

Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	<i>Asylum Eligibility Part II: Well-Founded Fear</i>
Rev. Date	March 13, 2009
Lesson Description	This lesson discusses the definition of a refugee as codified in the Immigration and Nationality Act and its interpretation in administrative and judicial caselaw. The primary focus of this lesson is the determination as to whether an applicant has established a reasonable possibility of suffering future harm in the country of nationality.
Field Performance Objective	Given an asylum application to adjudicate, the asylum officer will be able to correctly apply the law to determine eligibility for asylum in the United States.
Academy Training Performance Objective	Given written and roleplay asylum scenarios, the trainee will correctly apply the law to determine eligibility for asylum in the United States.
Interim (Training) Performance Objectives	<ol style="list-style-type: none"> 1. Identify standard of proof to establish well-founded fear of persecution. 2. Identify factors to consider in determining whether fear of future persecution is well founded. 3. Identify the four basic criteria to establish “well-foundedness.” 4. List factors to consider in determining whether internal relocation is reasonable. 5. Explain the presumption raised by a finding of past persecution.
Instructional Methods	Lecture, discussion, practical exercises
Student Materials/References	Participant Workbook, <i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421, 107 S. Ct. 1207 (1987); <i>Matter of N-M-A-</i> , 22 I&N Dec. 312 (BIA 1998), <i>Matter of Mogharrabi</i> , Int. Dec. No. 3028 (BIA 1987); <i>Matter of A-T-</i> , 24 I&N Dec. 617 (A.G. 2008)
Method of Evaluation	Observed Lab exercise with critique from evaluator, Practical exercise exam, Written test
Background Reading	<ol style="list-style-type: none"> 1. United Nations High Commissioner for Refugees, <i>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)</i>. HCR/GIP/03/03, 10 February 2003, 8 pp. (attached) 2. United Nations High Commissioner for Refugees, <i>Guidelines on</i>

International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees. HCR/GIP/03/04, 23 July 2003, 8 pp. (attached)

CRITICAL TASKS

SOURCE: Asylum Officer Validation of Basic Training Final Report (Phase One), Oct. 2001

Task/ Skill #	Task Description
001	Read and apply all relevant laws, regulations, procedures, and policy guidance.
012	Identify issues of claim.
024	Determine if applicant is a refugee.
SS 8	Ability to read and interpret statutes, precedent decisions and regulations.
SS 13	Ability to analyze complex issues.

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Presentation

References

I. INTRODUCTION

This lesson presents the standard of proof needed to establish a well-founded fear of future persecution and the factors to consider in making the determination. The lesson focuses on the standard of proof (risk of harm the applicant must establish) necessary to establish that the fear is well founded. It does not address the requirement that the persecution the applicant fears be on account of a protected characteristic in the refugee definition. That is discussed in lesson, *Asylum Eligibility Part III, Nexus and the Five Protected Characteristics*.

II. ELEMENTS OF WELL-FOUNDED FEAR

There are two elements to a well-founded fear of persecution: 1) a subjective element; and 2) an objective element. Both elements must be established for the fear to be considered well founded within the meaning of the refugee definition.

UNHCR Handbook, para. 38;
8 C.F.R. § 208.13(b)(2)

A. Subjective Element

1. The subjective element is satisfied if the applicant's fear of persecution is genuine. In the asylum context, fear has been defined as an apprehension or awareness of danger.
2. General dissent or disagreement with a government or the desire for more personal freedom or an improved economic situation, without more, does not satisfy this element.
3. Fear of famine or natural disaster fails to meet this element.
4. A genuine fear of persecution must be the applicant's primary motivation in seeking asylum. However, it need not be the only motivation. An applicant may fear persecution *and* desire more personal freedom or economic

UNHCR Handbook, para. 39; *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)

UNHCR Handbook, para. 39

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985);
UNHCR Handbook, para. 39

advantage.

B. Objective Element

1. Regulations

Regulations provide that, for the fear to be considered well founded, the applicant must establish that there is a **reasonable possibility** that he or she will actually suffer the feared persecution.

See 8 C.F.R. § 208.13(b)(2)(i)(B)

2. Cardoza-Fonseca

Defining well-founded:

In *Cardoza-Fonseca*, the Supreme Court distinguished between the “more likely than not” (withholding of removal) standard and the well-founded fear (asylum) standard: “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.”

INS v. Cardoza-Fonseca, 480 U.S. 421, 107 S. Ct. 1207 (1987); *See also INS v. Stevic*, 467 U.S. 407, 104 S. Ct. 2489 (1984)

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.

INS v. Cardoza-Fonseca, at 430, citing to 1 A.Grahl-Madsen, *The Status of Refugees in International Law* 180 (1966).

Instructor Note #1

The determination of whether a fear is well-founded does not ultimately rest on the statistical probability of persecution occurring to an applicant in the future, but rather on whether the applicant’s fear is based on facts that would lead a reasonable person in similar circumstances to fear persecution.

See Matter of Mogharrabi, Int. Dec. No. 3028 (BIA 1987); *Guevara Flores v. INS*, 786 F.2d 1242 (5th Cir.1986), *M.A. v. I.N.S.*, 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).

III. FOUR BASIC CRITERIA FOR WELL-FOUND FEAR (*MOGHARRABI-TEST*, MODIFIED)

In *Matter of Acosta* and *Matter of Mogharrabi*, the Board of Immigration Appeals (BIA) held that four basic criteria were required to establish a well-founded fear of future persecution. Subsequent caselaw has modified the basic criteria. The four basic criteria, as modified, are as follows:

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); Note: 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 section III.D., "Inclination," below; See, *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); see also *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997)

A. Possession (or Imputed Possession)

The applicant must establish that he or she possesses or is believed to possess a characteristic the persecutor seeks to overcome.

(To establish refugee status, the applicant must establish that the characteristic falls within one of the protected grounds listed in the refugee definition. See lesson, *Asylum Eligibility Part III, Nexus and the Five Protected Characteristics*.)

B. 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.

Matter of Acosta (which was decided before *Cardoza-Fonseca*), required a finding that the persecutor could "easily" become aware that the applicant possessed the characteristic. The

See *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987)

If the claim is based on a characteristic the applicant does not actually possess, but that the persecutor might attribute to the applicant

“easily” was dropped by the BIA in *Matter of Mogharrabi*, in order to bring the well-founded fear analysis into compliance with the Supreme Court ruling in *Cardoza-Fonseca*.

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.

C. Capability

The applicant must establish that the persecutor has the capability to persecute the applicant. Some factors to consider in evaluating capability include:

1. whether the persecutor is a government entity and, if so, the extent of that government entity’s power or authority;
2. whether the persecutor is a non-governmental entity, and if so, the extent to which the government is able or willing to control it; and
3. the extent to which the persecutor has the ability to enforce its will throughout the country.

D. Inclination

The applicant must establish that the persecutor has the inclination to persecute him or her. Note that the applicant need not establish either that the persecutor is inclined to *punish* the applicant, or that the persecutor’s actions are motivated by a malignant intent.

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.

(“imputed characteristic”), then the proper consideration is whether there is a reasonable possibility the persecutor might believe the applicant possesses the characteristic. Imputed characteristics are discussed in lesson, *Asylum Eligibility Part III: Nexus and the Five Protected Characteristics*.

Instructor Note #2

See also lesson, *Eligibility Part I, Definitions; ... Past Persecution*, section VI.A.2, *Entity the Government is Unable or Unwilling to Control*

See [Section XI, Internal Relocation](#), below

Instructor Note #3

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). The motive of the persecutor is discussed in detail in lesson, *Asylum Eligibility Part III, Nexus and the Five Protected Characteristics*.

Instructor Note #4

IV. PATTERN OR PRACTICE OF PERSECUTION OF INDIVIDUALS SIMILARLY SITUATED TO THE APPLICANT

A. General Rule

8 C.F.R. § 208.13(b)(2)(iii)

The applicant need *not* show that he or she will be singled out individually for persecution, if the applicant shows that:

1. 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; *and*
2. The applicant belongs to or is identified with the persecuted group, so that a reasonable person in the applicant's position would fear persecution.

8 C.F.R. §
208.13(b)(2)(iii)(A)

8 C.F.R. §
208.13(b)(2)(iii)(B)

B. "Pattern or Practice"

There is no established definition of "pattern or practice." This must be evaluated 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.

Instructor Note #5

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".)

Note that the Ninth Circuit has held that even if there is no systematic persecution of members of a group, persecution of

Sael v. Ashcroft, 386 F.3d 922, 925 (9th Cir. 2004);
Mgoian v. INS, 184 F.3d

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).”

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)

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.”

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.

Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005) (finding that violence against Chinese Christians in Indonesian 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 asylum applicants of the need to establish individualized persecution that is not found in the regulations)

C. 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.

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

The group of “similarly situated persons is not necessarily the same as the more limited ‘social group’ category mentioned in the asylum statute.”

applicant did not possess – prominent opposition to Islamic fundamentalists.)

Mgoian at 1036

D. Evidence

Instructor Note #6

To determine whether there is a pattern or practice of a group of individuals similarly situated to the applicant, the asylum officer should ask the applicant about the treatment of others with whom the applicant is associated. The asylum officer 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.

Instructor Note #7

V. PERSECUTION OF INDIVIDUALS CLOSELY RELATED TO THE APPLICANT

A. 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.

UNHCR Handbook, para. 43; *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990); Langlois, Joseph, INS Office of International Affairs, *Persecution of Family Members*, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 30 June 1997), 5 p.; *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007) (finding that well-founded fear not established where the sole basis for fear was that the applicant’s daughters could be subjected to female genital mutilation); *see also Mgoian v. INS*, 184 F.3d 1029, (9th Cir. 2000); *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir, 2007) (en banc) (evidence that the applicant’s uncle and a friend were harmed was insufficient to establish a well-founded fear in the absence of evidence that the applicant was individually targeted and where the evidence showed that the Indonesian government was able and willing to afford protection)

On the other hand, continued safety of individuals similarly

See Matter of A-E-M-, 21

situated to the applicant may, in some cases, be evidence that the applicant's fear is not well founded.

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).

B. 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.

Example: An applicant's sister was arrested on account of her membership in a union that was considered subversive. However, she had little contact with the applicant, did not live in the same city as the applicant, and the applicant had no association with the union. The sister's arrest must be considered in evaluating the applicant's claim, but without more, it probably will not carry much weight.

See Matter of A-K-, 24 I&N Dec. 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). *See also, e.g., Arriaga-Barrientos v. INS*, 937 F. 2d 411 (9th Cir. 1991) (abduction of geographically distant relatives by unknown gunmen for unknown reason failed to provide objective basis for fear); *Matter of E-P-*, 21 I&N Dec. 860 (BIA 1997)(applicant presented no evidence that military was interested in her due to her relatives' political activities.)

VI. THREATS

A. Threat May Be Sufficient Without Harm

A threat (anonymous or otherwise) may be sufficient to establish a well-founded fear of persecution, depending on all 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.

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 (2nd Cir. 1994); *Cordero-Trejo v. INS*, 40 F.3d 482 (1st Cir. 1994) (To infer that an applicant is unlikely to be persecuted because he was not killed during attempts to terrorize him leads to the absurd result of denying asylum to those who were fortunate enough to survive.)

However, the evidence must show that the threat is serious and

that there is a reasonable possibility the threat will be carried out.

B. Considerations

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, persecutors 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 many cases, the content of an anonymous threat sheds light on the identity of the source of the threat.

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)

Instructor Note #8

In determining whether a threat or threats establish a well-founded fear of persecution, the asylum officer should elicit information from the applicant about the entire circumstances relating to the threat. Factors to consider may include:

1. Who may have received similar threats (if any), and what happened to them;
2. The authority or power of the individual or group that made the threat;
3. Any activities that may have placed the applicant at risk;
4. Country conditions reports.

VII. COERCIVE POPULATION CONTROL

A. 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

Matter of J-W-S-, 24 I&N Dec. 185 (BIA 2007)

practice of persecution of those similarly situated to him or her in the area where he or she resides.

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 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;
2. that he or she is in violation of the local policy; and
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.

Matter of J-H-S-, 24 I&N Dec. 196 (BIA 2007)

See Matter of J-W-S- (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); *Matter of J-H-S-* (evidence did not demonstrate that the birth of a second child would violate family planning policy in Fujian province); *see also Huang v. 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).

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

See Matter of J-H-S- at 202 (the evidence did not demonstrate that in Fujian province enforcement mechanisms would be triggered after the birth of a

China or abroad.

B. Use of Country Conditions Specific to Applicant's Local Area of Residence

Asylum officers 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.

second child to someone, such as the applicant, whose first child was female).

Matter of J-W-S- 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. The 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-*, 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 (3rd Cir. 2008) (agreeing with *Matter of C-C-* regarding the Aird affidavit)

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; and

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 US. The BIA held that the applicant's reproductive behavior would 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.

Matter of S-Y-G-, 24 I&N Dec. 247 (2007).

VIII. SIGNIFICANT LAPSE OF TIME BETWEEN OCCURRENCE OF EVENT(S) AND FLIGHT

Castillo v. INS, 951 F.2d 1117 (9th Cir. 1991)

A. 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. The lapse of time may indicate that:

1. The applicant does not possess a genuine fear of harm; and/or
2. The persecutor does not possess the ability or the inclination to harm the applicant.

See *Lie v. Ashcroft*, 2005 396 F.3d 530 (3d Cir. 2005) (upholding BIA's determination that applicant did not establish a subjective fear of future when she had remained in Indonesia two years after the robbery that formed the basis of her claim to asylum)

B. Exceptions

There may be valid reasons why the applicant did not leave the country for a significant amount of time after receiving threats or suffering harm. For example, the applicant may not have had the funds to arrange for departure from the country, or may have needed to arrange for the safety of family members. The applicant may have thought the situation would improve or may have wanted to continue promoting a cause within his or her country. Also, there may have been reasons why the persecutor was temporarily disinclined or unable to harm the applicant that later became inapplicable.

Instructor Note #9

C. Considerations

To evaluate the weight to be given to this factor, the asylum officer should consider all the circumstances, including:

1. The amount of time the applicant remained (A relatively short period, such as days or a weeks may not be significant, whereas years certainly would be significant.)
2. 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.)
3. The applicant's location during that time (Did the applicant remain at home? Move about from place to place?)
4. The applicant's activities during that time (Was the applicant in hiding or going to work or school as usual?)
5. The persecutor's activities during that time, if known

See Gonzalez 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)

IX. 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 asylum 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.

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.

Procedurally, an applicant who leaves the United States without advance parole is presumed to have abandoned his or her asylum claim, regardless of which country he or she travels to. The presumption is generally overcome by the applicant's appearance at the asylum office.

8 C.F.R. § 208.8(b). Return to country of feared persecution is also addressed in lesson, *Asylum Eligibility Part I, Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution*. In this section, students should focus on how the applicant's return factors into the analysis of well-founded fear.

A. 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 an applicant's claim.

B. Considerations

1. Subjective Fear – Why did applicant return?

In evaluating the weight to be given to an applicant's return, the asylum officer must consider the reason(s) the applicant returned. There may be 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.

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)

2. Objective Fear – What happened upon return?

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).

C. Examples

1. An applicant from Kenya had been persecuted by the Kenyan government from 1992-1993 for his organization of a boycott and demonstrations by tea farmers against the Kenya Tea Development Authority.

Ngarurih v. Ashcroft, 371 F.3d 182 (4th Cir. 2004)

Two years after fleeing to the United States, the applicant returned to Kenya because he learned that his brother had been sentenced to imprisonment for rape. While in Kenya for two months, the applicant wrote to the trial court to obtain his brother's file, hired an attorney to challenge the conviction, and traveled to other villages to investigate the

facts of the case. As a result, the conviction was reversed and his brother's case was remanded for a new trial. The applicant personally posted a bond to secure his brother's release from prison. Several days later, the applicant returned to the United States.

In *Ngarurih v. Ashcroft*, the Fourth Circuit upheld a finding by the BIA that the applicant's experiences upon return to Kenya rebutted the presumption of well-founded fear created by his past persecution. The court cited the fact that the applicant "undertook activities that placed him in direct contact with government officials, seeking the protection of Kenya's laws" and did not suffer any mistreatment during his two months in Kenya as support for the conclusion that the applicant no longer had a well-founded fear of persecution.

2. A Rwandan applicant was an outspoken proponent of ethnic reconciliation between the Hutu and the Tutsi while studying at university. In response, the Tutsi soldiers and their student affiliates banned her from publishing letters in the school newspaper and told other students not to listen to her. The applicant was imprisoned for four months by Rwandan Patriot Front (RPF) soldiers who suspected her of aiding her father, a well-known Hutu rebel. During the detention the applicant was raped and tortured.

The applicant spent the following summer in Uganda at the Catholic convent where she had attended secondary school. Though the applicant told a nun at the convent about her imprisonment in Rwanda, the applicant did not tell her about the rape. The nun encouraged the applicant to return to Rwanda for the next school term. Because she had no family (her mother, a Tutsi, and her siblings had been killed by a Hutu death squad) or other means of economic support, the applicant decided to return to school in Rwanda.

The applicant was detained again by RPF soldiers, despite the fact that she had changed her name on her student ID from her father's Hutu name. She was held for two months during which time she was beaten and raped. After her release, the applicant returned to the convent in Uganda where she was confronted on several occasions by Ugandan and RPF soldiers. Despite her concerns for her safety, the applicant twice traveled to Rwanda on the urging of the nun in an unsuccessful effort to gather her university transcripts. The first trip lasted ten days and the

Ngarurih, 371 F.3d at 189; see also section XIII., "Presumption Raised by Past Persecution," below.

Note that the court also cited the applicant's willingness to return to Kenya as a factor that supported the BIA's determination that the applicant was not eligible for a humanitarian grant of asylum in the absence of a well-founded fear.

Mukamusoni v. Ashcroft, 390 F.3d 110 (1st Cir. 2004)

second lasted two days; each trip ended when the applicant heard that RPF soldiers planned to arrest her. The applicant subsequently fled to the United States.

In *Mukamusoni v. Ashcroft*, the First Circuit rejected the BIA's doubts that the above applicant possessed a genuine subjective fear of persecution. The BIA erred when it focused only on the fact that Mukamusoni returned to Rwanda on two occasions without considering the reasonable explanations for her return. The court found that the circumstances surrounding the applicant's return – that she went back to Rwanda on the urging of her confidant, the nun, who did not know that the applicant had been raped and only because the applicant believed that pursuing her education was her only means of support – were not sufficient to undermine the applicant's claim that she genuinely feared that she would be persecuted if returned to Rwanda.

Mukamusoni, 390 F.3d at 125-126

Instructor Note #10

X. POSSESSION OF TRAVEL DOCUMENTS

A. General Rule

Possession of a valid national passport and other official travel documents is not a bar to asylum. 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.

B. Considerations

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:

1. 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
2. Whether the applicant obtained the documents surreptitiously (e.g., through a bribe or with the help of a friend)

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)

3. Whether the government issued the documents so that the applicant would go into exile
4. Whether the applicant obtained the documents prior to the incidents that gave rise to the applicant's fear

XI. REFUGEE SUR PLACE

A. Definition

The 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.” 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.

UNHCR Handbook, paras. 94-96; *See Tun 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.)

B. Analysis

To evaluate a claim, the asylum officer should apply the *Mogharrabi* four-pronged test, as modified by recent case law, 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 attribute to the applicant a characteristic the persecutor seeks to overcome.

C. Factors to Consider

Instructor Note #11

1. The applicant's status in the country prior to departure (e.g., was the applicant well-known in the country or otherwise known to the persecutor?)
2. The applicant's status outside the country of feared persecution (e.g., does the applicant hold a particularly visible position?)
3. The visibility of the applicant's activities outside the country of feared persecution (e.g., does the applicant speak at large rallies, attend small rallies, simply give money to an organization, or has the applicant been exposed by the press?)

4. 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?)
5. 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?)

D. 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.

Matter of Mogharrabi, 19 I&N Dec. 439 (1987); see also *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992) (for another example)
Instructor Note #12

XII. INTERNAL RELOCATION

Instructor Note #13

A. General Rule

8 C.F.R. § 208.13(b)(2)(ii)

1. An applicant does not have a well-founded fear of persecution if the applicant
 - a. could avoid 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
 - b. if under all the circumstances it would be reasonable to expect the applicant to do so.
2. Whether an applicant could have avoided persecution by relocating is *not* relevant in determining whether that applicant suffered past persecution on account of a protected characteristic.
3. If an applicant suffered persecution on account of a protected characteristic, 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.

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985);
Matter of C-A-L- 21 I&N Dec. 754 (BIA 1997);
UNHCR Handbook, para. 91

Note: The applicant's ability to avoid future persecution by internally relocating may rebut the presumption of a well-founded fear that an applicant establishes by demonstrating past persecution, provided that under all the circumstances, it is reasonable for the applicant to relocate. 8

C.F.R. § 208.13(b)(1)(i)(B).
See Hagi-Salad v. Ashcroft,
 359 F.3d 1044, 1048 (8th
 Cir. 2004); *see also* lessons,
*Asylum Eligibility Part I:
 Definition of Refugee;
 Definition of Persecution;
 Eligibility Based on Past
 Persecution and Asylum
 Eligibility Part IV: Burden
 of Proof, Standards of Proof,
 and Evidence*

B. Avoiding Persecution

In order to find that the applicant could avoid persecution by relocating, it must be determined that the applicant does not have a well-founded fear of persecution in the area of relocation. Relevant factors to this inquiry include:

1. whether the persecutor has the ability and willingness to persecute the applicant elsewhere in the applicant's country, and
2. whether the government has the ability and willingness to control the persecutor.

See, e.g., Arboleda v. U.S. Attorney General, 434 F.3d 1220, 1226 (11th Cir. 2006) (finding that the applicant's personal experience and country conditions demonstrated that relocation not a viable option as the persecutor, the FARC, operated countrywide and thus had the ability to persecute the applicant throughout the country)

Example: The persecutor may be a local rebel group whose scope of power is limited to a remote area of a country, while 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. On the other hand, the persecutor may be a rebel group that has control of, and access to, a substantial part of the country.

See e.g., Matter of C-A-L-,
 21 I&N Dec. 754 (BIA
 1997)

C. Considerations in Evaluating What is Reasonable

The regulations provide that internal relocation to an area where the applicant does not have a well-founded fear should only be expected "if under all the circumstances it would be reasonable" for the applicant to relocate.

8 C.F.R. § 208.13(b)(2)(ii);
see Eduard v. Ashcroft, 379
 F.3d 182, 194 (5th Cir. 2004)
 (holding that IJ erroneously
 applied a higher standard for
 internal relocation when
 requiring applicants to
 demonstrate that they would
 be unable to relocate even
 "if necessary")

The Supplemental Information to the proposed rule adding this provision to the regulations (now codified in the final rule) provides some guidance on what is contemplated by “reasonable.” The Department explained, “We would expect . . . that the difficulties associated with an internal relocation option would have to be substantial to render relocation unreasonable.”

63 Federal Register 31945, 31948 (June 11, 1998)

Instructor Note #14

To determine whether it would be reasonable for the applicant to relocate within the country of feared persecution, the asylum officer should consider, but is not limited to considering, the following:

8 C.F.R. § 208.13(b)(3)
See also *UNHCR Handbook*, para. 91

1. Whether the applicant would face other serious harm in the place of suggested relocation

In the Supplemental Information to the final rule, “other serious harm” is described as “harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution.” The Supplemental Information further provides, “Mere economic disadvantage or the inability to practice one’s chosen profession would not qualify as ‘other serious harm.’”

63 Federal Register 31945, 31947 (June 11, 1998)

This factor may overlap with the other factors described below. For example, it may be unreasonable for an applicant to relocate to another part of the country because of ongoing civil strife, which would cause the applicant other serious harm.

2. Any ongoing civil strife within the country

There may be a civil war occurring in parts of the country, making it unreasonable for the applicant to relocate.

Examples: The only place where the persecutor has no authority is in 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.

See *Awale v. Ashcroft*, 384 F.3d 527, 532 (8th Cir. 2004) (finding that evidence that members of Somali minority clans continue to be “subjected to harassment, intimidation, and abuse by armed gunmen of all affiliations” and that travel is difficult because rival groups control routes of transportation indicates that it would not be reasonable to require applicant to internally relocate)

3. 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

Instructor Note #15

difficult for an individual to live in another part of the country. For example, in certain situations the fact that women may not have the same legal rights as men may hinder her ability to relocate.

4. 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).

5. Social and cultural constraints, such as age, gender, health, and social and familial ties

Examples: In some countries, a woman may be unable to live safely or survive economically without a husband or other family members. A member of a particular tribe may be unable to live safely among other tribes because of social and cultural constraints in the country.

See Knezevic v. Ashcroft, 367 F.3d 1206, 1214 (9th Cir. 2004) (evidence that Bosnian Serb applicants, ages 75 and 66, would have great difficulty finding employment while having no means of supporting themselves demonstrated that internal relocation would not be reasonable)

6. Any other factors specific to the case that would make it unreasonable for the applicant to relocate.

Instructor Note #16

D. Burden of Proof

8 C.F.R. § 208.13(b)(3)(i)

In determining who bears the burden of proof regarding internal relocation, the officer must consider whether:

1. the applicant has established past persecution;

8 C.F.R. § 208.13(b)(3)(ii)

In cases in which the applicant suffered past persecution, the burden is on the Department of Homeland Security to establish that the applicant could avoid future persecution through internal relocation and that it is reasonable to do so.

This is true whether the feared persecutor is a government or non-government actor.

2. the feared persecution is by the government or is government sponsored;

8 C.F.R. § 208.13(b)(3)(ii)

In cases in which the feared persecutor is a government or is government-sponsored, it shall be presumed that there is

no reasonable internal relocation option, and the burden shifts to DHS to overcome this presumption.

This presumption may be overcome if a preponderance of the evidence shows that the applicant could reasonably relocate to a part of the country where he or she would not be at risk of persecution and, under all the circumstances, it would be reasonable for the applicant to do so.

For factors to consider in evaluating what is “reasonable,” see [section XI.C., Considerations in Evaluating What is Reasonable](#), above.

For example, the evidence may establish that the persecutor is a rogue officer who acts without the knowledge or consent of the national government and has no ability to harm the applicant in a different part of the country. In this situation, the officer must consider whether it would be reasonable for the applicant to relocate, in light of all the circumstances, even those beyond the persecutor’s ability to harm the applicant.

[8 C.F.R. § 208.13\(b\)\(3\)](#)

If the persecutor is a government, the presumption that internal relocation is not reasonable is not overcome merely by the inefficiency of those in power.

3. the feared persecution is by a non-government actor.

[8 C.F.R. § 208.13\(b\)\(3\)\(i\)](#)

If the persecutor is not the government and is not government-sponsored, the applicant bears the burden to establish that he or she could not avoid persecution in his or her country by relocating, or that under all the circumstances, it would be unreasonable for the applicant to do so.

E. Applicant Relocated before Leaving 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 time before leaving the country may be evidence that the applicant can reasonably relocate within the country to avoid future persecution.

Matter of C-A-L, 21 I&N Dec. 754 (BIA 1997); see *Kaiser v. Ashcroft*, 390 F.3d 653, 659-60 (9th Cir. 2004) (threats received by applicant while living in two distant areas of Pakistan compel conclusion that applicant could not avoid persecution through internal relocation)

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

See *Gambashidze v. Ashcroft*, 381 F.3d 187, 193 (3d Cir. 2004) (BIA erred in resting solely on applicant’s eight-month residence in another area of Georgia)

lived in the new location.

without police encounter when denying applicant's claim; BIA should have considered the circumstances in which the applicant lived during the period of relocation)

Instructor Note #17

XIII. COUNTRY CONDITIONS INFORMATION

Information regarding the conditions in an applicant's country is critical in evaluating whether the applicant's fear of future persecution is well founded. The asylum officer is required to remain knowledgeable about current country conditions in refugee producing countries and to research available country conditions information in evaluating requests for asylum.

This will be discussed in greater detail in lesson, *Country Conditions Research and the Resource Information Center (RIC)*.
Instructor Note #18

XIV. PRESUMPTION RAISED BY PAST PERSECUTION

A. General Rule

8 C.F.R. § 208.13(b)(1)

If past persecution on account of a protected characteristic is established, then the applicant is a refugee and

This is also discussed in lesson, *Asylum Eligibility Part IV: Burden of Proof, Standards of Proof, and Evidence*.

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
 - a. there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or
 - b. the applicant could avoid future persecution through internal relocation and under all the circumstances it would be reasonable for the applicant to do so.

8 C.F.R. § 208.13(b)(1)(i)(A)

8 C.F.R. § 208.13(b)(1)(i)(B)

B. Explanation (Burden Shift)

This means that once the applicant has established past persecution, the asylum officer must presume that the applicant's fear of future persecution is well founded. This is a presumption that may be rebutted. However, the burden of proof shifts to DHS to establish by a preponderance of the evidence that the fear of future persecution is no longer well founded.

The asylum officer must weigh all available evidence to determine whether a preponderance of the evidence shows that

The asylum officer should consider not only country conditions, but other aspects

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.

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 XI.D.](#), *Fundamental Changes Must Affect Applicant's Situation*, below.

C. 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 fear of persecution on account of a different basis, unrelated to the past persecution.

[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); see *Hasalla v. Ashcroft*, 367 F.3d 799, 804 (7th Cir. 2004)

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

See, *Matter of A-T* 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, 103 (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.")

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.)

Matter of N-M-A, 22 I&N Dec. 312 (BIA 1998)

D. 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. 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."

Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998); *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 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).

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. 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.

See Mihaylov v. Ashcroft, 379 F.3d 15, 23 (1st Cir. 2004)

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.

See e.g., Gailius v. INS, 147 F.3d 34 (1st Cir. 1998)

E. 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. 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

Matter of Y-T-L-, 23 I&N Dec. 601 (BIA 2003); *see also* 484 F.3d 513 (8th Cir. 2007) *Qili Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) (adopting *Matter of Y-T-L-*); *Junshao Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006) (same).

the sterilization.

F. Female Genital Mutilation and Fundamental Change in Circumstances

1. Attorney General Decision: *Matter of A-T-*

The Attorney General has ruled that the infliction of female genital mutilation does not constitute an automatic fundamental change in circumstances that rebuts the presumption of well-founded fear of future persecution. 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 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.

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. 2969 (BIA 2007))

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

United States Department of State, Office of the Under Secretary for Global Affairs, Office of the Senior Coordinator for International Women's Issues, *Female*

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). The possibility of re-infibulation should be considered in determining whether there has been a fundamental change in circumstances.

Genital Mutilation (FGM), p.6 (Washington, DC: Feb. 1, 2000, updated June 27, 2001).

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:

a. 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. 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 threats to life or freedom must come in the same *form* or be the same *act* as the past persecution." (Emphasis in the original.)

Bah v. Mukasey, 529 F.3d 99 (2d Cir. 2008)

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*.

b. Ninth Circuit: *Mohammed v. Gonzales*

The portion of the BIA's decision in *Matter of A-T* regarding the nature of FGM as persecution was not vacated by the Attorney General's decision by the same name and, hence, remains in effect. In its decision in *Matter of A-T* the BIA rejected the Ninth Circuit's finding in *Mohammed v. Gonzales* that the applicant presented a viable claim (in her motion to reopen) that "genital mutilation constituted "a 'permanent and continuing' act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear."

Matter of A-T, 24 I&N Dec. 296, 299, discussing *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005)

Because the BIA's *Matter of A-T-* decision's holding regarding the "permanent and continuing" harm theory was not vacated by the Attorney General's *Matter of A-T-* decision, and because the BIA decision was issued subsequent to *Mohammed v. Gonzales*, it controls in the Ninth Circuit. Therefore, asylum officers adjudicating claims involving the question of whether FGM constitutes a fundamental change in circumstances must apply the BIA's finding.

3. 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 asylum officers 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. This issue was addressed by the BIA in *Matter of S-A-K- and H-A-H-*.

Matter of S-A-K- and H-A-H-, 24 I& N Dec. 464 (BIA 2008). See also regs and NMA (this is a consistent approach with all other cases, and that needs to be pointed out.)

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 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 the lesson *Eligibility I: Definition of a Refugee....*

Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution, Section VII.B.2.

XV. SUMMARY

A. Elements of a Well-Founded Fear

To establish a well-founded fear of persecution, the applicant must show that the fear is genuine and that it has an objective basis in fact.

B. 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.

C. 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.

D. *Mogharrabi* Test, Modified

If an applicant establishes all four prongs of the *Mogharrabi* test, as modified, then the fear of persecution is well founded. The elements of the four-prong test are 1) applicant possesses (or is believed to possess) a protected characteristic; 2) persecutor is aware or could become aware that applicant possesses the characteristic; 3) persecutor is capable of persecuting applicant; 4) persecutor is inclined to persecute applicant.

E. 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.

F. 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.

G. 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, the asylum officer should consider all possible sources of the threat, the content of the threat, circumstances surrounding the threat, and country conditions information.

H. Coercive Population Control

Well founded fear claims based on violation of China's coercive family planning program due to the birth of multiple children or

other violations, must be analyzed on a case-by-case basis to determine: whether a specific local policy applied to the applicant's situation; whether the applicant violated the policy; and whether the policy would be enforced in such a way that it would give rise to an objective fear of persecution.

I. 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.

J. 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 country of feared persecution does not necessarily defeat an applicant's claim.

K. Possession of Travel Documents

Possession of valid travel documents is not a bar to asylum, 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.

L. 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 at risk if the applicant returns to the country.

M. Internal Relocation

A fear is not well-founded if, under all the circumstances, it would be reasonable for the applicant to relocate in his or her country to avoid future persecution. Asylum officers 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. The burden of proof shifts DHS to show that the applicant could reasonably relocate to avoid future persecution if past persecution has been established or the persecutor is the government or is government-sponsored.

N. Country Conditions

Asylum officers must consider current conditions in the applicant's country to evaluate whether an applicant's fear of future persecution is well founded.

O. Presumption Raised by Past Persecution

If an applicant establishes past persecution, it is presumed that the applicant's fear of future persecution is well founded. Once an applicant has established past persecution, the burden of proof shifts to DHS to show, 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 reasonably avoid future persecution through internal relocation.