, 7 I&N Dec. 460, 463 (BIA

- “in his favor, just more than an even balance of the evidence.”

1957) (interpreting standard for an alien to establish that a marriage was not contracted for the purpose of evading immigration laws).

3. Evidence

Generally, asylum officers must consult country conditions information relevant to the applicant’s claim to determine whether there are changed country conditions material to the applicant’s eligibility for asylum.

Note: This, of course, would not apply where the changed circumstance is a change in the applicant’s spousal or parent-child relationship to the principal in a previous application.

While the burden of proof is on the applicant to show that there are changed circumstances that now materially affect his or her eligibility for asylum, many applicants affected by changed circumstances may not be able to articulate those circumstances. The unique nature of assessing an applicant’s need of protection places the officer in a “cooperative” role with the applicant. It is an asylum officer’s affirmative duty “to elicit all relevant and useful information bearing on the applicant’s eligibility for asylum.”

See RAIO Training Module, Researching and Using Country of Origin Information in RAIO Adjudications.

UNHCR Handbook, para. 196; 8 C.F.R. § 208.9(b). .

Asylum officers must be flexible and inclusive in examining changed or extraordinary circumstances, if credible testimony or documentary evidence relating to an exception exists. Documentary evidence includes country conditions and legal information that the asylum officer researches and uses.

INS, Interim Rule with Request for Comments, 62 Fed. Reg. 10312, 10316 (Mar. 6, 1997) (acknowledging the weight of “a decision to deny an alien the right to apply for asylum”); 142 Cong. Rec. S11840 (Sept. 30, 1996) (comments by Senators Hatch and Abraham shortly before passage of IIRIRA that indicate legislative intent for exceptions to cover a broad range of circumstances).

VI. FILING WITHIN A REASONABLE PERIOD OF TIME

A. Overview

If there are changed or extraordinary circumstances either material to the applicant’s claim or related to the applicant’s failure to file timely, respectively, the applicant must have filed the asylum application within a reasonable period of time from the occurrence of the changed or extraordinary circumstance in order to establish an exception to the one-year filing deadline.

8 C.F.R. § 208.4(a)(4)(ii).

B. Delayed awareness

If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness must be taken into account in determining what constitutes a "reasonable period of time."

8 C.F.R. § 208.4(a)(4)(ii).

C. **Evaluation of the "reasonable period of time"**

What constitutes a reasonable period of time to file following a changed or extraordinary circumstance depends upon the facts of the case. There is no amount of time that is automatically considered reasonable or unreasonable. Asylum officers must ask themselves if a reasonable person under the same or similar circumstances as the applicant would have filed sooner. Asylum officers are encouraged to give applicants the benefit of the doubt in evaluating what constitutes a reasonable time in which to file. An applicant's education and level of sophistication, the amount of time it takes to obtain legal assistance, any effects of persecution and/or illness, when the applicant became aware of the changed circumstance, and any other relevant factors should be considered.

Asylum Procedures, 65 Fed. Reg. 76121, 16123-24 (Dec. 6. 2000) (Supplementary Information) (noting that the finding of changed or extraordinary circumstances would justify late filing "to the extent necessary to allow the alien a reasonable amount of time to submit the application," but not providing an automatic extension of a certain period of time); see Matter of T-M-H- & S-W-C-, 25 I&N Dec. 193 (BIA 2010) (finding that there is no automatic one year extension in which to file an asylum application following material "changed circumstances")

In addition, the applicant may assert that a particular situation that would otherwise be considered "an extraordinary circumstance," such as a serious injury to the applicant and/or his or her representative, that took place outside of the one year filing period contributed to his or her delay in filing. Though such situations cannot be considered "extraordinary circumstances" for the purposes of an exception, they should be considered when determining whether the application was filed in a reasonable period of time where there has been a changed or extraordinary circumstance identified that could give rise to an exception.

Examples

1) An educated human rights lawyer arrived in the U.S. in 1985. She demonstrates that country conditions changed in 1997, placing her at risk. She files for asylum in January 2001. Due to this particular applicant's knowledge of the law and human rights conditions, an explanation for waiting so long to file would have to be very convincing to be considered reasonable.

2) In 1987 a Polish citizen was jailed by the Polish Government for one year for expressing a pro-democracy

political opinion. He arrived in the U.S. in 1988. He filed for asylum in September 2000. His attorney states that an I-589 was not filed for many years because she did not believe he was eligible. She believes that a BIA case decided in May 2000 affects his eligibility. Presuming his attorney is correct, a changed circumstance exception to the filing deadline rule – change in applicable U.S. law – applies, provided that the four-month period from May to September is considered a reasonable delay.

3) Applicant was seriously ill during a one-year period after her last arrival, but was in very good health for 18 months prior to filing her asylum application. When asked why she waited so long, she replied that she was too busy repairing her home. While this applicant's illness constituted an extraordinary circumstance for not timely filing the I-589, delaying the filing as long as she did was not reasonable. Such a delay might, depending on the circumstances, be considered reasonable for an applicant who continued to require intensive therapy and other treatment as a result of the illness.

Examples related to permission to remain in the U.S. ("status cases")

When it is determined that an application was untimely filed and that during the one-year period the applicant had TPS, parole, or a lawful status, the inquiry is whether the applicant filed for asylum within a reasonable period of time after the TPS, parole, or lawful status ended. The existence of an extraordinary circumstance in the form of a legal status does not toll the one-year limitation. The determinations of reasonableness are made on a case-by-case basis. Although the totality of circumstances in the case determines what is considered a reasonable period of time, guidance offered by the Department of Justice states that more than a six-month delay would usually be considered unreasonable.

Husyev v. Mukasey, 528 F.3d 1172 (9th Cir. 2008) (Court found that Husyev's filing 364 days after his lawful status expired was unreasonable even though the filing was six months after the one-year deadline had passed.); see Asylum Procedures, 65 Fed. Reg. 76121, 76123-24 (Dec. 6, 2000) (Supplementary Information) ("Clearly, waiting six months or longer after expiration or termination of status would not be considered reasonable.").

1) In February 1999, Applicant was admitted on a B-2 visa until August 1999. She applied for asylum untimely in June 2000. An extraordinary circumstance exception applies because Applicant was in lawful status during the one-year filing period. The issue before the asylum officer

See Asylum Procedures, 65 Fed. Reg. 76121, 76123 (Dec. 6, 2000) (Supplementary Information) ("The Department would expect a

is whether ten months between the expiration of lawful status (August 1999) and the time of filing (June 2000) is a reasonable period of time to file. The asylum officer does NOT look to the period of time between when the application should have been filed (February 2000) and when it was actually filed (June 2000).

person in that situation to apply for asylum, should conditions not improve, within a very short period of time after the expiration of her status. Failure to apply within a reasonable time after expiration of the status would foreclose the person from meeting the statutory filing requirements.").

2) In September 1998, Applicant entered the U.S. on a student visa. Her status lapsed in June 2000. She filed for asylum in August 2000. Because the I-589 was filed more than one year after the last arrival, the issue for the asylum officer is whether it was reasonable to delay filing for two months after the applicant's lawful status lapsed. Note: Barring facts to the contrary, in this situation a two-month delay would ordinarily be considered a reasonable period of time. A longer period of time may also be reasonable, depending on the circumstances.

3) In March 1999, Applicant was admitted to the U.S. on a B-1 visa and authorized to stay until June 1999. She applied for asylum in February 2000. This applicant timely filed the application within one year of her last arrival, so there is no filing deadline issue to adjudicate; whether it was reasonable to delay filing for eight months from the visa expiration is irrelevant. Applicant has met the one-year filing requirement.

VII. CREDIBILITY

A. Overview

As explained in this lesson, an applicant must demonstrate by clear and convincing evidence that he or she applied for asylum within one year after the date of last arrival. This may be demonstrated either by establishing the date of last arrival or by establishing that the applicant was outside the United States less than one year prior to the date the application was filed. If the applicant fails to file within one year from the date of last arrival, the applicant may still be eligible to apply for asylum if the applicant establishes to the satisfaction of the asylum officer that an exception applies. To determine whether the applicant met the filing deadline or whether an exception applies, the asylum officer will have to evaluate the credibility of the applicant's testimony regarding each of these issues.

B. Totality of the Circumstances

In making the determination as to an asylum applicant's credibility, including the credibility of testimony related to the elements of the one-year filing deadline, asylum officers should consider "the totality of the circumstances, and all relevant factors." As noted in the Congressional conference report issued in conjunction with the enactment of the REAL ID Act of 2005, the credibility "determination must be reasonable and take into consideration the individual circumstances of the specific witness and/or applicant."

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

H.R. Rep No.. 109-72, at 167 (2005).

<u>Note:</u> The standard for evaluating the applicant's credibility should be distinguished from the standards of proof by which the applicant must establish the requirements of the one-year filing deadline. For example, to determine whether an applicant has established that he or she timely filed the application, the asylum officer will evaluate whether, in the totality of the circumstances, the applicant can be considered credible as to the facts related to his or her date of entry and filing of the application and, if credible, whether the testimony establishes by "clear and convincing evidence" that the application was filed timely. To determine whether an applicant has established that he or she has satisfied the requirements of an exception, first, the asylum officer will evaluate whether, in the totality of the circumstances, the applicant's testimony related to the existence of an changed or extraordinary circumstance is credible and, if so, whether the testimony establishes to the "satisfaction of the adjudicator" that a changed or extraordinary circumstance exists. Then the asylum officer will evaluate whether, in the totality of the circumstances, the applicant's testimony regarding the circumstances surrounding the delay in filing is credible and, if so, whether the testimony supports a finding that the applicant was filed in a reasonable amount of time given the circumstances.

There may be instances where an applicant presents persuasive testimony as to one aspect of his or her claim, but does not present persuasive testimony as to another aspect. In evaluating whether an applicant was credible, asylum officers should evaluate the credibility of each factual issue, and then make a decision reviewing all relevant factors and the totality of the circumstances. Facts bearing on the filing deadline determination that should be evaluated for credibility include, but are not limited to, the details of the arrival, the applicant's whereabouts during the one year prior to the date of filing, the existence of changed or extraordinary circumstances, and the reason presented for any delay in filing if a changed or extraordinary circumstance is established. The testimony and

See Kadia v. Gonzales, 501 F.3d 817, 821-22 (7th Cir. 2007) (rejecting the doctrine of falsus in uno, falsus in omnibus - false in one thing, false in all things – for asylum credibility determinations).

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other relevant factors should be evaluated based on the totality of the circumstances to determine whether the applicant has credibly established the facts related to the elements of the one-year filing deadline rule.

Example

Applicant credibly testifies that she is a member of a minority religious group. She cannot credibly establish her last arrival date or when she was last outside the United States. She claimed that she was jailed because of her religion, but presents inconsistent testimony concerning important details about her arrest and prolonged jail sentence. Country conditions information establishes that there recently has been a significant escalation of violence against the applicant's religious group in her country. Although this applicant's claims regarding her last arrival and prior religious persecution are found not credible, she does credibly establish she is a member of a religious minority that recently has been targeted.

Considering the totality of the circumstances, the facts related to the applicant's date of entry are found not credible, and thus she has not established by clear and convincing evidence that she timely filed her application. Considering the totality of the circumstances, the facts related to an exception to the one-year filing deadline – the applicant's membership in the targeted religious minority and the recent change in conditions in the applicant's country – are found credible. Therefore, the applicant may establish that an exception to the one-year filing deadline applies and she is eligible to apply for asylum, assuming she filed within a reasonable period of time from the changed circumstance. The asylum officer would then analyze and make a decision on the merits of the asylum claim.

a. last arrival

There should always be an inquiry concerning an applicant's manner, place and time of last arrival. If satisfactory arrival documents are not available, follow-up questions should be asked and the credibility of the applicant's responses evaluated.

If the applicant cannot credibly establish the date of last arrival or cannot remember the date of last arrival, the asylum officer should inquire into whether the

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applicant was outside the United States at any time during the 12 months before the filing date. In such cases, the applicant's whereabouts during the 12 months before the filing date becomes relevant.

Examples

1) Applicant does not provide credible testimony on her manner, place, or time of last arrival. Applicant does, however, provide credible documentary and/or credible testimonial evidence of being in Taiwan seven months before the filing date. Because applicant credibly testified that she was in Taiwan seven months before filing for asylum and therefore must have last entered the United States less than 12 months before the filing date, she has satisfied her evidentiary burden of proving with clear and convincing evidence that the application was filed within one year of her last arrival.

   Note #1: Asylum officers should not assume that the absence of detailed and consistent testimony regarding the specifics of an applicant's arrival indicate an attempt to circumvent the filing deadline requirements. There may be other reasons an applicant fails to provide details about his or her arrival, such as the desire to protect the identity of the person whose passport an applicant used, language confusion, fear of smugglers, or the natural fading of memory over time. The asylum officer should inquire into the reasons an applicant fails to provide detailed information about his or her arrival and carefully consider the response based on the totality of the circumstances. If an applicant presents vague or inconsistent testimony about the date, manner, and place of last entry, the applicant may nonetheless be able to establish by clear and convincing evidence that he or she was outside the United States less than one year prior to the filing date and thus met the one-year filing requirement.

   Note #2: Information pertaining to an applicant's whereabouts prior to 12 months before the filing date may be relevant to the last arrival date, but only if it indicates the applicant was present in

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the United States. To illustrate, if the I-589 is filed in December 2000, information indicating that the applicant was in the United States before December 1999 without having left the United States and returned could be relevant, because it may be probative of whether the applicant was in the United States for more than a year before applying for asylum. On the other hand, information relating to an applicant's presence outside the United States before December 1999 generally would not be relevant.

2) Applicant files an I-589 in December 2000. He testifies that in February 2000 he moved from New York to Detroit. Three months later he moved to Miami, and four months after that he moved to Los Angeles. He testifies that during these months he installed billboards for a living. Upon further questioning, the asylum officer concludes that the applicant's testimony about the different places he claims to have resided during those months is not credible. The applicant also does not know anything about the billboard business. This testimony should be evaluated under the totality of the circumstances to determine whether the applicant's claim as to his employment is credible. Though the applicant may be found not credible as to his claimed work as a billboard installer in those specific cities, this information alone is insufficient to find that he has not established by clear and convincing evidence that he filed within one year of his last arrival, as the information is not related to whether the applicant was in the United States for more than 12 months before the filing date.

3) Applicant files an I-589 in September 2000. His testimonial and documentary evidence on being in a refugee camp from 1993 to 1998 is not credible. The evidence concerning 1993 to 1998 is not related to whether the applicant was in the United States for more than 12 months before the filing date, and does not cast doubt on a last arrival date. Therefore, it is not relevant and cannot be the basis upon which the application is referred. For this 1995 to1998 period, facts relating to a United States residence would be

relevant to the timeliness determination.

b. changed circumstances

Whenever a filing is untimely, asylum officers must explore reasons that may have caused a late filing, such as changes in the law, country conditions, the applicant's personal circumstances, or other areas that materially affect the applicant's asylum eligibility, and evaluate the credibility of the applicant's testimony regarding these reasons under the totality of the circumstances. Information directly related to the existence of a changed circumstance is relevant to the determination of whether the applicant is eligible for an exception to the filing requirement.

Example: Applicant claims that her sister recently published in a newspaper in Applicant's country an article that was highly critical of the government. Family members remaining in her country have been threatened by the government as a result. Facts related to whether the article was published by the applicant's sister and whether publication of such an article could affect the applicant's eligibility for asylum are relevant to whether the applicant established the existence of a changed circumstance for the purposes of the one-year filing deadline. Reminder: In evaluating the credibility of the presented changed circumstance, the asylum officer should not be making a determination on whether the applicant is eligible for asylum, only whether the applicant is eligible to apply for asylum.

c. extraordinary circumstances

Whenever a filing is untimely, asylum officers must explore events or factors in the applicant's life that may have caused a late filing. Information directly related to the existence of an extraordinary circumstance is relevant to the determination of whether the applicant has established the existence of an extraordinary circumstance for the purposes of the one-year filing deadline.

Example: Applicant claimed that she was in a serious car accident, which caused her to miss the one-year filing deadline. Facts relating to whether the accident occurred and the extent of Applicant's

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injuries are relevant to the determination of whether Applicant established the existence of an extraordinary circumstance.

Example: The applicant, a transgender male from Honduras, suffered severe and continuous sexual and other physical abuse for many years, as well as familial and societal discrimination and ostracism on account of his sexual orientation. He last entered the U.S. in 2003 but did not file for asylum until 2009. The applicant credibly explained that he felt isolated and was afraid to come forward sooner because he was ashamed and fearful of ostracism by friends and colleagues and society in general. According to medical reports he submitted, he suffered from PTSD as a result of the years of trauma he suffered in Honduras. His PTSD can be seen as an extraordinary circumstance related to the delay in filing during the year after he arrived; the 5-year delay afterwards may also be considered reasonable based on that medical condition.

See RAIO training module, Guidance for Adjudicating Lesbian, Gay, Bisexual and Intersex Claims.

d. delay in filing

An applicant's explanation of the circumstances surrounding the delay in filing is relevant to the issue of whether the applicant established that the application was filed in a reasonable period of time after the changed or extraordinary circumstance and thus established an exception to the filing requirement. Asylum officers should inquire into the reason for the delay when the delay appears unreasonable on its face.

For example, if an applicant filed for asylum within a few months after recovering from a serious illness that directly related to the failure to timely file, the delay would appear reasonable on its face. The asylum officer would not need to inquire into why it took the applicant two months to apply. However, if the applicant waited eight months after recovering from the illness, the asylum officer should inquire into the reason for the delay and evaluate the credibility of the explanation provided.

Example: A citizen of Bulgaria arrives in the U.S. in 1989 and files for asylum in January 2001. She is very well educated, fluent in English and not

represented by an attorney. The asylum officer knows that a widely-publicized change in U.S. law in 1998 may help Applicant's asylum case. When asked why the application was not filed sooner, the applicant testified that until late in 2000, she did not know about the change in the law or even that asylum existed. This change in law, which affects the applicant's eligibility, is a changed circumstance. The officer would need to evaluate the credibility of the applicant's explanation of delayed awareness of the change in the law to determine whether the delay in filing was reasonable.

VIII. SUMMARY

A. Filing Deadline Requirement

Any asylum applicant who applied for asylum on or after April 1, 1998 (or April 16, 1998, for those applying affirmatively), must establish that he or she filed for asylum within one year from the date of last arrival or that he or she is eligible for an exception to the one-year filing requirement.

B. Calculating the One-Year Period

The one-year period is calculated from the last arrival date ("day zero") up to the same calendar day the following year. If the last day for timely filing falls on a Saturday, Sunday, or legal holiday, filing on the next business day will be considered timely.

C. Burden and Standard of Proof for One-Year Period

The burden of proof is on the applicant to establish by clear and convincing evidence that the application was filed within one year from the date of the applicant's last arrival in the United States. The burden may be met by presentation of credible testimony, documentation, or a combination of both.

D. Exceptions—Changed or Extraordinary Circumstances

If an applicant did not apply for asylum within one year from last arrival in the United States, he or she may still be eligible to apply for asylum if the applicant establishes either the existence of changed circumstances that materially affect the applicant's eligibility for asylum or extraordinary circumstances related to the delay in filing and that the application was filed in a reasonable period of time given the circumstances.

E. Standard and Burden of Proof for Establishing a Changed or Extraordinary Circumstance

The burden of proof is on the applicant to establish to the satisfaction of the asylum officer that a changed or extraordinary circumstance exists.

F. Reasonable Period of Delay

Once an applicant establishes the existence of a changed or extraordinary circumstance, the applicant bears the burden to demonstrate that the application was filed within a reasonable amount of time given those circumstances. If the applicant can establish that he or she did not become aware of a changed circumstance until after it occurred, such delayed awareness must be taken into account in determining what constitutes a "reasonable period."

G. Credibility

Asylum officers must consider whether the applicant's testimony related to the one-year filing deadline is credible in the totality of circumstances. Facts bearing on the filing deadline adjudication that should be evaluated for credibility include the details of the arrival, the applicant's whereabouts before the filing date, the existence of changed or extraordinary circumstances, and the reason presented for any delay in filing if a changed or extraordinary circumstance is established. Credible testimony related to these facts should be evaluated to determine whether the applicant has established, according to the appropriate standard of proof, each element of the one-year filing deadline.

USCIS00516

U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

TRAINING MODULE

DATE (see schedule of revisions): 12/20/2019

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

DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

Training Module

MODULE DESCRIPTION

This module discusses the definition of persecution and the determination as to whether an act constitutes persecution.

TERMINAL PERFORMANCE OBJECTIVE(S)

When adjudicating a request for asylum or refugee resettlement, you will correctly apply the law to determine eligibility for asylum in the United States or resettlement in the United States as a refugee.

ENABLING PERFORMANCE OBJECTIVES

1. Distinguish between government and non-government agents of persecution.
2. Explain factors to consider in determining whether an act(s) is sufficiently serious to constitute persecution.
3. Explain factors to consider when deciding whether an applicant is eligible for asylum or refugee status based on past persecution alone.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Group and individual practical exercises

METHOD(S) OF EVALUATION

- Multiple-choice exam

REQUIRED READING

1.

2.

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

1. UNHCR Handbook
2. *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989)
3. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (en banc)
4. *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).
5. *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007)
6. *Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011)
7. *Haider v. Holder,* 595 F.3d 276, 288 (6th Cir. 2010).

Additional Resources – International and Refugee Adjudications

Additional Resources – Asylum Adjudications

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CRITICAL TASKS

Task/ Skill #	Task Description
ILR6	Knowledge of U.S. case law that impacts RAIO (4)
ILR19	Knowledge of criteria for past persecution (4)
ILR20	Knowledge of the criteria for refugee classification (4)
ILR21	Knowledge of the criteria for establishing a well-founded fear (WFF)(4)
ILR23	Knowledge of bars to immigration benefits (4)
DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5)
DM3	Skill in applying eligibility requirements to information and evidence (5)
DM5	Skill in analyzing complex issues to identify appropriate responses or decisions (5)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
1/20/2014	Throughout document	Fixed links, added recent case law examples	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 is one in a series of modules on eligibility for asylum and refugee status. This module provides an overview of the definition of persecution and eligibility based on past persecution.

Other RAIO Training modules on asylum and refugee eligibility discuss:

- the basic elements of the refugee definition (*Refugee Definition*)
- eligibility based on fear of future persecution (*Well-Founded Fear)*
- the motive of the persecutor and the five protected grounds in the refugee definition (*Nexus and the Five Protected Grounds*; *Nexus: Particular Social Group)*
- the burden of proof and evidence (*Evidence)*
- the role of discretion (*Discretion)*
- participation in the persecution of others on account of a protected ground (*Analyzing the Persecutor Bar)*
- entry into and permanent status in a third country (*Firm Resettlement)*

In addition, for asylum adjudications, one of the Asylum Lesson Plans discusses mandatory reasons to deny asylum. For overseas refugee adjudications, the RAIO Training module, *Grounds of Inadmissibility* discusses reasons an applicant may be inadmissible to the United States and the availability of waivers. The IRAD *Access* module discusses available means to access the U.S. Refugee Admissions Program.

2 PAST PERSECUTION

An applicant may establish that he or she is a refugee based on either past persecution or a well-founded fear of future persecution.[1]

The regulations implementing USCIS's discretionary authority to grant asylum generally require a well-founded fear of persecution. If an applicant establishes past persecution, a rebuttable presumption of a well-founded fear of future persecution is created.[2] Well-founded fear is presumed unless the officer establishes that a fundamental change in circumstances has occurred, such that the applicant no longer has a well-founded fear, or that the applicant could reasonably avoid future persecution by relocating to another part of his or her country of nationality.[3] If the persecutor is the government or is government-sponsored or the applicant has been persecuted in the past, there is a rebuttable presumption that internal relocation is not reasonable, unless you establish by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.[4] Asylum applicants who suffered past persecution but who no longer have a well-founded fear of future persecution may be granted asylum based on being unable or unwilling to return to the country due to the severity of the past persecution or if there is a reasonable possibility that the applicant will face other serious harm upon return.[5]

In the overseas refugee processing context, there is no equivalent regulatory guidance on past persecution at 8 C.F.R. § 207. In the absence of such regulatory guidance, a plain language interpretation of the term refugee as defined in INA § 101(a)(42) is followed in overseas refugee processing. If an applicant credibly establishes that the harm he or she suffered in the past rose to the level of persecution on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility. A rebuttable presumption is neither created nor necessary. Nonetheless, as a matter of policy, officers will always assess an applicant's well-founded fear of future persecution in the refugee processing context, regardless of whether or not he or she has established past persecution.[6]

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[1] INA § 101(a)(42)

[2] INA § 208; INA § 101(a)(42); 8 C.F.R. § 208.13(b)(1).

[3] For additional information, *see* Eligibility Based on Past Persection, below, and RAIO Training module, *Discretion*.

[4] 8 C.F.R. § 208.13(b)(3)(ii).

[5] 8 C.F.R. § 208.13(b)(1)(iii); For additional information on granting asylum in the absence of a Well-Founded Fear, see RAIO module, *Discretion*.

[6] *See* International and Refugee Affairs Division (IRAD), Refugee Application Assessment: Standard Operating Procedures (SOP) (requiring officers to elicit testimony and assess well-founded fear even where applicants have demonstrated past persecution).

In contrast, the UN refugee definition focuses primarily on well-founded fear, rather than past persecution. The cessation clauses of the 1951 Convention, however, do provide that a refugee who no longer fears future persecution should be given protection due to compelling reasons arising from previous persecution.[7]

3 PERSECUTION

3.1 General Elements

Severity of Harm

To establish persecution, an applicant must show that the harm that the applicant experienced or fears is sufficiently serious to amount to persecution. The degree of harm must be addressed before you may find that the harm that the applicant suffered or fears can be considered “persecution.”

Motivation

An applicant also must prove that the persecutor’s motivation in harming, or seeking to harm him or her, is on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.[8] Proving motivation is discussed in more detail in RAIO Training module, *Nexus and the Five Protected Grounds.* You should separate the analysis of motivation from the evaluation of whether the harm rises to the level of persecution, in order to make the basis of your decision as clear as possible.

Persecutor

The applicant must show that the entity that harmed, or is threatening, the applicant (the persecutor) is either an agent of the government or an entity that the government is unable or unwilling to control.[9]

Location

Only harm suffered in the country of nationality or, if stateless, the country of last habitual residence, may be considered in a finding of past persecution, for the purpose of establishing eligibility. Harm suffered in the United States or a third country may be considered as evidence of a well-founded fear if the applicant can establish a connection between the persecutor and his or her country of origin.[10]

[7] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Article 1C, paras. (5) and (6), incorporated by reference into the 1967 Protocol relating to the Status of Refugees.

[8] For additional information, *see* RAIO Training module, *Nexus and the Five Protected Grounds*.

[9] For additional information, *see* section, *Identifying a Persecutor*.

[10] *See* 8 C.F.R. § 208.13(b)(1); *Costa v. Holder*, 733 F.3d 13, 15 (1st Cir. 2013).

Example

> Applicant testifies to being the victim of domestic violence while living in the United States. Because applicant has filed a complaint against her spouse, the spouse has been removed to his country of nationality and now the applicant claims to fear additional harm from her spouse if returned to the same country as her spouse. In such a situation the applicant would not be considered to have suffered past persecution, but you would consider the violence suffered in the United States as evidence in your analysis of well-founded fear.

3.2 Whether the Harm Amounts to Persecution

3.2.1 Board of Immigration Appeals (BIA) Decisions

In an often-cited BIA decision, the BIA defined persecution as harm or suffering inflicted upon an individual in order to punish the individual for possessing a belief or characteristic the persecutor seeks to overcome.[11]

The BIA later modified this definition and explicitly recognized that a "punitive" or "malignant" intent is not required for harm to constitute persecution.[12] The BIA concluded that persecution can consist of objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm.[13]

Additionally, the BIA has found that the term "persecution" encompasses more than physical harm or the threat of physical harm so long as the harm inflicted or feared rises to the level of persecution.[14] Non-physical harm may include "the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."[15]

3.2.2 Guidance from the Department of Justice

In a proposed rule providing guidance on the definition of persecution, the Department of Justice indicated its approval of the conclusion in *Kasinga* that the existence of

[11] Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985), modified by Matter of Mogharrabi, 19 I&N Dec. 439, 446 (BIA 1987).

[12] Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996); Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997).

[13] Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996); for additional information, *see* RAIO Training module, *Nexus and the Five Protected Grounds.*

[14] Matter of T-Z-, 24 I&N Dec. 163, 169-71 (BIA 2007).

[15] Matter of T-Z-, 24 I&N Dec. at 171, citing Laipenienks v. INS, 750 F.2d 1427 (9th Cir. 1985).

persecution does not require a malignant or punitive intent.[16] The Department also emphasized that the victim must experience the treatment as harm in order for persecution to exist. Thus, under this reasoning, in a case involving female genital mutilation, whether the applicant at hand would experience or has experienced the procedure as serious harm, not whether the perpetrator intends it as harm, is a key inquiry.

3.2.3 Federal Court Decisions

Persecution encompasses more than just physical harm. The Supreme Court has held that persecution is a broader concept than threats to "life or freedom."[17]

The U.S. Court of Appeals for the Ninth Circuit has defined "persecution" as "infliction of suffering or harm upon those who differ . . . in a way regarded as offensive" and "oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate."[18] Such harm could include severe economic deprivation.[19]

Similarly, the Seventh Circuit described persecution as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate."[20] The term "persecution" includes actions less severe than threats to life or freedom. Non-life threatening violence and physical abuse also fall within the definition of persecution.[21] However, "actions must rise above the level of mere 'harassment' to constitute persecution."[22] More recently, the Seventh Circuit has faulted the BIA for failing to distinguish "…among three forms of oppressive behavior" that an applicant might experience: discrimination, harassment, and persecution.[23] The court offered the following definitions, in the absence of an agency definition:

- Discrimination "refers to unequal treatment, and is illustrated historically by India's caste system and the Jim Crow laws in the southern U.S. states."[24]

[16] U.S.Department of Justice, Asylum and Withholding Definitions, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. This proposed rule did not become a regulation but indicates the agency's view on the topic.

[17] *INS v. Stevic*, 467 U.S. 407, 428 fn. 22 (1984).

[18] *Kovac v. INS,* 407 F.2d 102, 107 (9th Cir. 1969); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985).

[19] *Kovac*, 407 F.2d at 107.

[20] *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000).

[21] *Id*.

[22] *Id*.

[23] *Stanojkova v. Holder,* 645 F.3d 943 (7th Cir. 2011).

[24] *Id*. at 947-48.

- Harassment "involves targeting members of a specified group for adverse treatment, but without the application of significant physical force."[25]

- Persecution is "the use of significant physical force against a person's body, or the infliction of comparable physical harm without direct application of force (locking a person in a cell and starving him would be an example), or nonphysical harm of equal gravity," such as refusing to allow a person to practice his religion or pointing a gun at a person's head.[26]

The court then went on to distinguish between harassment and persecution as being the difference "between the nasty and the barbaric, or alternatively between wishing you were living in another country and being so desperate that you flee without any assurance of being given refuge in any other country."[27]

The First Circuit has described persecution as an experience that "must rise above unpleasantness, harassment and even basic suffering."[28] There is no requirement that an individual suffer "serious injuries" to be found to have suffered persecution.[29] However, the presence or absence of physical harm is relevant in determining whether the harm suffered by the applicant rises to the level of persecution.[30]

Serious threats made against an applicant may constitute persecution even if the applicant was never physically harmed.[31] Under some circumstances, a threat may be sufficiently serious and immediate to constitute persecution even if it is not explicit.[32] Consider the following issues to explore when evaluating whether a threat is serious enough to rise to the level of persecution:

- Has the persecutor attempted to act on the threat?[33]

- Is the nature of the threat itself indicative of its seriousness?[34]

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[25] Id. at 948.

[26] Id.

[27] Id.

[28] Nelson v. INS, 232 F.3d 258, 263 (1st Cir. 2000).

[29] Asani v. INS, 154 F.3d 719, 723 (7th Cir. 1998); Mihalev v. Ashcroft, 388 F.3d 722, 730 (9th Cir. 2004); Sanchez-Jimenez v.U.S.Att'y Gen., 492 F.3d 1223 (11th Cir. 2007).

[30] Ruiz v. Mukasey, 526 F.3d 31, 37 (1st Cir. 2008).

[31] Salazar-Paucar v. INS, 281 F.3d 1069, 1074 (9th Cir. 2002), amended by Salazar-Paucar v. INS, 290 F.3d 964 (9th Cir. 2002).

[32] Aldana-Ramos v. Holder, 757 F.3d 9, 17 (1st Cir. 2014).

[33] Navas v. INS, 217 F.3d 646, 658 (9th Cir. 2000) (death threats alone may constitute persecution).

[34] Garrovillas v. INS, 156 F.3d 1010, 1016 (9th Cir. 1998) (three letters within three months containing death threats constituted persecution).

- Has the persecutor harmed or attempted to harm the applicant in other ways?[35]
- Has the persecutor attacked, harassed, or threatened the applicant's family?[36]
- Has the persecutor carried out threats issued to others similarly situated to the applicant?[37]
- Did the applicant suffer emotional or psychological harm as a result of the threat(s)?[38]

The federal courts, as well as the BIA, have held that cumulative instances of harm, considered in totality, may constitute persecution on account of a protected characteristic, so long as the discrete instances of harm were each inflicted on account of a protected characteristic.[39]

You should evaluate the entire scope of harm experienced and feared by the applicant to determine if he or she was persecuted and fears persecution.

3.2.4 Guidance from the UNHCR Handbook

The UNHCR Handbook explains the following:[40]

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

3.2.5 General Considerations

Individual Circumstances

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

[35] *Mejia v. U.S. Att'y Gen.*, 498 F.3d 1253, 1257-58 (11th Cir. 2007).

[36] *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Sanchez Jimenez v.U.S.Atty Gen.* 492 F.3d 1223, 1233 (11th Cir. 2007).

[37] *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998).

[38] For additional information, *see* section on *Psychological Harm*.

[39] *Chand v. INS*, 222 F.3d 1066, 1073 (9th Cir. 2000); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998); *Matter of O-Z-& I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998); cf. *Mihalev v. Ashcroft*, 388 F.3d 722, 728 (9th Cir. 2004).

[40] UNHCR Handbook, paras. 51-55.

applicant in determining whether the harm suffered or feared rises to the level of persecution.[41] For example, one may hold passionate political or religious convictions, the hindrance of which would cause great suffering; while another may not have such strong convictions.[42]

Age

In assessing whether harm rises to the level of persecution, you should determine the age of the applicant at the time the harm occurred and determine if age is a factor that should be considered.[43] For example, the effect of similar circumstances might be more severe on a child or an elderly person than they may be on others. Harm that may not rise to the level of persecution for an adult may be persecution if the harm is inflicted on a child. In considering whether past harm suffered by a child rises to the level of persecution, it is important to take into account a child's young age and dependence on family and community.[44]

No Set Number of Incidents Required

There is no minimum number of acts or incidents that must occur in order to establish persecution.[45] One serious incident or threat may constitute persecution, or there may be several incidents or acts, which considered together, constitute persecution.

3.3 Human Rights Violations

Violations of "core" or "fundamental" human rights, prohibited by international law, may constitute harm amounting to persecution. These rights include freedom from:[46]

- arbitrary deprivation of life
- genocide
- slavery
- torture and other cruel, inhuman, or degrading treatment

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[41] *Id.* at para. 52.

[42] *Id.* at para. 40.

[43] *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Ordonez-Quino v. Holder*, 760 F.3d 80, 93 (1st Cir. 2014).

[44] For additional information, *see* RAIO Training module, *Children's Claims*.

[45] *See, e.g.*, *Vaduva v. INS*, 131 F.3d 689, 690 (7th Cir. 1997); and *Lumaj v. Gonzales,* 462 F.3d 574, 577 (6th Cir. 2006).

[46] *See* Guy S. Goodwin-Gill, *The Refugee in International Law Second Edition* (New York: Oxford University Press, 1998), pp.68-9; and James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1992), p. 109.

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

Torture can take a wide variety of forms. It can include severe physical pain by beating or kicking, or pain inflicted with the help of objects such as canes, knives, cigarettes, or metal objects that transmit electric shock. Torture also includes the deliberate infliction of severe mental suffering.[47] Torture will always rise to the level of persecution. Keep in mind, however, that for purposes of asylum or refugee status, as opposed to protection under the Convention against Torture, torture must have been inflicted on account of one of the five protected grounds. Convention against Torture protection is available in immigration court removal proceedings, *see* Asylum Lesson Plans on Credible Fear and Reasonable Fear.

Other fundamental rights are also protected by customary international law, such as the right to recognition as a person in the law, and the right to freedom of thought, conscience, and religion or belief.[48] Deprivation of these rights may also constitute persecution.[49]

Examples

- The BIA has found that the enforcement of coercive family planning policy through forced abortion or sterilization is a violation of fundamental human rights. Forced abortion or sterilization deprives the individual of the right to make individual or conjugal decisions regarding reproductive rights.[50]
- The Third Circuit has stated that compelling an individual to engage in conduct that is abhorrent to that individual's deepest beliefs may constitute persecution.[51]
- UNHCR guidelines on religious-based refugee claims indicate that forced compliance could constitute persecution "if it becomes an intolerable interference with the

[47] J. Herman Burgers & Hans Danelius, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), pp. 117-18. For additional information, *see* RAIO Training module, *International Human Rights Law* (section on *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*).

[48] Guy S. Goodwin-Gill, *The Refugee in International Law Second Edition* (New York: Oxford University Press, 1998), p.69.

[49] For additional information, *see* RAIO Training module, *The International Religious Freedom Act (IRFA) and Religious Persecution Claims*.

[50] *See* *Matter of S-L-L-*, 24 I&N Dec. 1, 5-7 (BIA 2006), (en banc), overruled on other grounds by *Matter of J-S-*,24 I&N Dec. 520 (AG 2008); *Matter of Y-T-L-*, 23 I&N Dec. 601, 607 (BIA 2003); UNHCR, *UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies* (Geneva: Aug. 2005).

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

individual's own religious belief, identity, or way of life and/or if noncompliance would result in disproportionate punishment."[52]

3.4 Discrimination and Harassment

Less preferential treatment and other forms of discrimination and harassment generally are not considered persecution.[53] Where discriminatory practices or instances of harassment accumulate or increase in severity to the extent that they lead to consequences of a substantially prejudicial nature, adverse actions that would themselves constitute only discrimination or harassment may, cumulatively, rise to the level of persecution.[54]

The Second Circuit Court of Appeals has indicated that differentiating between harassment and persecution can be a matter of degree and that adjudicators must consider the context in which mistreatment occurs.[55] A minor beating may constitute only harassment when inflicted by a non-governmental entity. In the context of an arrest or detention by a government official, however, a minor beating, if inflicted on account of a protected characteristic, may rise to the level of persecution.

The fact that a non-citizen does not enjoy all of the same rights as citizens in the country of last habitual residence is generally, by itself, not harm sufficient to rise to the level of persecution.[56]

Examples

- Discrimination did not rise to the level of persecution against an Armenian living in Russia when it included merely harassment and pushing by Russian officers because of ethnicity and being denied a job because "there were no jobs for Armenians."[57]

- An Egyptian Coptic Christian claimed that his career as a medical doctor would suffer because of discrimination against Christians. The Ninth Circuit found that this level of discrimination was insufficient to amount to persecution.[58] In contrast, the

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[52] UNHRC, *Guidelines on International Protection: Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (HCR/GIP/04/06, 28 April 2004), para. 21.

[53] *See* UNHCR Handbook, paras. 54-55; *Stanojkova v. Holder*, 645 F.3d 943, 947-948 (7th Cir. 2011); *Matter of A-E-M-*, 21 I&N Dec. 1157, 1159 (BIA 1998); *Matter of V-F-D-*, 23 I&N Dec. 859, 863 (BIA 2006); *Baka v. INS,* 963 F.2d 1376, 1379 (10th Cir. 1992); *Mikhailevitch v. INS,* 146 F.3d 384, 390 (6th Cir. 1998).

[54] *Ivanishvili v. USDOJ*, 433 F.3d 332, 342 (2d Cir. 2006).

[55] *Beskovic v. Gonzales*, 467 F. 3d 223, 226 (2d Cir. 2006).

[56] *Ahmed v. Ashcroft*, 341 F.3d 214, 217 (3d Cir. 2003); *Najjar v. Ashcroft,* 257 F.3d 1262, 1291 (11th Cir. 2001); *Faddoul v. INS*, 37 F.3d 185, 189 (5th Cir. 1994).

[57] *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000).

[58] *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir.1995); cf. *Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004).

inability to practice medicine through the invalidation of a medical degree does amount to persecution when it is on account of the applicant's ethnicity.[59]

General Factors to Consider

Some relevant questions to consider in determining whether the discrimination and harassment of the applicant amount to persecution are:

- Was the harm actually persecution, not merely discrimination or harassment?
- How long has the discrimination or harassment lasted?
- Which human rights were affected?
- How has the discrimination or harassment affected the particular applicant?
- How many types of discriminatory practices or how much harassment has been imposed on the applicant, cumulatively?
- Has there been any escalation over time in the frequency or seriousness of the discrimination or harassment or has it remained at the same level over time?

Some significant factors to consider in determining whether discrimination and harassment amount to persecution include:

- serious restrictions on the right to earn a livelihood[60]
- serious restrictions on the access to normally available educational facilities
- arbitrary interference with a person's privacy, family, home, or correspondence
- relegation to substandard dwellings
- exclusions from institutions of higher learning
- enforced social or civil inactivity
- passport denial
- constant surveillance
- pressure to become an informer

[59] *Stserba v. Holder*, 646 F.3d 964, 976 (6th Cir. 2011).

[60] *See*, *e.g.*, *Gormley v. Ashcroft*, 364 F.3d 1172, 1179 (9th Cir. 2004)(in rejecting claim, court relied on fact that South African government provided unemployment compensation to couple laid off pursuant to affirmative action).

- confiscation of property
- the accumulation and type of discriminatory practices or harassment that have been imposed on the applicant

Generally none of these factors, by themselves, would be considered to rise to the level of severity necessary to constitute persecution, but may, on a case by case basis, be deemed to rise to the level of persecution. Each case must be judged individually based on the unique facts of that claim.

3.5 Arrests and Detention

In evaluating whether a detention is persecution, consider:

- length of the detention
- legitimacy of the government action
- mistreatment during the detention
- judicial processes or due process rights accorded[61]

Generally, a brief detention without mistreatment will not constitute persecution. Prolonged detention is a deprivation of liberty, which may constitute a violation of a fundamental human right and amount to persecution. Similarly, multiple brief detentions may, considered cumulatively, amount to persecution. Evidence of mistreatment during detention also may establish persecution.[62]

Examples

- A Chinese Christian was arrested during an underground religious service, detained for seven days, and repeatedly beaten. On one occasion, he was chained to an iron bar outside in the rain for several hours, causing him to become ill. The Eleventh Circuit Court of Appeals held that the evidence compelled the conclusion that the harm the applicant suffered rose to the level of persecution.[63]
- A Kosovar Albanian was interrogated on three occasions by Serbian police. One time, during a 24-hour detention, he suffered an injury to his hands caused by the police.

[61] For additional information, *see* RAIO Training module, *Nexus and the Five Protected Grounds*.

[62] *Asani v. INS*, 154 F.3d 719, 723 (7th Cir. 1998)(the court instructed the BIA on remand to apply the correct persecution standard and questioned the BIA, using the incorrect standard applied, "If having two teeth knocked out and being deprived of sufficient food and water are not 'serious injuries' or 'physical harm,' what is?")

[63] *Shi v. U.S. Att'y Gen.*, 707 F.3d 1231, 1237-1239 (11th Cir. 2013).

The Seventh Circuit held that substantial evidence supported a finding that the applicant had not suffered past persecution.[64]

- A 16-year old Chinese girl was detained for two days by police, during which time she was pushed and her hair was pulled, she was expelled from school, and her home was ransacked by police. The Seventh Circuit held that substantial evidence supported a finding that the applicant had not suffered past persecution.[65]

- A Chinese national was detained at a police station for three days, during which time he was interrogated for two hours and hit on his back with a rod approximately ten times, causing him pain and temporary red marks, but not requiring any medical treatment. The Ninth Circuit found that the facts did not compel a finding of past persecution.[66]

- A Bulgarian Christian was detained by police twice, each for two days, and on a third occasion was beaten by police in her home, resulting in a miscarriage of her pregnancy. The Seventh Circuit found that treatment suffered by the applicant was so severe as to compel a finding of past persecution.[67]

- A Bulgarian of Roma descent was detained by police for ten days, during which time he was beaten daily with sandbags and forced to perform heavy labor. The applicant suffered no significant bodily injury. The Ninth Circuit found that treatment suffered by the applicant was so severe as to compel a finding of past persecution.[68]

3.6 Economic Harm

To rise to the level of persecution, economic harm must be deliberately imposed and severe.[69] Severe economic harm must be harm "above and beyond [the economic difficulties] generally shared by others in the country of origin and involve more than the mere loss of social advantages or physical comforts."[70]

In *Matter of T-Z-*, the Board held that adjudicators should apply the following test in determining whether economic harm amounts to persecution: whether the applicant suffered or faces a "deliberate imposition of severe economic disadvantage or the

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[64] *Prela v. Ashcroft*, 394 F.3d 515, 518 (7th Cir. 2005).

[65] *Mei Dan Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004).

[66] *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006).

[67] *Vladimirova v. Ashcroft*, 377 F.3d 690, 693 (7th Cir. 2004).

[68] *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004).

[69] *See Minwalla v. INS*, 706 F.2d 831, 835 (8th Cir. 1983); *Ambati v. Reno*, 233 F.3d 1054, 1060 (7th Cir. 2000); *Guan Shan Liao v. INS*, 293 F.3d 61, 69-70 (2d Cir. 2002).

[70] *Matter of T-Z-*, 24 I&N Dec. 163, 173 (BIA 2007).

deprivation of liberty, food, housing, employment or other essentials of life." [71] An applicant, however, need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution. [72]

In this decision, the BIA highlighted some factors to consider in assessing whether the fines and job loss at issue amounted to persecution, [73] including

- the applicant's and his or her household's earnings
- the applicant's net worth
- other employment available to the applicant
- loss of housing
- loss of health benefits
- loss of school tuition and educational opportunities
- loss of food rations
- confiscation of property, including household furniture and appliances
- any other relevant factor

In *Vincent v. Holder*, the Sixth Circuit held that the burning of the applicant's house was "sufficiently severe and targeted to constitute persecution," relying on *T-Z-*'s holding that a large-scale confiscation of property may in itself constitute persecution. [74] In contrast, in *Yun Jian Zhang v. Gonzales*, the Seventh Circuit held that the partial destruction of the applicant's house was not severe economic harm where damage could be repaired, particularly given that the applicant worked in construction; the applicant continued to be gainfully employed; the family found shelter at his in-laws' home; and the government did not continue to harm him or his family. [75]

In *Zhen Hua Li v. Att'y Gen. of U.S.*, the Third Circuit held that a fine worth eighteen months' salary, combined with being blacklisted from any government employment and

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[71] Matter of T-Z-, 24 I&N Dec. 163, 173 (BIA 2007). *See also* Vicente-Elias v. Mukasey, 532 F.3d 1086 (10th Cir. 2008)(adopting *Matter of T-Z-* standard on economic persecution); Borca v. INS, 77 F.3d 210 (7th Cir. 1996) (holding that total economic deprivation is not required to establish persecution).

[72] Matter of T-Z-, 24 I&N Dec. at 173.

[73] Id. at 173-75.

[74] Vincent v. Holder, 632 F.3d 351, 355 (6th Cir. 2011), *citing* T-Z-, 24 I&N Dec. at 174.

[75] Yun Jian Zhang v. Gonzales, 495 F.3d 773, 777-78 (7th Cir. 2007).

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from most other forms of legitimate employment, the loss of health benefits, school tuition, and food rations, and the confiscation of his household furniture and appliances, would constitute the deliberate imposition of severe economic disadvantage that could threaten his family's freedom, if not their lives.[76] In *Mu Ying Wu v. U.S. Att'y Gen.*, on the other hand, the Eleventh Circuit held that substantial evidence supported a finding that a fine that would amount to about 60 to 100 per cent of the applicant's family's annual income, which could be paid in installments or which the applicant could avoid paying by forgoing free medical care and public education for her children, would not, without any additional harm, rise to the level of persecution.[77]

Applying the BIA's standard in *Matter of T-Z-*, the Eighth Circuit has held that being relegated to low-level jobs despite advanced schooling did not amount to severe economic deprivation. Because private employment remained available, the economic discrimination was not sufficiently harsh so as to constitute persecution.[78]

An applicant's loss of employment as a result of a government-sponsored employment program instituted to correct past discrimination is not sufficient to support a finding of past persecution on account of a protected characteristic where the government provided considerable unemployment compensation to the applicant, and other similarly situated individuals were able to maintain or regain employment.[79] On the other hand, a program of state-sponsored economic discrimination against a disfavored group within the society that could lead to extreme economic harm may amount to past persecution.[80]

3.7 Psychological Harm

3.7.1 Psychological Harm Alone May Be Sufficient to Constitute Persecution

You should always consider evidence, including the applicant's testimony, that the events he or she experienced caused psychological harm.[81] Psychological harm alone may rise to the level of persecution.[82] Evidence of the applicant's psychological and emotional

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[76] Zhen Hua Li v. Att'y Gen. of U.S., 400 F.3d 157, 166-69 (3d Cir. 2005).

[77] Mu Ying Wu v. U.S. Att'y Gen., 745 F.3d 1140, 1157 (11th Cir. 2014).

[78] Beck v. Mukasey, 527 F.3d 737, 741 (8th Cir. 2008).

[79] Gormley v. Ashcroft, 364 F.3d 1172 (9th Cir. 2004).

[80] Himri v. Ashcroft, 378 F.3d 932, 937 (9th Cir. 2004)(finding that Palestinian applicants were members of a persecuted minority who, due to Kuwaiti state-sponsored economic discrimination, would be subject to denial of right to work, attend school, and to obtain drinking water if returned to Kuwait).

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

[82] Ouk v. Gonzales, 464 F.3d 108, 111 (1st Cir.2006) ("a finding of past persecution might rest on a showing of psychological harm"); Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir.2004) ("Persecution may be emotional or psychological, as well as physical."). The Fourth Circuit held that in withholding of removal cases only, which are not at issue in asylum or refugee adjudications, psychological harm alone cannot amount to persecution. Niang v. Gonzales, 492 F.3d 505,512 (4th Cir. 2007).

characteristics, such as the applicant's age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution.

3.7.2 Under The Convention Against Torture, Severe Mental Harm Alone May Be Sufficient to Constitute Torture

Under the Convention Against Torture, severe mental suffering may constitute torture under certain circumstances.[83] Some examples of mental suffering that fall within this definition of torture, and thus would be considered serious enough to rise to the level of persecution, include:

- mental harm caused by the intentional infliction or threatened infliction of severe physical pain or suffering
- administration or threatened administration of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality
- threat of imminent death
- threat that another person will imminently be subjected to death or severe physical pain or suffering

3.7.3 Other Forms of Mental Harm May Be Sufficient to Constitute Persecution

Other forms of mental harm that amount to persecution, but may not amount to torture include:

- receipt of threats over a prolonged period of time, causing the applicant to live in a state of constant fear
- being forced to witness the harm of others[84]
- forced compliance with religious laws or practices that are abhorrent to an applicant's beliefs

For example, the Ninth Circuit found in *Mashiri v. Ashcroft* that the emotional trauma suffered by a native of Afghanistan living in Germany was sufficiently severe to amount to persecution. The cumulative harm resulted from watching as a foreign-owned store in her neighborhood was burned, finding her home vandalized and ransacked, running from

[83] *See* 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990); UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465; and 8 C.F.R. § 208.18.

[84] *See* *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004). *But see* *Shoaira v. Ashcroft*, 377 F.3d 837, 844 (8th Cir. 2004) (upholding a finding that the emotional harm suffered did not rise to the level of persecution).

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a violent mob that attacked foreigners in her neighborhood, reading in the newspaper about a man who lived along her son's path to school who shot over the heads of two Afghan children, and witnessing the results of beatings of her husband and children.[85]

The U.S. Court of Appeals for the Third Circuit has indicated that forced compliance with laws that are deeply abhorrent to a person's beliefs may constitute persecution. For example, being forced to renounce religious beliefs or to desecrate an object of religious importance might be persecution if the victim holds strong religious beliefs.[86]

3.8 Sexual Harm

3.8.1 Rape and Other Sexual Abuse

Rape and other severe forms of sexual harm constitute harm amounting to persecution, as they are forms of serious physical harm.[87] Rape is regarded as a "form of aggression constituting an egregious violation of humanity," which can constitute torture.[88]

You should also consider less severe sexual harm when determining whether harm amounts to persecution.[89] You must examine the entire circumstances of the case before you, including any resulting psychological harm, the social or cultural perceptions of the applicant as a victim of the sexual harm, and other effects on the applicant resulting from the harm.

Example

> The applicant was stopped by the police several times and three times was stripped and twice threatened with sodomy by a gun barrel. In overturning the IJ's decision, the court stated, "[m]ost egregiously, the IJ failed to consider the significance of the sexual humiliation that occurred on three occasions. This court has previously noted that abuse of this nature can make all the difference."[90]

3.8.2 Female Genital Mutilation or Female Genital Cutting

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[85] *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004).

[86] *Fatin v. INS*, 12 F.3d 1233, 1241-42 (3d Cir. 1993).

[87] *See* Memorandum from Phyllis Coven, INS Office of International Affairs, to INS Asylum Officers and HQASM Coordinators, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, (26 May 1995), p.9.

[88] See UNHCR, *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/02, 7 May 2002), para. 9; *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097-98 (9th Cir. 2000); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996); and *Zubeda v. Ashcroft,* 333 F.3d 463, 472 (3d Cir. 2003).

[89] *See*, *e.g.*, *Angoucheva v. INS*, 106 F.3d 781, 790 (7th Cir. 1997).

[90] *Haider v. Holder,* 595 F.3d 276, 288 (6th Cir. 2010).

The practice of female genital mutilation (FGM), also known as female genital cutting (FGC), is objectively a sufficiently serious form of harm to constitute persecution.[91] Generally, in determining whether FGM is persecution to the applicant, you should consider whether the applicant experienced or would experience the procedure as serious harm.[92] The BIA in *Matter of S-A-K- & H-A-H-* recognized that FGM imposed on a young child constituted past persecution.[93] The BIA held that she and her mother had suffered an atrocious form of persecution that resulted in continuing physical pain and discomfort and that they merited humanitarian asylum based on the severity of their harm.[94]

Even in countries that have prohibited the practice of FGM, the government may condone, tolerate, or be unable to protect against the practice. The fact that a state has enacted a law prohibiting FGM does not necessarily indicate that the government is willing and able to protect an applicant.[95]

3.9 Harm to Family Members or Other Third Parties

Harm to an applicant's family member or another third party may constitute persecution of the applicant where the harm the applicant suffers is serious enough to amount to persecution and where the persecutor's motivation in harming the third party is to harm the applicant.[96] The BIA has held that emotional harm may rise to the level of persecution where a person "persecutes someone close to an applicant, such as a spouse, parent, child or other relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself."[97] For example, the wife of a political dissident may be abducted and killed as a way of teaching her husband a political lesson.

An applicant may suffer severe psychological harm from the knowledge that another individual has been harmed in an effort to persecute the applicant.[98] The harm may be intensified if the applicant feels that his or her status or actions led the persecutor to harm

[91] *See* Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996)

[92] U.S. Department of Justice, Asylum and Withholding Definitions, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. The proposed rule did not become a regulation but represents the agency's view on the topic.

[93] *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464, 465 (BIA 2008)

[94] *Id.* at. 465-66.

[95] For additional information, *see* section, *Entity the Government is Unable or Unwilling to Control.*

[96] *See* Memorandum from Joseph Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Persecution of Family Members*, (30 June 1997).

[97] *Matter of A-K-*, 24 I&N Dec 275 (BIA 2007); *see also* Sumolang v. Holder, 723 F.3d 1080, 1084 (9th Cir. 2013) (finding that the emotional harm an applicant suffered from the death of her child constituted persecution where doctors had denied the child medical treatment because of the mother's race and the parents' religion).

[98] For additional information, *see* RAIO Training module, *Interviewing - Survivors of Torture.*

the family member or if the applicant witnessed the harm to the family member.[99] The witnessing of harm to a family member or third party will not constitute persecution of the applicant, unless the intent in harming the third party is to cause harm to the applicant, the applicant's family, or all members of a group to which the applicant belongs on account of a protected characteristic.[100] Furthermore, as explained above, harm that would constitute torture will always rise to the level of persecution, and the definition of torture under U.S. law includes threats that another person would be imminently subjected to death or severe physical pain or suffering.[101]

For example, if a persecutor severely assaults an applicant's spouse and indicates that the harm was motivated by the applicant's political activity, the applicant may be able to establish that he was persecuted on account of his political opinion. However, psychological harm suffered by an applicant based on the harm to a family member would not constitute persecution if the family member was targeted solely because of the family member's own protected characteristic rather than the protected characteristic(s) of the applicant. In the latter case, the harm was not directed at the applicant.

4 IDENTIFYING A PERSECUTOR

Inherent in the meaning of persecution is the principle that the harm that an applicant suffered or fears must be inflicted either by the government of the country where the applicant fears persecution, or by a person or group that the government is unable or unwilling to control.[102]

The UNHCR Handbook, para. 65 provides context:

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

[99] *See* Memorandum from Joseph Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., Persecution of Family Members, (30 June 1997).

[100] *See* N.L.A. v. Holder, 744 F.3d 425, 432-433 (7th Cir. 2014) (holding that a direct threat to an applicant's family member may cause suffering that constitutes persecution of an applicant where the threat is intended to target the entire family); Panoto v. Holder, 770 F.3d 43, 47 (1st Cir. 2014) (finding that the harm an Indonesian Christian applicant suffered when a bomb was planted at her church and, within six months, she witnessed a fellow Christian passenger being brutally murdered during a ferry highjacking by an anti-Christian group could constitute persecution of the applicant on account of her religion).

[101] 8 C.F.R. § 208.18(a)(4)(iv); see also Section 3.3, Human Rights Violations.

[102] *See* Matter of Villalta, 20 I&N Dec. 142, 147 (BIA 1990); Matter of H-, 21 I&N Dec. 337 (BIA 1996); and Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996) (en banc).

tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

4.1 The Government

In cases in which the applicant was harmed or fears harm by the government, the applicant must establish the following:

- the harm or feared harm was on account of a protected characteristic
- the harm or feared harm is sufficiently serious to rise to the level of persecution
- the persecutor or feared persecutor is an agent or agents of the government

The Court of Appeals for the Ninth Circuit has stated that where a government agent is responsible for the persecution, it is unnecessary to consider whether the applicant sought protection from the police or other government entity.[103]

4.2 Entity the Government Is Unable or Unwilling to Control

4.2.1 General Principles

An applicant may establish that he or she has suffered or will suffer persecution by a non-government actor if the applicant demonstrates that the government of the country from which the applicant fled is unable or unwilling to control the entity doing the harm.[104] The applicant is not required to show direct government involvement or complicity with the non-government actor.

In determining whether a government is unable or unwilling to control the entity that harmed or seeks to harm the applicant, you should address whether:

- there were reasonably sufficient governmental controls and restraints on the entity[ies] that harmed the applicant
- the government had the ability and will to enforce those controls and restraints with respect to the entity that harmed the applicant
- the applicant had access to those controls and constraints

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[103] *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004).

[104] *See* *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007).

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- the applicant attempted to obtain protection from the government and the government's response, or failure to respond, to those attempts[105]

4.2.2 Guidance from Federal Courts

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

> While the acts of persecution were not perpetrated directly by government officials, the widespread nature of the persecution of ethnic Armenians documented by the State Department Country Report, combined with the police officer's response when Mr. Andriasian turned to him for help, clearly establishes that the government of Azerbaijan either could not or would not control Azeris who sought to threaten and harm ethnic Armenians living in their country.[106]

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

- evidence that government actors committed or instigated the acts
- evidence the government actors condoned the acts
- evidence of an inability on the part of the government to prevent the acts[107]

The First Circuit has further explained that the applicant must demonstrate more than "a general difficulty preventing the occurrence of particular future crimes" and that "where a government is making every effort to combat violence by private actors, and its inability to stop the problem is not distinguishable from any other government's struggles, the private violence has no government nexus and does not constitute persecution."[108]

4.2.3 Efforts to Gain Government Protection or an Explanation of Risk or Futility

To demonstrate that the government is unable or unwilling to protect a refugee or asylum applicant, the applicant must show that he or she sought the protection of the government, or provide a reasonable explanation as to why he or she did not seek that protection.[109]

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[105] Surita v. INS, 95 F.3d 814, 819-20 (9th Cir. 1996); Ortiz-Araniba v. Keisler, 505 F.3d 39, 42 (1st Cir. 2007).

[106] Andriasian v. INS, 180 F.3d 1033, 1042-43 (9th Cir. 1999).

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

[108] Ortiz-Araniba v. Keisler, 505 F.3d 39, 42 (1st Cir. 2007); Khan v. Holder, 727 F.3d 1, 7 (1st Cir. 2013) (citing Burbiene v. Holder, 568 F.3d 251, 255-56 (1st Cir. 2009).

[109] Roman v. INS, 233 F.3d 1027, 1035 (7th Cir. 2000).

Reasonable explanations for not seeking government protection include evidence that the government has shown itself unable or unwilling to act in similar situations, that the applicant would have increased his or her risk by affirmatively seeking protection, or that the applicant was so young that he or she would not have been able to seek government protection.[110]

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

Examples

- An Indian Muslim applicant was shot by Hindu extremists during the 2002 riots in Gujarat. While he was in the hospital, a police officer visited him and advised him not to tell anyone the truth about what had happened. The applicant remained in India for four years without ever formally reporting the incident to the police or seeking help from state or federal authorities. He explained that based on what the police officer had told him, he believed that reporting would be futile. Considering country conditions evidence indicating that the Indian government was making significant and often successful efforts to apprehend perpetrators of anti-Muslim violence in Gujarat, the Seventh Circuit held that substantial evidence supported the conclusion that the Indian government was not unwilling or unable to protect him at the time.[111]

- A Colombian applicant who was threatened and attacked several times by the Revolutionary Armed Forces of Colombia (FARC) because of her political activity did not report any of the incidents to the police. The BIA concluded that she had not established that the Colombian government was unwilling or unable to protect her because she did not seek protection from law enforcement. The Eleventh Circuit Court of Appeals held that the BIA erred in its decision because it failed to address the applicant’s argument that her testimony and country conditions evidence established that reporting the attacks to law enforcement would have been futile.[112]

4.2.4 Unwilling to Control

There may be situations in which the government is unwilling to control the persecutor for reasons enumerated in the refugee definition (the government shares, or does not wish

[110] *See* Matter of S-A-, 22 I&N Dec. 1328, 1335 (BIA 2000); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1057 (9th Cir. 2006); and *cf.* *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005).

[111] *Vahora v. Holder*, 707 F.3d 904, 908-909 (7th Cir. 2013).

[112] *Lopez v. U.S. Att’y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2010).

to oppose, the persecutor's opinion about the applicant's protected characteristic).[113] However, there is no requirement that the government's unwillingness to protect the applicant be motivated by any protected characteristic.[114]

A government may be unwilling to intervene in what are perceived to be domestic disputes within a family, or in disputes between tribes, or in a dispute that involves societal customs.[115] You may need to evaluate country conditions information concerning relevant laws and the enforcement of those laws, as well as the applicant's testimony, to determine if the government is unwilling to control the persecutor.

Evidence that the government is unwilling to control the persecutor could include a failure to investigate reported acts of violence, a refusal to make a report of acts of violence or harassment, closing investigations on bases clearly not supported by the circumstances of the case, statements indicating an unwillingness to protect certain victims of crimes, and evidence that other similar allegations of violence go uninvestigated.[116]

4.2.5 Unable to Control

No government can guarantee the safety of each of its citizens or control all potential persecutors at all times. In order for you to find that the government was "unable to control" a non-governmental persecutor when the applicant was harmed, the applicant "must show more than just a difficulty controlling private behavior. Rather, the applicant must show that the government condoned the private behavior or at least demonstrated a complete helplessness to protect the victims."[117] Where the state has made reasonable efforts to control the persecutor or protect the applicant, the harm the applicant suffered does not constitute persecution.[118] However, generalized evidence that the government has attempted to control a private persecutor does not preclude you from finding, based on the applicant's testimony and the record as a whole, that the government was unable or unwilling to control the persecutor in an applicant's individual case.[119] In most cases,

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[113] UNHCR Handbook, para. 65.

[114] *Doe v. Holder*, 736 F.3d 871, 878 (9th Cir. 2013).

[115] UNHCR. *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/02, 7 May 2002), paras. 9, 15 and 19.

[116] *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004).

[117] *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732-733 (8th Cir. 2013) (citations omitted); *see also Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005) (holding that the state must provide "protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct").

[118] *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013).

[119] *See N.L.A. v. Holder*, 744 F.3d 425, 441-442 (7th Cir. 2014) (holding that the BIA erred in relying solely on country conditions reports indicating that some parts of the Colombian government have recently engaged in efforts to control the FARC and ignoring applicants' testimony that the police were not willing to help them in their particular situation).

the determination of whether a government is unable to control the entity that harmed the applicant requires careful evaluation of the most current country of origin information available, as well as an evaluation of the applicant's circumstances.

Examples

- A Pakistani applicant received death threats from the Taliban after he urged people in his community to oppose them, and his house was attacked with a grenade. He reported the incidents to the police, and they investigated and took statements from witnesses, but they did not apprehend the perpetrators. The First Circuit upheld the BIA's determination that the applicant had not demonstrated the Pakistani government's inability to control the persecutors because law enforcement officials had made reasonable efforts to protect him and, according to country conditions evidence, had had some success in combating the Taliban in his area; although the government had not "eradicated" the threat the Taliban posed, a reasonable factfinder could conclude that it was willing and able to control them.[120]
- A Mexican applicant was kidnapped and beaten by the Los Zetas drug cartel because of his own activities opposing Los Zetas while in the Mexican armed forces. The Ninth Circuit held that the BIA's determination that the Mexican government was willing and able to control the persecutors was in error because it failed to consider significant evidence in the record that the Mexican government's efforts to control the persecutor had been unsuccessful; instead, it had focused solely on the government's willingness.[121]

A government in the midst of a civil war, or one that is unable to exercise its authority over portions of the country may be unable to control the persecutor in areas of the country where its influence does not extend.[122] An evaluation of how people similarly situated to the applicant are treated, even in portions of the country where the government does exercise its authority, is relevant to the determination of whether the government is unable to control the entity that persecuted the applicant.

In order to establish that he or she is a refugee based on past persecution, the applicant is not required to demonstrate that the government was unable or unwilling to control the persecution on a nationwide basis.[123] The applicant may meet his or her burden with evidence that the government was unable or unwilling to control the persecution in the specific locale where the applicant was persecuted.

[120] Khan, 727 F.3d at 7.

[121] Madrigal v. Holder, 716 F.3d 499, 506-507 (9th Cir. 2013).

[122] Matter of H-, 21 I&N Dec. 337, 345 (BIA 1996).

[123] Mashiri v. Ashcroft, 383 F.3d 1121, 1122 (9th Cir. 2004).

5 ELIGIBILITY BASED ON PAST PERSECUTION

5.1 In the Refugee Context: Past Persecution is Sufficient

Overseas, if an applicant for classification as a refugee credibly establishes that the harm he or she suffered in the past rose to the level of persecution, and that the harm was on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility for refugee status. However, officers must still elicit testimony on and assess whether or not an applicant has a well-founded fear of persecution on account of any of the five protected grounds.[124]

5.2 In the Asylum Context: Presumption of Well-Founded Fear

In the asylum context, if an applicant has established past persecution on account of a protected characteristic, the applicant is not required to separately establish that his or her fear of future persecution is well-founded.[125] It is presumed that the applicant's fear of future persecution, on the basis of the original claim, is well-founded, and the burden of proof shifts to USCIS to establish by a preponderance of the evidence that,

- due to a fundamental change in circumstances, the fear is no longer well-founded

  or

- the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.[126]

If USCIS does not meet this burden, the applicant's fear is well-founded. A well-founded fear of persecution on the basis of the original claim means fear of persecution on account of the protected characteristic on which the applicant was found to have suffered past persecution. If USCIS is able to rebut the presumption of well-founded fear, the applicant may still be granted asylum, in the exercise of discretion, based on severe past persecution, or other serious harm. For more information, *see* [Asylum Adjudications Supplement]

6 CONCLUSION

[124] *See* IRAD Refugee Application Assessment SOP. IRAD requires assessment of both past persecution and well-founded fear for several reasons.

[125] 8 C.F.R. § 208.13(b)(1); *see Matter of A-T-*, 24 I&N Dec. 617 (AG 2008)

[126] For further information refer to RAIO Training module, *Well-Founded Fear* and *Matter of A-T-*, 24 I&N Dec. 617 (AG 2008).

An applicant must meet all the elements of the refugee definition in order to establish eligibility for protection as a refugee or asylee. Unlike the international definition, the definition of refugee in the INA allows an applicant to establish eligibility by a showing of past persecution, without having to establish a well-founded fear of persecution in the future. In order to show past persecution the applicant must establish that he or she has suffered harm in the past that rises to the level of severity necessary to constitute persecution, that the harm was inflicted on account of a protected characteristic, and that the agent of harm was either a part of the government, or an entity that the government was unable or unwilling to control.

7 SUMMARY

7.1 Persecution

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

To establish persecution, the level and type of harm experienced by the applicant must be sufficiently serious to constitute persecution.

There is no single definition of persecution. Guidance may be found in precedent decisions, the UNHCR Handbook, and international human rights law. The determination of whether an act or acts constitute persecution must be decided on a case-by-case basis, taking into account all the circumstances of the case including the physical and psychological characteristics of the applicant.

Serious violations of core or fundamental human rights that are prohibited by customary international law almost always constitute persecution. Less severe human rights violations may also be considered persecution. Discrimination, harassment, and economic harm may be considered persecution, depending on the severity and duration of the harm. The harm may be psychological, such as the threat of imminent death, the threat of infliction of severe physical pain or suffering, or the threat that another person will imminently be subjected to death or severe physical pain or suffering.

Acts that in themselves do not amount to persecution may, when considered cumulatively, constitute persecution.

7.2 Eligibility Based on Past Persecution

In the overseas refugee context, an applicant is eligible for refugee status if he or she establishes past persecution on account of one of the five protected grounds. There is no requirement that the applicant have an on-going fear of future persecution. Also, if the past harm is found to have risen to the level of persecution, there is no additional

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requirement that the harm be particularly severe and compelling in order to grant status on past persecution alone.

In the asylum context, after an applicant has established eligibility through past persecution, you must still consider whether there is a well-founded fear. In this inquiry the burden of proof is on the government to show by a preponderance of the evidence that a well-founded fear no longer exists. If you can show that the applicant no longer has a well-founded fear, the application should be denied or referred as a matter of discretion unless the applicant can show that there are compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution, or that there is a reasonable possibility they would face other serious harm if returned.

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PRACTICAL EXERCISES

Practical Exercise # 1

- **Title:** *Persecution Exercise*

- **Student Materials:**

Fact Pattern:

You are the parent of a sixteen year old girl. She attends the local public high school and is a member of the marching band. She is also involved with several extra-curricular activities. She has a 3.8 grade point average and has already been accepted to several distinguished universities.

One activity that she participates in is a student club known as Students for Civic Responsibility, and she is one of the main organizers. Another is Students for Social Change, and she is the Secretary of this club. These clubs have been very active in holding information fairs on a wide range of issues, such as police violence, spouse abuse, corruption in local government, and environmental concerns. These clubs are regularly contributing articles and letters to the local paper, have their own websites, and produce their own monthly newsletters.

One winter day you returned home from work, and your daughter did not come home from band practice at the normal time that she usually arrives home. After a delay of about 40 minutes, you begin to call a few of her friends. They tell you that band practice was cancelled due to the band director's illness, and that there were no after-school activities. The last person you talk to tells you that he saw your daughter talking to some police officers at the parking lot of the school, but his bus pulled away before he could see what happened. You call the school, but at this late hour, there is no answer.

You then call the local police station to find out if there was some problem involving your daughter, and if they know where she is. The duty officer at the station tells you that he does not have any record of any incident involving your daughter, and that there was no incident at the school that day. When you explain that your daughter was last seen talking to police officers at the school, the duty officer tells you that he has no record of the police being at the school that day. You then request to make a missing persons report, but are advised that you must wait 48 hours after the disappearance before they will take a report.

You call all of the other area police departments, but you are told the same thing. You call every person that you can think of that might know of your daughter's

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whereabouts, explaining the situation, and asking them for more leads. All of your leads turn up dry.

It is now about 10:00 PM. You get in your car and begin driving throughout the neighborhood, starting with the high school, and working your way out. You drive until 2:00 AM, and then return home. No one is at home and there are no messages on your answering machine. You call out from work the next morning, and repeat the whole process. You finally get the police to accept a missing persons report early. You contact the local television news station and ask for help. They tell you to call them the next day, just in case she shows up.

On the third day you call out from work again and continue to look for your daughter. Once again, there is no luck.

The same on the fourth day. But on the fourth night you get a telephone call at 1:00 AM and you hear your daughter crying and begging you in a shaken voice to pick her up outside the Municipal Building. You speed to the building and find your daughter huddled in a phone booth. You make sure that she is not physically injured, and take her home.

After calming her, you are able to talk to her about what happened. She tells you that the police came to the school and stopped her when she came out of the school. Once they verified her identity, they told her that there was a family emergency, and that she must accompany them to the station. Once at the station, she was handcuffed without explanation, and taken by two men in dark suits to a car, and was driven to another building about an hour away. She was placed in a solitary cell. The men did not talk to her at all, despite her plea for an explanation. She was given two meals each day, and her cell had a sink and faucet with potable water. On the last night, she was taken from her cell, again without explanation, and dropped off in front of the municipal building. She saw the telephone booth and called home. She has no idea who the men were or why she was held for four days.

The next day you call the police and demand an explanation, but they tell you that they do not know what you are talking about. You call a reporter at the local television station and try to explain the situation, but the reporter tells you that, without more information, he cannot help you. In the meantime, your daughter refuses to leave the house, and is afraid to be alone.

Finally, one day you get an anonymous telephone call and the caller tells you that they know that your daughter was under the custody of the FBI. You call the nearest FBI office and demand an explanation. You are simply told that it is none of your business, and that if you persist, you might need several days in a cell.

Discussion:

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8. Would you conclude that your daughter was a victim of persecution? If so, why? If not, why not?

Practical Exercise # 2

- **Title:** *Matter of H- - Past Persecution*
- **Student Materials:**

Fact Pattern:

The applicant is a native of Somalia and an undisputed member of the Darood clan and the Marehan subclan, an entity which is identifiable by kinship ties and vocal inflection or accent. For 21 years Somalia had been ruled by Mohammed Siad Barre, a member of the Marehan subclan, which constitutes less than 1 percent of the population of Somalia. In December of 1990, an uprising was instituted by members of the other clans, which ultimately caused Mohammed Siad Barre to relinquish his power and to flee the capital city of Mogadishu on January 21, 1991.

As a result of favoritism that had been shown to members of the Marehan subclan during the course of Mohammed Siad Barre's often brutal regime, the clans which rebelled against this regime sought to retaliate against those who had benefited from the regime. The applicant's father, a businessman who had greatly benefited from his membership in the Marehan subclan, was murdered at his place of business in Mogadishu on January 12, 1991, by members of the opposition United Somali Congress, composed mostly of members of the Hawiye clan. The applicant's family home, located in the Marehan section of the city, was targeted 2 days later by the same group. During the course of that attack, the applicant's brother was shot. He was later murdered at the hospital to which he had been brought for the treatment of his injury.

On January 13, 1991, 1 day after the attack on the applicant's home, he fled Mogadishu with his step-mother and younger siblings to a smaller town, Kismayu, which was a stronghold of the Darood clan. Approximately 1 month later, that town was attacked by the United Somali Congress. As a result, the applicant, who was not with his family at the time, was rounded up and detained without charges along with many other Darood clan members. During the course of his 5-day detention, the applicant was badly beaten on his head, back, and forearm with a rifle butt and a bayonet, resulting in scars to his body which remain to the present. A maternal uncle of the applicant, who was a member of the United Somali Congress,

recognized him and assisted in his escape, driving him approximately 40 kilometers in the direction of Kenya.

Discussion:

1. Is the applicant unwilling or unable to return to his/her country due to past harm or mistreatment? Yes ☐ No ☐

2. If no, go to Question 3. If yes, identify the perpetrator(s) of, and describe, harm or mistreatment.

Perpetrators:

3. Harm/Mistreatment:

4. Does the claimed harm or mistreatment rise to the level of persecution? If no, explain. Yes ☐ No ☐

Practical Exercise # 3

- **Title:** *Applicant Testimony and Interview Notes* – Past Persecution
- **Student Materials:**

Fact Pattern:

The Applicant testified that before fleeing his country, he resided with his son and his Russian wife in the Ukrainian city of Kharkiv. On February 12, 1992, he attended a political rally at which he gave a short speech promoting democracy and unification with Russia. Immediately after he finished his speech, someone grabbed him and began to beat him. He recognized the insignia on the clothing of his attacker as a symbol of "Rukh," a nationalistic, pro-Ukrainian independence movement. The Applicant required stitches on his lip and eyebrow from the beating. That evening, he discovered a leaflet from Rukh in his pocket, with the message "Kikes, get away from Ukraine." He testified that he began to receive similar anti-Semitic leaflets at home in his mailbox or slipped under the door. The record contains one of the leaflets he received in 1993.

In March 1992, a month after the attack at the rally, the Applicant's apartment was vandalized. The door had been broken down, furniture was ripped open, some of his possessions were stolen, others were smashed, and a half dozen leaflets from Rukh were left at the scene. The leaflets warned that "kikes" and "Moskali," a derogatory term for Russian nationals living in Ukraine, should leave Ukraine to the Ukrainians.

On January 3, 1993, the Applicant was attacked on his way home from work. He heard a voice saying, "Sasha, we've been waiting for you for quite some time." He was thrown to the ground and kicked. During the beating, the attackers repeatedly warned him to take his "Moskal" wife and "mixed" son out of Ukraine. He sustained a rib injury from the attack.

On July 3, 1993, the Applicant and his son were physically assaulted at a bus stop near their home by four men who were calling them derogatory names and making anti-Semitic remarks. The Applicant was pushed to the ground, and when his son tried to come to his aid, the assailants picked him up and dropped him on the pavement. The beating left bruises on the Applicant's torso, and his son sustained an injury to his right knee, which required surgery.

The Applicant also recounted the abuse his son endured at school on account of his Jewish background. In 1991, his class was required to read nationalist literature promulgated by Rukh. In December of that year, he was dragged into a corner by some classmates who made anti-Semitic comments and beat him. Also, in December 1993, he was cornered in the men's room by his classmates and forced to remove his pants to show that he had been circumcised. He did not return to school after this incident.

The Applicant testified that he reported the burglary as well as the January 1993 and July 1993 assaults to the police. He testified that the police promised to "take care of [it]" on each occasion, but that no action was ever taken.

Practical Exercise #4

- **Title:** *Eligibility –Discussion of Discrimination or Harassment Persecution*
- **Student Materials:**

Fact Pattern 2-a:

Applicant is a 50-year-old male native and citizen of Egypt who entered the United States in 1990, and was admitted as a visitor.

Applicant credibly testified that he is a Coptic Christian. Applicant was a successful accountant in Cairo and owned his own business. He was the only Christian business owner in a building with approximately 15 businesses. Because of Applicant's social standing, fundamentalist Muslims tried to force him to convert to Islam; they felt that it would be a great success if a successful businessman converted to Islam. Fundamentalist Muslim religious leaders visited Applicant several times at his office and to tell him how much he could benefit by becoming

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Muslim. Applicant expressed his Christian beliefs and asked the religious leaders to leave him alone. He accused them of being fanatics. The Muslim religious leaders then organized a Muslim boycott of Applicant's business. As a result, Applicant lost approximately 40% of his clientele. Other business owners in the building began to pray in front of Applicant's door making it difficult for clients to come and go. Whenever they encountered Applicant, the other business owners would degrade Applicant's religion. One day Applicant found that the sign for his business had been smashed. Applicant learned from a friend that the Muslims who smashed the sign arranged with the police to accuse Applicant of defaming Islam if he reported the incident. Therefore, Applicant was afraid to report the incident to the police. Applicant was also afraid to hang another sign identifying his business. Shortly after this, Applicant's car was vandalized.

Applicant used to attend Church regularly. However, because of the harassment he and other congregants experienced, Applicant began to attend church less frequently. Stones and feces were thrown at his church. Muslims standing outside would call out pejorative names and degrade the Christian religion. As a result, Applicant and his family no longer felt it was safe to go to church.

Because of the decrease in business, Applicant found it more difficult to support his family. He also worried about his children who were often taunted at school because of their religion. He feared the situation for Christians would only deteriorate. Therefore, he brought his family to the United States and applied for asylum.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution.
2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.
3. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-b:

Applicant is a 31-year-old female citizen of Belarus. Applicant credibly testified that she was often humiliated at school because of her Pentecostal religion. As an adult, Applicant continued to be harassed because of her religion. Applicant and her husband often held prayer meetings in their home. Their neighbors, who accused them of participating in a cult and practicing magic, would throw trash and waste in front of Applicant's door and would threaten to call the police, which they often did. When the police arrived, they would push people around and threaten to exile Applicant and her husband if they did not stop praying. On one occasion when a

neighbor called the police in 1989, the police roughly pushed the congregants and destroyed some of Applicant's property. Applicant was eight months pregnant at the time. The police told the congregants that if they did not stop praying, they would be detained.

Applicant had difficulty finding and retaining employment. Her employers dismissed her after learning that the police were often summoned to her home because she held prayer meetings there.

Applicant received inadequate medical care when she was once hospitalized for removal of a tumor. One of the nurses knew Applicant was Pentecostal. She told the other nurses, who then neglected to care for Applicant. Applicant was often left waiting for long periods of time before nurses would respond to her calls for assistance to get to the bathroom, and several times Applicant was not brought meals when other patients were fed. Two times, nurses neglected to give her pain killers at the prescribed time.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment. Also consider the individual characteristics of Applicant (would it make a difference whether or not she were pregnant when pushed?)

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-c:

Applicant is a 28-year old male from Russia. Applicant credibility testified that he is Jewish, though he has never practiced his religion and does not believe in any one religion. Because he is Jewish, he experienced discrimination in Russia. For example, he was not admitted to a university and could not pursue his dream to study Russian literature. He was admitted to a technical school for machinery and technology, where he learned the trade of machinist. Applicant stated that he had difficulty obtaining employment as a machinist and eventually found work as a cashier. Applicant was never given any raises and was generally harassed at work. For example, his supervisor would tell him that he was not correctly doing his work, even though Applicant followed all the instructions his supervisor gave him. Applicant came to the United States to visit an aunt. He now wants to remain in the United States where he can pursue his life-long dream of studying Russian literature.

USCIS00558

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment. Consider also individual characteristics of Applicant.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-d:

Applicant is a 25-year old citizen of Russia. When Applicant was in primary school, she was the only Jew in her class. The teacher often hit Applicant's hands with a wooden pointer without giving her a reason. She was too young to understand at the time, but she now believes she was treated this way because she is Jewish. None of the other children were treated the same way. Applicant's parents moved her to another school, where she had problems with other students. They made fun of her and taunted her, making pejorative nicknames out of her last names, because she is Jewish. Applicant was moved to a different school. Applicant had difficulties with her feet and received a note from a physician explaining that she should not participate in physical exercises and competition. Her teacher did not believe that she had problems with her feet and said the note was only an excuse from a Jewish doctor. Applicant was forced to participate in a physical competition and, as a result, was hospitalized for several months as doctors tried to heal her feet.

Applicant did not receive good grades at the university, even though she prepared better than other students. Because she did not receive good grades, Applicant was not entitled to a stipend. She believes she was given poor grades, because she is Jewish. Since she could not obtain a stipend, she was forced to attend night school so that she could earn money during the day. She was not able to pass one class, even though she prepared for it. The professor explained that she would not pass the Applicant, because Applicant is Jewish. In 1987, Applicant was expelled from school, because she complained about receiving a lower grade than a student who was not as prepared as she was. When the faculty later changed, Applicant was readmitted. As a result of these set-backs, it took Applicant seven years to graduate from university, even though the average time for completion was four years.

From 1986 to 1988, Applicant worked as an assistant teacher. She felt that other teachers isolated her and made it difficult for her to work with the children by speaking poorly to her in front of the children. Applicant told a teacher that her grandfather was on the ritual committee at the main Moscow synagogue. This exacerbated the poor treatment she had been receiving. Because Applicant felt she

could not do her job in that atmosphere, she quit her job. She then worked as a teacher at a different school until she left Russia.

One evening as Applicant was returning home from a friend's house, she was stopped by three men. They pushed her and made pejorative comments such as "You Jews should get out of Russia." They spoke in general about Jews and also said, "Pamiat will show you," indicating that they were associated with the anti-Semitic group, Pamiat. A man walked near-by, and his presence frightened the three men. They ran away, leaving Applicant frightened, but unharmed.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-e:

Applicant is a 48-year old male citizen from Belarus. Applicant credibly testified that he was born and raised in Minsk, where he attended the Polytechnic Institute. After graduation, he was certified as an electrical engineer. Applicant interviewed for a position as an electrical engineer at the Enterprise of Refrigeration and was told to report to personnel to complete an application. At the personnel office, Applicant's internal passport was checked. He was then told that there was no position available. Applicant believes he was told this because his internal passport revealed that he is Jewish. Applicant took another job as an electrician and continued to work as an electrician for approximately twenty years until he came to the United States in 1991. Applicant's job required him to travel quite a bit. At one time, he was required to spend two months to the Gomel Region, where radiation from Chernobyl was still very high. When Applicant asked why he, as opposed to other employees, was sent to that region, he was told, "Go to Israel, there is no radiation there. You should be thankful that with your passport, you are able to keep this job."

Applicant's wife worked as an accountant. After Applicant's wife married Applicant, she stopped receiving the promotions she had been receiving every year prior to the marriage.

In the last three or four years that the Applicant lived in Minsk, his family received threatening letters in the mail box once or twice a month. The letters said, "Dirty Jews, go to Israel."

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Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into account severity and duration of discriminatory actions and/or harassment.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-f:

Applicant is a 38-year old male citizen of Romania. Applicant credibly testified that he is a woodcarver and had his own studio and business in Romania. In 1986, Applicant organized the people in his town to strike to protest the building of a chemical plant near the town. Applicant publicly spoke out against the government -- accusing the local politicians of corruption and failure to represent the people's interest. Applicant began receiving anonymous letters stating that if he did not stop speaking out against the government, his home and studio would be burned. Applicant's wife was fired from her government job. Undercover government agents began to watch Applicant and would go to his studio about two or three times a week. When the undercover agents went to Applicant's studio, they would linger inside, asking him questions about what he did and how much money he made, and would watch the people who entered his studio. Sometimes, the agents would remain at the studio all day, making it difficult for Applicant to work. Customers, who feared the agents, stopped coming to Applicant's studio. This continued for several months before Applicant left Romania.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.

2. What additional information could be elicited to better evaluate the claim?

<u>Practical Exercise #5</u>

- **<u>Title:</u>** *Eligibility – Discussion of Past Persecution*

USCIS00561

- **Student Materials:**

Fact Pattern 3-a:

Applicant is a 40 year old female native and citizen of India. Applicant credibly testified that she is Muslim, but lived in a predominantly Hindu neighborhood. During Muslim-Hindu riots that erupted after the destruction of a mosque by fundamentalist Hindus, Applicant remained hidden in her bedroom, praying for protection of her son, who had been out in the street when the rioting erupted. The riots occurred during the month of Ramadan and Applicant was fasting, as prescribed by her religious beliefs. As Applicant prayed, a Hindu mob burst into the house and pulled Applicant out into the streets. They removed from Applicant's head the scarf that she wore over her head whenever in the company of men and began making obscene gestures at her. Several men then dragged a beaten teenager and threw him at her feet. She recognized the teenager as her son. The leader of the mob thrust a piece of cooked pork into Applicant's hand and ordered her to eat it. At first Applicant refused, because she was prohibited by her religious beliefs from eating pork and she was also prohibited from eating prior to sundown during the month of Ramadan. The leader struck Applicant's son with a bamboo stick, then threatened to beat her son even more if she did not eat the pork. Despite the religious prohibition, Applicant ate the pork to save her son from further abuse. Satisfied, the leader of the mob led the mob on to find their next victim.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 3-b:

Mr. Z is a citizen of Poland. From 1974 to February 1982, he worked as a manager of a livestock farm owned by the Polish government. At the end of 1981, he refused to sign an oath of loyalty to party officials. Soon after this refusal, the police arrested and interrogated Mr. Z three times. He was not physically mistreated on any of these occasions. In February of 1982, he was dismissed from his job. He was not given a reason. He then started his own business, a fox farm. He was again arrested in April of 1982 and interrogated about his association with Mr. M, a Solidarity member to whom he had loaned money. Although Mr. Z had loaned Mr. M money, he was not himself involved in the activities of Solidarity. Beginning in June of 1982 and continuing until December of 1984, the police would summon Mr. Z every two to three months and interrogate him over a period of three to five hours, primarily about his relationship to Mr. M, but also about his own activities. He was not physically

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harmed during any of these detentions. Mr. Z's final detention occurred in 1984, while he was in Warsaw selling fox furs. He was detained for 36 hours but released once the police determined that his papers were in order. Although the police spoke harshly to the applicant, he was not physically harmed during this detention. When Mr. Z returned home after this detention, he found that his apartment had been searched and some money and foxes confiscated. He left Poland shortly thereafter and entered the United States on a tourist visa.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 3-c:

Applicant is a 42-year-old male native and citizen of Peru. Applicant credibly testified that he lived in the city of Lima, where he worked at a bank. He owned and his wife managed a small dairy farm outside the city. In early 1988, he attended a public rally for the Democratic Action (AD) party at the invitation of his uncle, a political activist. At the rally, Applicant was challenged by a police officer who demanded his identification and questioned him about his supposed membership in *Sendero Luminoso* (SL). Applicant denied membership in SL. Applicant's wife testified that her husband may have been questioned because his uncle has a history of political activism for the opposition AD party and had often been harassed by the police.

In the weeks following the rally, Applicant was questioned repeatedly at his home and work by police officers concerning his supposed affiliation with SL. On three occasions he was taken from home by the police for further interrogation at the police station. The interrogation sessions at the police station lasted from 3 to 5 hours. During these interrogations, Applicant was initially pressured by slaps in the face with a wet cloth, and then the abuse progressed to blows with closed fists. At the bank where Applicant worked, police officers periodically appeared and kept watch on him while he worked, causing consternation among his co-workers and his supervisor. Applicant insisted that he had no relation to SL and the police were unable to come up with any evidence to link him to the terrorist group.

On May 15, 1988, two men attempted to abduct Applicant's son as he was leaving school. They were deterred by alarms which Applicant's wife and other parents raised. Applicant's wife believes the abductors were policemen. This incident caused Applicant to take precautionary measures. He sent his wife and son to live

with his grandparents in another city and began planning the family's departure from Peru.

Applicant testified further that the employees of his dairy farm learned that he was under suspicion as an SL member. Some of the employees were SL members or sympathizers. They took advantage of the situation to invite him to join SL. He said he wanted nothing to do with the SL because he opposed their Communist ideology. Shortly after his departure from Peru in September of 1988, Applicant's dairy was burned by a mob shouting "Long Live *Sendero Luminoso*!"

Discussion

1. Does the harm Applicant suffered from the police amount to persecution?
2. Does the harm Applicant suffered from the SL amount to persecution? Discuss which rights have been violated and the degree of harm Applicant suffered from each event and cumulatively.
3. What additional information could be elicited to better evaluate the claim?

Practical Exercise #6

- **Title:** *Eligibility – Discussion of Persecution*
- **Student Materials:**

Fact Pattern 4-a:

Vladimir is a 43-year old native of Lviv, Ukraine, where he owns a small bookstore. He started the bookstore because no one would hire him for employment because his father is ethnic Turkmen. Vladimir's name and distinct facial features make him stand out among Ukrainians and reveal his ethnicity.

Starting five years ago, policemen came to his store demanding that he pay them approximately $100.00 monthly to make sure that "nothing would happen" to his store. Although the amount represented a severe hardship to him, he paid it because he was afraid what might happen if he did not.

Five months ago, the policemen told him that his mandatory monthly donation was increased to $500.00. He told them that he was barely able to pay $100.00. They warned him to consider the consequences. He had no money to pay the demanded amount. The policemen returned after one week, and severely beat him with sticks, and kicked him with their steel-toed boots. They left him alone, bleeding and

unconscious in the back of his store. Luckily, he was found by an off-duty employee, who returned to the store having forgotten her keys.

Vladimir returned to the store after a month of recuperation. After he returned to work, he re-arranged the window display to feature a book critical about the Ukrainian role in the Nazi holocaust during World War II. The book had been discussed at the Orthodox Church he attends.

The following morning, before Vladimir opened the store, a large crowd gathered outside and chanted, “No more Jews.” A few minutes later, several men in the crowd broke the storefront glass and destroyed all the books in the new display. They then proceeded to set the business on fire, which completely destroyed the building.

When Vladimir arrived, he was stunned by the chaotic scene. A policeman passing through the area observed the commotion and quickly came to the scene. When the policeman inquired as to the cause of the trouble, the people in the crowd told him that it was because of the displayed books. The policeman observed the activity for a few minutes and then hit Vladimir on the head several times with his nightstick. Vladimir lost consciousness. “That should do it,” the policeman said before returning to his vehicle and driving away.

Vladimir was hospitalized for 2 days to recover from the beating. After he was released, he went to visit the site of his store, and he saw the store had been totally destroyed by fire. On its site was a huge sign, stating “Ukrainians yes, Jews no.”

Discussion

1. Discuss whether the harm Vladimir experienced in the past amounts to past persecution.

2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory action and/or harassment.

3. What additional information could be elicited to better evaluate the claim?

Fact Pattern 4-b:

The applicant, Laurita Tong, is a 24-year old Chinese ethnic female native of Indonesia. She has lived her entire life in Jakarta. Three years ago, she completed her university studies with a bachelor’s degree in Travel and Tourism. Her family owns a successful travel agency in Jakarta, where she works.

Laurita is Catholic by birth and attends church whenever she can – usually twice a month and on most holy days.

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On April 14, 2004, she was walking to work when a native Indonesian man, who was sitting on the steps of his house, stared at her as she walked by. Each day thereafter, he stared at her as she walked to work. Laurita was convinced that he was giving her the "evil eye," and that horrible things would happen to her. The windows of his house were covered with pictures of Muslim religious leaders.

On May 2, 2004, a group of native Indonesians blew up the church that Laurita attends. These people often harassed the churchgoers on Sundays and told them that they would be cursed unless they converted to Islam. Laurita became afraid to attend church after that happened.

On May 12, 2004, Indonesian natives raped Laurita's best friend, Melanie. The men told her that she should "go back to China."

On May 27, 2004, Laurita was leaving a shoe store when a native Indonesian man grabbed her roughly and yelled, "I hate you rich Chinese. Give me all your money, or I'll kill you now." Laurita handed over her purse, and the man ran away.

After these events, Laurita suffered from severe anxiety and depression. She was afraid to leave her house because she was worried what would happen to her. She did not leave her house until June 2, 2004, when she left Indonesia. Her father gave her an airplane ticket for Seattle, where she arrived the same day.

Discussion

1. Discuss whether the harm experienced by Laurita in the past amounts to persecution.

2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of each act.

Fact Pattern 4-c:

Applicant, Lin Xiang, is a 25-year old female native and citizen of China. For two years, she has worked as a bookkeeper at the Fujian Electronics Cooperative, a private business, which has received subsidies from the Chinese government. During the last three months, Lin and most of the other 314 workers have not received any pay because of unexpected financial shortages.

Lin became increasingly outraged. She wrote and printed a pamphlet explaining that the owners of the business had recently bought new homes, luxury vehicles, and even enjoyed vacations in Monte Carlo. She included a photo of one of the owner's homes in her pamphlet. Because of her position at the company, she had personal knowledge of the financial circumstances of the business.

Lin went out late one night in February to distribute the pamphlets into random mailboxes in several apartment buildings. She distributed the pamphlets in a similar manner each night for ten nights. On the tenth night, she was walking in a different neighborhood with about 75 pamphlets in her backpack when a policeman asked her what she was doing out on the street at 1:10 a.m. She replied that she came outside to walk because she could not sleep. He inquired as to what she carried in her backpack, and she told him she had documents from her work. He insisted on inspecting the documents, and after he did so, he angrily chastised her for lying and for disturbing the public social order. He then handcuffed her and brought her to the local Public Security Bureau.

Upon arrival at the Public Security Bureau, Lin was required to identify herself, and to explain what she had been doing. She explained that she had not been paid since December, and that she did not have enough food to feed her little girl. The police asked Lin who employed her and who put her up to distributing the pamphlets. Lin told the police that she does not get paid for her work and that everything she does is accomplished on her own.

The investigator angrily stated, "I don't believe you. I want you to examine yourself, and understand the damage you have done," he said. Then, he grabbed her and struck her on her back with an electric baton. She was released without conditions after 24 hours without further harm. However, as a result of the electric shock, she suffered a miscarriage in her third month of pregnancy.

After her release, she received notice that she was terminated from her employment. She sought other employment, but was unable to find any job because of her "bad record."

She became despondent, and realized that she could no longer live in China.

Discussion

1. Does the harm experienced by the applicant constitute persecution?
2. What facts support your conclusion?
3. What additional information, if any, would help evaluate this claim?

Practical Exercise #7

Alternative Exercise For Any of the PEs Above With Multiple Fact Patterns

- **Title:** *House of Commons Debate*

- **Introduction**

  The participants of the face-to-face session are challenged in the *House of Commons* debate to react to stimulating positions. A panel chairman facilitates the debate and a jury is responsible for the judgment concerning the content of the arguments. The nature of the positions and the role of the panel chairman guarantee a lively discussion, in which "pro's" and "con's" surface very quickly. Per round you need approximately 45 minutes.

- **Output**

  The output of the *House of Commons* debate is an overview of all possible arguments pro and con of the position. Because of the competitive element in the debate all participants are stimulated to actively contribute and take turns.

- **Method**

  Preparation

  The debate will be based on any of the fact patterns from the practical exercises above, seeking subject matter that will be stimulating, controversial and interesting for all participants. The group will be split into three teams and for each fact pattern used, one team will be assigned the role of supporter of the applicant's claim, one group will be assigned to oppose the applicant's claim, and the third group will act as a jury. This will not take more than 5 minutes.

  Tasks

  Every group prepares, in separate rooms, for the coming debate. In approximately 10 minutes, each group collects arguments for the defense of the group's stand in the debate. The participants prepare themselves both on the content of the arguments and on the presentation of the arguments.

  Organization

  The debate will be facilitated by a panel chairman. Next to this, there is the jury group, who will observe and judge the debate and the debaters.

OTHER MATERIALS

There are no Other Materials for this module.

SUPPLEMENT A – INTERNATIONAL AND REFUGEE ADJUDICATIONS

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

International and Refugee Adjudications Supplement

There are no supplements.

USCIS00570

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. 8 C.F.R. § 208.13(b)

ADDITIONAL RESOURCES

1. 1. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors and Deputy Directors, *Change in Instruction Concerning One Year Filing Deadline and Past Persecution,* (15 March 2001) (HQ/IAO 120/16.13).

2. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Persecution of Family Members*, (30 June 1997).

3. Memorandum from David A. Martin, INS Office of General Counsel, to Management Team, et al., *Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, (21 Oct. 1996) (HQCOU 120/11.33-P).

4. Memorandum from David A. Martin, INS Office of General Counsel, to Asylum Division, *Legal Opinion: Palestinian Asylum Applicants*, (27 Oct. 1995) (Genco Opinion 95-14).

5. Memorandum from David A. Martin, INS Office of General Counsel, to John Cummings, Acting Assistant Commissioner, CORAP, *Legal Opinion: Application of the Lautenberg Amendment to Asylum Applications Under INA Section 208*, (6 Oct. 1995) (Genco Opinion 95-17).

6. Memorandum from Rosemary Melville, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Follow Up on Gender Guidelines Training*, (7 July 1995) (208.9.9).

7. Memorandum from Phyllis Coven, INS Office of International Affairs, to Asylum Officers and HQASM Coordinators, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, (26 May 1995).

8. T. Alexander Aleinikoff. "The Meaning of 'Persecution' in United States Asylum Law," *International Journal of Refugee Law* 3, no. 1 (1991): 411-434.

9. UNHCR, *Note on Refugee Claims Based on Coercive Family Planning Laws or Policies* (Aug. 2005).

SUPPLEMENTS

Asylum Adjudications Supplement

Exercise of Discretion to Grant Based on Past Persecution, No Well-Founded Fear

If past persecution on account of a protected characteristic is established, then the applicant meets the statutory definition of refugee. Regulation and case law provide guidelines on the exercise of discretion to grant asylum to a refugee who has been persecuted in the past, but who no longer has a well-founded fear of persecution.[127]

- **Granting Asylum in the Absence of a Well-Founded Fear**

Regulations direct that the adjudicator's discretion should be exercised to deny asylum to an applicant whose fear of future persecution is no longer well founded,[128] unless either of the following occurs:

> - "The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution."[129]
> - "The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country."[130]

- **Severity of Past Persecution**

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[133] INA 101(a)(42)

[128] 8 C.F.R. § 208.13(b)(1)(iii)

[129] 8 C.F.R. § 208.13(b)(1)(iii)(A)

[130] 8 C.F.R. § 208.13(b)(1)(iii)(B)

When evaluating when to exercise discretion to grant asylum based on past persecution alone, the factors you should consider include:

- duration of persecution
- intensity of persecution
- age at the time of persecution
- persecution of family members
- conditions under which persecution was inflicted
- whether it would be unduly frightening or painful for the applicant to return to the country of persecution
- whether there are continuing health or psychological problems or other negative repercussions stemming from the harm inflicted
- any other relevant factor

- **BIA Precedent Decisions**

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

Matter of Chen

In *Matter of Chen*, the BIA held that discretion should be exercised to grant asylum to an applicant for whom there was little likelihood of future persecution. The applicant in that case related a long history of persecution suffered by both himself and his family during the Cultural Revolution in China. As a young boy (beginning when he was eight years old) the applicant was held under house arrest for six months and deprived of an opportunity to go to school and later abused by teachers and classmates in school. The applicant was forced to endure two years of re-education, during which time he was physically abused, resulting in hearing loss, anxiety, and suicidal inclinations. In finding that the applicant was eligible for asylum based on the past persecution alone, the BIA considered the fact that the applicant no longer had family in China and that though there was no longer an objective fear of persecution, the applicant subjectively feared future harm.[131]

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

[131] Matter of Chen, 20 I&N Dec. 16 (BIA 1989).

comparable to the harm suffered by Chen, an exercise of discretion to grant asylum may be warranted.

Matter of H-

In *Matter of H-*, the BIA did not decide the issue of whether the applicant should be granted asylum in the absence of a well-founded fear, but remanded the case to the IJ to decide whether a grant of asylum was warranted. The BIA held that "[c]entral to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past."[132]

Matter of B-

In *Matter of B-*, the BIA found that an Afghani who had suffered persecution under the previous Communist regime was no longer at reasonable risk of persecution. Nevertheless, the BIA held that discretion should be exercised to grant asylum based on the severity of the persecution the applicant had suffered in the past – a 13-month detention, during which time the applicant endured frequent physical (sleep deprivation, beatings, electric shocks) and mental (not knowing the fate of his father who was also detained and separation from his family) torture, inadequate diet and medical care, and integration with the criminal population – and the on-going civil strife in Afghanistan at the time of decision.[133]

Matter of N-M-A-

In *Matter of N-M-A-* the BIA found that a grant of asylum in the absence of a well-founded fear was not warranted where the applicant's father was kidnapped, the applicant's home was searched twice, and the applicant was detained for one month (during which time he was beaten periodically and deprived of food for three days). In reaching that conclusion, the BIA noted that the harm was not of a great degree, suffered over a great period of time, and did not result in severe psychological trauma such that a grant in the absence of a well-founded fear was warranted.[134]

Matter or S-A-K- and H-A-H-

In *Matter of S-A-K- and H-A-H-*, the BIA held that discretion should be exercised to grant asylum to a mother and daughter who had been involuntarily subjected to FGM based on the severity of the persecution they suffered. Some of the factors

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

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

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

the Board considered in finding that the persecution was severe were: the applicant's daughter was subjected to FGM at an early age and was not anesthetized for the procedure; the mother nearly died from an infection she developed after the procedure; both mother and daughter had to have their vaginal opening reopened later on in their lives, in the case of the mother about five times; mother and daughter continued to experience medical problems related to the procedure (e.g., the mother experienced great pain and the daughter had difficulty urinating and cannot menstruate); and the mother was beaten because she opposed having her daughters subjected to FGM.[135]

- **Federal Court Decisions**

A comparison of the decisions above with the federal cases below will help you understand the application of this standard.

Eighth Circuit – *Reyes-Morales v. Gonzales*

The court upheld the BIA's the denial of asylum finding that the applicant did not establish that the past persecution he suffered was sufficiently serious to warrant a discretionary grant of asylum in the absence of a well-founded fear.[136] In this case, members of the Salvadoran military beat the applicant to unconsciousness, resulting in a physical deformity and several scars.[137] The applicant's friend was killed during the same incident. On review, a federal court cannot disturb a discretionary ruling by the BIA unless it is arbitrary or capricious.

Third Circuit – *Lukwago v. Ashcroft*

The court held that although forcible conscription of a child by a guerrilla group may constitute persecution, it was not on account of a protected ground. The severity of past harm cannot provide the basis for a grant of asylum in the absence of a well-founded fear if the applicant has not established that the harm was inflicted on account of a protected ground.[138]

- **"Other Serious Harm"**

Even where the past persecution suffered by an applicant does not rise to the higher level of severe persecution, a grant in the absence of a well-founded fear may be

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

[136] For additional federal cases, see *Lal v. INS*, 255 F.3d 998, 1009–10, as amended by *Lal v. INS*, 268 F.3d 1148 (9th Cir. 2001); and *Vongsakdy v. INS*, 171 F.3d 1203, 1206–07 (9th Cir. 1999).

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

[138] *Lukwago v. Ashcroft*, 329 F.3d 157, 173-74 (3d Cir. 2003).

justified where there is a reasonable possibility that an applicant who suffered past persecution may face other serious harm upon return.[139]

By "other serious harm," the Department means harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but that is so serious that it equals the severity of persecution.[140]

In considering whether there is a reasonable possibility of other serious harm, you should focus on current conditions that could severely affect the applicant, such as civil strife and extreme economic deprivation, as well as on the potential for new physical or psychological harm that the applicant might suffer.[141] Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as "other serious harm."

Two federal courts that have considered this regulation have noted that the following circumstances might qualify as "other serious harm:"

- harm resulting from the unavailability of necessary medical care[142]
- debilitation and homelessness due to unavailability of specific medications[143]

In *Matter of T-Z-* the BIA found that to rise to the level of persecution and, thus, be considered "serious" economic disadvantage, the harm must be not just substantial but "severe," and deliberately imposed.[144] When analyzing whether economic disadvantage constitutes "other serious harm," you need to determine if the harm is "serious." In making that determination, you need to focus your analysis on whether the economic disadvantage feared is "severe" as required by *Matter of T-Z*, but you do not need to find that the economic harm will be deliberately imposed. The deliberate imposition requirement of *Matter of T-Z-* is not required in the context of analyzing "other serious harm" because in that context the harm feared does not necessarily have to be volitionally imposed by a persecutor on account of a protected characteristic but can be the result as well from non-volitional situations and events such as, for example, natural disasters.

- **Additional Humanitarian Factors**

[139] 8 C.F.R. 208.13(b)(1)(iii)(B)

[140] 65 FR 76121 at 76127; *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012).

[141] *Matter of L-S-*, 25 I. & N. Dec. 705 (BIA 2012).

[142] *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155, 162 (3d Cir. 2011).

[143] *Kholyavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008).

[144] For additional information, *see* section on Economic Harm.

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

For example, in *Matter of H-*, the BIA indicated that on remand the Immigration Judge could consider humanitarian factors independent of the applicant's past persecution, such as age, health, or family ties, when exercising discretion to grant asylum.[145] However, in the supplemental information to the final rule, the Department of Justice specifically stated that it did not intend for adjudicators to consider additional humanitarian factors unrelated to the severity of past persecution or other serious harm in exercising discretion to grant asylum in the absence of a well-founded fear.[146] Thus, under the current rules, humanitarian factors such as those that the BIA referenced in *Matter of H-* are considered in the exercise of discretion analysis only if they have a connection to either the severity of past persecution or to other serious harm that the applicant may suffer.

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

[146] 65 FR 76121 at 76127.

USCIS00577

U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

WELL-FOUNDED FEAR

TRAINING MODULE

DATE (see schedule of revisions): 12/20/2019

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USCIS00579

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

WELL-FOUNDED FEAR

Training Module

MODULE DESCRIPTION:

This module discusses the definition of a refugee as codified in the Immigration and Nationality Act and its interpretation in administrative and judicial case law. The primary focus of this module is the determination as to whether an applicant has established a reasonable possibility of suffering future harm in the country of nationality or last habitual residence.

TERMINAL PERFORMANCE OBJECTIVE(S)

During an interview you (the Officer) will be able to elicit relevant information to correctly determine if an applicant has a well-founded fear of future persecution.

ENABLING PERFORMANCE OBJECTIVES

1. Explain the legal standard required to establish a well-founded fear of persecution.
2. Distinguish between the subjective and objective elements of well-founded fear.
3. Summarize the four basic criteria necessary to establish a well-founded fear of future persecution.
4. Analyze factors to consider in determining whether internal relocation is reasonable.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Practical Exercises

METHOD(S) OF EVALUATION

- Observed Practical Exercises
- Multiple Choice Exam

REQUIRED READING

1. *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).
2. 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).
3. 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).

Required Reading – International and Refugee Adjudications

Required Reading – Asylum Adjudications

ADDITIONAL RESOURCES

Additional Resources – International and Refugee Adjudications

Additional Resources – Asylum Adjudications

USCIS00581

CRITICAL TASKS

Task/ Skill #	Task Description
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR4	Knowledge of the relevant sections of the 8 Code of Federal Regulations (CFR) (4)
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ILR17	Knowledge of who has the burden of proof (4)
ILR18	Knowledge of different standards of proof (4)
ILR20	Knowledge of the criteria for refugee classification (4)
ILR21	Knowledge of the criteria for establishing a well-founded fear (WFF) (4)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
IRK3	Knowledge of the procedures and guidelines for establishing an individual's identity (4)
RI1	Skill in identifying issues of claim (4)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
12/20/2019	Entire Lesson Plan	Minor edits to reflect changes in organizational structure of RAIO; no substantive updates	RAIO Training

USCIS00583

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USCIS00586

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 refugee definition at INA § 101(a)(42) states that an individual is a refugee if he or she establishes past persecution or a well-founded fear of future persecution on account of a protected characteristic. An applicant can establish eligibility for refugee resettlement or asylum even if he or she has not actually suffered persecution in the past. The requirements for an applicant to establish eligibility based on past persecution are discussed in the RAIO Training modules, *Refugee Definition* and *Definition of Persecution and Eligibility Based on Past Persecution*. The requirements needed to establish that persecution or feared persecution is "on account of" any of the five protected grounds in the refugee definition are discussed in the RAIO Training module, *Nexus and the Five Protected Grounds.*

This module discusses the elements necessary to establish a well-founded fear of future persecution and how to elicit testimony regarding each of these elements.

To correctly determine whether an applicant's fear is well-founded, you must have a firm understanding of: 1) the subjective and objective elements of well-founded fear; 2) the four-part *Mogharrabi* test;[1] and 3) the reasonable possibility standard of proof.

2 WELL-FOUNDED FEAR: BURDEN OF PROOF[2]

The burden of proof is on the applicant to establish that he or she is a refugee as defined in the refugee definition. Credible testimony alone may be sufficient to meet the

[1] Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (BIA 1987).

[2] For information on establishing a well-founded fear based on Coercive Population Control, see Asylum Adjudications Supplement – Coercive Population Control.

applicant's burden. As such, you, the officer, have a duty to elicit sufficient testimony to make the determination whether the applicant is eligible for asylum or refugee status.

An applicant for asylum or refugee status may qualify as a refugee either because he or she suffered past persecution or because he or she has a well-founded fear of persecution on account of a protected ground.

In asylum processing, if an applicant establishes past persecution, he or she shall be presumed to have a well-founded fear of future persecution on the basis of the original claim.[3] The burden of proof then shifts to the officer to rebut the presumption that the applicant has a well-founded fear of future persecution. That presumption may be rebutted if an officer finds that there has been a fundamental change in circumstances to such an extent that the applicant no longer has a well-founded fear of persecution or the applicant could avoid future persecution by relocating to another part of his or her home country. See Asylum Adjudications Supplement – Presumption Raised By Past Persecution.

The same is not true in overseas refugee processing. In refugee processing, an applicant may be admitted as a refugee if he or she establishes past persecution on account of a protected ground, regardless of changed circumstances or the possibility of internal relocation.[4]

An applicant who is claiming a well-founded fear of persecution based on coercive population control must establish more than a generalized fear that he or she will be persecuted. As this scenario is not often seen in the overseas refugee context, information regarding this issue is located in the Asylum Adjudications Supplement – Coercive Population Control.

In either the asylum or refugee context, an applicant can show he or she is a refugee based solely on a well-founded fear of future persecution without having established past persecution.

3 ELEMENTS OF WELL-FOUNDED FEAR

To establish a well-founded fear of persecution within the meaning of the refugee definition, an applicant must show that he or she has: 1) a subjective fear of persecution; and, 2) that the fear has an objective basis.[5]

3.1 Subjective Element

[3] 8 C.F.R. § 208. See Asylum Adjudications Supplement –Presumption Raised By Past Persecution.

[4] INA § 101(a)(42).

[5] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, para. 38 (2011).

The applicant satisfies the subjective element if he or she credibly articulates a genuine fear of return.[6] As the *UNHCR Handbook* notes, when evaluating whether an applicant's fear is subjective, it is important to keep in mind the applicant's background, personal beliefs, sensitivities, societal status, and personality:

> since psychological reactions of different individuals may not be the same in identical situations. One person may have strong political or religious convictions, the disregard of which would make life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape, another may carefully plan his departure.[7]

Fear has been defined as an apprehension or awareness of danger.[8] Fear of famine or natural disaster, without more, fails to meet this element as does general dissent, disagreement with a government, the desire for more personal freedom, or an improved economic situation.[9]

A genuine fear of persecution must be the applicant's primary motivation in seeking refugee or asylum status.[10] However, it need not be the only motivation.[11] An applicant may fear persecution ***and*** desire more personal freedom or economic advantage.

It is important to remember that just because an applicant exhibits courage in the face of danger this does not negate his or her genuine fear of persecution.[12]

Examples

An applicant continued to protest against the government after an arrest, despite a lengthy detention.

An applicant returned to her country after fleeing, in the hopes that the situation had improved, even though she was tortured there in the past.

Relevant Questions

Would the applicant be able to go back to his or her country? Why? Why not? Has the applicant ever gone back to his or her country? Why? Why not? (As a last resort, if

[6] *See* Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985).

[7] *UNHCR Handbook*, para. 40.

[8] *Matter of Acosta,* 19 I. & N. Dec. 211, 221 (BIA 1985); *UNHCR Handbook*, para. 39.

[9] *UNHCR Handbook*, para. 39; Matter of Acosta, 19 I. & N. Dec. 211, 221 (BIA 1985).

[10] *Matter of Acosta,* 19 I. & N. Dec. 211, 221 (BIA 1985).

[11] *UNHCR Handbook*, para. 39.

[12] *Smolniakova v. Gonzales*, 422 F.3d 1037, 1050 (9th Cir. 2005), citing *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995).

applicant does not respond) Is the applicant afraid to go back? Why? Why not? What does the applicant think would happen if he or she were to return to his or her country?

3.2 Objective Element

In *Cardoza-Fonseca,* the Supreme Court concluded that the standard for establishing the likelihood of future harm in asylum is lower than the standard for establishing likelihood of future harm in withholding of deportation: "One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."[13]

Cardoza-Fonseca points to the following example to illustrate:

> In a country where every tenth adult male is put to death or sent to a labor camp, "it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return." [14]

The determination of whether a fear is well-founded does not ultimately rest on the statistical probability of persecution, which is almost never available, but rather on whether the applicant's fear is based on facts that would lead a reasonable person in similar circumstances to fear persecution.[15]

An applicant must establish the likelihood of future persecution by the reasonable possibility standard of proof, i.e., that a reasonable person in the applicant's circumstances would fear persecution upon return to his or her country of origin. The reasonable possibility standard is more generous than a "more likely than not" standard.[16]

4 THE *MOGHARRABI* TEST

[13] *INS v. Cardoza-Fonseca* , 480 U.S. 421, 431(1987); *see also* *INS v. Stevic* , 467 U.S. 407 (1984).

[14] *INS v. Cardoza-Fonseca*, at 431, *citing to* 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966).

[15] *See* *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987); *Guevara Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986); *M.A. v. U.S. INS*, 899 F.2d 304, 311 (4th Cir. 1990). *See also* *Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007) (en banc) (to establish that her fears are objectively reasonable the applicant must provide evidence that is credible, direct, and specific); *Zheng v. Gonzales*, 475 F.3d 30 (1st Cir. 2007) (the applicant's fears found not objectively reasonable, despite her personal opposition to China's coercive population control policies, because her circumstances were no different from those of other Chinese women of marriageable age and she intended to abstain from sex until marriage).

[16] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

USCIS00590

Matter of Mogharrabi lays out a four-part test for determining well-founded fear. To establish a well-founded fear of future persecution, the applicant must establish the following elements:[17]

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

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

3. Capability (the persecutor has the capability of punishing the applicant)

4. Inclination (the persecutor has the inclination to punish the applicant)

This is sometimes referred to as "PACI" (pronounced "pah'-chee") for the first letter in each element.

4.1 Possession (or Imputed Possession) of a Protected Characteristic

The applicant must establish that the characteristic falls within one of the protected grounds listed in the refugee definition. For additional information, see RAIO Training module, *Nexus and the Five Protected Grounds*. The applicant must establish that he or she possesses or is believed to possess the characteristic the persecutor seeks to overcome.[18] Although *Mogharrabi* states that the applicant must establish that the persecutor seeks to overcome the characteristic by means of punishment, more recent case law holds that the persecutor need not intend to punish or have any malignant intent toward the applicant.[19]

Relevant Questions

Why is the applicant afraid of returning to his or her country? What does the persecutor not like about the applicant? Why would someone want to harm the applicant in his or her country? If harmed in the past, why did the persecutor harm applicant? What is the applicant's protected characteristic? How are others with the applicant's protected characteristic treated? What did the persecutor say to the applicant? Why would the persecutor think the applicant has a protected characteristic?

4.2 Awareness

The applicant must establish that the persecutor is aware or could become aware that the applicant possesses (or is believed to possess) the characteristic.

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[17] Matter of Mogharrabi , 19 I. & N. Dec. 439 (BIA 1987) *modifying* Matter of Acosta , 19 I. & N. Dec. 211 (BIA 1985).

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

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

The applicant must establish that there is a reasonable possibility that the persecutor could become aware that the applicant possesses the characteristic; mere speculation that the persecutor could become aware is insufficient.[20]

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

Relevant Questions

How would someone know that the applicant had the protected characteristic? How could someone recognize the applicant as someone with the protected characteristic? If you were in the applicant's country, how would you know the applicant was someone with the protected characteristic? How would the persecutor know that the applicant had returned to his or her country?

4.3 Capability

The applicant must establish that the persecutor has the capability to persecute the applicant because he or she possesses a protected characteristic, or because the persecutor believes the applicant possesses a protected characteristic. Some factors to consider 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 it21
- the extent to which the persecutor has the ability to enforce his or her will throughout the country

Relevant Questions

Who is the persecutor? If the persecutor is a part of a government, what role does the persecutor play within the government? How much authority does the persecutor have? If the persecutor is part of the government, can the applicant seek protection from another government entity within the country? Why or why not? If the persecutor is a non-government actor, would the government be able to or want to protect the applicant? Did the applicant report the non-governmental actor to the police? Would the police or government offer any protection to the applicant?

[20] See Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985); Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

[21] For additional information, see RAIO Training modules, *Refugee Definition* and *Definition of Persecution and Eligibility Based on Past Persecution* (section on *Entity the Government is Unable or Unwilling to Control*).

During the interview, you will need to ask the applicant questions about the persecutor's capability to persecute him or her. You may use country of origin information[22] to help you determine the capability of the persecutor to harm the applicant if the applicant is having difficulty answering your questions regarding capability.

4.4 Inclination

The applicant must establish that the persecutor has the inclination to persecute him or her. Note that the applicant does not need to establish that the persecutor is inclined to *punish* the applicant, i.e., that the persecutor's actions are motivated by a malignant intent.[23]

Relevant Questions

If many months or years have passed, does the applicant think the persecutor would still want to harm him or her? Why? Why not? Does the applicant know anyone with his or her protected characteristic who has returned to the home country? What happened to the person who returned? Does the applicant know anyone in the same circumstances who remained in the home country? If so, what, if anything, has happened to that person in the home country? What does the applicant hear about the treatment of others possessing the applicant's protected characteristic in the home country now?

Similar to documenting the capability of the persecutor, you will need to ask the applicant questions about whether the persecutor would be inclined to persecute the applicant. If the applicant is unable to answer questions regarding whether the persecutor is inclined to persecute him or her, you may use country of origin information to help you determine the persecutor's inclination to persecute the applicant.[24] Factors to consider when evaluating inclination include any previous threats or harm from the persecutor and the persecutor's treatment of individuals similarly situated to the applicant. The motive of the persecutor is discussed in detail in the RAIO Training module, *Nexus and the Five Protected Grounds.*

5 PATTERN OR PRACTICE

5.1 General Rule

The applicant need ***not*** show that he or she will be singled out individually for persecution, if the applicant shows that:

[22] For additional information, see RAIO Training module, *Country of Origin Information*.

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

[24] As noted above, although *Mogharrabi* states that the applicant must establish that the persecutor seeks to overcome the characteristic by means of *punishment,* more recent case law holds that the persecutor need not intend to punish or have any malignant intent. *See* Matter of Kasinga, 21 I. & N. Dec. 357 (BIA 1996) and Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997).

- There is a pattern or practice of persecution on account of any of the protected grounds against a group or category of persons similarly situated to the applicant.25
- The applicant belongs to or is identified with the persecuted group, so that a reasonable person in the applicant's position would fear persecution.26

5.2 "Pattern or Practice" of Persecution

There is no established definition of "pattern or practice." You must evaluate claims of well-founded fear based on a pattern or practice of persecution on a case-by-case basis. The Court of Appeals for the Eighth Circuit has interpreted "pattern or practice" to mean something "on the order of organized or systematic or pervasive persecution," but held that it does not require a showing of persecution of all the members of the group.[27]

The Ninth Circuit has held that even if there is no systematic persecution of members of a group, persecution of some group members may support an applicant's fear of being singled out in the future, if the applicant is similarly situated to those members. The court explained:

> if the applicant is a member of a 'disfavored' group, but the group is not subject to systematic persecution, this court will look to (1) the risk level of membership in the group (i.e., the extent and the severity of persecution suffered by the group) and (2) the alien's individual risk level (i.e., whether the alien has a special role in the group or is more likely to come to the attention of the persecutors making him a more likely target for persecution).[28]

The Ninth Circuit went on to state, "[t]he relationship between these two factors is correlational; that is to say, the more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution needs to be."[29]

[25] 8 C.F.R. § 208.13(b)(2)(iii)(A).

[26] 8 C.F.R. § 208.13(b)(2)(iii)(B).

[27] *See* Makonnen v. INS, 44 F.3d 1378, 1383 (8th Cir. 1995); Feleke v. INS, 118 F.3d 594 (8th Cir. 1997); *see also* Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005) (adopting Eighth Circuit's definition of "pattern or practice" of persecution), Matter of A-M-, 23 I& N Dec. 737, 741 (BIA 2005) (applying the Eighth Circuit standard in upholding the IJ's finding that the applicant failed to establish a pattern or practice of persecution in Indonesia against Chinese Christians). See also Meguenine v. INS, 139 F.3d 25, 28 (1st Cir. 1998) (to establish a pattern or practice of persecution the applicant must submit evidence of "systematic persecution" of a group); Mitreva v. Gonzales, 417 F.3d 761, 765 (7th Cir. 2005) (citing case examples, and noting that "courts have interpreted the regulation to apply only in rare circumstances").

[28] Sael v. Ashcroft, 386 F.3d 922, 925 (9th Cir. 2004); Mgoian v. INS, 184 F.3d 1029, 1035 n. 4 (9th Cir. 1999); citing to Kotasz v. INS, 31 F.3d 847, 853 (9th Cir. 1994); see also Singh v. INS, 94 F.3d 1353 (9th Cir. 1996).

[29] Mgoian at 1035: *see also* Kotasz and Singh.

The First, Third, and Seventh Circuits have rejected the Ninth Circuit's use of a lower "disfavored group" standard where there is insufficient evidence to establish a "pattern or practice" of persecution.[30]

5.3 Group or Category of Individuals Similarly Situated

There is no established rule regarding the type of group or category with which the applicant must be identified. The group could include a few individuals or many. However, the members of the group or category must share some common characteristic that the persecutor seeks to overcome and that falls within one of the protected grounds in the refugee definition.[31]

Relevant Questions

How were others similarly situated to the applicant treated in the applicant's home country? How were others treated, with whom the applicant was associated? How would the applicant be seen as connected with this group? How does the persecutor treat people who are seen as belonging to this group? Have other people in this group who also fled returned to the home country? How have they been treated? What has happened to them?

You should also consult country conditions reports to determine whether the applicant belongs to a group at risk of harm and the extent to which that group is at risk.

6 PERSECUTION OF INDIVIDUALS CLOSELY RELATED TO THE APPLICANT

6.1 Objective Evidence Supporting Fear

The persecution of family members or other individuals closely associated with the applicant may provide objective evidence that the applicant's fear of future persecution is well-founded, even if there is no pattern or practice of persecution of such individuals. On the other hand, continued safety of individuals similarly situated to the applicant may, in some cases, be evidence that the applicant's fear is not well-founded.[32]

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[30] Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005) (finding that violence against Chinese Christians in Indonesia is not sufficiently widespread to constitute a "pattern or practice" of persecution); Firmansjah v. Gonzales, 424 F.3d 598, 607 n.6 (7th Cir. 2005) (noting that the court has not recognized a lower threshold of proof based on membership in a "disfavored group" where the evidence is insufficient to establish "pattern or practice"); Kho v. Keisler, 505 F.3d 50, 55 (1st Cir. 2007) (noting that the disfavored group analysis is creates a threshold for relieving applicants of the need to establish individualized persecution that is not found in the regulations).

[31] *See*, Meguenine v. INS, 139 F.3d 25 (1st Cir. 1998) (Applicant failed to establish well-founded fear based on pattern or practice of individuals similarly situated to him, because evidence indicated that those targeted were not persecuted because of the characteristic they shared with the applicant, but rather a characteristic the applicant did not possess – prominent opposition to Islamic fundamentalists).

[32] *See* Matter of A-E-M-, 21 I. & N. Dec. 1157 (BIA 1998); *but see* Cordero-Trejo v. INS, 40 F.3d 482 (1st Cir. 1994) (remanded to the BIA, in part, for the Board to consider evidence that others similarly situated to the applicant were also being subjected to violence by government forces).

6.2 Connection Must Be Established

The applicant must establish a connection between the persecution of the family member or associate and the harm that the applicant fears.[33]

Example

> An applicant's sister was arrested because she was a member of the same opposition party as the applicant. The sister and the applicant lived in the same city. The applicant learned of the arrest through continued contact with family in the home country. The sister's arrest must be considered in evaluating the applicant's claim. On the other hand, if the facts were different and the applicant did not live in the same city as her sister, had little contact with her, and had no association with her political party, the sister's arrest must still be considered, but might not be enough to establish a well-founded fear.

7 THREATS MAY BE SUFFICIENT WITHOUT HARM

Serious threats made against an applicant may constitute past persecution even if the applicant was never physically harmed.[34] A threat (anonymous or otherwise) may also be sufficient to establish a well-founded fear of persecution, depending on all of the circumstances of the case. There is no requirement that the applicant be harmed in the past or wait to see whether the threat will be carried out. The fact that an applicant has not been harmed in the past is not determinative of whether his or her fear of future persecution is well founded**.** However, the evidence must show that the threat is serious and that there is a reasonable possibility the threat will be carried out.[35]

Threats must be evaluated in light of the conditions in the country and the circumstances of the particular case. Anonymous threats could be a result of personal problems unrelated to any of the protected characteristics in the refugee definition. On the other hand, death squads may use anonymous threats to terrorize those over whom they seek control. The fact that a threat is anonymous does not necessarily detract from the seriousness of the threat. Further inquiry should be made regarding the circumstances and content of the threat to evaluate whether it provides a basis for a well-founded fear. In

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[33] *See* Matter of A-K-, 24 I. & N. Dec. 275, 277-78 (BIA 2007) (the applicant was not eligible for withholding of removal, based on a fear that his daughters would be subjected to FGM, as he did not establish a pattern of persecution tied to him personally).

[34] Salazar-Paucar v. INS, 281 F.3d 1069, 1074 (9th Cir. 2002), *amended by* Salazar-Paucar v. INS, 290 F.3d 964 (9th Cir. 2002). For additional information, see RAIO Training modules, *Refugee Definition* and *Definition of Persecution and Eligibility Based on Past Persecution*.

[35] Matter of Villalta, 20 I&N Dec. 142 (BIA 1990); Kaiser v. Ashcroft, 390 F.3d 653, 658 (9th Cir. 2004); Arteaga v. INS, 836 F.2d 1227 (9th Cir. 1988); Sotelo-Aquije v. Slattery, 17 F.3d 33 (2d Cir. 1994); Cordero-Trejo v. INS, 40 F.3d 482 (1st Cir. 1994).

many cases, the content of an anonymous threat sheds light on the identity of the source of the threat.[36]

In determining whether a threat or threats establish a well-founded fear of persecution, you should elicit information from the applicant about all of the circumstances relating to the threat. Factors to consider may include:

- whether others have received similar threats, and what happened to those individuals
- the authority or power of the individual or group that made the threat
- any activities that may have placed the applicant at risk
- country of origin reports

8 SIGNIFICANT LAPSE OF TIME BETWEEN OCCURRENCE OF EVENT(S) AND FLIGHT

8.1 General Rule

A significant lapse of time between the occurrence of incidents that form the basis of the claim and an applicant's departure from the country may be evidence that the applicant's fear is not well-founded.[37] The lapse of time may indicate that:

- the applicant does not possess a genuine fear of harm
- the persecutor does not possess the ability or the inclination to harm the applicant

8.2 Possible Exceptions

There may be valid reasons why the applicant did not leave the country for a significant amount of time after receiving threats or being harmed, including:

- lack of funds to arrange for departure from the country
- time to arrange for the safety of family members

[36] *See, e.g.*, Aguilera-Cota v. INS, 914 F.2d 1375 (9th Cir.1990); Cordero-Trejo v. INS, 40 F.3d 482 (1st Cir. 1994); Gailius v. INS, 147 F.3d 34 (1st Cir. 1998); Kaiser v. Ashcroft, 390 F.3d 653, 658 (9th Cir. 2004); Canales-Vargas v. Gonzales, 441 F.3d 739, 744-745 (9th Cir. 2006) (finding that the timing of threats – two or three weeks after the applicant publicly denounced the Shining Path guerrillas – was circumstantial evidence sufficient to establish the Shining Path as the source of the threats).

[37] *See* Castillo v. INS, 951 F.2d 1117 (9th Cir. 1991); Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005) (upholding BIA's determination that applicant did not establish a subjective fear of future persecution when she had remained in Indonesia for two years after the robbery that formed the basis of her claim to asylum).

- belief that the situation would improve
- promotion of a cause within the home country
- temporary disinclination or inability by the persecutor to harm the applicant

8.3 Factors to Consider

To evaluate the weight to be given to this issue, it is important to consider all circumstances,[38] including:

The amount of time the applicant remained

A relatively short period, such as weeks or months, may not be significant, whereas years could be significant, depending on the circumstances. You must ascertain whether the length of time has a significant impact on the applicant's claim.

The reason for the delay

There may have been a lack of opportunity to escape or the applicant may have had other legitimate reasons for deciding to remain in the country. On the other hand, an applicant may provide reasons that are not consistent with his or her alleged reasons for leaving the country.

The applicant's location during that time

Whether the applicant remained near the place of persecution, or went into hiding, or moved to a distant location within the country, may have a bearing on the issue. If an applicant remained in the area where the persecutor could easily locate the applicant, you must elicit additional testimony as to why the applicant did so, as well as reasons why the persecutor did not continue his or her activities against the applicant.

The applicant's activities during that time

It may be relevant to determine whether the applicant went into hiding or assumed his or her normal routine. If the applicant made attempts to reduce his or her vulnerability to persecution, and believed that those attempts would be effective, this could explain the delay. If the applicant did not change his or her daily routine, you should explore whether the applicant continued to remain vulnerable to the possibility of persecution.

The persecutor's activities during that time, if known

[38] *See* Gonzales v. INS, 82 F.3d 903, 909 (9th Cir. 1996) (finding that the applicant's stay in Nicaragua for 3 years after the first threat did not undermine her claim of a well-founded fear where the threats were repeated, applicant took steps to protect herself, and a pattern of violence against her family members made her fear well-founded).

If the persecutor suspends persecutory activities during the time in which the applicant remained in his or her country, this could explain the delayed departure.

9 RETURN TO COUNTRY OF FEARED PERSECUTION

9.1 Effect on Well-Founded Fear Evaluation

Depending on the circumstances, an applicant's return to the country of feared persecution may indicate that the applicant does not possess a genuine (subjective) fear of persecution or that the applicant's fear is not objectively reasonable. However, return to the country of feared persecution does not necessarily defeat the claim.[39]

The regulations at 8 C.F.R. § 208.8(b) address the effect of return to the home country in the context of an asylum seeker. Please see the Asylum Adjudications Supplement – Return to Country of Feared Persecution for further information on this topic. While there is no equivalent regulation governing overseas refugee adjudications, return to the country of feared persecution in this context may affect whether the applicant has a well-founded fear of persecution. International and Refugee Adjudications Supplement – Return to Country of Feared Persecution. For additional information, see RAIO Training modules, *Refugee Definition* and *Definition of Persecution and Eligibility Based on Past Persecution.*

In the overseas refugee context, an applicant need only establish either past persecution or a well-founded fear of future persecution.

9.2 Factors to Consider

Why Did Applicant Return?

In evaluating the weight to be given to an applicant's return, you must consider the reason the applicant returned. There may be one or more compelling reasons for an applicant to return. For example, the Ninth Circuit held that the fact that applicant returned to the country of feared persecution to get her child, whose custodian had died, did not undercut the genuineness of her fear.[40]

What Happened Upon Return?

[39] Procedurally, an applicant with a pending asylum application who leaves the United States without advance parole is presumed to have abandoned his or her asylum claim, regardless of the country he or she travels to. 8 C.F.R. § 208.8(b). The presumption is generally overcome by the applicant's appearance at the asylum office. Return to country of feared persecution is also addressed in the RAIO Training module, *Refugee Definition.* In this section, you should focus on how the applicant's return factors into the analysis of well-founded fear.

[40] *Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987); *see also* *Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986) (Applicant's return to country of feared persecution because he wanted to help his uncle and sister who had been arrested was not inconsistent with a well-founded fear).

It is also important to consider what happened to the applicant after he or she returned to the country of feared persecution. Threats or harm experienced upon return would strengthen the applicant's claim that he or she faces a reasonable risk of persecution. However, the ability to return to and remain safely in the country of feared persecution would undercut the reasonableness of the applicant's fear, particularly if the applicant remained there a significant amount of time and lived openly (not in hiding).

Examples

- An applicant returned to his home country of Lebanon to attend to his dying father. Out of fear of persecution, he cut short his visit and returned to the United States before his father's funeral. Four years later, he returned to Lebanon to attend to his dying mother. Because a fear of persecution, the applicant delayed this visit and by the time he arrived in Lebanon his mother had already died. The court concluded that these two return visits were not substantial evidence that the applicant's fear of persecution was not well-founded.[41]

- A Rwandan applicant provided "reasonable explanations" for remaining in school in her home country and several return trips to her home country after she fled, according to the First Circuit Court of Appeals.[42] The court noted that all members of her immediate family had been killed and she returned at the urging of a close friend, a nun, who was not aware that she had been raped in Rwanda and who believed that the applicant would no longer be a target after her father's death. The court also relied on the fact that the applicant had no means of financial or emotional support, except for the nun, and her only means of obtaining an education was through the free education offered at the National University of Rwanda. Upon return, the applicant changed her name, but was soon discovered. She also returned later to obtain her transcript so that she might be able to attend school in the United States. The court concluded that "[f]aced with no viable means of support otherwise, people take risks in the face of their fears."[43]

10 POSSESSION OF TRAVEL DOCUMENTS

10.1 General Rule

Possession of a valid national passport and other official travel documents is not a bar to refugee status. However, possession of such documents may be considered in evaluating whether the applicant is at reasonable risk of harm from the government, because it may be evidence that the government is not inclined to harm the applicant. This would only be relevant when the government is the persecutor.

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[41] *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005).

[42] *Mukamusoni v. Ashcroft*, 390 F.3d 110, 125 (1st Cir. 2004).

[43] *Mukamusoni*, 390 F.3d at 126.

10.2 Factors to Consider

To evaluate the weight to be given to the applicant's possession of travel documents, the circumstances surrounding the acquisition of the documents should be elicited and considered. Factors to consider include:

- Whether the passport-issuing or exit control agency is separate from the branch of government that seeks to harm the applicant and whether that agency is aware of the applicant's situation[44]

- Whether the applicant obtained the documents surreptitiously (e.g., through a bribe or with the help of a friend)

- Whether the government issued the documents so that the applicant would go into exile

- Whether the applicant obtained the documents prior to the incidents that gave rise to the applicant's fear

11 REFUGEE SUR PLACE

11.1 Definition

UNHCR defines a "refugee *sur place*" as a "person who was not a refugee when he left his country, but who becomes a refugee at a later date."[45] An individual may become a refugee due to circumstances arising in the country of origin after the individual left, or due to actions the individual took while outside his or her country.[46]

11.2 Analysis

To evaluate a claim, you should apply the *Mogharrabi* four-pronged test, just as in any other claim of well-founded fear. A common issue that arises in such cases is whether there is a reasonable possibility the persecutor could become aware that the applicant possesses a characteristic that the persecutor seeks to overcome, or might impute the characteristic to the applicant.

11.3 Factors to Consider

[44]*See* Khup v. Ashcroft, 376 F.3d 898, 905 (9th Cir. 2004) (finding that IJ erred in failing to consider Khup's explanation that he obtained the passport through a broker to whom he paid a large sum of money and IJ failed to explore how the applicant was able to renew the passport).

[45] UNHCR Handbook, para. 94.

[46]UNHCR Handbook, paras. 94-96: Refugees "sur place;" *see* Kyaw ZwarTun v. INS, 445 F.3d 554 (2d Cir. 2006) (finding error where the IJ failed to consider whether the applicant's political activities since coming to the US, even if not motivated by actual political beliefs, established a well-founded fear of persecution).

- The visibility of the applicant's activities outside the country of feared persecution (e.g., does the applicant attend or speak at small and large rallies, give money to an organization, is the applicant active online or in social media, or has the applicant been exposed by the press?)

- The extent of the feared persecutor's network outside the country of feared persecution (e.g., does the applicant's government closely monitor nationals abroad?)

- The persecutor's opinion of those who have resided in other countries (e.g., is the applicant's government suspicious of those who have resided in countries viewed as political opponents?)

Example

> An Iranian national had an altercation with an Iranian official at the Iranian Interests Section of the Algerian Embassy in the United States. The applicant accused the official of robbing Iran and being a religious fascist. In response, the official pulled a gun and threatened the applicant. The BIA found that a reasonable person in the applicant's situation would fear persecution on account of political opinion, because the applicant's opposition to the authorities was known to an Iranian official, and it was not disputed that the Iranian regime persecutes its opponents.[47]

12 INTERNAL RELOCATION

12.1 Countrywide Scope of Feared Persecution

The threat of feared persecution must exist throughout the country where persecution is feared, unless it is unreasonable for the applicant to relocate within the country. If the applicant can *reasonably* relocate to another part of the country to avoid future persecution, then the applicant's fear of persecution is not well-founded.[48] When determining whether internal relocation is an option, apply the reasonableness test explained below.

A countrywide threat of persecution is not required to establish past persecution. It is not logical to state that a person was or was not harmed countrywide in the past. If an applicant suffered persecution on account of a protected ground, then the applicant is a refugee, irrespective of whether the persecutor would have had the ability to harm the applicant if the applicant had relocated within the country.

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

[47] Matter of Mogharrabi, 19 I. & N. 439 (1987); *see also* Bastanipour v. INS, 980 F.2d 1129 (7th Cir. 1992).

[48] 8 C.F.R. § 208.13(b)(3)(i)

1. Determine if an applicant could avoid future persecution by relocating to another part of the applicant's home country.[49] If you find that an applicant will not be persecuted in another part of the country, then,

2. Determine if an applicant's relocation, under all circumstances, would be reasonable[50]

Examples

- In some countries, it would be unreasonable to require a single woman to relocate to areas where she has no family or social safety net.

- For an applicant with a disability, it would be unreasonable to expect the applicant to relocate to an area that lacks appropriate medical care.

- Where relocation is inconvenient because the applicant lacks social connection such as family and friends, it may nonetheless be reasonable to expect the applicant to relocate if the applicant has sufficient funds, the applicant could obtain employment, and where he or she could integrate into the new area without difficulties.

- It could be reasonable to expect an applicant to relocate to a safe area of his country, even though he does not fluently speak the dialect used in that location.

12.2 Government or Government-Sponsored Persecutor

In cases in which the feared persecutor is a government or is government-sponsored, you must presume that there is no reasonable internal relocation option. This presumption may be overcome if you show by a preponderance of the evidence that the applicant could avoid future persecution by relocating to another part of the applicant's country and that it would be reasonable to expect the applicant to relocate.[51]

12.3 Non-Governmental Persecutor or Entity

If the persecutor is a non-governmental entity, the applicant must demonstrate that there is no reasonable internal relocation option. Analyze the facts according to the two-step test for internal relocation. First, determine if the applicant could avoid future persecution by relocating to another part of the country. If the applicant would not face persecution in another part of the country, then determine if, under all circumstances, it would be reasonable to expect the applicant to relocate.

Examples

[49] 8 C.F.R. § 208.13(b)(2)(ii).

[50] 8 C.F.R. § 208.13(b)(2)(ii).

[51] 8 C.F.R. § 208.13(b)(3)(ii)

- If the persecutor is a rebel group that has control of, and access to, a substantial part of the country, then the applicant could not avoid future persecution by relocating. On the other hand, if the persecutor is a local rebel group whose scope of power is limited to a remote area of a country, the applicant might not have a well-founded fear in another part of the country. In addition, if the applicant has the support of family in an area where the rebels are inactive, or the government has effectively protected individuals from rebel threats in other parts of the country, it might be reasonable to expect the applicant to relocate.

- If the persecutor is a nationally known religious leader that has *de facto* power and access to large parts of the country, then the applicant could not avoid persecution by relocating to another part of the applicant's home country and your inquiry would end there. On the other hand, if the persecutor is a local religious leader whose scope of power is limited to a remote area of the country, the applicant might not have a well-founded fear in another part of the country. In this situation, you should move on to the second step of the test and determine if it would it be reasonable, under all circumstances, to expect the applicant to relocate.

12.4 Considerations in Evaluating When Internal Relocation Is Reasonable

If the fear of persecution is not countrywide, you must determine whether it would be reasonable for the applicant to relocate within the country of feared persecution. In determining reasonableness, you should consider the following factors. These are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

Whether the Applicant Would Face Other Serious Harm

Other serious harm means harm that may not be inflicted on account of one of the five protected grounds in the refugee definition, but is so serious that it equals the severity of persecution. Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as other serious harm.

This factor may overlap with the other factors described below

Any Ongoing Civil Strife

There may be a civil war occurring in parts of the country, making it unreasonable for the applicant to relocate.

Example

> The only place where the persecutor has no authority is within the war-torn area; or the applicant would have to travel through unsafe areas to try to get to a place not controlled by the persecutor.

Administrative, Economic, or Judicial Infrastructure

There may be circumstances under which aspects of the infrastructure may make relocation difficult. Depending on the circumstances, such infrastructure may make it very difficult for an individual to live in another part of the country.

Example

In certain situations, the fact that women may not have the same legal rights as men may hinder an applicant's ability to relocate; or a member of a particular tribe may be unable to live safely among other tribes because of social and cultural constraints in the country.

Geographical Limitations

There may be situations in which geographical limitations, such as mountains, deserts, jungles, etc., would present barriers to accessing a safe part of a country. Or, there may be cases in which the only safe places in a country are places in which an individual would have difficulty surviving due to the geography (e.g., an uninhabitable desert).

Social and Cultural Constraints

You may consider factors such as age, gender, health, and social and familial ties. The applicant may also possess a characteristic that would readily distinguish the applicant from the general population and affect his safety in the new location. The applicant may speak a dialect or have a physical appearance unique to a minority group or to a certain part of the country that would make it difficult for the applicant to integrate into the new area. An applicant's high or low profile status may also affect his or her ability to safely relocate to another part of the country. There may be other social or cultural constraints that make it unreasonable for the applicant to relocate.

Example

In some countries a woman may be unable to live safely or survive economically without a husband or other family members.

Other Factors

Any other factors specific to the case that would make it unreasonable for the applicant to relocate should be considered.

12.5 Applicant Relocated before Leaving the Country of Feared Persecution

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

whether the applicant was able to live a relatively normal life in that location or was forced to live in hiding; whether the persecutor knew of the applicant's relocation; and the length of time the applicant lived in the new location.

13 COUNTRY OF ORIGIN INFORMATION[52]

Information regarding the conditions in an applicant's country is critical in evaluating whether the applicant's fear of future persecution is well-founded. You are required to keep abreast of country of origin information and to research available information in evaluating claims.

14 CONCLUSION

The main component of determining whether an applicant's fear is well-founded is the 4-part *Mogharrabi* test. In order to establish that a well-founded fear exists, the applicant must establish that the likelihood of future persecution on account of a protected ground is a reasonable possibility.

15 SUMMARY

Elements of a Well-Founded Fear

To establish a well-founded fear of persecution, the applicant must show that the fear is genuine (the subjective basis) and that it has an objective basis in fact.

No Requirement of Past Harm

There is no requirement that the applicant have suffered harm in the past to establish a well-founded fear of future persecution.

Objective Basis for Fear

The requirement of an objective basis is met if the applicant establishes that the fear of persecution is reasonable; i.e., that there is a reasonable possibility of suffering persecution in the future.

The Mogharrabi Test

If an applicant establishes all four prongs of the Mogharrabi test, as modified by Matter of Kasinga and Pitcherskaia v. INS[53], the fear of persecution is well-founded. The elements of the four-prong test are 1) applicant possesses (or is believed to possess) a

[52] For additional information, see RAIO Training module, *Country of Origin Information.*

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

protected characteristic; 2) persecutor is aware or could become aware that applicant possesses the characteristic; 3) persecutor is capable of persecuting applicant; and 4) persecutor is inclined to persecute applicant.

Pattern or Practice

An applicant does not need to show that he or she will be singled out if there is 1) a pattern or practice of persecution of a group or category of individuals similarly situated to the applicant, and 2) the applicant belongs to or is identified with the group or category of persons such that a reasonable person in the applicant's position would fear persecution.

Persecution of Family Members or Close Associates

Persecution of family members or others associated with the applicant may be objective evidence that the applicant's fear is well founded. However, the applicant must establish some connection between such persecution and the persecution the applicant fears.

Threats

Threats (anonymous or otherwise) may be sufficient to establish a well-founded fear if the applicant establishes that there is a reasonable possibility the threats will be carried out. If the threat is anonymous, you should consider all possible sources of the threat, the content of the threat, circumstances surrounding the threat, and country conditions information.

Applicant Remains in Country after Threats or Harm

A significant lapse of time between the incidents that give rise to the claim and the applicant's departure from the country may indicate that the fear is not well-founded. However, the reasons and circumstances for delayed departure must be considered.

Return to Country of Persecution

An applicant's return to the country of feared persecution generally weakens the applicant's claim of a well-founded fear of persecution. Consideration must be given to the reasons the applicant returned and what happened to the applicant once he or she returned. Return to the country of feared persecution does not necessarily defeat an applicant's claim.

Possession of Travel Documents

Possession of valid travel documents does not preclude eligibility for refugee or asylum status, but may indicate that the applicant's government does not have the inclination to harm the applicant. All of the circumstances surrounding acquisition of such documents must be considered.

Refugee Sur Place

An applicant may become a refugee due to events that occur while the applicant is outside his or her country. These events may be changed circumstances in the applicant's country, or actions the applicant takes while outside of his or her country that put him or her at risk if the applicant returns to the country.

Internal Relocation

A fear is not well-founded if the applicant could avoid future persecution by relocating to another part of his or her country, and, under all the circumstances, it would be reasonable to expect the applicant to do so. You must consider whether the persecutor is the government or is government-sponsored; the extent of the authority of the persecutor; and any factors that may make it unreasonable for the applicant to relocate. In the Asylum context, the burden of proof shifts to the officer to show that the applicant could reasonably relocate to avoid future persecution if past persecution has been established or if the persecutor is the government or is government-sponsored.

Country of Origin Information

You must consider current conditions in the applicant's country to evaluate whether an applicant's fear of future persecution is well-founded.

PRACTICAL EXERCISES

Practical Exercise # 1

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

USCIS00609

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.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

International and Refugee Adjudications Supplement – Return to Country of Feared Persecution

Returns in the Iraqi Context

Response to Query

Date: May 15, 2009

Subject: Returns Guidance

Keywords: Returns, Iraq, Well-Founded Fear, Objective Fear

Query: To what degree do voluntary returns to Iraq (or other countries of claimed persecution) undercut claims of a well founded fear of future persecution?

Response:

While the voluntary return to the country of claimed persecution may indicate that an alien is willing and able to return, it does not in and of itself preclude the

establishment of eligibility for refugee status. **The reasons motivating the temporary return, including the intent and circumstances surrounding such, are the most critical factors in determining if an applicant is unable or unwilling to return or if his/her return calls into question the credibility of the applicant's past persecution or well-founded fear claim.** In all of these cases, you should weigh the reasons for the applicant's return, with what happened to the applicant previously and the circumstances of the return (why they returned, what activities they engaged in upon return, what happened during the return, the length of the return).

According to the April 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection needs of Iraqi Asylum-Seekers*, "the situation in Iraq has further evolved, with important improvements in the overall security situation in many parts of the country." This improvement in conditions may help to explain why we're seeing so many applicants traveling back and forth frequently. UNHCR goes on to say that "the developments and improvements all have to be seen in context. Conditions can still be unpredictable, with several set-backs occurring, and there are major uncertainties and risks remaining." "It is UNHCR's assessment that the improvement of the situation in Iraq does not yet constitute fundamental changes sufficient to allow a general application of the cessation clauses of Articles 1C(5) or (6) of the 1951 Convention." Therefore, the UNHCR believes that the conditions/reasons that made these individuals refugees still exist.

Here are some factors to consider when addressing the return issue:

1) Has the applicant suffered past persecution?

The refugee definition requires an applicant to demonstrate **either** actual past persecution **or** a well-founded fear of future persecution. An applicant may also establish both actual past persecution and a well-founded fear of persecution; however, it is only required that one or the other be established to be eligible for refugee status.

Regarding returns, if past persecution is established, you would want to look at whether the return calls into question the credibility of the past persecution.

For example: the applicant returns to the same place the past persecution took place.

Some sample questions to ask would be: Did he/she live openly? How long did he/she return for? Why did he/she return? Did any incidents of harm occur during the return?

Based on these responses, you would want to evaluate if it is plausible that the applicant would return. Does it call into question the past persecution?

For example: The applicant responds that he/she returned to Iraq every 3 months

for a 1 month period to continue operating his/her business. The applicant's claim is that he was threatened and beaten at his place of business, and told he would be killed if he continued to sell his goods to the Americans. The return calls into question whether the past persecution claim is credible, particularly, if no incidents occurred during his/her regular returns. In such cases, the credibility issue should be well documented in the Assessment.

If the applicant returned but did not go to the same place/undertake same activities/live openly, the act of returning is less likely to call into question the past persecution.

2) Why did the Applicant Return? What are the Conditions of the Return/Stay in Iraq?

Family: In general, returns for family or personal reasons such as picking up a child whose custodian died, visiting an old or sick parent, or some other family emergency will not be cause for concern. You should, nevertheless, briefly ask about the circumstances surrounding return: length of stay, if applicant went back to the same area, if so, were they in hiding, were there any incidents upon return. These cases should be adjudicated on a case-by-case basis.

Economic reasons: Consider whether the applicant went back to his/her old job or are running the same business as before—this could be problematic because it seems the alleged persecutor could easily identify/find the applicant. Look at where the applicant's job is – for example, if it is in the Green Zone where there may be more protection, such a return may not be cause for concern. Would want to consider how destitute the family is in country of asylum. We know that applicants are struggling to make ends meet, so this should be taken into account. If an applicant goes back numerous times to pick up checks, etc, may want to ask if anyone else could pick it up for them, how it is they continue to get paid if not working, if they have sought assistance or work in country of asylum, etc. Then evaluate based on those responses.

Education: Would want to determine if the student could study in country of asylum. (Refugee children generally receive basic schooling.) For return, how long did the applicant stay? Is the educational institution the same they always attended? Is it near the place from which they claim a fear or at a more distant location? Where did the applicant live during the return? How did they manage to stay safe? Did they go and take exams and immediately flee again? Did they go to pick up their diploma?—couldn't anyone else have done that for them? If other members of the family experienced past persecution, how was applicant able to stay and study? Did any incidents of harm occur during the return/stay in Iraq?

Certain scenarios that will generally undermine a well-founded fear claim: returns for vacation or to establish new business contacts. **NOTE: If the applicant has a credible past persecution claim, such a return generally will not adversely**

affect his/her eligibility.

3) Who has returned?

If it is the derivatives that are traveling back and forth, they are not the ones that need to establish well founded fear, rather it is the PA. As such, a return by a derivative is generally not problematic, but you should consider if their travel calls into question any claimed persecution of the PA.

Is the PA returning on his/her own or with the whole family? Does the whole family remain in Iraq except for the PA? How are they surviving? Did any incidents of harm occur during the return/stay in Iraq?

4) Have the most Concrete Reasons for Denial been Addressed/Documented?

In general, if making a denial for Returns it should be a strong denial, because this is the kind of denial that someone reviewing an RFR might review and given country conditions think the applicant does have a WFF, thus overturning or sending for reinterview. If the returns signal a credibility issue with the applicant, it's probably better to deny on credibility.

SUPPLEMENT B – ASYLUM ADJUDICATIONS

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

REQUIRED READING

1.

2.

ADDITIONAL RESOURCES

1.

2.

SUPPLEMENTS

Asylum Adjudications Supplement – Coercive Population Control

Establishing an Objective Fear Based on Violation of Coercive Population Control Policies

An applicant claiming a well-founded fear of persecution under China's coercive family planning policy as a result of the birth of two or more children, or any other violation, must demonstrate more than a generalized fear that he or she will be persecuted. To demonstrate that his or her fear is objectively reasonable the applicant needs to establish a personal risk of being singled out for persecution or that there is a pattern or practice of persecution of those similarly situated to him or her in the area where he or she resides.[54]

In *Matter of J-H-S-* the Board found that because there are so many provincial and local variations in the application and enforcement of China's national family

[54] *Matter of J-W-S-*, 24 I. & N. Dec. 185 (BIA 2007).

planning program that, to meet his or her burden of proof, the applicant must show:

1. the details of the applicable family planning policy in the locality where he or she resides [55]

2. that he or she is in violation of the local policy

3. that the violation of the policy would be punished in the local area where he or she lives in a way that would give rise to an objective fear of future persecution[56]

The three part analysis elaborated in *Matter of J-H-S-* must be applied on a case-by-case basis and is to be used to determine whether the applicant has a well-founded fear of persecution in all instances involving the birth of a second or subsequent child, regardless of whether the applicant's children were born in China or abroad.[57]

Use of Country Conditions Specific to Applicant's Local Area of Residence

You must consult country conditions reports for the local area (provincial or municipal) where the applicant resides in order to determine the specific policies that apply to each case.[58]

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[55] *Matter of J-H-S-*, 24 I. & N. Dec. 196 (BIA 2007).

[56] *Matter of J-H-S-*, 24 I. & N. Dec. at 199 (evidence did not demonstrate that the birth of a second child would violate family planning policy in Fujian province); *see also, Matter of J-W-S-*, 24 I. & N. Dec. 185 (BIA 2007) (evidence did not establish a national policy requiring forced sterilization upon birth of second child overseas, and evidence was insufficient to show that in Fujian Province, any sanctions for out of plan births would rise to the level of persecution); Huang v. U.S. INS, 421 F.3d 125 (2d Cir. 2005) (well-founded fear of persecution not established where country conditions show that local Fujian province authorities are lax in the enforcement of the one-child policy and frequently allow the birth of a second child in situations such as the applicant's where the firstborn child is a girl.); Matter of C-C-, 23 I. & N. Dec. 899 (BIA 2006) (violation of policy not established where Chinese policy allows individuals to apply for the birth of a second child four years after the birth of the first child, and the applicant's second child was born six years after her firstborn).

[57] *See Matter of J-H-S-*, 24 I. & N. Dec. at 202 (the evidence did not demonstrate that in Fujian province enforcement mechanisms would be triggered after the birth of a second child to someone, such as the applicant, whose first child was female).

[58] *Matter of J-W-S-*, 24 I. & N. Dec. at 194 (well-founded fear not established where country conditions evidence did not support the applicant's claim that he would be sterilized upon return to Fujian province with two children born in the US; evidence showed that, at most, the applicant and his wife would be subjected to 'sanctions and penalties,' the severity of which would not rise to the level of persecution); *see Matter of C-C-,* 23 I. & N. Dec. at 900-903 (the affidavit of demographer John Aird, submitted by the applicant as a source of country conditions evidence, was insufficient to show that the Chinese government has an established national policy of sterilizing returning Chinese citizens who have had more than one child while living abroad because the affidavit was generalized, not based on personal knowledge, did not specifically address situations of individuals similarly situated to the applicant, and the 2005 State Department country report contradicted the affidavit); *Yu v. US Att'y Gen*., 513 F.3d 346 (3d Cir. 2008) (affirming *Matter of C-C-* regarding the Aird affidavit).

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Relevant considerations that may be used to determine whether there has been a violation of the local coercive planning policy include:

1. the gender of the children
2. the spacing between the children's births
3. the parents' marital status
4. whether or not the parents are government employees

For example, in *Matter of S-Y-G-*, the BIA denied a motion to reopen asylum proceedings based on the birth of a second child in the U.S.[59] The BIA held that the applicant's reproductive behavior may not be viewed as violating the family planning policies in Fujian Province because she was not a government employee, and there was a seven-year interval between the birth of her two children. The BIA also found that even if the applicant did violate the local family planning policy, any sanctions would likely be economic sanctions that would not rise to the level of persecution.

Asylum Adjudications Supplement – Return to Country of Feared Persecution

As a procedural matter, the regulations provide that an asylum applicant who returns to the country of feared persecution with a grant of advance parole is presumed to have abandoned his or her claim. This presumption is overcome if there are compelling reasons for the applicant's return to that country. In addition, even if the presumption of abandonment is not overcome by compelling reasons for the return, events that occurred during the time that the applicant was in his country could be the basis for a new claim. Procedurally, the applicant whose experiences upon return provide the basis for a new claim would not be required to submit a new I-589, but would be required to testify about events that occurred during the return to the country of feared persecution.[60]

An applicant's return to the country of feared persecution, and the events that occur during that return, may not lead to a procedural finding that the asylum application was abandoned; however, the return to the country of persecution raises substantive questions regarding whether or not the applicant has a well-founded fear of return to that country.

[59] *Matter of S-Y-G-*, 24 I. & N. Dec. 247 (BIA 2007).

[60] For additional information, see RAIO Training module, *Refugee Definition*.

Asylum Adjudications Supplement – Presumption Raised by Past Persecution

General Rule

If past persecution on account of a protected characteristic is established, then the applicant is a refugee and

1. it is presumed that the applicant has a well-founded fear of future persecution on the basis of the original claim

2. unless it is established by a preponderance of the evidence that

    i. there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or

    ii. the applicant could avoid future persecution through internal relocation and under all the circumstances it would be reasonable for the applicant to do so[61]

Explanation (Burden Shift)

This means that once the applicant has established past persecution, the officer must presume that the applicant's fear of future persecution is well founded. This is a presumption that may be rebutted. In order to rebut the presumption, however, the burden of proof shifts to the officer to establish by a preponderance of the evidence that the fear of future persecution is no longer well-founded.

The officer must weigh all available evidence to determine whether a preponderance of the evidence shows that there has been a fundamental change in circumstances such that the applicant's fear of persecution is no longer well-founded, or the applicant could reasonably avoid future persecution through internal relocation. This will require a thorough knowledge and understanding of current country conditions in the applicant's country and the circumstances of the individual applicant.[62]

Consideration Regarding Source of Persecution

The presumption raised by a finding of past persecution applies only to a fear of future persecution based on the original claim of persecution and does not apply to

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[61] 8 C.F.R. § 208.13(b)(1). For additional information, see RAIO Training module, *Evidence*.

[62] The officer should consider not only country conditions, but other aspects of the applicant's circumstances, as well, to evaluate whether a preponderance of the evidence establishes that the applicant's fear of persecution is not well founded. See section below, *Fundamental Changes Must Affect Applicant's Situation*.

fear of persecution on account of a different basis, unrelated to the past persecution.[63]

As the Attorney General clarified in *Matter of A-T-*, "on the basis of the original claim" means that the future persecution feared is "on account of the same statutory ground" on which the applicant suffered past persecution. In other words, the presumption applies when a fear of future persecution arises from the same protected characteristic on account of which applicant was targeted for past persecution.[64]

The applicant does not have to fear that he or she will suffer the identical type of harm in the future that he or she suffered in the past in order to retain the presumption of future persecution so long as the fear of any future harm is on account of the original basis for persecution.

The BIA has made clear that a change in regime does not automatically shift the burden of proof back on an applicant to show well-founded fear of persecution from the changed regime or its successor. (See discussion below regarding what constitutes a change in circumstances sufficient to overcome the presumption.)[65]

Fundamental Changes Must Affect Applicant's Situation

The fundamental change in circumstances may relate to country conditions in the applicant's country or to the applicant's personal circumstances. However, the change must directly affect the risk of harm the applicant fears on account of the protected ground in order to overcome the presumption.

The BIA has emphasized that simply demonstrating a change, such as a change in regime, cannot substitute for careful analysis of the facts of each applicant's individual circumstances.[66] Similarly, the First Circuit has held that the "abstract" materials indicating fundamentally changed circumstances "do not automatically trump the specific evidence presented by the applicant."[67]

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[63] 8 C.F.R. § 208.13(b)(1); *see Matter of A-T-*, 24 I. & N. Dec. 617 (A.G. 2008) (vacating *Matter of A-T-*, 24 I. & N. Dec. 296 (BIA 2007)); *Matter of N-M-A-*, 22 I. & N. Dec. 312 (BIA 1998); *Hasalla v. Ashcroft*, 367 F.3d 799, 804 (8th Cir. 2004).

[64] *See Matter of A-T-*, 24 I. & N. Dec. at 622; *cf. Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (finding that the presumption of well-founded fear does not operate only as to the exact same harm experienced in the past); *Bah v. Mukasey*, 529 F.3d 99, 115 (2d Cir. 2008) (identical harm not required to rebut the presumption, "the government must show that changed conditions obviate the risk to life or freedom related to the original claim, *e.g.* persecution on account of membership in [the] particular social group.")

[65] *Matter of N-M-A-*, 22 I. & N. Dec. 312, 320 (BIA 1998).

[66] *Id.*

[67] *Fergiste v. INS*, 138 F.3d 14, 19 (1st Cir. 1998); *see also Rios v. Ashcroft*, 287 F.3d 895, 901 (9th Cir. 2002) (DHS "is obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant's specific grounds

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For example, a despot may be removed from a seat of government, but still wield enough influence to pose a threat to an applicant, or a new government may harbor the same animosities towards an applicant as the old regime.[68] Those types of changes would not rebut the presumption of well-founded fear. The determinative issue is whether the changes are such that the particular applicant's fear of persecution is no longer well-founded.

Evidence that an applicant may still be at risk despite a change in circumstances includes, but is not limited to, evidence that the applicant or individuals similarly situated to the applicant continued to be threatened on account of the protected characteristic after circumstances have changed.[69]

Forced Sterilization Does Not Constitute a Change in Circumstances

In *Matter of Y-T-L-* the BIA considered whether the fact that an asylum applicant had been forcibly sterilized could constitute a change in circumstances such that the applicant's fear of future persecution would no longer be well founded.[70] The BIA found that the intent of Congress in amending the definition of a refugee, coupled with the "permanent and continuing" nature of the harm suffered by one forcibly sterilized, prevents finding a fundamental change in circumstances based on an act of forced sterilization, even when a long period of time has passed since the sterilization.

Female Genital Mutilation and Fundamental Change in Circumstances

1. Attorney General Decision: *Matter of A-T-*

The Attorney General (AG) vacated the BIA's decision which held that female genital mutilation was a fundamental change in circumstances.[71] The AG found that the BIA had made several errors of law and fact. As in all cases in which the applicant demonstrates past persecution, in claims involving FGM the government has the burden of rebutting the presumption of well-founded fear by establishing evidence of fundamental change in circumstances (or that the applicant can relocate). The AG noted in *Matter of A-T-*, that the applicant was subjected to FGM on account of membership in a particular social group, not on account of FGM; FGM was the harm suffered not the original basis on account of which the

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for his well-founded fear of future persecution. Information about general changes in the country is not sufficient."); Berishaj v. Ashcroft, 378 F.3d 314, 327 (3d Cir. 2004); *Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008).

[68] *See* Mihaylov v. Ashcroft, 379 F.3d 15, 23 (1st Cir. 2004).

[69] *See, e.g.*, Gailius v. INS, 147 F.3d 34 (1st Cir. 1998).

[70] Matter of Y-T-L-, 23 I. & N. Dec. 601 (BIA 2003); *see also* Qu v. Gonzales, 399 F.3d 1195, 1203 (9th Cir. 2005) (adopting *Matter of Y-T-L*); Zhang v. Gonzales, 434 F.3d 993, 1001-1002 (7th Cir. 2006) (same).

[71] Matter of A-T-, 24 I. & N. Dec. 617, 622-623 (A.G. 2008) (*vacating in part Matter of A-T-*, 24 I. & N. Dec. 296 (BIA 2007)).

applicant was persecuted. Hence, to rebut the presumption of well-founded fear the government had to show that there had been a fundamental change of circumstances such that the applicant no longer had a well-founded fear of suffering any other harm, including the possible repetition of FGM, on the basis of membership in the particular social group for which she was persecuted.

For most claims based on the infliction of FGM, the protected characteristic asserted is membership in a particular social group, and the particular social group is often defined as some subset of women who possess (or possessed) the trait of not having undergone FGM as required by the social expectations under which they live. In many cases, after having been subjected to FGM in the past, the applicant will no longer be a member of the particular social group on account of which she was persecuted. Therefore, having undergone FGM removes the applicant from the particular social group for which she was targeted, and will often constitute a fundamental change in circumstances such that the applicant's fear of harm on the basis of the original claim no longer will be well-founded.

The Attorney General's decision in *Matter of A-T-* makes it clear that the fact that a woman has been subjected to FGM in the past does not preclude a valid claim that she retains a well-founded fear of future persecution if it is established that she would be subject to additional FGM (for example, it may be the practice of a woman's tribe to subject her to a second infibulation after she has given birth; or it may be that the first time she was subject to FGM the procedure was not performed to the extent required by her culture).[72] The possibility of re-infibulation should be considered in determining whether there has been a fundamental change in circumstances.

The Attorney General's holding in *Matter of A-T-* controls in all jurisdictions. Note that the Attorney General decision is consistent with and relies in part on the Second Circuit's holding discussed below.

2. The Federal Courts:

i. Second Circuit: *Bah v. Mukasey*

In *Bah v. Mukasey,* the Second Circuit court held that the infliction of FGM does not, without more, relieve the government of the burden of establishing a fundamental change in circumstances.[73] First, women could be subjected to the repetition of FGM and, additionally, the woman could be subjected to other forms of harm on account of the protected characteristic for which she was subject to FGM. The court stated that "Nothing in the regulations suggest that the future

[72] 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), p.6 (Washington, DC: Feb. 1, 2000, updated June 27, 2001).

[73] Bah v. Mukasey, 529 F.3d 99 (2d Cir. 2008).

threats to life or freedom must come in the same *form* or be the same *act* as the past persecution." (Emphasis in the original.)

The Second Circuit's finding in *Bah v. Mukasey* is precedent law for the Second Circuit; all other circuits need to apply the Attorney General's decision in *Matter of A-T-*.

ii. Ninth Circuit: *Mohammed v. Gonzales*

In its decision in *Matter of A-T-,* the BIA rejected the Ninth Circuit's finding in *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) that female genital mutilation constituted a permanent and continuing act of persecution, such that "the presumption of well-founded fear in such cases cannot be rebutted."[74] The Attorney General's decision vacating the Board's decision in *Matter of A-T-* did not specifically address the "permanent and continuing" persecution theory. His analysis, however, makes clear that past FGM can be *part of* a fundamental change in circumstances that rebuts the presumption of well-founded fear, implicitly rejecting the Ninth Circuit's theory that such a presumption can never be rebutted. Moreover, as the Attorney General's opinion sets forth a comprehensive analysis of such claims that has never been rejected by the Ninth Circuit or other Circuit courts, it remains the controlling precedent for cases involving past FGM. Accordingly, officers should not rely upon a "permanent and continuing" persecution theory in FGM cases as such reliance would be inconsistent with the controlling precedent set forth by the Attorney General in *Matter of A-T-*. The severity of any ongoing harm to an applicant, however, may be considered in determining whether to grant asylum based on the severity of the past persecution.

iii. Rebuttal of well-founded fear and consideration of granting asylum in the absence of a well-founded fear

If it is found that there has been a fundamental change in circumstances such that the presumption of well-founded fear is rebutted in a case where the applicant was subjected to FGM, you then need to consider whether it is appropriate to grant asylum in the absence of a well-founded fear either based on the severity of the past persecution or because of a reasonable possibility that the applicant would suffer other serious harm upon return.[75] This issue was addressed by the BIA in *Matter of S-A-K- and H-A-H-*.[76]

For discussion of factors to consider in determining whether past is harm sufficiently severe as to provide compelling reasons to grant asylum in the absence of a well-founded fear, and discussion of *Matter of S-A-K- and H-A-H-*, where the

[74] *Mohammed*, 400 F.3d at 801.

[75] 8 C.F.R. § 208.13(b)(1)(iii).

[76] Matter of S-A-K- and H-A-H, 24 I. & N. Dec. 464 (BIA 2008); *see also* Matter of N-M-A-, 22 I. & N. Dec. 312 (BIA 1998).

BIA found that discretion should be exercised to grant asylum based on the severity of the persecution to a mother and daughter who were subjected to FGM, see RAIO Training module, *Definition of Persecution and Eligibility Based on Past Persecution.*

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